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BOARD
OF
REVIEW

OPINIONS

CM ETO 17699
CM ETO 19354

VOLS. 33-34

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 33 B.R. (ETO)

including

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JAGC, ASS'T EXEC ON 20 MAY 54

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

BOARD OF REVIEW NO. 1

CM ETO 17699

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates CURNEY B. WINSTEAD (35577448), WALTER D. HICKS (36553611), JAMES WEBB (32721227), HARRISON W. SMITH (39700975), JOHNNY DUMAS (34415156), JAMES HOLLAWAY (34647719), DANIEL JONES (32972815), JAMES E. SHERED, JR. (35658874), MALCOLM THOMAS (38455218), SAM H. SEWELL(35262823), ROSSIE JOHNSON, JR. (36899638), WILLIAM T. ROBINSON (42091228), all of 4016th Quartermaster Truck Company	Trial by GCM, convened at Mannheim, Germany, 19, 20 May and 12 June 1945. MOTION FOR SEVERANCE GRANTED: ROBINSON NOT GUILTY: DUMAS DISAPPROVED: HOLLAWAY Sentences as to nine remaining accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, DEWEY and CARROLL, 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 ofThe Judge Advocate General with the European Theater.

2. Accused (except Robinson, as to whom a motion for severance was granted) were tried together with their consent upon the following charges and specifications:

CHARGE I: Violation of the 66th Article of War.

Specification 1: In that Private Curney B. Winstead and Private Walter D. Hicks, both of 4016th Quartermaster Truck Company, did, acting jointly and in pursuance of a common intent, at or near Heilbronn, Germany, on

(2)

or about 29 April 1945, begin a mutiny by concertedly refusing to obey the lawful orders of Captain John J. Flynn, their Commanding Officer, to get into designated trucks, by urging the members of said company concertedly to refuse to obey the lawful orders of Captain John J. Flynn, their Commanding Officer, to get into certain designated trucks, and causing said soldiers concertedly to disregard and defy the lawful orders of Captain John J. Flynn to get into certain designated trucks, and by making insulting and abusive remarks to the said Captain John J. Flynn, ther Commanding Officer, with the intent to usurp, subvert, and override for the time being lawful military authority.

Specification 2: In that Private James Webb, Private Harrison W. Smith, Private Johnny Dumas, Private James Hollaway, Private Daniel Jones, Private James E. Shered, Jr., Private Malcolm Thomas, and Private Sam H. Sewell, all of 4016th Quartermaster Truck Company, did, jointly and in pursuance of a common intent, at Heilbronn, Germany, on or about 29 April 1945, voluntarily join in a mutiny which had begun in the 4016th Quartermaster Truck Company against the lawful military authority of Captain John J. Flynn, the Commanding Officer thereof, and did with intent to subvert and override such military authority for the time being, refuse to obey the lawful orders of Captain John J. Flynn to get into designated trucks, shoot Sergeant Joseph A. Waitman in the head, make insulting and abusive remarks to Captain John J. Flynn, and physically strike Captain John J. Flynn on his body.

Specification 3: In that Private Rossie Johnson, Jr., 4016th Quartermaster Truck Company, did, at or near Heilbronn, Germany, on or about 29 April 1945, voluntarily join in a mutiny which had begun in the 4016th Quartermaster Truck Company, against the lawful military authority of Captain John J. Flynn, the Commanding Officer thereof, and did, with intent to subvert and override such military authority for the time being, fire a shot from his M-1 rifle in the presence of sundry other members of said company assembled in the immediate street area.

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

Specification 1: In that Private Curney B. Winstead and Private Walter D. Hicks, both of 4016th Quartermaster Truck Company, having received a lawful order from Captain John J. Flynn, their Commanding Officer, to get into certain designated trucks, did, at or near Heilbronn, Germany, on or about 29 April 1945, acting jointly and in pursuance of a common intent, behave in an insubordinate manner toward the said Captain John J. Flynn, by refusing to get into certain trucks,

by using insulting language to him, by calling him opprobrious names, and by urging other members of said company to refuse to obey the lawful orders of Captain John J. Flynn, their Commanding Officer, all to the prejudice of good order and military discipline.

Specification 2: In that Private James Webb, Private Harrison W. Smith, Private Johnny Dumas, Private James Hollaway, Private Daniel Jones, Private James E. Shered, Jr., Private Malcolm Thomas, and Private Sam H. Sewell, all of 4016th Quartermaster Truck Company, having received a lawful order from Captain John J. Flynn, their Commanding Officer, to get into certain designated trucks, did, at or near Heilbronn, Germany, on or about 29 April 1945, acting jointly and in pursuance of a common intent, behave in an insubordinate manner toward the said Captain John J. Flynn, by refusing to get into said trucks, by using insulting language to him and calling him opprobrious names, by physically striking him on his body and by urging other members of said company to refuse to obey the lawful orders of Captain John J. Flynn, their Commanding Officer, all to the prejudice of good order and military discipline.

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

Specification 1: In that Private Curney B. Winstead, 4016th Quartermaster Truck Company, having received a lawful command from Captain John J. Flynn, his superior officer, to report immediately to the 1st Platoon, did, at or near Zinzig, Germany, on or about 28 April 1945, willfully disobey the same.

Specification 2:
(Specification against Robinson for trial of which severance was granted).

Specification 3: In that Private Roscie Johnson, Jr., 4016th Quartermaster Truck Company, having received a lawful command from Captain John J. Flynn, his superior officer, to get into a designated truck, did, at or near Heilbronn, Germany, on or about 30 April 1945, willfully disobey the same.

3. a. Each accused pleaded not guilty to the charges and specifications preferred against him. Accused Dumas was acquitted of the charges and specifications preferred against him. All of the members of the court present at the times the votes were taken concurring, accused Winstead, Hicks, Webb, Smith, Hollaway, Jones, Shered, Thomas and Sewell were found guilty of the charges and specifications preferred against them.

Three-fourths of the members of the court present at the time the vote was taken concurring, accused Johnson was found guilty of Charge I and Specification 3 thereof and of Specification 3, Charge III, except the words "willfully disobey", substituting therefor the words "fail to obey" and not guilty of Charge III but guilty of a violation of the 96th Article of War.

b. The following evidence of previous convictions was introduced against accused:

NAME	COURT	OFFENSE	ARTICLE OF WAR
Hicks (2)	Summary	AWOL 4½ hours; (Failure to repair (to proper place (of assembly	61
	Special	(Breaking restriction	96
		(AWOL 6 days	61
Webb (3)	Summary	(AWOL 3-3/4 hours	61
		(Failure to obey order of military police	96
	Special	(AWOL 6 days	61
		(Breaking restriction	96
	Special	Escape from confinement.	69
Smith (1)	Summary	AWOL Unstated time	61
		Wrongful application of 2½-ton vehicle	96
Holloway (2)	Special	AWOL 5 days	61
	Special	AWOL 8 days	61
Jones (2)	Summary	Insulting and disrespectful language to non-commissioned officer	65
	Special	Disobedience of lawful order of non-commissioned officer	65
Shered (1)	Summary	AWOL 1 day	61
Thomas (1)	Summary	Drunk on duty as truck driver	85
Johnson (1)	Special	AWOL 12 days	"61-96"

No evidence of previous convictions was introduced against either of accused Winstead or Sewell.

c. All of the members of the court present at the times the votes were taken concurring, accused Winstead, Hicks, Webb, Smith, Jones, Shered, and Sewell were each sentenced to be shot to death with musketry. Three-fourths of the members of the court present

at the times the votes were taken concurring, accused Holloway, Thomas, and Johnson were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, Continental Advance Section, Communications Zone, European Theater of Operations, returned the record of trial to the court for reconsideration of the sentences in revision proceedings in accordance with paragraph 83, Manual for Courts-Martial, 1928, with a view to reduction. The court reconvened pursuant to the direction of the reviewing authority, but adhered to its former findings and sentences as to all accused.

d. The reviewing authority, as to accused Winstead, Hicks, Webb, Smith, Jones, Shered, and Sewell, approved the sentences and forwarded the record of trial for action pursuant to Article of War 48, with the recommendation that the sentences be commuted to life imprisonment. As to accused Thomas and Johnson, he 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. As to accused Holloway, he disapproved the sentence. The confirming authority, The Commanding General, United States Forces, European Theater, as to accused Winstead, Hicks, Webb, Smith, Jones, Shered, and Sewell, confirmed the sentences, but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted each of the sentences 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 accuseds' natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to each accused, and withheld the order directing the execution of the sentences pursuant to Article of War 50½.

4. Evidence for the prosecution and court is in material substance as follows:

a. Specification 1, Charge III: On the evening of 27 April 1945, at Zinsig, Germany, Captain John J. Flynn, Commanding Officer of the 4016th Quartermaster Truck Company, of which all accused were members (R14), ordered the company to clear their barracks by 0615 hours the following morning and be ready to move. All members of the company obeyed except accused Winstead. At 0645 hours on 28 April, Captain Flynn found Winstead in his quarters and asked him why he did not leave the building. He replied in a sarcastic manner that he was combing his hair (R15). The officer said "Winstead, I'll give you one minute to get out of this building" and told him he should have been out at 0615 hours, because the company was leaving ten minutes later at 0700 hours. Captain Flynn left, returned in five minutes and found Winstead on the side-walk by the building, with his equipment on the ground.

making no attempt to leave. The officer ordered "I will give you two minutes out of here and go to your platoon". Winstead refused, placed his hands on his hips and exclaimed "Hell, I'm sick of taking your shit" (R15, 28). Thereupon Captain Flynn had him placed under arrest (R15) in a truck (R17).

b. Charges I and II and Specifications: On 12 April 1945, the 12 original accused, along with 27 other men, were transferred to Captain Flynn's company which was still in France (R23, 32-33). Of the 39 men, 13 came from each of three organizations. Captain Flynn called roll, but after about five minutes, received answers from only six or seven men, who were the only ones who would enter the formation. The other men, including accused Webb, used vile language, made a clamor and, despite the commanding officers's attempts to quiet them, protested against the proposed move into Germany. The officer thereupon rebuked them and lectured them on the necessity of obedience to commands of superiors. In about an hour, when he ordered the men to fall into formation "on the double", only 15 men obeyed, so he informed the others they would be punished. The obedient men he directed to report to the first sergeant and to their trucks preparatory to moving, and the remainder he directed to return to their respective former organizations, as they were not the type of men to perform the required mission in Germany (R33). Captain Flynn reported the situation and explained the recalcitrant attitude of the men to his battalion commander, who nevertheless directed him to take the men anyway because orders called for 136 men (R34).

At about 1800 hours on 29 April, the company, including all 12 original accused, was in Heilbronn, Germany. There were 12 company trucks in a convoy which was preparing to leave the area. Captain Flynn ordered Private William T. Robinson into arrest (R15-16, 40). (Accused Johnson testified that Robinson, who had been drinking, asked for and was refused chow, threw away his mess kit and complained. He proceeded to drink wine and when directed not to do so by First Lieutenant Henry E. Gooding, of the accused's company, stated he could drink it anywhere he wished (R86). Captain Flynn then caused Robinson to be arrested. For details as to this episode, see holding of Board of Review in CM ETO 13269, Robinson, wherein the record of the separate trial of that soldier was held legally sufficient). Robinson thereupon hopped into the truck (No. 18 (R44)) where his weapon was. Because he had previously threatened to shoot the officers, Captain Flynn ordered him out of the truck without his weapon. At this time the remainder of the company were in the vicinity, with their trucks (R15). Robinson refused to obey the order and announced

"that he was going to shoot any mother-fucker that attempted to take him out of the truck" (R16). The captain then obtained three military police (R16, 43, 51) who removed Robinson from truck No. 16 and took him to their jeep (R17, 44, 51). Winstead, in violation of his arrest (see supra), and Hicks were beside the trucks near No. 16 (R17). When Robinson was taken from the truck, Hicks yelled to the group of about 30 men by the trucks:

> "to get out of this mother-fucking chicken shit outfit, and they shouldn't take orders from this mother-fucking chicken-shit officer" (R51-52).

While Robinson was being conducted to the jeep, both Winstead and Hicks yelled to the other men

> "Don't pay no attention to his orders" and "Let's all thirty-eight of us get out of this mother-fucking outfit and go to the stockade" (R17, 25).

Each specifically urged the "other thirty-eight" members of the group:

> "come on, let's all get out of this mother-fucking company" (R25).

Hicks said he was going to the stockade with Robinson and asked Captain Flynn if he would take him. Hicks yelled,

> "What kind of a mother-fucking, chicken-shit outfit this was, that the men should take any orders from any chicken-shit officers, and he had been overseas 25 months, whereas the officer, referring to Captain Flynn, had been only over two months" (R52).

The officer then directly ordered both Winstead and Hicks to get back into their truck (R17, 25). They refused to comply, saying,

> "We don't want to stay in this mother-fucking outfit. We want to get out of it. We're not going to stay here. We want to get to the stockade" (R17).

The captain then ordered Winstead and Hicks to the stockade. As they were being conducted to the jeep where Robinson sat, they insisted in loud voices that they would rather be in the stockade than in this

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"chicken-shit outfit". They were taken to the stockade with Robinson and there confined (R17, 36-37, 44, 55).

While Winstead and Hicks were yelling, a number of the group, including Webb (the ringleader), Smith, Jones, Shored, Thomas, and Sewell, congregated near truck No. 16 (R17, 25, 37, 43-44, 54). There were between 20 (R48) and 30 (R52) men. Some of them threw their bags off the trucks and many dismounted therefrom (R52). Some of accused said:

> "If the M.P.'s took Robinson, we are all going to go". They "weren't going to stay with a mother-fucking outfit, and it was no damned good" (R44).

Commotion and milling about by the men continued when the jeep departed with the three arrested soldiers. Webb in a loud voice exherted the other men to

> "get out of this mother-fucking outfit, they didn't want to work for this mother-fucking no good bastard", and "Let's all go to the mother-fucking stockade" (R17) "where we will get better treatment" (R53).

Some of the men protested loudly to Captain Flynn that if one man was going to the stockade, they were all going. Some men attempted to dismount from the trucks and others pulled them back into them (R44-45). Everyone in the entire group took up the cry to "get out of this mother-fucking, chicken-shit outfit" (R52). At least Webb, Smith, Jones and Thomas made the remark: "Let's all 38 of us get out of this mother-fucking outfit and go to the stockade" (R47).

Captain Flynn at this point gave a direct order to the group of men which included Webb, Smith, Jones, Shored, Thomas and Sewell, to get into their own trucks. They refused, saying they "were not going to get into any mother-fucking vehicle" but were going to leave the outfit and wished to go to the stockade (R17, 26, 53). He then ordered the men taken to the stockade to await trial by court-martial, and, to implement this, ordered them first to go to the sidewalk, then into truck No. 13, which was near the commotion and finally into another vehicle. All of these orders they also refused to obey. Accordingly he instructed the driver of truck No. 13 to meet him, with the recalcitrant soldiers, in a few minutes at the Traffic Control Point a

few hundred yards away, whence they could be taken to the stockade (R18, 26, 45, 53). During this time, all six of accused Webb, Smith, Jones, Shered, Thomas, and Sewell made insulting remarks to the captain and absolutely refused his direct orders (R26). Captain Flynn and Staff Sergeant Joseph A. Waitman, one of the military police, proceeded to the designated meeting point and after waiting there about 20 minutes returned to the convoy. The order to board truck No. 13 had not been obeyed, but the six mentioned accused and the other members of the group were some 25-50 yards back, at about the middle of the column, where they had all their personal equipment in the road, blocking the path of the trucks (R18, 42, 45, 124). The officer again ordered the men to get into truck No. 13 but they refused. When he ordered them to place their equipment on the sidewalk, they also refused, loudly proclaiming that they

> "weren't going to put their mother-fucking equipment on any truck or on the sidewalk" and were "going to put it any place they pleased whenever they pleased" (R18); and "No goddamned white fucking Captain is going to tell us to move any baggage. You move the baggage yourself if you want to" (R45).

This last answer was given by all six of the mentioned accused (R45). There was a general state of confusion and many profane and obscene exclamations were directed at the company and its commanding officer (R40).

At this point Captain Flynn became apprehensive about the situation and directed Lieutenant Gooding and the truck drivers to prepare to move out of the area. He again ordered the men to remove their equipment from the road and they again refused (R18).

Just as the captain was about to order the movement to commence, accused Rossie Johnson, Jr., (admittedly) fired a shot from his M-1 rifle from one of the trucks about two trucks ahead of the Captain (R18-19, 125). He surrendered several clips of ammunition and the captain ordered him to board another truck and remain there until ordered off, except for calls of nature (R19, 41). The officer then proceeded in the jeep with Waitman to the recalcitrant group, which included the six mentioned accused, whom he once again ordered to place their equipment on the sidewalk to be picked up. He was again met with a refusal accompanied by remarks by several men that they would get on the truck any time they wished and not just because the ordered them (R19-20).

As the vehicles in the convoy were pulling out, eight of the men surrounded the jeep in which Captain Flynn and Waitman were sitting and for between 20 and 30 minutes threatened and insulted the captain with vile language and assaulted him (R20-21, 40, 45-46, 125-126). Six of the men in this group were Webb, Smith, Jones, Shered, Thomas, and Sewell all of whom were using insulting and profane language (R124, 126-127). Smith, who was the most violent, continually threatened to shoot the officer, whom he addressed as a "no good son of a bitch", grabbed him by the shirt or jacket, picked him up from his seat, and punched him several times above the heart and on the arm. Jones, who sought to calm Smith and pulled him away, punched the captain with his finger or hand and told him he agreed with Smith that the captain was a "no good mother-fucking bastard" (R20-22, 26-27, 40, 45-46). Webb cocked his rifle (R20), placed it in Waitman's stomach and told him to "go for" his pistol -that he wished to kill him, addressing him as a "white son of a bitch" (R45). The other men around the jeep also told the captain he was "no mother-fucking good" and made other violent and filthy remarks (R20, 46).

After about 20 or 30 Minutes, when the men seemed somewhat quieter, Captain Flynn told them he would send a truck to the stockade and that if they would not go in this manner, he would be obliged to secure a military police detachment to transport them. They stated they would get on the truck (R21). The captain and sergeant then started in the jeep for the convoy and forced their way out of the crowd. When they had proceeded about 25 yards, two shots were fired "over or beside the jeep". Webb was seen to fire a shot. The officer speeded up, as between 15 and 30 shots were fired at them. Waitman returned the fire and himself received a wound in the head which required hospitalization (R21, 45-46; Pros. Ex. 1). The captain therewith returned to the area of the disturbance with about 40 security guards, who there apprehended eight men who included Webb, Smith, Jones, Shered, Thomas and Sewell (R21-22).

Voluntary sworn pretrial statements by Webb and Shered, dated respectively 4 and 6 May 1945, were admitted in evidence, to be considered solely against their respective makers (R56-57; Pros. Exs. 2, 3).

Webb's statement was a follows:

> "Sometime in April I and 38 other men were transferred into the 4016 QM. Tr. Co. From the first night we have never been able to get along with our Commanding Officer, Captain Flynn. Everytime he could, he would take advantage of us. He wouldn't let us ask him any questions in

regard to being able to get our sleep and food that we were eating. When we ask him about these things he would say "I am the boss and I give the orders. So we 39 new men decided to get together and get out of his company, so we asked for a transfer but he would not give us a transfer. On the night of 28 April 1945, when we saw the M.P.'s take Robinson, Hicks and Winstead to the stockade, we decided that we had taken enough of this treatment and ould go to the stockade rather than take his unreasonable orders. Captain Flyn then told us that he would have truck #13 take us to the stockade but we, the eight men, decided that we were through with the Company and through taking his orders, so we wouldn't get into truck #13. When we wouldn't get into truck #13 the Captain told us to get into another truck at the end of the convoy. The reason that we wouldn't get into this truck was because we couldn't decide if we wanted to go to the stockade or just what we wanted to do. After the convoy left, the Captain and a soldier was sitting in a jeep some of the men walk over to the jeep and were talking to the Captain. I walked up a little later and heard Smith telling the Captain that he wasn't treating us right and that he wasn't a good officer and he wanted to go to the Stockade and get out of his company. All this time he was poking him. After a few minutes the Captain and the white soldier drove away. They had gone about 25 yards when I heard some shots. I don't know who fired the shots. After the shooting Jones and myself went to find the M.P. Hq. We were unable to find the M.P. Hq. so we were returning to the place where we left the other six men when we were arrested by some soldiers and taken to the Stockade" (Pros. Ex. 2).

Shored's statement was as follows:

"Sometime in April 1945, I was transferred from 3862 Q.M. Tr. Co. to 4016 Q.M. Tr. Co. With me were about 38 other men who

were also transferred to 4016. From the first day we did not get along with Captain Flynn our new Co.Commander. We could not get along with him because he hollered and shoutin at us often. He did not treat us as he did his old men. When we got to Heilbronn, Robinson was arrested and as he was put in the jeep to the stockade Hicks or Winstead said, 'Since they are taking Robinson, lets go along with him to the stockade. Now is the time to get out of this mother fucking outfit! At this the Capt. said that the men that wanted to transfer and go to the MPs, should put their things on truck #13 and I'll take you to the M.P.'s station. About eight or nine of of us decided that we would not put our things on this truck as we were undecided as to whether we wanted to go to the MP's station or not. About this time Johnson fired his M-1 from where he was sitting in his truck. When the Captain returned he asked why we were not on truck #13 and we said we had not decided what we wanted to do. The Capt. then told us to put our things on the last truck if we had made up our mind and he would take us to the M.P.s. We did not put our things on this last truck as we did not know if the Capt. would take us to the M.P's or back to the company and we did not want to go to the Co. This is all I can remember" (Pros. Ex. 3).

c. Specification 3, Charge III: At about 0830 hours the following day, 30 April, near Heilbronn, Germany, Captain Flynn discovered accused Johnson on the street talking to members of the company and asked him what he was doing there, in view of the captain's order to stay on the truck the preceding night (see supra). He replied that he was not under arrest and would not "get on any truck" (R22). Captain Flynn then ordered him to"get back to that truck". Johnson refused on the ground that he was not under arrest, so the captain told him he was under arrest now and again ordered him to get on the truck, but he persisted in his refusal (R23).

5. Evidence for the defense is, in pertinent summary, as follows:

After their rights were explained to them (R61-62, 71-73), each of accused Winstead, Hicks, Jones, Thomas, Sewell, and Johnson elected to be sworn as a witness in his own behalf; and each of accused Webb and Smith elected to make an unsworn statement; and accused Shered elected to remain silent (R62, 73-74,121).

Winstead denied: that he received orders from Captain Flynn to report immediately to the first platoon or to the company area (28 April) (R62, 65) or to remain on his truck; that he made profane or abusive remarks to that officer; that he said anything or heard Hicks say anything (R63-64); or that there was any commotion or disturbance (29 April) (R67, 69).

Hicks denied: that he received an order to remain on his truck (R75); that he heard an order to all the men to get back on their trucks; that he said anything to Winstead or saw him or that he suggested that all 38 men get out of the outfit or go to the stockade (R76, 79-80); that he made abusive remarks (R79); or that he had in mind creating a mutiny or riot (R83). He admitted: he heard some men say "Damn the captain" (R82), and he did not like the way the captain was treating him (R83). He stated that he obeyed the captain's order to get on the truck but when the captain told him to hop down if he wished a transfer, he did so and said he was ready for a transfer, when the captain arrested him (R75, 77). The captain did not like the new men and exaggerated their remarks and conduct to build up a case of mutiny against them, an idea he conceived after they were confined. He did not treat them fairly (R76, 81, 84). Witness walked to the jeep from the truck without circulating (R80).

Jones denied: that he was present when Robinson was taken to the jeep (R115), having returned only after the commotion had commenced (R114); that he received an order from the captain to get on a certain truck; that he struck or raised his hands on the captain (R116); that he saw Webb with his rifle in Waitman's stomach (R118); that he heard any cursing or abusive remarks against the captain, or other than grumbling (R115, 119); or that he fired any shots (R116). When Smith pointed his finger in the captain's face, witness pulled him off and warned him that it might be insubordinate (R114). Smith told the captain "it was no good the way he was treating us" and asked why they had "to go through all this to get a transfer", but he did not curse or threaten to shoot the captain (R117). The captain said he would leave a truck at the rear of the column to pick up the men, and witness hollered for the truck as it pulled out but to no avail (R115). He heard some shooting (R118).

Thomas denied: that he was present when Robinson was removed from the truck (R109, 112); that he said anything to Captain Flynn (R110) or approached him when in the jeep (R111); or that he heard any loud talking around the jeep just prior to its departure (R112).

Sewell denied: that he saw a commotion around the captain's jeep (R94); that he went close to it; that he said anything to anyone (R95, 97); that he saw groups of men or heard suggestions to get out of the company (R97); or that he was guilty of any conduct

to warrant his arrest (R92). He obeyed the captain's order to get back on his truck (R95-96). He failed to accompany the convoy when it left because he was looking for his duffle bag and did not know the convoy was leaving (R98).

Johnson testified he was present when Robinson was arrested but denied he saw any members of the company in groups around the convoy (R89). He stated that his rifle was accidentily fired, as he had informed the captain (R87). When the captain ordered him on to the truck (29 April) he did not mention arrest (R88). He admitted: he heard noise (R89), he heard men cursing the company and the captain and heard a suggestion that they get out of the "mother-fucking company" (R90), and that they wanted a transfer (R92). He obeyed the captain's only order of 30 April to get on the truck (R88-90).

Webb, in his unsworn statement, said that the Criminal Investigation Division agent who took his pretrial statement assured him that if it were used in court, the agent would let the court know Webb could not speak for any of the other men. The agent did not do this (R121).

Smith, in his unsworn statement, admitted that he went to the captain's jeep and argued with him about a transfer, told the captain, without profanity, he was no good and became excited. Jones told Smith to calm down and get his finger out of the captain's face and pulled Smith away from the jeep. He chased a truck to mount it, without success. He heard shots (R122).

6. a. The granting of the defense motion for severence of trial as to accused Robinson on the ground that as he was charged only with willfull disobedience of an order by Captain Flynn and that trial with the 11 men accused of mutiny and insubordination would be highly prejudicial to his rights (R5-6) was proper, in the exercise of the court's sound discretion (cf; CM ETO 3147, Gayles et al, and authorities therein cited). As above indicated, Robinson was tried a few days after the trial herein and convicted of willfull disobedience and exciting a mutiny, sentenced to dishonorable discharge, total forfeitures and life imprisonment and the record of trial was finally held legally sufficient to support the findings and sentence (CM ETO 13269, Robinson).

b. The court denied a defense motion to strike out Charge II and its specifications on the ground that a series of offenses which constitutes substantially one offense should not be made the basis of multiple charges (MCM, 1928, par.27, p.17) (R6-7) The specifications of Charge I allege beginning a mutiny (Spec. 1) and joining in a mutiny (Spec. 2). Those of Charge II allege behaving in an insubordinate manner by the same accused to their commanding officer. The

overt acts of insubordination alleged in the specifications of Charge II are also alleged in those of Charge I. Although the offenses alleged in the two groups of specifications are similar they are none the less separate and distinct (Winthop's Military Law and Precedents (Reprint, 1920), pp.578-579; CM ETO 1920, Horton; CM ETO 16940, McCoy). Moreover, one transaction may appropriately be made the basis for charging two or more offenses when doubt exists as to the facts or law (MCM, 1928, par.27, p.17). Common prudence dictates the practice

> "where the legal character of the act of accused cannot be precisely known or defined till developed by the proof" (Winthrop's Military Law and Precedents (Reprint, 1920) p.143).

Lastly, the denying of the motion was a matter within the sound discretion of the court and we cannot say it was arbitrary here. The motion was properly denied (CM ETO 895, Davis et al 3 BR(ETO)59; CM ETO 4570, Hawkins; CM ETO 5155, Carrell and D'Elia).

e. Testimony as to prior mutinous conduct in the company was revelent and admissible (CM ETO 13269, Robinson).

7. Specifications 1 and 3, Charge III (Willful disobedience, Winstead and Johnson): The evidence establishes that at the dates and places alleged, each accused refused to obey direct orders by Captain Flynn, their commanding officer, as alleged. The willfullness of their disobedience was demonstrated by Winstead's insolent and defiant language to his superior officer and by Johnson's insistence he was not under arrest and the persistence of his refusal. The court found, however, that Johnson was guilty only of a failure to obey the order, a lesser included offense of that alleged and established (cf: CM ETO 3362, Shackleford). The record fully supports the findings of guilty of the Charge and these specifications with the substitution noted as to Johnson(CM ETO 3078, Bonds et al; CM ETO 3147, Gayles et al; CM ETO 13269, Robinson).

8. a. Specifications 1, 2, 3, Charge I: Accused Winstead and Hicks are charged with jointly beginning a mutiny by (1) concertedly refusing to obey the lawful order of Captain Flynn, their Commanding Officer, to get into designated trucks, (2) urging members of their company concertedly to refuse to obey such orders, (3) causing said members concertedly to disregard and defy such orders, and (4) making insulting and abusive remarks to Captain Flynn, with intent to usurp, subvert, and override for the time being, lawful military authority (Spec. 1).

Accused Webb, Smith, Jones, Shered, Thomas, and Sewell are charged with jointly joining in an existent mutiny in their company against the lawful military authority of Captain Flynn, their Commanding Officer and, with intent to subvert and override such military authority

for the time being, (1) refusing to obey his lawful orders to get into designated trucks, (2) making insulting and abusive remarks to him, (3) striking him and (4) shooting Sergeant Waitman in the head (Spec.2).

Accused Johnson is charged with joining this existent mutiny in his company and, with the same intent as alleged in Specification 2, firing a shot from his M-1 rifle in the presence of members thereof assembled in the immediate street area (Spec.3).

Article of War 66 provides in pertinent part:

> "Any person subject to military law who * * * begins, * * * or joins in any mutiny * * * in any company, * * * or other command shall suffer death or such other punishment as a court-martial may direct".

The Manual for Court-Martial provides:

> "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority.
>
> * * *
>
> The concert of insubordination contemplated in mutiny * * * need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or ommission to obey orders, or to do duty, with an insubordinate intent.
>
> * * *
>
> The intent which distinguishes mutiny * * * is the intent to resist lawful authority in combination with others. The intent to create a mutiny * * * may be declared in words, or, as in all other cases, it may be inferred from acts done or from surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny * * * and so be guilty of an attempt to create a mutiny * * * alike whether he was joined by others or not, or whether a mutiny * * * actually followed or not.
>
> * * *

> There can be no actual mutiny * * * until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases" (MCM, 1928, par.136, pp. 150-151).

Winthrop thus defines mutiny and the offenses of beginning and joining in a mutiny:

> " It may, it is believed, properly be defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office.
>
> * * *
>
> it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime, that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny, that mere disobedience of orders, unaccompanied by such intent, does not amount to mutiny, and that insolent language or disorderly behavior is per se insufficient to establish it.
>
> * * *
>
> The intent may be openly declared in words, or it may be implied from the act or acts done, - as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a rescue or attempt to rescue a prisoner, a stacking of arms and refusal to march or do duty, a taking up arms and assuming a menacing attitude, &c; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of <u>combination</u> - that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose - is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question.

* * *

While the intent indicated is essential to the offense, the same is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice.

* * *

The opposition or resistance need not be active or violent. It thus may consist simply in a persistent refusal or omission, (with the intent above specified), to obey orders or do duty .

* * *

To constitute mutiny it is not necessary that there should be a concert of several persons: a single individual may entertain the intent and commit, or in the words of the Article, 'begin', an act of mutiny. As already indicated, however, a combination is usual and indeed almost invariable; the causes which actuate mutiny being commonly matters of joint grievance or complaint with a greater or less number of persons. The concert, where it exists, need not necessarily be preconcert; but, as mutinies naturally grown out of previous consultations and conspirings, it will generally be such.

* * *

'Who begins, excites, causes, or joins in, any mutiny', &c. Samuel distinguishes in general terms the two classes of persons contemplated by the Article as those who lead and those who follow. And the simplest view to take of the words quoted is, to treat begin, excite and cause as different names for the same thing, to wit the offence of the officer or soldier who originates or is instrumental in originating a mutiny, and join in as referring especially to the offence of one who participates in a mutiny when once inaugurated.

* * *

Joining in a mutiny is the offence of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do. The joining in

> a mutiny constitutes a conspiracy and the doctrines of the common law thus become applicable to the status - viz. that all the participators are principals and each is alike guilty of the offence; that the act or declaration of anyone in pursuance of the common design is the act or declaration of every other, and that, the common design being established, all things done to promote it are admissable in evidence against each individual concerned.
>
> None of the offenses is complete unless mutiny actually occurs. The Article, in designating as offences the beginning, &c., and joining in, a mutiny, evidently contemplates that a mutiny shall have been consumated. A mutiny complete in law must actually have existed to authorize the bringing to trial of an accused for an offence of this class" (Winthrop's Military Law and Precedents (Reprint, 1920), pp. 578-583).

a. The evidence shows that from 12 April 1945, when accused first came to Captain Flynn's company, they were noncooperative and recalcitrant. He accordingly used sterner language and, no doubt, methods in dealing with them than in dealing with old members of the company. This the men resented and evidently interpreted, rightly or wrongly, as unjust discrimination. With this background, the events of 29 April are not difficult to understand (cf, CM ETO 13269, Robinson). The arrest of Robinson followed by his forcible removal from the truck to the military police jeep was the spark which Hicks and Winstead fanned into the flame of a mutiny. This they did by together refusing to return to their truck when told to do so by Captain Flynn, by urging the 20 or 30 men who were nearby with the trucks not to take or pay attention to his orders and to "get out of this mother-fucking company" en masse, and by addressing Captain Flynn as a "mother-fucking chicken-shit" officer. The direct result of their concerted disobedience and exhortations was the congregating of accused Webb (the ringleader), Smith, Jones, Shered, Thomas, Sewell and others near the truck; the throwing of bags off the trucks and dismounting therefrom; the general confusion and "milling around"; the general hue and cry of "Let's all get out of this mother-fucking, chicken-shit outfit"; and the concerted disobedience by the named accused of Captain Flynn's orders to mount their trucks. The intent of Hicks and Winstead to overthrow and override their commanding officer's lawful military authority, in combination with other members of their company, is manifest from their concerted overt acts of insubordination which were among the first acts of mutiny to occur - their own concerted disobedience and mutinous exhortations to their fellows to follow their example in disobeying the captain and to get out of the company. Here began the mutiny. The evidence fully supports the findings that Hicks and Winstead began a mutiny as alleged (Specification 1, Charge I) (CM ETO 3147, Gayles et al; CM ETO 3803, Gaddis et al; cf: CM ETO 3928, Davis; CM ETO 13269, Robinson; Compare Ogletree's harangue to excited, angered colored soldiers in CM ETO 895, Davis et al, 3 BR (ETO) 59, 103,110, with the exhortations of Hicks and Winstead). The possible existence of other contributing causes of the mutiny is no defense (CM ETO 13269, Robinson).

b. Kindled by Hicks and Winstead and further aroused by their arrest and removal in the jeep with Robinson, and by Webb's continuation of the two soldiers' mutinous suggestions, the mutiny thus begun, was joined in by the whole group. Accused Smith, Jones, Shered, Thomas and Sewell, together with Webb congregated near the trucks, refused to obey Captain Flynn's lawful order tomount their trucks, took up the wry to get out of the company and go to the stockade, made insulting and abusive remarks to the captain, and refused to move their equipment (which they had taken from the trucks) so as to permit the trucks to pass. Accused Johnson fired a shot from his rifle while in arrest in a nearby truck at the height of the confusion. As the convoy pulled out, all six of the named accused surrounded their commanding officer's jeep and for 20 to 30 minutes threatened him and insulted him with vile language. Two of their number, Smith and Jones, even struck him, and Webb, the ringleader, cocked his rifle and stuck it into Military Police Sergeant Waitman's stomach,with a threat to kill him. When the captain was finally able to get away from them in the jeep, 15 to 30 shots were fired from accused's group, one by Webb, and one of which wounded Waitman in the head. That the six accused possessed the required intent is beyond dispute and they clearly joined in overt acts of mutiny which temporarily overthrew and nullified Captain Flynn's authority. Their defiance of his authority could hardly have been more complete. It was aggravated by their threats and their actual endangering of his life. The responsibility of accused, all of whom were participators, as principals for the acts of Jones, Smith and Webb and for the shooting of Waitman is beyond question (CMETO 804, Ogletree et al, 2 BR (ETO) 337; CM ETO 1052 Geddies et al; CM ETO 5764, Lilly et al). Johnson's claim that his rifle was accidently discharged just at a critical point in the uprising as well as the various denials and explanations by the other accused were not required to be believed in whole or in part by the court (CM ETO 16655, Pagano). The finding of guilty of the six named accused and Johnson of joining in a mutiny as alleged, are amply supported by the evidence (Specification 2, Charge I) (CM ETO 895, Davis et al 3 BR (ETO) 59; supra; CM ETO 1052, Geddies et al; CM ETO 3147, Gayles et al).

c. Specifications 1,2, Charge II:

The evidence above discussed proves that Winstead and Hicks concertedly behaved in an insubordinate manner toward Captain Flynn in violation of Article of War 96 by (1) refusing to obey his lawful order to get into certain trucks, (2) using insulting language to him and calling him opprobrious names, and (3) urging other members of the company to refuse to obey his lawful orders (Spec. 1). The evidence shows that accused Webb, Smith, Jones, Shered, Thomas,and Sewell also concertedly behaved in an insubordinate manner toward the captain in violation of Article of War 96, by (1) refusing to get into the trucks as lawfully orderdd by him, (2) using insulting language to him and calling him opprobrious names, (3) striking him on his body (by Smith and Jones), and (4) urging other members of the company to refuse to obey his lawful orders. The findings of guiltyof the eight named accused of the insubordinate conduct alleged is fully supported by the record (Winthrop's Military Law and Precedents (Reprint, 1920), pp. 578-579; CM ETO 1920, Horton; CM ETO 16940, McCoy).

9. The charge sheet shows the following with respect to the several accused:

NAME	AGE	PLACE OF INDUCTION	DATE OF INDUCTION
Winstead	23 5/12	Indianapolis, Indiana	31 December 1942
Hicks	23 2/3	Detroit, Michigan	21 December 1942
Webb	22 11/12	New York City, New York	16 January 1943
Smith	21 9/12	Los Angeles, California	1 July 1943
Jones	21*	New Rochelle, New York*	21 June 1943
Shered	21 9/12	Huntington, West Virginia	23 April 1943
Thomas	22 3/12	Fort Sam Houston, Texas	1 March 1943
Sewell	27 1/4	Fort Thomas, Kentucky	22 January 1942
Johnson	26 5/6	Detroit, Michigan.	27 January 1944

* As corrected by accused Jones at trial (R132).

Each accused was inducted to serve for the duration of the war plus six months. No prior service of any of accused is shown.

10. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to accused Winstead, Hicks, Webb, Smith, Jones, Shered, and Sewell to support the findings of guilty and the sentences as commuted and legally sufficient as to accused Thomas and Johnson to support the findings of guilty and the sentences.

11. The penalty for beginning a mutiny, for joining in a mutiny and in time of war for willfull disobedience of the lawful command of a superior officer is death or such other punishment as the court-martial may direct (AW 66,64). Confinement in a penitentiary is authorized upon conviction of beginning a mutiny and of joining in a mutiny by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars. 1b (4), 3b).

Edward L. Stevens, Jr. Judge Advocate

[signature] Judge Advocate

(DETACHED SERVICE) Judge Advocate

(22)

1st Ind.

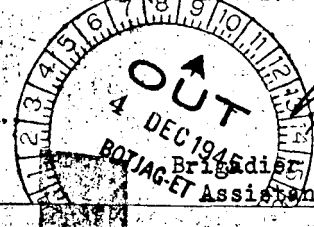
War Department, Branch Office of The Judge Advocate General with the European Theater. 3 DEC 1945 TO: Commanding General, Theater Service Forces, European Theater, APO 887, U.S. Army.

1. In the foregoing case of Privates MALCOLM THOMAS (38455218), ROSSIE JOHNSON, JR. (36899638), both of 4016th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to such accused to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The period of confinement included in accuseds' sentences is excessive when judged by the standards adopted by court-martial authorities in similar cases. A review of the cases arising in this theater will show that the approved sentences have ranged from five to 25 years. I recommend a substantial reduction in the period of confinement of each accused.

3. The publication of the general court-martial order and the order of execution of the sentence may be done by you as the successor in command to the Commanding General, Continental Advance Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being as provided by Article of War 46.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17699. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17699).



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

(As to accused Hicks, sentence as commuted ordered executed. GCMO 639, USFET, 26 Dec 1945).
(As to accused Winstead, sentence ascommuted ordered executed. GCMO 641, USFET, 26 Dec 1945).
(As to accused Webb, Smith, Jones, Shored and Sewell, sentence as commuted ordered executed. GCMO 642, USFET, 26 Dec 1945).

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

BOARD OF REVIEW NO. 3

27 OCT 1945

CM ETO 17705

UNITED STATES	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Ingolstadt, Germany, 6 June 1945. Sentence:
Private JAMES G. HEILIG (33642015), Company F, 39th Infantry	)	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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James G. Heilig, Company "F", 39th Infantry, did, at Grosskuhnau, Germany, on or about 27 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Helene Tyrra, a German civilian residing in Grosskuhnau, Germany.

He pleaded not guilty and, three fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification and the Charge. No evidence of previous 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 U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on the night of 27 April 1945, two shots were fired outside the residence of Anton Tyrra and his wife, Helene, the prosecutrix, in Grosskuhnau, Germany. Anton went outside to investigate, and accused pointed a rifle at him, then indicated with a pistol that he should open the door. When Anton was unable to open the door with a hammer and pliers, accused fired a shot through a window. Anton then broke a hole in some glass and crawled through it, and being still unable to open the door, broke a panel out of it. Helene came running out screaming "My husband, my husband", and accused pointed his pistol at both of them (R6-9,14-15). He then forced Helene to kiss her husband, and advanced and motioned that he wanted to kiss Helene. Anton held his hands in the air and nodded in the affirmative, whereupon accused kissed both Helene and Anton (R9,16-17). Hoping to arouse sympathy in accused, Helene and Anton got their two children from their beds and showed them to accused, who had followed them with his pistol in his hand. They also pleaded with accused not to shoot. When he showed no sympathy and motioned the children away, they returned the children to bed and went out again (R10,17). As Herr Reuter, a roomer, came out of the house, accused fired at him and then ordered them all into the house (R11,18). Anton refused to enter and, when accused turned to Helene for a moment, ran around a corner of the house to the village, nearly three miles away, and got four American soldiers (R11). Reuter also succeeded in leaving (R23). Helene testified that when her husband left, accused forced her, with his pistol, into the room with her children, and motioned for her to undress, which she did. When she was completely naked, he unbuttoned his trousers, and placed his penis in her vagina while they were standing in the center of the room (R18-19). She stood with her feet together at first but did not know if she kept them together. His penis "slipped in". He did not have an emission (R25). After about two minutes he shoved her backwards to a couch and made her sit down. He lay on the couch and made her pull his trousers down by holding his pistol against her breast (R19). She testified:

> "Then, he motioned with his hands, he patted his thighs. I assumed this meant that he wanted me to sit on it, his body moved up and down" (R19).

She sat on him and his penis "went in by itself" (R19,21). After three or four minutes he motioned for her to get up, put one of his hands behind her head and "I had to put the penis into my mouth. This went on for 15 minutes that I had to lick on it" (R19). He did not have an emission and his penis remained erect at all times (R21). She did not cooperate with him at any time, the acts were against her will, and she did not resist more because she was afraid, especially of the pistol (R24). Accused asked her in German to sleep with him and she refused. She reached for her clothes and had just put a slip on when the door opened and an American soldier entered. He left after some conversation, and she ran to another room. Accused followed with his pistol in his hand and motioned for her to undress again. She refused and he slapped her. Accused went outside in response to a call in English, and she ran away to her friends (R19). In her opinion accused was drunk (R20).

Sergeant Irving Q. Frey testified that he came with four other soldiers to the house at the summons of a civilian policeman. Accused came to the door

and said there was no trouble and that, "I got the woman snowed and I am just trying to get a little and you boys leave me alone". The woman had been crying and when she came to the soldiers, accused ordered her back in the house at the point of his gun, then "covered" the soldiers and ordered them to "beat it". They went behind the house and heard the woman crying again, and then devised a plan pursuant to which they called accused outside and one of the soldiers slipped up behind him and grabbed the pistol from him. When a vehicle drove up with Anton and several other soldiers in it, accused "took off shouting, 'You can shoot me in the back if you want to'". Accused had "evidently been drinking" (R25-27). According to another of the soldiers he was drunk (R29).

4. After his rights as a witness were explained to him, accused elected to remain silent (R36).

For the defense, evidence impeaching the testimony of prosecutrix was given by the interpreter to the effect that in a pre-trial statement, she had stated that accused's penis was not erect during the second act, and that when she took his penis in her mouth, accused ceased to maintain pressure on her head when she "did not want to any more" (R29-30).

A medical officer testified that it was impossible for a man to penetrate a woman's vagina while standing unless either the man or woman inserted the penis. Even with cooperation it would be difficult, and the relative heights of accused and prosecutrix would make it more difficult. Also, if a woman sat on a limp penis, penetration would be impossible unless either the man or woman inserted the penis, but penetration without assistance would be possible if the penis were erect. Extreme drunkenness would make either of the acts still more difficult (R31-32).

A private of accused's company testified that at about 2115 hours on 27 April, accused was "pretty well dead drunk" on "high light", which was "something like gas and benzine" (R32-33).

Accused's commanding officer testified that accused's character was excellent and he was satisfactory as a soldier, while his first sergeant testified that his character was "very efficient" and that he was a very good soldier. Both witnesses desired to have accused back with the unit (R34,35).

5. The testimony of prosecutrix showed that accused, at the time and place alleged, had carnal knowledge of her without her consent, by putting her in fear of losing her life or suffering serious bodily injury, by threatening her with a pistol. Her testimony relating to the indiscriminate shooting by accused prior to the alleged rape is corroborated by testimony of her husband. American soldiers further corroborate her testimony by showing that accused threatened her with the pistol and expressed his intent to have carnal knowledge of her, while she was crying and in apparent genuine fear of him. While there is no direct corroboration of the fact of carnal knowledge, all of the circumstances are corroborative of prosecutrix' testimony with reference thereto, and her testimony is both reasonable and uncontradicted except in minor respects. If prosecutrix was placed in a state of submission through reasonable fear

engendered by accused, his acts constituted rape. The evidence supports the findings of guilty (CM ETO 3933, Ferguson et al; CM ETO 3740, Sanders et al; CM ETO 10841, Utsey; CM ETO 12472, Syacsure; CM ETO 14382, Janes; CM ETO 15905, Arias).

While the evidence indicates a strong probability that accused was drunk at the time of the acts, voluntary drunkenness alone does not constitute an excuse for the commission of the crime of rape (CM ETO 9611, Prairiechief; CM ETO 13476, Givens).

6. The charge sheet shows that accused is 21 years ten months of age and was inducted 25 June 1943 at Richmond, Virginia. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the 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 the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of 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 K Cooper Judge Advocate

Malcolm C. Sheehan Judge Advocate

(TEMPORARY DUTY) Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater [redacted]
APO 887

BOARD OF REVIEW NO. 1

22 OCT 1945

CM ETO 17707

UNITED STATES	IX AIR FORCE SERVICE COMMAND
v.	
Private ROBERT F. HAWKINS (38242923), 2004th Ordnance Maintenance Company (AF), 42nd Air Depot Group	Trial by GCM, convened at Erlangen, Germany, 25 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, 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. Specifications 2 and 3 of the Charge allege that accused assaulted two German civilians with intent to do bodily harm by striking them with his fist. The evidence showed no more than that. One of the persons assaulted (Buchner) testified that he was not injured (R11) and there is no evidence that the other (Aberle) suffered any injuries (R9,R29;Pros.Ex.2). Under such circumstances accused was guilty only of a simple assault(CM ETO 8189, Ritts and French). It follows that the record is legally sufficient to support only so much of the findings of guilty of Specifications 2 and 3 as involves a finding that accused did, at the time and place alleged, commit an assault and battery on the persons alleged in the manner alleged, in violation of Article of War 96 and legally sufficient to sustain all other findings of guilty and the sentence.

(TEMPORARY DUTY) Judge Advocate

Donald K. Carroll Judge Advocate

Judge Advocate

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

BOARD OF REVIEW No. 5

8 DEC 1945

CM ETO 17723

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RALPH SEBALLOS (20846956), Company K, 157th Infantry.	Trial by GCM, convened at Marseille, France, 6 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 5
HILL, JULIAN and BURNS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ralph Seballos, Company K, 157th Infantry, did, at or near St. Victoret, France, on or about 16 January 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Marseille, France, on or about 19 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring,

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was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The confirming authority, the Commanding General, United States Forces, 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. It was stipulated, the accused expressly consenting thereto, that his correct name is Ralph Seballos and that from 16 January 1945 he was a member of Company K, 157th Infantry in the military service of the United States (R13). On 16 January 1945, accused was a prisoner in the Delta Base Section stockade at St. Victoret, France (R10) on which date while outside of the stockade on a work detail he escaped (R11). Accused wore his dogtags and uniform after leaving the stockade, according to a witness who was with him, and expressed his intention of turning himself in as he wanted "to get straightened out" and return to soldiering (R12). On 18 April 1945 at about 0145, two military policemen on patrol in Marseille, France, apprehended the accused in the company of two colored soldiers and a French civilian (R14,15, 21). The civilian was carrying a 60 pound sack of sugar and the accused, carrying a cocked .45 pistol in his hand and representing himself to be Staff Sergeant Keller of the 507th Port Battalion, stated that he had apprehended the civilian stealing sugar and was taking him to the military police station (R15,16,22). Several other civilians appeared carrying sugar and all, including accused, were taken by the military police to the 6th Port sub-police station (R16). Accused and the two colored soldiers were not detained by the military police (R16) but on the night of 19 April 1945 the accused was apprehended at a dance at Marseille, France, by the same military police patrol (R16). At this time the accused stated that he was Private Lombardo of the 45th Division

(R16). On both occasions when encountered by the military police, accused was wearing G.I. overalls (R17).

After being duly warned of his rights, accused made a sworn statement (Prox. Ex. 1) which he signed as Ralph Lombardo (R24-25). The statement, received in evidence without objection by defense related that he had been "AWOL" since January 1945, that he had been living in a bombed building behind the 379th Port Battalion Area for about two months; that he was in the act of hijacking a sack of sugar from a Frenchman when the military police came up; and that on 19 April he was apprehended by the military police at a dance hall.

On 30 April 1945 accused made a second sworn statement (Pros. Ex. 2), after again being duly warned of his rights, which he signed with his true name (R27-29). His statement was received in evidence (R33) over defense counsel's objection that it contained inadmissible evidence of offenses committed prior to the date of the offense charged (R29-31). In this statement accused said that he had absented himself from his organization in January, 1944, at Palermo, Sicily; that he was thereafter apprehended and confined in a stockade for about four months and was then returned to his unit at Venafro, Italy; and that two weeks later he again went absent without leave and after two or three months was arrested and returned to his unit at Anzio.

After several months he again absented himself without leave, was apprehended in Naples, Italy, and sent to the Peninsular Base Section Stockade and then to the Delta Base Section in France. On the day of his arrival at the port of Marseille he again absented himself and caught a plane back to Italy where he was apprehended and was returned to the Delta Base Section stockade during the month of January 1945. After about one week he escaped and during that period until apprehended he lived by stealing clothes and rations from the port and selling them to Frenchmen. On about 17 April 1945, while he was hijacking a French civilian with a .45 automatic, he was stopped by military police to whom he explained that he was arresting the civilian for stealing sugar and that he was Staff Sergeant Keller of the 507th Port Battalion. On 19 April 1945 he was again arrested by the military police (R33).

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 (R35).

5. It is clearly established by the evidence that accused was absent without leave from about 16 January 1945 until he was apprehended on 19 April 1945, a period of over three months. This unexplained absence over the extended period shown, terminated by apprehension, is sufficient in itself to sustain the findings of guilty of desertion (CM ETO 3963, Nelson; CM ETO 17551, Yanofsky; CM ETO 17629, Guyette). The intent of accused to separate himself permanently from the military service is further proved by his use of false names, his repeated absences, escapes from confinement, and his thefts of clothing and rations. These offenses were properly considered by the court for the purpose of determining the intent of accused to desert (CM ETO 2901, Childrey et al; CM 130239 Dig. Op. JAG, 1912-40, Sec.395 (7) p.201).

6. The charge sheet shows that accused is 23 years of age, and that he was mobilized with his National Guard unit at Yuma, Arizona on 16 September 1941. He had been in the National Guard since 1938.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Private RALPH SEBALLOS (20846956), Company K, 157th 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 17723. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17723).

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

(Sentence as commuted ordered executed. GCMO 637, USFET, 26 Dec 1945).

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

BOARD OF REVIEW NO. 3

27 OCT 1945

CM ETO 17724

U N I T E D S T A T E S	)	VI CORPS
	)	
v.	)	Trial by GCM convened at Igls, Austria 4 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private DOCK C. COPELAND (34099542), 163rd Chemical Smoke Generator 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 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 Dock C. Copeland, 163rd Chemical Smoke Generator Company, did, at Kirchhausen Germany, on or about 2000 hours, 6 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mazus Franc, a human being by shooting him with a rifle.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Specification and the Charge, except the words "Mazus Franc", substituting the word "Franz". Evidence

was introduced of four previous convictions, two by summary court for drunkenness in quarters, one by summary court for drunkenness in quarters and absence without leave, all three in violation of Article of War 96, and one by special court-martial for absence without leave for one day in violation of Article of War 61. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, VI Corps, 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 period 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 shows that on the date and at the place alleged accused killed a Polish worker named Franz by shooting him twice with a carbine, once in the head and once in the chest (R38-40,42; Pros.Ex.2). According to accused's extra judicial confession, the shooting occurred at about eight o'clock in the evening when, upon entering a cellar in search of schnapps, he met accused coming out. "I was scared as I saw him coming, so I shot him * * * I shot two round into the kid, one into his head and the other into his chest while he was standing" (R42; Pros.Ex.2). Several hours earlier, accused had been in a shed with Private First Class Dewie P. Haley when deceased came in to feed the sheep and horses. Accused then told him to "get out of there before he blew his head off" (R26). At nine o'clock the same eveningabout an hour after the killing, accused told Haley that he had "shot a boy" (R24,28). At approximately the same time, the house where the killing occurred caught fire and deceased's body was discovered near the basement door (R13-16,24). Shortly thereafter, accused, referring to deceased, said "I killed that son of a bitch" (R20). A post mortem examination showed that death resulted from a "trauma produced by a high velocity missile or missiles entering the chest and head of the individual" (R33).

Accused was drinking on the afternoon and evening of the homicide, was drunk when he first admitted having killed deceased and afterward "laid on the floor and stayed there all night"(R18,29). He was an alcoholic with a mental age of 10 years eight months and perhaps would respond abnormally to an overdosage of alcohol (R46).

Accused elected to remain silent and the only evidence adduced by the defense was a stipulation that a medical officer who examined accused 19 May 1945 would testify that in his opinion accused was suffering from alcoholism and borderline intelligencewith a mental age of 10 years according to one test and 10 years eight months according to another, but

that neurologically he was essentially normal.

For further evidentiary details see paragraphs 5 and 6 of the review by the staff judge advocate of the confirming authority.

4. Upon all evidence the court was warranted in finding that accused's intoxication at the time of the shooting was not of such severity as to deprive him of the mental capacity to harbour "malice aforethought" (CM ETO 16122, Barton; CM ETO 7815, Gutierrez; CM ETO 3812, Harschner).

To the extent that the issue of sanity was raised by the evidence, the question of accused's legal responsibility was one of fact for the determination of the court (CM ETO 2023, Corcoran). A mere showing that accused is of low intelligence does not relieve him of legal responsibility for his offense unless his mental deficiencies are so pronounced as to render him unable to distinguish right from wrong and adhere to the right (MCM, 1928, par. 78a, p. 63; CM ETO 739, Maxwell).

It is clear that the person whom the Specification alleged to have been killed by accused was the same person whom the evidence showed that accused had actually killed at the time and place alleged. The variance in the name alleged-Mazus Franc-and the name by which deceased was identified in evidence and findings of guilty - merely Franz - was therefore immaterial since it affirmatively appears that it neither misled the court nor prejudiced accused (2 Wharton's Criminal Evidence (11th Ed., 1935), sec. 1046, p. 1841).

Substantial evidence establishes every element of the offense of murder as alleged (MCM 1928, par. 148a, pp. 162-164).

5. The charge sheet shows that accused is 29 years of age and was inducted at Fort Jackson, South Carolina, 2 December 1941. He had no prior service.

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

7. The penalty for 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).

R. R. Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 2

29 NOV 1945

CM ETO 17728

U N I T E D S T A T E S	CHANOR BASE SECTION, EUROPEAN THEATER OF OPERATIONS
v.	
Private ELLSWORTH WILLIAMS, (34200976), Company E, 1349th Engineer General Service Regiment	Trial by GCM convened at Le Havre, France, 19 June 1945. Sentence: To be hanged by the neck until dead.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Ellsworth Williams, Company "E", 1349th Engineer General Service Regiment, did, at or near Le Havre, France, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Second Lieutenant Eddie L. May, a human being, by shooting him with a rifle, on or about 24 May 1945, thereby inflicting a mortal wound as a result of which the said Second Lieutenant Eddie L. May died, at or near the place aforesaid, on or about 26 May 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

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Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Chanor Base Section, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing the execution, pursuant to Article of War 50½.

3. The evidence for the prosecution, as accurately summarized by the Assistant Staff Judge Advocate, United States Forces, European Theater, is as follows:

On 24 May 1945, the accused, a member of Company E, 1349th Engineer General Service Regiment, was serving guard duty at Le Havre Airport (R7). At about 0930 hours, Sergeant Minor R. Davis arrived at the airport. Lieutenant Eddie L. May told the sergeant what he wanted done for the day. Shortly thereafter the sergeant heard the accused say to the officer, "It doesn't matter to me from out here at all, if you don't send me from out here at all". Lieutenant May replied, "If it takes that you'll remain". Sergeant Davis proceeded with his work and his attention was not called to the accused again until a weapons carrier drove up to where he was working. The accused started for the weapons carrier, and asked the driver where he was going. The accused said "Sir, this is my relief" and turned and went toward Lieutenant May. Sergeant Davis had walked away from Lieutenant May and the accused, and sometime thereafter he heard the officer call to Private Haynes. Sergeant Davis called to Private Haynes and told him that the officer wanted him (R7). Davis was a hundred yards away from the officer and the accused, whom he observed standing about eight feet apart. He heard someone speaking in a loud tone of voice saying, "Don't come up to me, don't come up to me, Lieutenant". As Sergeant Davis faced them the accused had his gun pointed toward Lieutenant May. The gun was an '03 Springfield. The accused appeared to be holding his gun between his waist and shoulder. As Sergeant Davis started toward them the accused fired his gun and Lieutenant May fell backwards. After the accused fired his gun he turned his back and walked away (R8). Sergeant Davis ran to Lieutenant May who was lying on the ground. The latter was hollering "Get a doctor, Get a doctor, quick". The officer was placed in the weapons carrier. Sergeant Davis then went to the accused and said, "Soldier, give me that rifle". He replied, "Sergeant, you take the rifle, take the ammunition, take everything". The rifle, four rounds of ammunition, and the empty cartridge were given to the sergeant of the guard (R9). The rifle was unloaded when it was taken from the accused (R27).

Private Daniel Boone, who was supervising a prisoner of war detail at the scene of the incident (R11), at approximately 0930 hours, heard the accused scream, "I been out here a long time. I been out here too long". Private Boone was standing about 150 yards away when he turned and saw the accused and Lieutenant May standing a short distance apart. The accused was holding his rifle at his side pointed toward the officer. The witness indicated that the rifle was held with the butt at the right hip with the muzzle pointed toward the front, approximately horizontal. At that time the rifle "went off" and Lieutenant May fell on his back. The accused

turned and walked across the road with the rifle in his hand (R12). When Private Boone reached Lieutenant May he was lying on his back saying, "Will you please get me the doctor? I have been shot. Get me the doctor. I have been shot" (R13).

Captain Edward John Dill, Medical Corps, examined the deceased on 24 May 1945. He was suffering severe shock as a result of perforating gunshot wounds of the chest and abdomen. The wound of entrance was in the left side, between the ninth and tenth ribs. The wound of exit was in the back about three inches to the right of the spine, at the level of the eleventh and twelfth vertebrae (R18). Lieutenant May died on 26 May 1945 (R15). The cause of his death, in the opinion of the medical officer, was a circulatory failure due to perforating gunshot wound (R18).

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

a. The rights of the accused as a witness were explained to him and he elected to testify under oath (R21). On 24 May 1945, the accused was posted as a guard at 0200 hours, at the rifle range, Le Havre Airport. His tour of guard duty was for a period of four hours. He was not relieved at the proper time and when his company came out to the rifle range, at a little after 0900 hours, he spoke to Lieutenant May with reference to being relieved. Lieutenant May was busy and did not reply to the accused, who followed behind the officer slowly. He asked Lieutenant May again. Private David Harris made a wisecrack at the accused, who said "something back to Dave Harris, and I know I wouldn't say to an officer". Lieutenant May asked the accused what he had said, and he replied that he had said nothing. The officer told the accused to watch his words a little closer. He asked the accused if Levi Haynes had told him what he, the officer, had told Haynes to tell the accused. The accused said that he had not and Lieutenant May called Haynes and asked him if he had spoken to the accused. Haynes told the officer that he had told the accused to get on the truck. The accused maintained that he had not heard Haynes. Lieutenant May then told the accused to get on the truck, that he was relieved. He had his rifle slung over his right shoulder (R22) and removed it and unlocked it in order to unload it. He removed one or two bullets and as he was about to remove the third bullet the rifle went off. Sergeant Minor R. Davis came up to the accused and took his rifle, saying, "Rooster, you shot Lieutenant May" (R23-24).

On cross-examination, the accused admitted shooting Lieutenant May, but maintained that it was an accident. He denied having had an argument with the officer prior to the shooting (R23). At the time of the shooting, he had his rifle in his left hand, but it was not pointing directly at Lieutenant May, but "the barrel was facing him". The accused saw the officer fall but he did not hear him ask for a doctor (R24). He denied that he turned and walked away after the rifle was fired. Sergeant Davis took his rifle and finished unloading it; he told the accused to get in the truck and placed a guard over him (R25).

b. Private First Class Levi Haynes was the supervisor of some prisoners on the rifle range on 24 May (R19,20). Lieutenant May and the accused were standing near each other, when the officer called Haynes. Haynes reported to the officer, who asked him what he had told the accused.

He said that he had told the accused to catch the weapons carrier and go in. He then left the officer and returned to his job. He was about 50 to 75 yards away when the gun went off. He did not hear the accused say anything before the shot was fired. He made an about face, and Lieutenant May was lying on the ground (R20). The accused was walking away, using the bolt of his rifle to unload it (R21).

5. The accused has been convicted of the murder of Lieutenant Eddie L. May by shooting him with a rifle. Murder is defined as 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, Criminal Evidence (4th Ed., 1935), sec. 557, p.1090; CM ETO 559, Monsalve, 2BR (ETO) 119; CM ETO 739, Maxwell, 2BR (ETO)251; CM ETO 1941, Battles; CM ETO 13139, Ridenour; CM ETO 14987, Harrison).

The evidence for the prosecution and the admission under oath of the accused clearly established that at the time and place alleged in the specification the accused unlawfully killed Lieutenant May by shooting him with a rifle. The only question for determination presented by the evidence was whether he entertained the malice aforethought necessary to constitute the homicide the cause of murder. Its determination depended upon whether he shot the Lieutenant intentionally or accidentally. The evidence was substantial and convincing that the accused, enraged because he could not obtain relief from guard duty, deliberately pointed his rifle at the officer and killed him by shooting him. Two witnesses observed the pointed gun and were attracted by the loud tone of voice of the accused. The accused on the other hand claimed that the rifle accidentally discharged while he was unloading it. The two witnesses who observed the accused point and fire the gun saw him turn and walk away from the mortally wounded officer. There was thus an issue of fact created which was in the exclusive province of the court - the fact-finding body - to determine (CM ETO 3932, Kluxdal; CM ETO 7815, Gutierrez). Inasmuch as the court has resolved the issue against the accused and its findings are based upon substantial evidence in the record, its decision will not be disturbed by the Board upon appellate review (CM ETO 1554, Pritchard; CM ETO 1631, Pepper; CM ETO 4194, Scott; CM ETO 14048, Mason; CM ETO 13139, Ridenour).

6. The charge sheet shows that the accused is 23 years two months of age. He was inducted 24 January 1942 at Camp Blanding, Florida. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

(44)

1st Ind.

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

1. In the case of Private ELLSWORTH WILLIAMS (34200976), Company E, 1349th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attached to the record of trial are many letters from accused's family and friends asking a new trial for accused and clemency. They contain the statement that accused's conviction was obtained through the testimony of a German prisoner of war. Senators Claude Pepper and Charles O. Andrews and Representative Joe Hendricks have also indicated an interest in the case. Both Senator Pepper and Representative Hendricks repeat this statement in their letters. It is false. No German prisoner testified at the trial, although the report of investigation contains one such statement, which added nothing to the testimony of other witnesses. Accused in a letter addressed to you makes this statement:

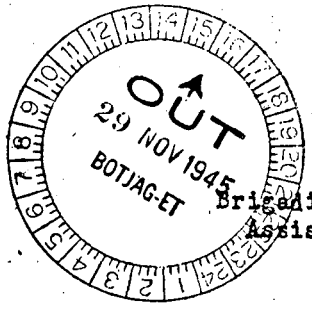
> "Another witness against me, a German Prisoner of War, said he was 100 yards away when the rifle went off and he said the rifle was fired from under my left arm. He, the German Prisoner of War, was not used in court". (Underscoring supplied).

The letters from War Department officials and officers of the Army, to the family, friends and the members of Congress are perfunctory letters of acknowledgment. At no time has there ever been a denial of this insidious statement concerning the alleged testimony of a German prisoner of war. I believe that the family and friends of accused and the members of Congress who are interested in the case are entitled to an explanation of accused's crime, which should contain a specific and positive denial of the assertion that a German prisoner of war testified against accused.

I believe that in such a case as this, the interests of the military establishment require a definite explanation of the processes of military justice to the end that it may be vindicated. If this accused is executed (or even if his sentence be finally commuted) the undenied and often repeated assertion concerning the German prisoner of war witness will do damage to the military establishment among a group of citizens (accused's family and friends) who from their letters appear to be fairly well educated and intelligent people. In addition, I believe Senators Pepper and Andrews and Representative Hendricks are entitled to a full statement of the case.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 17728. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17728).

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



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

1 Incl.
Record of Trial

(Sentence ordered executed. GCMO 626, USFET, 19 Dec 1945).

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

BOARD OF REVIEW NO. 1

30 OCT 1945

CM ETO 17749

U N I T E D S T A T E S	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private NATHANIEL W. MAJOR (37660021), 257th Port Company 500th Port Battalion	Trial by GCM, convened at Cherbourg, France, 29 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocate

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 evidence amply sustains the findings of guilty of wrongful possession of United States Government property of a value of over $50 furnished and intended for the military service thereof (Specification 1) and wrongful possession of marihuana (Specification 2), both offenses in violation of Article of War 96 (CM ETO 902, Barreto and Colitto). Accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for four years. In his action the reviewing authority approved the sentence and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement. The question is presented as to whether the sentence and the designation of a Federal Reformatory are proper.

With respect to the sentence, the Table of Maximum Punishments does not specifically prescribe the punishment for wrongfully possessing United States Government property, furnished and intended for the military service thereof, or for any offense in which it is necessarily included and, consequently, the punishment prescribed for related offenses, or, if there are none, the punishment authorized by statute or by the customs of the service will govern (MCM,1928,par.104c,p.96). The most closely related offense for which a limit is prescribed is that of wrongfully disposing of property of the United States furnished and intended for the military service thereof

in violation of Article of War 94. When the value of the property involved in such a case is in excess of $50, the maximum punishment is dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The offense involved in the instant case is analagous to that offense in that both involve dealing with the same sort of property and unlawful possession is merely a prelude to disposition. On the other hand there is some force in the argument that section 288 of the Federal Criminal Code (18 USCA 467) which punishes the possession of stolen property, knowing it to have been stolen, should govern.

In CM ETO 5942, Williams et al we held that this statute fixed the limits of punishment for the wrongful possession of Army Exchange Service property (Cf. CM 199672, 4 B. R. 153, (1932)). However, property of the Army Exchange Service is not property of the United States (CM ETO 1538, Rhodes), and for this reason the Williams case is not controlling here. We think that the offense in the instant case is more nearly analogous to that denounced by Article of War 94 and that, accordingly, the limit prescribed as to offenses in violation of that article should govern.

As for the unlawful possession of marihuana involved in Specification 2, it is well settled that the maximum punishment for this offense is dishonorable discharge, total forfeitures, and confinement at hard labor for one year (CM 264800, Fong, 42 BR 267 (1944), III Bull JAG 515; CM ETO 902, Barreto and Colitto). It follows that the sentence adjudged in the present case of dishonorable discharge, total forfeitures, and confinement at hard labor for 4 years, is legal.

With respect to penitentiary confinement, Article of War 42 provides that,

> "* * * No person shall * * * be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States * * * or by the law of the District of Columbia * * * and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary".

There are numerous statutes dealing with narcotics. The "Narcotic Drugs Import and Export Act" (Act Feb.9,1909,c.100,sec.2;35 Stat.614; 21 USCA 173) provides that any person who "knowingly" imports any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or facilitates the transportation or concealment thereof, knowing the same to have been so imported, shall be imprisoned for not more than ten years. Evidence of possession of a narcotic drug is sufficient to authorize a conviction under this statute. Accused in the instant case is charged with unlawful possession, while the gravamen of the offense denounced by the above quoted statute is importation (Pon Wing Quong v. United States, 111 Fed (2nd)(CCA 9th) 751). It follows that this statute cannot be invoked to justify penitentiary confinement in this case.

The Uniform Narcotic Drug Act (Title 33,secs. 401-425, District of Columbia Code (1940)) denounces in section 402 the possession of narcotic drugs and punishes violations with imprisonment for one year for a first offense, and with imprisonment for ten years, for subsequent offenses. "Narcotic" is defined as including, among other things, marihuana (sec. 401(m) and (n)). Since there is no evidence that this is accused's second offense and since, accordingly, he can be punished by imprisonment for only one year, this statute cannot justify penitentiary confinement (AW 42).

The only other Federal statute dealing with marihuana is a tax statute (26 USCA 2590) which can have no application to the instant case.

From the foregoing it follows that the unlawful possession of marihuana is not an offense of a civil nature punishable by penitentiary confinement for more than one year by some statute of the United States or law of the District of Columbia (AW 42) and, consequently, conviction of a specification alleging unlawful possession will not authorize penitentiary confinement. Neither, in our opinion, can a conviction of wrongfully possessing government property justify penitentiary confinement. There is no Federal Statute or law of the District of Columbia denouncing it as a crime and, while we may analogize it to a violation of Article of War 94 for the purpose of ascertaining the maximum limit of punishment, we may not do so for the purpose of ascertaining the place of confinement.

We conclude, therefore, that the designation of the Federal Reformatory, Chillicothe, Ohio, was improper and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is the proper place of confinement (AW 42 and Cir.210,WD, 14 Sep.1943,sec. VI, as amended).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 5

22 JAN 1946

CM ETO 17754

U N I T E D S T A T E S	OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER.
v.	
Private First Class JOHN MITCHELL (38315846), 957th Quartermaster Service Company.	Trial by GCM, convened at Nancy, France, 5 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life, United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW NO. 5
HILL, VOLLERTSEN and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pfc John Mitchell, 957 Quartermaster Service Company did at Rombas, France, on or about 29 July 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pfc Albert L. Taylor, 957 Quartermaster Service Company, a human being by shooting him with a pistol.

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

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3. Evidence for the prosecution showed that on 29 July 1945 at about 2400 hours, accused, a member of the 957th Quartermaster Service Company and Private First Class Albert Taylor, deceased, were engaged in a dispute in front of a cafe in Rombas, France (R7). Also present were Privates First Class Jett, Fountain, and Daggs (R17). Accused said to deceased "I ought to hit you" to which the latter replied "I wouldn't do you that way" (R10). Accused, holding a pistol in his right hand, then said "Get your pistol" and deceased replied that he did not have one (R7). Staff Sergeant Burgett came out of the cafe and told accused to quit (R7). He "struck around" the sergeant with his left hand and the latter moved aside. He struck deceased twice with his pistol and said "I ought to kill him" or "I ought to shoot you" (R7,10,15,16). Some of those present tried to intervene but deceased "rushed into" accused and "jumped on him". Accused was holding the pistol at his side at the time (R15-17). They both fell over a wire fence about knee high on to the ground. Accused landed on his back with deceased on top of him and others present "jumped right on" (R16-18). Burgett yelled "Get the pistol". Accused moved his arms down between his legs and the pistol fired. A flash appeared at his waist (R8,12). Jett, who had been endeavouring to get the pistol, took it from accused's hands about five seconds after the shot was fired (R8,11,12). At the time the shot was fired Fountain was holding accused's right arm about eight inches from the shoulder. He and Daggs were also on the ground (R16,17,18). Taylor said "I am shot" and a vehicle was called to take him to the hospital (R8).

It was stipulated between accused, defense counsel and the prosecution that if Captain John J. Corbin, Medical Corps, were present he would testify that Private First Class Albert L. Taylor was admitted to the 168th General Hospital at 0130 hours, 30 July 1945. He died at 0700 hours 30 July 1945 as the result of the collapse of both lungs coincident with hemorrhage and shock from a bullet wound of the left thigh (R19).

4. No evidence was introduced for the defense. Accused, after having been fully advised of his rights, elected to remain silent (R20).

5. On the evidence, meager though it was, but unexplained and uncontradicted, the court was justified in finding that accused fired the weapon intentionally and that he did it for the purpose of preventing the deceased and the other soldiers from taking the gun away from him. The evidence also warranted the court in finding that when accused fired his gun he knew that the act would probably cause the death of, or grievous bodily harm to, one or more of the men who were lawfully attempting to disarm him. Such knowledge, coexisting with the act by which death was caused, constituted malice aforethought (MCM, 1928, par.148a, pp.163-164). Since accused was the aggressor and intentionally provoked the difficulty he could not avail himself of the right of self-defense (Id. par.148a, p.163). On the evidence, therefore, he was not improperly found guilty of murder (CM ETO 7815, Gutierrez; CM ETO 14573, Morton; CM ETO 16874, Miller; CM ETO 18748, Thompson; and authorities therein cited).

6. The charge sheet shows that accused is 23 years and six months of age and was inducted 3 November 1942. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater ~~of Operations~~
APO 887

BOARD OF REVIEW NO. 4

27 OCT 1945

CM ETO 17761

UNITED STATES)
)
v.)
)
Private CARL W. DENTON)
(35681895), Attached)
Unassigned Detachment)
94, Ground Force Rein-)
forcement Command.)
)
)

SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER

Trial by GCM, convened at Etampes, France, 22 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 morning report of Detachment 94, Ground Force Replacement Command, admitted without objection by the defense, was properly received. In the absence of evidence to the contrary, it may be presumed, because of the peculiar nature of the reporting organization, that the officer who signed the report in the capacity of assistant adjutant was assistant adjutant of such organization and not of some higher echelon and that he was therefore an officer properly designated to sign the report by the commanding officer of the organization within the meaning of paragraph 43(a), AR 345-400, 3 January 1945.

Judge Advocate

Judge Advocate

Judge Advocate

(56)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater ~~of Operations~~ 27 OCT 1945 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private CARL W. DENTON (35681895), Attached Unassigned Detachment 94, 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 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 17761 . For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17761).

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

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

BOARD OF REVIEW NO 1.

-8 NOV 1945

CM ETO 17767

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Munich,
	)	Germany, 6 July 1945. Sentence:
Private GEORGE T. DIXON (33046051), 3202nd Quartermaster Service Company	)	Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

HOLDING by BOARD OF REVIEW NO 1
STEVENS, CARROLL and O'HARA, 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 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private George T. Dixon, 3202nd Quartermaster Service Company, did, at Furth, Germany, on or about 14 May 1945, with intent to do him bodily harm, commit an assault upon Private Thelmer O'Neal Saint, 95th Chemical Mortar Battalion, by willfully and feloniously striking the said soldier in face and body with his fists.

(58)

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by summary court, one for absence without leave for two days and breaking restriction in violation of Articles of War 61 and 96 and one for absence without leave for one day in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. 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, Bouches du Rhone, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders Number 354, Headquarters Third United States Army, APO 403, U.S.Army, 15 September 1945.

3. The undisputed evidence for the prosecution was in material substance as follows: At the time and place alleged, accused was spokesman for a group of about 50 colored soldiers who were enraged at Private O'Neal Saint, a white security guard, for shooting a colored soldier (R7-8,10,12,13,15). Members of the group threatened to shoot and otherwise harm Saint and when a Lieutenant, who had been summoned to the scene, intervened to protect him, one colored soldier pushed a Luger into the officer's stomach and threatened to kill him (R8-9,13). At this time, three of the colored soldiers, including accused, disarmed Saint of his carbine, with which he had threatened to defend himself if necessary, and as he attempted to flee, beat him with their fists (R8,10). When the others stopped, accused continued beating Saint, who did not strike back (R9,14-15). Accused struck him several times "all over" (R9-10) and as Saint endeavored to get away, hit him on the head and "anywhere he could hit him" (R11). Saint broke away and the soldier with the Luger shot at him (R9). Accused gave chase but when he fell, Saint eluded him (R15). After the beating, Saint was nervous and had bruises on his right cheek and left shoulder, which were not severe enough to require hospitalization. He was "not badly beaten up" (R23).

In a voluntary sworn pretrial statement made the following day (15 May 1945) (R20-22; Pros. Ex.1), accused related that he saw the security guard shoot the sergeant. When questioned by accused and others, the guard threatened to shoot them if they did not back away. Three or four soldiers drew their pistols, disarmed the guard and "beat him around a little". Accused heard threats to kill the guard and saw the lieutenant threatened with the Luger.

"The rest were back around him [the guard] and I beat him up with my fists for a minute or so",

after which the guard escaped.

4. After an explanation of his rights, accused elected to remain silent and no evidence was offered on his behalf (R23-24).

5. The assault is established and admitted by accused and the only question presented is whether the evidence is sufficient to establish that it was with intent to do bodily harm, as alleged.

The essential distinction between a simple assault and one with intent to do bodily harm lies in the motive or purpose of the assailant. In the former his motive is punishment rather than harm; in the latter his motive is ulterior to this and embodies the specific, malicious intention to produce injury in his victim by means of the force employed (4 Am. Jur., sec.26,p. 142; CM ETO 1177, Combess). But it is not necessary that serious or any injury ensue, provided the facts and circumstances show the requisite intent (MCM, 1928, par. 149m,p. 180). An assault with hands (CM ETO 1177, Combess) or fists (CM ETO 1690 Armijo; CM ETO 8189, Ritts and French) unaccompanied by aggravating circumstances, does not warrant the inference of an intent to do bodily harm, because hands and fists are not per se dangerous instruments. It does not follow, however, that an assault with such intent may not be committed with fists. In CM ETO 4071, Marks et al, it is stated:

> "A fist is not a dangerous weapon or instrument and an assault with intent to do bodily harm is a felony, a violation of Article of War 93, only when a dangerous weapon or instrument is employed (Dig.Op.JAG 1912-1940,Sec. 451 (7) p. 312, CM 107659 (1917), 125267 (1919))".

To the extent, if any, that the foregoing statement is intended as a pronouncement that assault with intent to do bodily harm, in violation of Article of War 93, may not be committed by the use of a fist in any case, it is disapproved and overruled. Such pronouncement is not substantiated by the authorities cited. Article of War 93 itself denounces separately, among others, two specific offenses:(1) assault with intent to do bodily harm with a dangerous weapon, instrument or other thing and (2) assault with intent to do bodily harm. The offenses are also separately treated in the Manual, both substantively (MCM, 1928, pars. 149m,n,p.180) and for purposes of maximum limits of punishment (ibid., par. 104c, p.99). Thus even assuming, as we do not decide, that a fist is never a dangerous weapon, it does not follow that one may not commit an assault

with intent to do bodily harm in violation of Article of War 93 by the use of fist. Indeed, the Board of Review has held that murder and lesser degrees of homicide may under some circumstances be committed with a fist(CM ETO 13090, Brynjolfsson,and authorities therein cited; CM ETO 72,Jacobs and Farley).
The Board of Review (sitting in Washington)has held that assault with intent to do bodily harm in violation of Article of War 93 may be committed by striking the victim's face with a fist (CM 221170, Hammitt, 13 B.R.131,135 (1942)).

The facts and circumstances in the instant case afford ample basis for the inference of the alleged intent. Accused was a member and probably the ringleader of a group of enraged colored soldiers who simultaneously set upon Saint and disarmed and beat him with their fists, while another of their number prevented the lieutenant's intervention by pushing a Luger into his stomach and threatening his life. Accused was aware of all this, yet even after his companions desisted he continued to beat the victim, striking him several times on the head and "anywhere he could beat him". Only when he fell and Saint escaped did accused desist. For this reason, the trivial character of the victim's injuries is not significant on the question of accused's intent.
Had Saint's injuries been serious or had he died as a result of the beating, accused's guilt of aggravated assault or murder would not be open to question (cf: CMETO 72 Jacobs and Farley, supra). The evidence justified the inference that Saint's continuous efforts, finally successful, to escape his assailants' and particularly accused's blows rendered them less effective than they desired and that accused would have persisted indefinitely in his violence if given the opportunity. His conduct was essentially riotous and reckless in character and, when considered in the light of his knowledge that he was participating in mass violence upon an unarmed, defenseless victim, under armed protection from his confederates, justifies the inference that his motive was ulterior to mere punishment and embodied a desire to inflict substantial injury, albeit short of death, upon the victim. The evidence shows more than a mere minor squabble or a mere fist fight. In the opinion of the Board of Review, the findings of guilty are supported by substantial evidence.

6. The record shows (R2) that the charges were served on accused the day before the trial. In view of his waiver of objection to trial at this time, the statement of his counsel that he was prepared for trial, and the lack of indication that any of accused's substantial rights were prejudiced, the irregularity may be regarded as harmless (CM ETO 8083, Cubley; CM ETO 14564, Anthony and Arnold).

7. The charge sheet shows that accused is 27 years four

months of age and was inducted 8 April 1941 at Roanoke, Virginia, to serve for the duration of the war plus six months. No prior service is shown.

8. 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.

9. 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).

EDWARD L. STEVENS JR. Judge Advocate

(DETACHED SERVICE) Judge Advocate

GERALD T. O'HARA Judge Advocate

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

BOARD OF REVIEW NO. 5 12 DEC 1945

CM ETO 17789

U N I T E D S T A T E S	UNITED KINGDOM BASE, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private First Class WILLIAM R. KNIGHT (38547649), Battery A, 515th Field Artillery Battalion	Trial by GCM, convened at London, England, 27 September and 4 October 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for four years. Loire Disciplinary Training Center, Le Mans, Sarthe France.

OPINION by BOARD OF REVIEW NO. 5
HILL, JULIAN and BURNS, 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 the Branch Office.

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 William R. Knight, Battery "A", Five One Five Field Artillery Battalion, did, at Brixworth, Northamptonshire, England, on or about 17 September 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Harold

William Newton, a human being by shooting him with a pistol.

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

Specification: (Nolle Prosequi)

CHARGE III: Violation of the 61st Article of War.
(Nolle Prosequi)
Specification: (Nolle Prosequi)

He pleaded not guilty and the court, by exceptions and substitutions found him not guilty of murder but guilty of voluntary manslaughter in violation of Article of War 93. 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 for four years. The reviewing authority approved the sentence and ordered it executed but suspended the portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 1355, Headquarters, United Kingdom Base, Theater Service Forces, European Theater, APO 413, U.S.Army, 11 October 1945.

3. The evidence for the prosecution in pertinent part shows that at about 2000 on 17 September 1945, the accused was in the "Coach and Horses" public house in Brixworth, Northamptonshire, England. Henry Harris, Henry Dennett and the deceased, Harold Newton, were also present. An argument, in which accused was not involved developed between some civilians and American soldiers (R9-10, 17,33,42). The proprietor required that the Americans leave. The argument continued outside (R10,34,43). Patricia Boon, an acquaintance of accused saw him standing apart from the others and told him to come away. While she spoke with him, Harris walked up and said "something" to accused (R10) or said "Goodnight Pat" (R18,35). Accused replied that if Harris came any closer he would shoot or "If you don't stand back I will shoot you". Miss Boon, Harris and Stanley Douglas heard a "click", like the "clicking of a gun" and Harris walked away (R10, 18-19, 35). Accused and Patricia then left and proceeded up the street to a telephone booth where Patricia attempted to place a telephone call (R10).

After leaving accused and Patricia Boon, Harris met Douglas and shortly thereafter they were joined by Dennett and the deceased (R19,35-36,43). Harris told them that the "Yank" had drawn a gun on him and, that he was not going to stand for it. One of the men said the American was "there" with Pat Boon. Harris accompanied by Dennett and deceased walked to where Patricia and accused stood by a wall near the telephone booth (R20,36,43).

Patricia Boon testified that accused stood with his back against the wall, his hands on her shoulders and that she stood close to him with her hands on his shoulders (R13), when the three men came up "of a sudden" and said they wanted to talk to accused. Their manner showed they intended to fight him (R15). He "just stood there", saying nothing (R10,11,13) and they "grabbed" hold of him, deceased taking his left arm, Harris his right arm and Dennett taking him by both shoulders. They pushed her aside as accused struggled to free himself. The three men towered over accused and by their actions indicated they were trying to beat him up (R14). She heard a shot and accused broke away, ran across the street with Harris and Dennett after him. Deceased walked "around twice and fell down" (R11-13). About three quarters of an hour had elapsed from the time Harris passed them at the "Coach and Horses" until the shot was fired (R16).

According to Harris, when deceased, Dennett and himself approached the telephone booth he asked accused "why he did it" - "why pull a revolver on me", and as accused moved away he "swung" him around on the grass. He did not hear a shot and did not hit accused until after Dennett told him deceased was down. He first struck accused while they stood on the grass and hit him twice more when they were across the road. The accused pleaded to be released and struggled to free himself (R20-22). On cross examination and examination by the court, Harris stated that he was about six feet tall (R25). When he was joined by deceased and Dennett they looked for accused because of the "cowardly thing" he had done. He did not see accused touch either Dennett or deceased nor did he see a gun (R26-27). He hit accused with all his strength because he was angry and "thought" accused had "pulled" a gun on him (R28-29).

Dennett testified that when they walked up to accused, Harris said to him "I want to talk to you". The three of them "grabbed a hold" of accused but Dennett released him and got hold of Harris at the suggestion of deceased. There

was a general struggle with deceased and Harris holding on to accused who tried to get away from them. He heard a shot but did not see a gun, nor did he see any blows struck before the shot was fired. Accused ran across the road but was caught by Harris and himself, Harris stood over accused striking him while the latter hung over a small wall(R44-45). Dennett looked back and, on seeing deceased lying in the middle of the road told Harris he was hurt (R45). On cross-examination, Dennett stated that he was about six feet two inches tall (R46). When they joined Harris, the latter was angry and wanted revenge so they started to look for accused (R47). In his opinion, accused must have been scared when they approached because there were three of them against him. He further testified that Harris hit accused before he knew deceased had been shot(R48-49).

Mary Thomas, a medical practitioner called to the scene of the shooting pronounced Newton dead. She observed that he was a "big chap" about six feet tall; that he had a small perforating wound between the first and second rib on the right side of his body and identified a photograph (Pros. Ex.4) of deceased showing the wound (R31-32). The autopsy report (Pros. Ex.9) received in evidence with the consent of accused and agreement of counsel (R55) shows that deceased died very quickly from the passage of a bullet through vital structures causing shock and internal hemorrhage.

A ballistic experts report (Pros.Ex.10) received in evidence showed that the bullet (Pros.Ex.12) extracted from the body of deceased was fired from a weapon found in accused's possession (R52-53,55).

In a voluntary statement (Pros.Ex.8) made by accused about four hours after the shooting he related that on the night of 17 September he left the "pub" at about closing time to urinate and when he returned was denied admittance because of an argument inside. He was joined by Pat Boon and they walked up the road to the telephone booth. They stood against the wall for some minutes when a man"reached out" and said "I want to talk with you". Two other men appeared and they all "grabbed" him, pushing Pat Boon aside. One of the men said he was with another boy's girl friend. "They were all beating me up". He tried to free himself. Believing they were going to kill him he freed one hand and took a gun from his pocket thinking he stood a chance of getting away. He still could not break loose so he "just" fired a shot not intending to hit anyone. One man went away and the other two "dragged" him across the street where they continued to beat him. There were more shots in the gun but not wanting to use it again he returned the weapon to his pocket. He did not know anyone had been hit by the bullet. He finally broke away and ran back to his quarters.

Photographs (Pros.Ex.1,2,3) of the scene of the shooting showing the high wall where accused stood when attacked, the telephone booth at the place deceased was found were received in evidence (R23).

A motion by the defense at the conclusion of the prosecution's case for a finding of not guilty on the ground that accused had acted in self defense was denied by the court (R57-58).

5. For the defense: A medical officer who examined accused the day after the shooting observed that he had received a very severe beating. The left side of his face was very swollen and tender. His lip was cut and there was a big cut inside his cheek. He had a black eye, scratched leg, bruised shoulder and a swollen ankle "like somebody had kicked him good and hard", (R61-62).

Advised of his rights as a witness, accused elected to take the stand and testify under oath (R69). While he stood outside the "pub" with Patricia Boon a civilian walked towards them and said "something". Accused pulled the bolt of his gun, dropped the weapon back in his pocket and walked away with the girl. Later, when he stood outside of the telephone booth with his arms around Patricia someone approached him from the left and "grabbed" him by the collar. Patricia was pushed away and two more men "grabbed" him. As he struggled to free himself the men started to beat him. He called for help until they choked him. Releasing his hand for a moment he pulled his gun and not aiming at anyone fired a shot. The fight continued across the street where two of the men continued to beat him until he finally broke away and ran back to camp (R70). Accused further related that he was five feet seven inches tall. He was afraid for his life when the three men had hold of him. He did not intend to shoot anybody but pulled the gun to frighten them away from him (R71). On examination by the court, accused testified that he demonstrated his pistol in the yard of the "Coach and Horses" because he was afraid as one of the civilians who kept him out of the "pub" approached him a few minutes before (R81-82).

6. In rebuttal the prosecution introduced in evidence a statement (Pros.Ex.13) made by accused on 18 September to a C.I.D. agent. Accused in the statement in part related that he could not recall that he showed a gun outside the "pub" nor did remember that he threatened any one (R82).

7. Manifestly the evidence presents for consideration the question whether accused killed the deceased in self defense. the following quotations are pertinent:

(68)

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * * " (MCM Par.1 48a p. 163).

> "Where accused is attacked by two or more persons, or is attacked by one person and others are acting with the assailant, or are present and aiding and encouraging him, he has a right to act in self defense against all and, in a proper case, to kill one of all" (30 CJ sec.254, p. 75).

The evidence presented in this case, both by the prosecution and the defense shows that Harris, Dennett and deceased were the aggressors in the affray which resulted in the fatal shooting. As a result of a threat made by accused some time before, the three men, all strangers to accused, searched for him for the purpose of securing revenge. The picture presented to accused, of three men, all over six feet tall, pouncing upon him in the night, leaves no room for doubt that he was placed in fear for his life or personal safety.

> "A person unlawfully assaulted, when without fault, may * * * repel force with force to the extent which to him seems reasonably necessary to protect himself from injury (4 Am.Jur., sec.38.p. 147)".

According to accused, he did not intend to take a life but used the weapon with the hope of frightening away his antagonists. His story is strengthened by the fact that when he failed to drive them away with one shot he did not attempt again to fire the weapon. His use of the gun, however, under the existing circumstances was justified.

> "Circumstances * * * may be such in a particular case as to justify a person assailed in using a dangerous weapon to repel the assault" (4 Am.Jur., Ibid, sec.51, p.153).

Accused did not lose the right to defend himself because

of the threats he had made earlier that evening.

> "To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM 1928, par.148a, p. 163).(See also 30 CJ.sec. 223, p.53)

Ordinarily the plea of self defense with its supporting evidence creates an issue of fact for the court and its finding thereon will be accepted as final by the Board of Review upon appellate review (30 CJ.Sec 696, p.439; 17 CJ. Sec.3542, p. 202). However, when the evidence without contradiction shows all of the elements of the plea the question becomes one of law for the Board of Review and it may declare as a matter of law that the defense has been sustained (17 CJ.Sec 3542, p. 202; CM ETO 15661, Satmary). This is a case of the last described class. The court at the conclusion of the prosecution's evidence should have granted accused's motion for a finding of not guilty. The evidence for the defense served to reinforce the obvious weakness of the prosecution's case. The circumstances proved by the evidence without contradiction present every element of self defense. There was no issue of fact for resolution of the court. The accused used such force as to him seemed reasonably necessary to defend himself against being killed or suffering serious bodily injuries, and the defensive measures shown are legally justified (CM ETO 16512, Rowland).

For the foregoing reasons the Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

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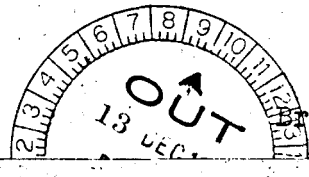
War Department, Branch Office of The Judge Advocate General with the European Theater 12 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S.Army.

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 WILLIAM R.KNIGHT (38547649), Battery A, 515th Field Artillery 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.



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

(Findings and sentence vacated. GCMO 12, USFET, 7 Jan 1946).

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater [redacted]
APO 887

BOARD OF REVIEW NO. 3

24 OCT 1945

CM ETO 17799

UNITED STATES v. Private First Class CARL H. NESTLE (36420610), Section 44, Supply Division, Base Air Depot Number 1, Army Air Forces Station 590	) BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE))) Trial by GCM, convened at Army Air Forces Station 590, (England), APO 635, U. S. Army, 21 September 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for five years, and $1000 fine. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support [redacted] only so much of the sentence as imposes dishonorable discharge, total forfeitures and confinement at hard labor for five years. "Although the 94th Article of War specifically authorizes the imposition of a fine in addition to all other punishments a court-martial may direct, upon conviction of an accused for violation thereof, the table of maximum punishments prohibits the imposition of a fine in the case of an enlisted man convicted of a violation of the Article" (CM ETO 11936, Tharpe et al).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

AGPO 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO. 5

20 DEC 1945

CM ETO 17808

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Munich, Germany, 26,27 June, 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ALEX O. BRACAMONTE (39856118), and Private TONY G. AGUIRRE (39281758), both of Battery C, 390th Antiaircraft Artillery Automatic Weapons Battalion.	

HOLDING by BOARD OF REVIEW NO. 5
HILL, VOLLERTSEN and JULIAN, Judge Advocates

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

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

Bracamonte

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician Fifth Grade Alex O. Bracamonte, Battery C, 390th Antiaircraft Artillery Automatic Weapons Battalion, did at Lembach, Austria, on or about 3 May 1945, forcibly and feloniously, against her will have carnal knowledge of Maria Jolly.

Specification 2: In that * * * did, at Lembach, Austria, at or about 1930 on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Hilda Distlberger.

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Specification 3: In that * * * did, at Lembach, Austria,

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at or about 2115 on or about 3 May 1945, forcibly and feloniously against her will, have carnal knowledge of Hilde Distlberger.

Specification 4: In that * * *, did, at Lembach, Austria, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Stastka.

Aguirre

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Tony G. Aguirre, Battery C, 390th Antiaircraft Artillery Automatic Weapons Battalion, did, in conjunction with Technician Fifth Grade Alex O. Bracamonte, Battery C, 390th Antiaircraft Artillery Automatic Weapons Battalion, at Lembach, Austria, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Jolly.

Specification 2: In that * * *, did, at Lembach, Austria, at or about 1930 on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Stastka.

Specification 3: In that * * *, did at Lembach, Austria, at or about 2115 on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Stastka.

Each pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, each was found guilty as charged. No evidence of previous convictions was introduced as to either accused. Each was sentenced, by separate vote, all of the members of the court 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. Specifications of Rape of Maria Jolly.

Evidence for the prosecution showed that on 3 May 1945, Maria Jolly and her 11-year-old daughter were staying in one of several houses situated near Lembach, Austria. They were in the kitchen with 12 other persons consisting of two men respectively 70 and 50 years of age, three children, and seven women (R8,9). The area had been occupied by American troops two days previously (102). At about 4:00 p.m. the two accused entered the house without knocking and uninvited (R9,

Both were under the influence of liquor, Bracamonte more so than Aguirre, and both were armed with guns (R12,45,60). Maria was sitting on a bench with her daughter on her lap (R12). Bracamonte placed his hand on the young girl's breast and then touched her near her sexual organs (R13). Maria removed his hand, whereupon he directed his attention to her and placed his hand on her thigh. She pushed it away and told him to let her alone (R14,15). The young girl began to cry (R15). At this point Bracamonte moved away and Aguirre went over to Maria and started to push her and beat her. He then pulled her away from the bench and ordered her to the door of an adjoining bedroom (R15,16,18). She objected and both accused pushed her into the bedroom (R18). There Bracamonte forced her into a sitting position on the bed and forcibly removed her underclothing (R18,19-21). He then removed his own clothes (R20). Aguirre pushed her into a lying position on the bed, placed his hand in the region of her genitals, saying "beautiful", and left the bedroom (R22,23). Bracamonte attempted to get on top of her and she shoved him away with her foot. He fell on the floor. She looked to see if she could make her escape through the window but saw that it was barred by a grille (R23). Aguirre stood outside the bedroom door and looked in from time to time (R21). Bracamonte took his gun and pointed it at her, the muzzle touching her breast, and asked her if she wanted to push him again. He then put aside the gun (described as a "machine pistol"), laid himself on top of her and inserted his sexual organ into hers (R24). His act of intercourse was interrupted by the arrival of three American soldiers who had been summoned by Maria's sister (R25,29,43). One of them asked Aguirre, who was found standing in kitchen, where his companion was and he replied that he was in the bedroom and that they should wait as he would soon be through (R56,58). They entered the bedroom and found Bracamonte on top of Maria (R57). Her clothes were thrown up above her waist and the lower part of her body was exposed (R51). He had nothing but his socks on. Maria was weeping and hysterical (R51,58). He was ordered to get off the woman but did not do so until told that the captain was coming (R58). He then dressed and left the house with Aguirre (R57,58). A day or two afterward, Maria talked with the burgomeister of Lembach about the incident and he asked her whether the act had reached the point where she might become pregnant. She replied that it had not. The question whether the sexual organ of accused had actually penetrated her sexual organ was not discussed (R143,144,146,148,149).

b. Specifications of Rape of Hilda Distlberger and Hedwig Stastka.

Shortly after they left the home of Maria Jolly the two accused, unbidden and without knocking, entered a house near Lembach occupied by Hilda Distlberger, her daughter, Hedwig Stastka, another daughter, Gertrude, a 14-year-old son and five other persons (R62,63,65,107). All were in the kitchen. Bracamonte was still under the influence of liquor and was armed with a "machine pistol", a weapon stated to be about two and one-half feet long and also described as a "grease gun" (R63,66). Aguirre carried a knife in a scabbard hanging on the side of his leg, and a gun about the size of a .45 caliber pistol

(R68). They looked around the house and asked for something to drink (R65,135). Aguirre had the pistol in his hand and pointed it at the people in the room (R110). Bracamonte announced to everyone that "the Americans were now masters of the country and the Germans had to do what they told them" (R69). Hedwig had a limited knowledge of English (R66). Aguirre made her understand that he wanted to go to bed with her and when she refused, he ordered her out of the kitchen and forced her to go upstairs despite her resistance (R66,67,69,70). When they reached the upper floor he pushed her through the doorway leading to the attic but was prevented from closing the door by her mother who had followed them begging him to leave her daughter alone (R111,112,136). Aguirre ordered the mother away, but as she did not remove her foot from the door, he pulled out his knife and put it to her throat. She defied him to stab her and he laughed (R71,73,113,138). Hedwig attempted to get out but was held back by Aguirre (R72). At this point Bracamonte, who was still armed and had come upstairs from the kitchen with Gertrude, ordered the mother to go into an adjoining room (R113,114). After the mother removed her foot from the door, Aguirre pulled or pushed Hedwig up the next flight of stairs into the attic, and, by threatening her with his gun and pushing her down, forced her to lie on the floor. He held her down by pressing his hands on her breast (R74). He placed his pistol on the floor within reach, forcibly removed her pants, opened his own clothes and lay on top of her. Whenever she struggled he reached for the pistol and threatened to shoot her (R75,76). He succeeded in spreading her legs and inserting his penis into her sexual organ (R77). After he got up she looked for her combs and arranged her hair. She appeared excited and nervous (R122). There were "black and blue marks" on her thighs which she stated were caused by accused in the course of the struggle (R76,94,100).

After Hedwig and Aguirre had left the kitchen, followed by the mother, Bracamonte pointed his gun at Gertrude and directed her to go with him. She said, "I don't go, I don't want to go", but one of the male civilians told her, "You have to go". She left the kitchen with Bracamonte and went upstairs where she eluded him, went out of the house to some neighbors and reported what was happening. She begged them for help but they did not do anything. She remained with them until the following morning (R137,140).

Hilda left her daughter Hedwig and Aguirre and entered the room as directed by Bracamonte (R114). There the latter started to undress her. She resisted and he threatened her with his fist (R115). He seized her and shoved her on the bed. He laid his gun nearby and pulled her pants down. She tried to prevent it by pushing his hands away and by holding her legs together (R116). She did not cry for help because there were three male civilians in the house and if they found it impossible to interfere there was no use in crying for help. She pleaded with Bracamonte that she was old enough to be his mother, and said to him," Aren't you a gentleman?" and he replied, "No" (R116, 117). After removing her pants accused placed himself on top of her, pressed himself between her legs and separated them. Against her resistance he succeeded in inserting his penis into her sexual organ.

He urged her to kiss him but she turned her head away from him. When he asked her to cooperate with him, she stiffened herself so that he might not succeed. He did not have an orgasm. After a period of activity accused fell asleep on her. She attempted to slip away from under him but he awakened and grabbed her tightly again (R117-120). He finally got up, dressed, took his weapon and motioned to her to go (R120). She was taken to the attic where she found Hedwig and Aguirre(R121,122). Then all four went down to the kitchen. After remaining there for a few minutes both accused left the house (R123).

About an hour later they returned (R123). A number of other persons were still in the house including women, children and two men (R83). The mother was in the bedroom ready to go to bed. When she heard them, she put out the lights, closed the windows and storm shutters, and sought to conceal herself behind the door. Bracamonte opened the door and entered the bedroom. He lit his cigarette lighter and looked to see if there was anyone in the room. He discovered her behind the door and she drew away from him to the corner of the room. He pulled her away from there and threw her on a mattress. She was frightened and felt as if "paralyzed". He opened his trousers and placed himself on top of her. After he pulled off her pants he penetrated her sexual organ with his penis. She felt faint and completely shocked, and began "shaking" all over. He asked her if she were cold and raising himself on his knees took his jacket and put it over himself and her. He again lay on her and fell asleep (R124-126). When she thought he was sound asleep she tried to get away from him, but he awoke and held her tightly. She remained motionless. He lit his cigarette lighter, looked at her, and shook her saying, "Madam,Madam" (R127). He then put on his clothes, and handed her her pants which she put on. As she could hardly stand, he assisted her downstairs to the kitchen (R128).

When warned of their return Hedwig also had concealed herself in a dark bedroom (R83,84). The door to that bedroom opened and Aguirre entered with a flashlight. He saw her and pulled her out by the hand. She resisted. He wanted to pull her up the stairway again and she knelt down and pleaded with him to let her alone. He lifted her back on her feet, pulled her upstairs into a room and forced her on the bed against her protests. He took his pistol and placed it next to her. He then pulled off her pants and effected penetration again (R85-87). He remained on her until Bracamonte entered the room. Aguirre then stood up and she sat on the edge of the bed. Bracamonte in turn forced her down on the bed, place his gun nearby and opened his clothes. She attempted to get up but he pushed her back and inserted his penis into her genitals (R88-89). Although she tried, she was unable to push him away because he was too strong for her. He got off when Aguirre re-entered the room and they both went away. She remained on the bed awhile, then walked down the stairway, fell over the last three steps, was picked up and went into the kitchen where she found her mother. They both sat there weeping and trembling (R90-91). Hedwig's appearance was "indescribable" (R129). They reported what happened to them to the military authorities the following day (R91). Hedwig was examined by an

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American Army medical officer on 6 May and she showed him the bruises on her legs (R94). The medical officer did not testify. Gertrude who saw her mother and sister on the morning following the alleged rapes testified that they were hardly recognizable (R142).

4. Accused, after their rights as witnesses were explained to them, elected to remain silent (R150,151).

5. No discussion is required to demonstrate that the evidence warranted the court in finding each accused guilty of the charge and specifications preferred against him. With minor variations, the rapes committed by accused follow the pattern of many others heretofore considered by the Boards of Review (CM ETO 9083, Berger; CM ETO 12683, McCullough and Wetherspoon; CM ETO 17134, Scott). There was substantial proof that carnal knowledge was had of the victim in each instance by force and without her consent. In the rape of Maria Jolly the act of penetration was perpetrated by accused Bracamonte only. It was proved, however, that accused Aguirre was present, aiding and abetting Bracamonte in the commission of the crime. He was, therefore, properly charged as a principal in Specification 1 of the Charge against him (CM ETO 5068, Rape and Holthus).

6. The charge sheets show that accused Bracamonte is 20 years and ten months of age, and that he was inducted 10 February 1943 at Phoenix, Arizona, and that accused Aguirre is 23 years and ten months of age and that he was inducted 6 February 1943 at Los Angeles, California. No prior service is shown as to either accused.

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

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

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

20 December 1945

BOARD OF REVIEW NO. 5

CM ETO 17826

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM convened at Gutersloh, German, 11, 21 and 22 August 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life, United States Penitentiary, Lewisburg, Pennsylvania.
Privates First Class JOSEPH C. BARTHELEMY (32833248) and CLARENCE L. WALKER(33219413), and Private HERMAN J. MORAN (34614237), all of Battery D, 597th Antiaircraft Artillery Automatic Weapons Battalion (Mobile) CAC	

HOLDING by BOARD OF REVIEW NO. 5
HILL, VOLLERTSEN AND JULIAN, Judge Advocates

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

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

BARTHELEMY

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Joseph C. Barthelemy, Battery "D", 597th Anti-aircraft Artillery Automatic Weapons Battalion (Mobile), did at Horste, Westfalen, Germany, on or about 26 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Berta Meuller.

Specification 2: In that * * * did at Horste, Westfalen, Germany, on or about 26 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Maria Toahnehson.

WALKER AND MORAN

(Charge and specifications as above, except as to name of accused)

Each accused pleaded not guilty and, at least three-fourths of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and specifications preferred against him. No evidence of previous convictions was introduced as to accused Barthelemy and Walker; but as to accused Moran, evidence was introduced of one previous conviction by summary court for being disorderly in uniform in a public place in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, each was sentenced, by separate vote, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 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. Evidence introduced by the prosecution showed that accused, all privates in Battery D, 597th Anti-aircraft Artillery Automatic Weapons Battalion (R7,8), were identified by Frau Maria Toannehson and her sister Fraulein Berta Meuller (R27,28,51,53), and by a German civilian Herr Flagmeier, who said he saw them at the scene (R17,25,26), as three soldiers, each of whom on the evening of 26 April, at Westfalen, Germany, had sexual intercourse with each of these two women (R34, 35, 37, 56, 57, 59, 61). Accused Walker wore a sweater and no steel helmet (R25, 31). The other two accused wore olive drab shirts and helmets (R31). By their testimony, these women indicated neither of them consented to this intercourse. Their resistence was slight, consisting, for the most part of protests and attempts to push or shove each assailant away (R21,33,35,42,58,59). They testified to threats and force employed by accused. One accused was armed with a rifle which he used in a threatening manner and which he fired into the ceiling when at first there was reluctance on the part of the first woman to submit to the demands (R19,30,54). There had been firing out of doors before the soldiers actually appeared (R17,18,27,53). Frau Toannehson was threatened with a bayonet and carbine and was subject to physical force, pulling and pushings (R29,33,35,39,43). Berta Meuller was "much afraid and shivering" when accused appeared (R53). She was at first pulled around a bit by accused Moran and then, holding her by the arms, he "pulled" her to the floor and inserted his sexual organ into her vagina (R54-58). Berta found it "no use" to resist Moran. He was much stronger (R57). During sexual intercourse with her by each of the other accused she "had too much fear

to run away" (R59); she "couldn't do much" resisting since she was "afraid"; and she was so afraid that her teeth chattered (R61).

Accused arrived at the scene of the assaults at about 2200 hours and remained until about 2330 hours (R17, 50). They left hurriedly due to the arrival of a patrol (R62), and Moran's helmet was soon thereafter discovered at the scene (R7, 13, 14, 23, 24, 91; Pros. Ex. 2). These assaults about three miles from accuseds' company area (R9).

4. Each accused, advised of his rights as a witness elected to take the stand as a witness on his own behalf (R89, 97, 101). Their defense was that they had never seen the two women before the identification parade (R91,99,103); that they left their company area at about 9:30 p.m.; never went farther away than three-quarters of a mile; and spent the time - until about one o'clock the next morning when they returned to the command post - drinking and singing at some place on the road, taking turns riding a bicycle which belonged at their command post. Moran said that he lost his helmet early in the day and borrowed Walker's for use during the greater part of the day; and that he borrowed another helmet from another soldier later in the afternoon, which helmet he wore that evening (R91). Moran's explanation was confirmed in part by Walker, who said Moran had borrowed his helmet that morning (R98,99), and also by Moran's section leader who said that Moran had reported to him the loss of his helmet at 1300 hours that day (R71). In addition, the defense called as a witness a soldier who had been on guard that night from 12 until two o'clock and who saw the three accused return to camp at about one o'clock and talked to them for 10 or 15 minutes. He testified that he could not tell whether accused were drunk but "they had been drinking" (R110). While he thought that the three accused all wore olive drab, he was positive that all wore helmets and that each was carrying a rifle (R74,75). He did not see a bicycle with them (R109). It seems that news of the acitivities of the soldiers' committing these assaults reached accuseds' organization, and that at about 2230 hours a detail of five men left for the farm house, three miles away, where this all took place (R9-12). A corporal who accompanied this detail saw a figure "leaving the barn part of the house". He fired a few rounds to stop him but he kept on going. This fugitive wore a tan jacket (R78,79,83). The investigating officer in this case, called by the defense, testified that he examined the ceiling in the room into which and where the prosecution claimed one of the accused had fired a bullet. This officer, in effect, testified that he found nothing which could have been a recent bullet hole (R87-89).

The prosecution developed the fact that only one of the accused, identified as Barthelemy, carried a rifle (R19,25). The defense supplemented proof on this last point by the evidence of a Yugoslavian who was present at the scene. He testified that only one of the three offending soldiers carried a gun (R109; Def.Ex.B).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148a, p. 165). There is no doubt that

within the meaning and legal requirements of this definition that the two women in this case were raped by each of three soldiers at the time and place alleged in the specifications. There was little, if any, resistance, on the part of either prosecutrix. But under the circumstances found here, involving as they do the shooting and brandishing of a rifle and of a bayonet, together with the employment of superior physical strength (pulling, shoving and forcing down), failure to resist is excused. One woman was physically unable to resist and the other was to terrorized (44 Am Jur., secs. 7,13, pp.905,906,910). Lack of resistance cannot, as a matter of common sense, even suggest consent to a man seeking sexual intercourse at the point of a gun. All of the elements of the crime of rape were proved by substantial evidence (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson and Rorie; CM ETO 4194, Scott; CM ETO 7869, Adams and Harris; CM ETO 8450, Garries and Jackson; CM ETO 8837, Wilson; CM ETO 12667, McDonald).

6. The only real question presented in this case is that which involves the identity of these accused as the assailants. The three accused claimed that they were together that night, but at another place, on a road side, drinking and riding a bicycle which they took from an later brought back to the company area. On the question of the bicycle being brought back by accused on their return, two were questioned on this point. One said he thought it was returned, which the other testified flately that they brought it back. Neither remembered who was responsible for its return.

Evidence given by prosecution witnesses at the scene is that one of the three soldier assailants wore a tan colored sweater and was without a helmet, and that only one carried a rifle. In addition Moran's helmet was found at the scene of the crime right after the three had fled on the approach of the patrol. The defense supplemented this in part by showing that one of the fugitives wore a tan colored upper garment and that only one of the three culprits was armed with a rifle. The defense showed further, by a guard on duty, that all three of these accused, on their return to their area, wore helmets and carried rifles. Moran attempted to deny responsibility for his helmet's being at the scene of the crime that night by showing that he had lost his helmet early in the day. It was proved that he had reported this loss about noon time. Moran said he borrowed another helmet to wear that night.

Accused made the bicycle an important, vitalizing factor in their alibi. They were spending their time, they claimed, riding a bicycle up and down the road, a short distance from their area. They were also drinking and singing. They were at this place from 2130 and 0100 hours. They could not very well have spent all this time drinking steadily, else there would have been strong likelihood of their being drunk when they returned. The bicycle element would tend to emphasize the harmless aspect of their evening's occupation and lend a certain tone to their story. Accused said they brought this bicycle back with them when they returned. However, the guard who met them and talked with them for over ten minutes and who was able to see that they all wore helmets and that each carried a rifle didnot

see the bicycle. The scene of the crime was of sufficient distance (three miles) from the camp to require the lapse of time (one and one-half hours) between the flight of the rapists (at 2130 hours) and the return of accused to their company area (at 0100 hours). If one of the rapists fired a shot into the ceiling, the investigating officer should probably have found it. His failure to find the bullet hole, however, had no bearing on the identity of accused nor on the validity of their alibi.

Accused were identified in court as the perpetrators of the crimes by each of the two victims, and as present at the scene by a third civilian, Herr Flagmeier. The trial judge advocate, in leading each of these witnesses up to the question of identification, stated that the accused in the case were in the courtroom (R17,27,51). This was improper since identification of the guilty participants was a real issue. Particularly was it improper in the case of Herr Flagmeier, who, just before receiving this item of information from the prosecutor had stated that he was not sure whether he could recognize "them" any longer. However, the court is in a better position to determine how much weight is to be given an "identification" made by a witness before the court than is the Board of Review. It may be swift and certain, or it may be hesitant and unconvincing. The record rarely shows the positive identification as testifies. The record shows a positive identification by the two women. It must be concluded that if under the circumstances the unfortunate statement of the trial judge advocate had been of material assistance the observing court would have properly evaluated the identification made. And the identifications raised a real issue as to the validity of the alibis and as to each supporting circumstance.

In the opinion of the Board of Review accused were identified as the perpetrators of the crimes by substantial credible evidence (CM ETO 3200, Price; CM ETO 3837, Smith; CM ETO 12656, Tibbs). Such being the case, the court's findings of guilty may not be disturbed by the Board of Review upon appellate review (CM ETO 1953, Lewis; CM ETO 12592, Kolanko and Sanchez; CM ETO 16971, Brinley).

7. The charge sheets show that accused Barthelemy is 21 years and eight months of age and that he was inducted 12 February 1943 at Buffalo, New York; that accused Walkeris 23 years and eight months of age and that he was inducted 13 July 1942 at Richmond, Virginia; and that accused Moran is 22 years and three months of age and that he was inducted 4 January 1943 at Camp Shelby, Mississippi. They had no prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 sentences.

9. The penlty for rape is death of life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized

upon conviction 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).

JOHN WARREN HILL Judge Advocate

JACK R. VOLLERSTEN Judge Advocate

ANTHONY JULIAN Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 December 1945 TO: Commanding General, Seventh United States Army, APO 758, U. S. Army.

1. In the case of Privates First Class JOSEPH C. BARTHELEMY (32833248) and CLARENCE L. WALKER (33219413), and Private HERMAN J. MORAN (34614237) all of Battery D, 597th Antiaircraft Artillery Automatic Weapons Battalion (Mobile) CAC, attention is invited to the foregoing holding by the Boardof 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 17826. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17826).

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

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

BOARD OF REVIEW NO. 2

30 OCT 1945

CM ETO 17839

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM convened at Salzburg, Austria, 30 June 1945. Sentence: Dishonorable discharge, Total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York
Private FLOYD E. REID, (14071396) Company I, 7th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Floyd E. Reid, (then Private First Class), Company I, 7th Infantry, did, near Viden Champ, France, on or about 26 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Bruyeres, France, on or about 1 December 1944.

Specification 2: In that * * * did, near Ostheim, France, on or about 23 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 again came under military control, on or about 30 January 1945.

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Specification 3: In that * * * did, at Nurnberg, Germany, on or about 23 April 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 again came under military control, on or about 26 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: (1) The Charge; (2) Specification 1 except the words "was apprehended" substituting therefor the words "returned to military control"; (3) Specification 2 except the words "near Ostheim, France, on or about 23 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 again came under military control on or about 30 January 1945" substituting the words, "without proper leave absent himself from his organization from on or about 23 January 1945 until about 30 January 1945"; (4) Specification 3 except the words "at Nurnberg, Germany, on or about 23 April 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 again came under military control, on or about 26 April 1945," substituting therefor the words,"without proper leave absent himself from his organization from on or about 23 April 1945 until about 26 April 1945."; and (5) the substituted words . He was found not guilty of the excepted words, and not guilty of violations of Article of War 58 as to Specification 2 and 3 but guilty of violation of Article of War 61. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for one day 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 under Article of War 50½.

3. The evidence for the prosecution in support of the findings may be summarized as follows:

a. Specification 1: An extract copy of the morning report of accused's organization for 27 October 1944 and 3 December 1944 was admitted in evidence without objection (R8, Pros. Ex. A). The entries showed that the organization was near Viden Champ, France, on 26 October 1944 and that on that date the accused's status was changed from duty to missing in action. On 3 December 1944 the entry was corrected to read from duty to AWOL and from AWOL to confinement on 2 December 1944. Sergeant F. F. Majka testified that on 26 October 1944 he was the leader of the platoon of which accused was a member. Accused returned

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to the platoon from the hospital on that day and was told to get some ammunition as the platoon was going into an attack against the enemy. Accused returned later with the ammunition but during that night disappeared without permission and could not be found. The platoon made the attack the following morning and sustained about 17 casualties. The accused was not present for duty from that time until 1 December 1944 (R9-11).

b. Specification 2: An extract copy of the morning report of the accused's organization was admitted in evidence without objection which on 25 January 1945 recited the change of accused's status from "Duty to AWOL 1900 23 Jan 45" and on 3 February 1945 from "AWOL to Duty 30 Jan 45". On 23 January 1945 the organization was at Ostheim, France. (R8, Pros. Ex. B). Accused's absence during this period was corroborated by Pfc Schoenfeld (R12-14). On 20 June 1945 the accused voluntarily signed a statement, admitted in evidence without objection, that he was sent to a rest camp on 15 January 1945 and remained there until 23 January 1945, when he got drunk and went to Bruyere, France and on the following day turned himself in to the military police who, because of lack of transportation, did not return him to his organization until 30 January (R22, Pros. Ex. D).

c. Specification 3: An extract copy of the morning report of the accused's organization was admitted in evidence without objection which contained entries that showed that on 23 April 1945 at Nurnberg, Germany, the accused's status changed from duty to AWOL and on 26 April 1945 at Wortelstetten, Germany from AWOL to duty (R9, Pros. Ex. C). His unauthorized absence during this period was corroborated by his platoon leader, Sergeant F.F. Majka (R16) and Pfc James Garipolas (R18).

4. The accused having been fully advised concerning his rights as a witness, elected to make an unsworn statement (R25) in which he related his extensive combat experiences, following his enlistment 3 January 1942, commencing with Sicily and including Anzio, the Volturno River, Vagney, and Colmar, France. He told of the times he sustained injuries in combat and how he fortunately escaped death many times while those around him were killed. He was with his outfit until 14 June 1945 when he was put in the stockade (R25-27).

5. The accused has been found guilty of desertion in violation of Article of War 58 and two absenses without leave in violation of Article of War 61. The morning report of his organization, corroborated by the testimony of witnesses who knew the accused and knew him to be absent without authority during the periods of time and at the places alleged in the three specifications, clearly established his absence without leave during the periods of time alleged and fully sustained the findings of guilty of Specification 2 and 3 as violations of Article of War 61 (MCM, 1928, par.132.p.145). With reference to Specification 1 of the Charge and the Charge, in addition to absence without leave, it is incumbent upon the prosecution to prove: (1) That accused or his organization was under orders or anticipated orders involving hazardous duty, namely, combat with the enemy; (2) that the accused was aware of the

anticipated hazardous duty; and (3) that at the time he absented himself he entertained the specific intent to avoid that duty. The court may infer the presence of the intent if the other elements are shown and no other reasonable explanation of absence appears. (CM ETO 5958 Perry; CM ETO 13475, Podesta). The record shows that accused absented himself without leave immediately before his organization started an attack upon the enemy and sustained numerous casualties and that he was told that the attack was about to take place. In the absence of any reasonable explanation of his disappearance the court was justified in inferring from these proven facts that he departed with the intent to avoid combat with the enemy and was therefore guilty of desertion as charged. Its findings are therefore supported by substantial evidence and will not be disturbed.

6. The charge sheet shows that accused is 23 years 7 months of age. Without prior service he enlisted at Camp Shelby, Miss. on 3 January 1942.

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

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

(ON LEAVE) Judge Advocate

Donald D Miller Judge Advocate

John J Collins Jr Judge Advocate

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

BOARD OF REVIEW NO. 2

1 NOV 1945

CM ETO 17840

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Wildungen,
	)	Germany, 30 July 1945. Sentence:
Private WILLIAM T. BRONSON,	)	Dishonorable discharge, total forfeitures,
(34651621), Company "A"	)	confinement at hard labor for life.
30th Infantry	)	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.

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

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

Specification: In that Private William T. Bronson, Company "A", 30th Infantry, did, at or near Eulmont, France, on or about 27 February 1945, desert the service of the United States, and did remain absent in desertion until he returned to military control at or near Lyon, France, on or about 25 May 1945.

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

Specification: In that * * *, having been duly placed in confinement in the 1st Battalion 30th Infantry, Guard House, on or about 14 June 1945, did, at Salzburg, Austria, on or about 17 June 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Salzburg, Austria, from about 17 June 1945 to about 4 July 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all 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, 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. The evidence for the prosecution showed that on 28 February 1945 an entry was made in the morning report of accused's organization, Company A, 30th Infantry, "Dy to AWOL 27th". A certified extract copy thereof was admitted in evidence without objection (R8,Pros.Ex.A). On 27 February 1945 that organization was at Eulmont, France, training and practicing river crossing preparatory to crossing the Rhine River 100 miles away (R9-10). The accused disappeared on the 27th of February without authority and could not be found (R10-11). He was not seen with his company from that date until 14 June 1945 when he was placed under arrest and later confined in the battalion guard house in Salzburg, Austria (R11). Accused had been with the company only 2 days when he absented himself in February and had never been in combat with the company (R13-14). It was stipulated that he returned to military control at Lyon, France, on 25 May 1945 (R17, Pros.Ex.B). In the evening of 17 June 1945 he was in confinement in the guard house (R15). On the morning of the 18th, he was missing and could not be found. He had not been released in the meantime (R16). It was stipulated that he returned to military control at Lyon, France, on 4 July 1945 (R17, Pros. Ex. C).

4. Accused having been fully advised concerning his rights as a witness elected to make the following unsworn statement:

"I, Private William T. Bronson, Company "A", 30th Infantry, having been advised to my rights by my defense counsel have decided to make the following unsworn statement. I know that I was AWOL as described. I have no excuse for doing wrong, except that I was sweating out the Rhine Crossing

I was in mortal fear of what awaited methere. There was much talk that the Germans would make their final and strongest stand at the Rhine. The bloodshed, deaths and casualties that I invisioned made me so afraid that I became oblivious of my duty as a soldier and took off. It was a compelling force that drove me into AWOL. I couldn't control it, try as I would. I knew I couldn't control it and I couldn't take combat and I felt I would cause lessharm by not being there. I could not control myself in combat and be of any help. I did not wish to accept the responsibility for what I might do. I could not behave as a reasonable and responsible person. I didn't know what I was doing. Another fact which was very instrumental in preventing me from carrying my duties as a soldier and which caused me a great concern was the fact that I had not been receiving any mail from my wife since Anzio up until the present day. I have tried desparately to adjust myself to the Army routine. I have never liked the Army life or regimentation in any form. Even when I was going to college I quit because I did not like ROTC training. It's a feeling I cannot control. I'm psychologically indifferent to Army routine and cannot adjust myself, try as I may. My wrongs are not deliberate, but I just can't control myself in the Army. I have never been in trouble of any kind prior to this AWOL. I leave myself at the mercy of the court. Signed Private William T. Bronson".

5. a. Charge I (Desertion)

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). The evidence for the prosecution and the unsworn statement of the accused made to the court admits that on 27 February 1945 when the accused and his outfit were practicing river crossings preparatory to invading Germany across the Rhine River, he departed without authority because of his fear of the hazardous undertaking. He remained away until 25 May 1945, when all hostilities in the European area had ceased. All of the elements of the offense charged are amply supported by the evidence (CM ETO 16880, Ferrara and the numerous cases cited therein).

b. Charge II and Charge III. The evidence for the prosecution clearly showed that the accused was duly placed in confinement and on 17 June 1945 he escaped from confinement and remained away without leave or other

authority until 4 July 1945. He was therefore properly found guilty of escape from confinement at the time and place alleged in the Specification of Charge II (MCM,1928,par.139b,p.154) and of absenting himself without leave at the time and place and for the duration alleged in the Specification of Charge III (MCM,1928,par.132,p.145).

6. The charge sheet shows that the accused is 25 years of age and, without prior service, he was inducted 3 April 1943.

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

8. The 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).

(ON LEAVE) Judge Advocate

Judge Advocate

John J. Collins Jr. Judge Advocate

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

3 NOV 1945

BOARD OF REVIEW NO. 3

CM ETO 17843

U N I T E D S T A T E S	1ST ARMORED DIVISION
v.	Trial by GCM, convened at APO 251, U.S. Army, 27 August 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.
Privates ROBERT L. COOPER (14056875), SAMUEL R. JONES (38183730) and REUBEN O. HAYDEN (35312470) and Technician Fifth Grade JOHN H. HOWARD (34384048), all of 4377th 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:

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

Specification 1: In that Technician Fifth Grade John H. Howard, Private Robert L. Cooper, Private Reuben O. Hayden, and Private Samuel R. Jones, all of 4377th Quartermaster Truck Company, acting jointly, and in pursuance of a common intent, did, at or near Bensheim, Germany, on or about 7 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Lilli Freitag, an unmarried female under sixteen (16) years of age.

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Bensheim, Germany, on or about 7 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Erika Freitag, an unmarried female.

Specification 3: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Bensheim, Germany, on or about 7 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Margarite Freitag, a female not their wife.

Specification 4: (Finding of not guilty)

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Bensheim, Germany, on or about 7 April 1945, with intent to do him bodily harm, commit an assault upon Mr. Franz Freitag by threatening him with a dangerous weapon, to wit, a pistol.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, each was found not guilty of Specification 4 of Charge I and guilty of the remaining specifications and the charges. Evidence was introduced of one previous conviction of Cooper by summary court for being drunk and disorderly in uniform in a public place in violation of Article of War 96. Evidence was introduced of two previous convictions of Hayden, both by summary court, one for exceeding a speed limit and one for leaving a vehicle unattended in violation of orders, both in violation of Article of War 96. No evidence of previous convictions was introduced against Jones and Howard. 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 sentence as to each accused, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that between 2200 and 2330 hours on 7 April 1945, four colored American soldiers knocked at the home of Franz Freitag in Bensheim, Germany. When Franz opened the door, all four soldiers entered the kitchen, lighted only a candle, where Franz' two daughters, Erika, aged 16, and Lilli, aged 14, were present (R7-8, 13-15,22). The soldiers, who were "all ready drunk" (R22), or "a little drunk" (R15), demanded wine and, after an argument, one of them drew a pistol on Franz and, with another of the soldiers, forced him to sit on the stairs and stood beside him (R8, 19,22).

One of the soldiers grabbed Erika, threw her on a bed in the kitchen, choked her, pulled off her pants and had intercourse with her in

spite of screaming, crying and kicking by her (R8, 8,10). Another soldier grabbed Lilli, slapped her, forced her to the floor and held a pistol against her breast, tore off her clothes, and had intercourse with her without her consent (R9,12,15-16). The girls' mother, Marguerite Freitag, who heard their cries from upstairs where she was in bed, came downstairs dressed in her nightgown and begged the soldier to let Erika go, whereupon he threw the bed sheets on the floor, grabbed Marguerite and threw her on them, forced her legs apart and had intercourse with her, in spite of resistance by her (R8,19). She was afraid of the soldiers (R21). Her husband, Franz, could see the acts of intercourse from his seat on the stairs, but was prevented from interfering by the two soldiers with the pistol (R7, 23).

The soldiers then went through and searched the house with a pistol and flashlight, then returned and took a watch from Erika and demanded alcohol again (R9, 10,11). One soldier "poked" Franz with a pistol and searched him (R23). Erika and Lilli tried to leave the house, but the soldiers grabbed them and brought them back (R13).

Erika was then attacked a second time on the floor of the hallway by another soldier, but apparently he did not achieve penetration (R10-11). She could not identify either of her assailants, but identified Cooper as one of the soldiers present in the house (R8,11,12). Marguerite identified Cooper as the second soldier to have intercourse with her, also on the floor of the hallway, but she was unable to identify her first assailant or any of the other soldiers (R19-20,22). Lilli identified Hayden as a soldier who had intercourse with Erika, but she was unable to identify her attacker (R16,18). Franz was able to identify only Cooper (R22).

Erika and Lilli denied accepting American rations from soldiers that night or at any other time (R13,14,17). The soldiers left three cans on a table when they left, but prosecutrices did not touch them (R13,20).

On 9 and 10 April 1945, accused each signed voluntary written statements, each of which was received in evidence against the accused making it (R5-7). In the various statements, each accused claimed that the family was very friendly when he went to the house, and that the girls and woman freely accepted cigarettes, chocolates and "PX rations". Cooper admitted having intercourse with the older girl with her consent. Hayden also admitted having intercourse with the older girl with her consent. Howard admitted drawing his pistol on the "old man" when the latter made a suspicious move, and handing the pistol to Jones, then going out with the same girl whom Cooper had taken out, but stated that he was unable to have intercourse with her because he lost his "hard". Jones admitted having intercourse with the older woman, and taking the pistol from Howard when he went out. He also stated that he had seen the girls around the billet area and that they had offered to exchange drinks for chocolate (Pros. Exs. 1,2,3,4).

By stipulation, the report of a medical officer was introduced in evidence, showing that the prosecutrices were examined on 8 April 1945, and that no abrasions, cuts or contusions were found. A fluid

"suggesting seminal fluid" was visible in the vagina of Marguerite. Definite evidence of trauma, including slight bleeding and unusual tenderness of the vaginal tracts of both Lilli and Erika, was found. The evidence was compatible with claims of sexual intercourse as to each woman (R26, Pros. Ex. 5). Another stipulation was made as to the results of laboratory tests of clothing for presence of spermatozoa, which showed the presence of spermatozoa on articles of clothing of Erika and Marguerite, but none on clothing of Lilli (R26-27, Pros. Ex. 6).

4. After accused's rights as witnesses were explained to them, each elected to testify (R27).

Cooper testified that he went, "pretty well lit up" to the house to get wine with the other three accused because "Jones said he had been there before and swapped cigarettes and chocolate before". The family "seemed friendly" and witness gave out cigarettes, "C rations" and chocolate. The oldest girl began to play with him and got a sheet and lay down on the hall floor out of sight of the other persons, and had intercourse with him voluntarily for chocolate (R27-30).

Jones testified that the girls started rubbing his head and playing with his hand and he tried to have intercourse with the 14-year-old girl, but "couldn't get it in so I started 'jiving' with the old lady", who had intercourse with him for chocolate. She "put it in" for him and "said it was good". He had been drinking but was not drunk (R33-39).

Hayden testified that after they arrived at the house, Mr. Freitag went to get some wine, and the girls and woman got friendly. The "old lady" asked for chocolate and one of the men gave her some. Witness then took her out in the hall, where she lay down and he had intercourse with her with her consent. She brushed him off when he finished. He had been drinking but "not very much" (R31-33).

Howard testified that he gave two cans of "C rations" to Mrs. Freitag and chocolate to the girls. One of the girls "played around" with him and agreed to have intercourse with him for chocolate. He went into the hall with her and tried, but was unable to have intercourse because he lost his "hard". He admitted having a pistol but denied taking it out of his belt or drawing it on the "old man". He admitted giving the pistol and "whole belt" to Jones, as his statement showed. He had been drinking but was not drunk (R39-41).

5.a Specifications of Charge I: The evidence for the prosecution shows that four colored soldiers, at the time and place alleged, entered the home of prosecutrices, and that at least two of the soldiers and probably more, each had carnal knowledge of one or more of the prosecutrices by force and violence and without their consent, in each case under circumstances showing without doubt the commission of the crime of rape (CM ETO 611, Porter; CM ETO 1202, Ramsey and Edwards; CM ETO 3933, Ferguson et al; CM ETO 9083, Berger and Bamford). No question of identity is raised since

by both written statement and by his testimony, each accused admitted his presence at the house at the time of the alleged acts. Accuseds' testimony that the various acts of intercourse were consummated with consent of the prosecutrices was sharply contradicted by the testimony of each prosecutrix, and the court's determination of this question of fact against the accused cannot now be disturbed (CM ETO 14032, Andrews and Hathcock; CM ETO 15617, Anthony and Cahee).

The joint charge of all of the accused with the rape of each of the three prosecutrices was not improper under the circumstances shown by the evidence, in view of the settled rule of law that all who aid or abet in the commission of an offense are chargeable as principals (CM ETO 4234, Lasker and Harrell; CM ETO 10857, Welch and Dollar; CM ETO 10871, Stevenson and Stuart; CM ETO 13824, Johnson et al; CM ETO 14596, Bradford et al; CM ETO 15393, Dale et al).

It appears from the evidence of both prosecution and defense that each accused did not have actual carnal knowledge of each prosecutrix, and the evidence indicates a possibility that Howard did not have intercourse at all, although he admits that he tried. However, the evidence sufficiently shows that Howard aided and abetted the other accused in the commission of the acts by restraining the husband and father of the prosecutrices at the point of a pistol while the acts were being consummated. Moreover, the prosecution's evidence in its entirety shows a continuing community of purpose between all four accused in accomplishing the rape of Erika, Lilli, and their mother, Marguerite. Under the circumstances shown, the court was clearly authorized to find each accused guilty of rape of each prosecutrix as charged (CM ETO 3740, Sanders et al; CM ETO 3859, Watson et al; CM ETO 5068, Rape and Holthus; CM ETO 10857, Welch and Doblar; CM ETO 15393, Dale et al). Drunkenness on the part of any of the accused, if shown, would not constitute an excuse for the commission of the crime of rape (CM ETO 9611, Prairiechief; CM ETO 13476, Givens).

b. Specification of Charge II: The evidence shows that one of the accused drew a pistol on Franz Freitag and that he was thereby forced to sit on the stairs while his wife and daughters were raped by the accused. From the statements, it appears that Howard drew the pistol and later gave it to Jones. Franz was later "poked" with the pistol and searched by one of the accused. Under the circumstances, the propriety of encumbering the record with this charge may well be questioned (See MCM 1928, pars. 27,80, pp.17,67). While it does not appear that the pointing of the pistol was accompanied by specific threats or words indicating an intent to do bodily harm, the evidence clearly justifies the inference that the pointing of the weapon was accompanied by an intent to do bodily harm in the event that Franz should fail to comply with the demands of his assailant. Indeed, in view of the language difficulties, actual verbal threats would, in all probability, have added nothing to the threatening gestures made. Where the assault with a dangerous weapon is accompanied by a demand or condition which the holder of the weapon has no legal right to make or impose, the intent to do bodily harm may be inferred, and the offense as described in

Article of War 93 is complete (CM ETO 3255, Dove; CM ETO 7000, Skinner; CM ETO 11004, Evans; Dig. Op. JAG, 1912-40, sec. 451(10), p.313).

The evidence sufficiently shows that each accused, if not actually in possession of the pistol, was present during the commission of the assault, consenting to it and benefiting from it, so that each was properly charged and found guilty as a principal (CM ETO 3859, Watson et al; CM ETO 6522, Caldwell). Whether any of the accused was too drunk to entertain the requisite specific intent to do bodily harm was, under the circumstances, a question of fact for the court's determination (CM ETO 3812, Harshner; CM ETO 7585, Manning).

6. The charge sheet shows that accused Cooper is 23 years of age and enlisted 14 June 1941 at Memphis, Tennessee. Jones is 23 years of age and was inducted 29 August 1942 at Oklahoma City, Oklahoma. Hayden is 27 years of age and was inducted 6 July 1942 at Cleveland, Ohio. Howard is 24 years of age and was inducted 28 August 1942 at Fort Jackson, South Carolina. No prior service of any accused is shown.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuricously 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 the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567), and for the crime of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and sections 276 and 335, Federal Criminal Code (18 USCA 455, 541) and act of June 14, 1941, c.204, 55 stat. 252 (18 USCA 753f); (cf. U.S. v. Sloan (D.C. South Carolina, 1940) 31 F Supp.327). 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

Malcolm C. Sherman Judge Advocate

B. W. Geary Jr. Judge Advocate

17843

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

BOARD OF REVIEW NO. 2

20 NOV 1945

CM ETO 17871

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Captains FRANK M. SANTORIELLO (O-1634289) and JAMES J. YAMAN (O-1309469) and Second Lieutenant EDGAR L. PHILLIPS (O-2000158), all of Headquarters, Military Intelligence Service, European Theater of Operations.	Trial by GCM, convened at Paris, France, 31 May 1945. Sentence as to Santoriello and Yaman: Dismissal, fine of $1000.00, and confinement at hard labor for three years. Sentence as to Phillips: Dismissal, fine of $500.00, and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING BY BOARD OF REVIEW NO. 2
HEPBURN, HALL, AND COLLINS, Judge Advocates

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

2. Accused were tried by common trial, with their consent, upon the following charges and specifications:

SANTORIELLO

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Frank M. Santoriello, Headquarters, Military Intelligence Service, European Theater of Operations, United States Army, did, at London, England, and Paris, France, between about 1 November 1944 and 1 April 1945, wrongfully conspire and agree with Captain James J. Yaman, Second Lieutenant Edgar L. Phillips, Private James A. Georgouras, Private Joseph Mansour, and other persons unknown,

(102)

to wrongfully, knowingly, and without proper authority import, hold, and transfer British and United States paper currency in the liberated territory of France, and wrongfully participate in transactions involving the purchase and sale of francs, French currency, against British and United States currency, through other than official channels.

Specification 2: In that * * * did, at or near Paris, France, on or about 2 December 1944, wrongfully, knowingly, and without proper authority import and hold about 34 pounds, British currency, in the liberated territory of France, and wrongfully participate with Private James A. Georgouras, and other persons unknown, in a transaction involving the purchase of about 15,300 francs, French currency, in return for said British currency, through other than official channels.

Specification 3: In that * * * did, at or near Paris, France, on or about 16 January 1945, wrongfully, knowingly, and without proper authority import and hold about 125 pounds, British currency, and 200 dollars, United States currency, in the liberated territory of France, and wrongfully participate with Captain James J. Yaman, and other persons unknown, in a transaction involving the purchase of about 70,000 francs, French currency, in return for 100 pounds of the said British currency and for the said United States currency, through other than official channels.

Specification 4: In that * * * did, at Paris, France on or about 6 February 1945, wrongfully, knowingly, and without proper authority participate with persons unknown in a transaction involving the purchase of about 32,400 francs, French currency, in return for about 90 pounds, British currency, through other than official channels.

Specification 5: In that * * * did, enroute between London, England and Paris, France, and at Paris, France, on 6 March 1945, wrongfully, knowingly, and without proper authority import and hold about 150 pounds, British currency, in the liberated territory of France, and wrongfully participate with persons unknown in a transaction involving the purchase of about 60,000 francs, French currency, in return for said British currency, through other than official channels.

YAMAN

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain James J. Yaman, Headquarters, Military Intelligence Service, European Theater of Operations, United States Army, did, at London, England, and Paris, France, between about 1 November 1944 and 1 April 1945, wrongfully conspire and agree with Captain Frank M. Santoriello, Master Sergeant Allen Silver, Staff Sergeant Samuel J. Marshall, Private Joseph Mansour, Second Lieutenant Edgar L. Phillips,

and other persons unknown, to wrongfully, knowingly and without proper authority import, hold, and transfer British paper currency in the liberated territory of France, and wrongfully participate in transactions involving the purchase and sale of francs, French currency, against British currency, through other than official channels.

Specification 2: In that * * * did, at Paris, France, on or about 15 November 1944, wrongfully, knowingly, and without proper authority participate with Captain Frank M. Santorielle, and other persons unknown, in a transaction involving the purchase of about 64,500 francs, French Currency, in return for about 150 pounds, British currency, through other than official channels.

Specification 3: In that * * * did, at or near Paris, France, on or about 18 December 1944, in conjunction with Staff Sergeant Samuel J. Marshall and other persons unknown, wrongfully, knowingly, and without proper authority import about 267 pounds, British currency, in the liberated territory of France.

Specification 4: In that * * * did, at Paris, France, on or about 1 February 1945, wrongfully, knowingly, and without proper authority participate with Private Joseph Manseur and other persons unknown, in a transaction involving the purchase of about 15,850 francs, French currency, in return for about 42 pounds, British currency, through other than official channels.

PHILLIPS

CHARGE: Violation of the 96th Article of War.

Specification 1: In that second Lieutenant Edgar L. Phillips, Headquarters, Military Intelligence Service, European Theater of Operations, United States Army, did, at Paris, France, and London and Litchfield, England, between about 1 October 1944 and 1 April 1945, wrongfully conspire and agree with Lieutenant Colonel George Danker, Captain Frank M. Santorielle, Captain James J. Yaman, and other persons unknown, to wrongfully, knowingly, and without proper authority import, hold, and transfer British paper currency in the liberated territory of France, and wrongfully participate in transactions involving the purchase and sale of francs, French currency, against British currency through other than official channels.

Specification 2: In that * * * did, at Paris, France, on or about 25 December 1944, wrongfully, knowingly, and without proper authority participate with Captain Frank M. Santorielle and other persons unknown in a transaction involving the purchase of about 10,000 francs, French currency, in return for about 25 pounds, British currency, through other than official channels.

Specification 3: In that • • • did, enroute between London, England, and Paris, France, and at Paris, France, on or about 8 February 1945, wrongfully, knowingly, and without proper authority, import and hold about 235 pounds, British Currency, in the liberated territory of France, and wrongfully participate with Captain Frank M. Santorielle and other persons unknown in a transaction involving the purchase of about 12,250 francs, French currency, in return for about 35 pounds of said British currency, through other than official channels.

Specification 4: In that • • • did, at Paris, France, on or about 1 March 1945, wrongfully, knowingly, and without proper authority participate with Captain Frank M. Santorielle, and other persons unknown, in a transaction involving the purchase of about 15,000 francs, French currency, in return for about 35 pounds, British currency, through other than official channels.

Specification 5: In that • • • did, at Paris, France, between 15 October 1944 and 30 November 1944, wrongfully, knowingly, and without proper authority participate with Private James A. Gourgouras and other persons unknown in a transaction involving the purchase of about 80,000 francs, French currency, in return for about 200 pounds, British currency, through other than official channels.

Each accused pleaded guilty to the respective specifications and Charge against him and, two-thirds of the members of the court present at the time the votes were taken concurring, each was found guilty of the respective specifications and Charge against him. No evidence of previous convictions was introduced as to any accused. Two-thirds of the members of the court present at the time the votes were taken concurring, accused Santorielle and accused Yaman were each sentenced to be dismissed the service, to pay to the United States a fine of $1000.00, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years, and accused Phillips was sentenced to be dismissed the service, to pay to the United States a fine of $500.00, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, United States Forces European Theater, approved each 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, as to each, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

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

a. As to Santorielle: Corporal James A. Gourgouras testified that in December 1944, near Paris, Captain Santorielle handed him a package, stating that it contained 234 English pounds, and requested him to exchange them for francs. However, witness refrained from making the exchange (R27-28).

A deposition of Major Dalton Newfield shows that in December 1944, at Southampton, England, accused told witness that the exchange of pounds and American currency for French francs "was lucrative and had been done by lots of people". Later witness loaned accused about $600.00 in American and English currency, and on 5 February 1945 he received from accused Phillips an envelope containing nine money orders for $100.00 each and a note from accused stating that it was in payment of the money borrowed (RZ2, Pros. Ex. B, pp. 2,4-7).

Sergeant Joseph Mansour testified that during the latter part of January or first part of February 1945, near Paris, accused asked witness to "cash some pounds" for him, and gave witness about 125 to 150 pounds and about 300 American dollars which witness changed at a jewelry store in Paris for about 400 francs per pound and 150 francs per dollar, and returned the francs to accused (RZ1).

Private Allen Silver testified that in February 1945, in London, he exchanged 5000 francs into pounds at a finance office for accused, at accused's request, at which time accused stated that he "had already cashed some" (R16).

In a voluntary pre-trial statement, accused admitted that in November 1944, in France, he made arrangements with a sergeant for the exchange of 7000 francs into pounds in England, and that under the arrangement he received 34 pounds which, with 200 pounds belonging to Captain Yaman, were, at accused's request, about 7 December, exchanged by Private "Gregoures" for them for French currency at the ratio of 430 francs for each pound. About 22 December, in England, accused exchanged 20,000 francs for accused Yaman and accused Phillips, and 15,000 francs for himself, into English pounds, some of which were later exchanged for francs at illegal rates by Phillips and some by Private Mansour at Accused Yaman's request. While in England, accused met Major Newfield, from whom he received 300 American dollars and 35 British pounds, which he exchanged for francs about 15 January 1945. He later sent nine money orders for $100.00 each to Major Newfield in England by Accused Phillips who, at about the same time, exchanged about 22,000 francs for 90 pounds for accused. Accused took the pounds and exchanged them through a French civilian for francs at a rate of 360 francs per pound. About 6 March 1945, accused brought from England 50 pounds for Phillips and 100 pounds for himself, which he exchanged through another French civilian for 400 francs per pound (R45-46,Pros.Ex.E).

b. As to Yaman: Staff Sergeant Samuel J. Marshall testified that early in December 1944, at accused's directions, he took from France a package and two letters to Sergeant Silver and Lieutenant Taub in England, and on his return to France, Lieutenant Taub gave to him a loosely wrapped package for delivery to accused and also 10,000 francs, with instructions to "cash" them in and deliver them to accused. The package became unwrapped and witness saw that it contained 267 pounds

in British one and five pound notes. Witness gave both the pounds and the francs to accused, who later stated that the pounds belonged to Lieutenant Taub, and "bawled" witness out for failing to cash the francs, stating that he had sent francs on other occasions and that Sergeant Silver had cashed them for him (R11-12). Witness thought there was general knowledge that it was a violation of orders to "transfer pounds into francs" (R13).

Private Allen Silver testified that he received the letter brought by Staff Sergeant Marshall in December 1944, and that it contained 4000 francs and instructions pursuant to which he cashed the francs and delivered the proceeds to accused's wife. On another occasion witness had exchanged over 5000 francs for accused and delivered the proceeds to accused's wife (R14-16).

Sergeant Joseph Mansour testified that early in November 1944, when he came to Paris from England, he gave accused about 25 English pounds, at accused's solicitation, to be exchanged for francs, and that accused gave him 10,000 francs later the same day. Later, accused handed witness a package containing 42 British pounds, with instructions to "cash it for Captain Taub", but witness did not carry out such instructions (R18-20).

Received in evidence over objection of the defense were nine applications for post office money orders, dated in January and February 1945, totaling $1,100, on seven of which accused's name appears as both sender and payee and on the other two of which he is named as sender or payee (R23-26, Pros. Ex. A).

In a voluntary pre-trial statement accused admitted that in November 1944 he gave 150 pounds to accused Santorielle, who had it exchanged for about 430 francs per pound. Accused did not at that time know that such exchange was wrong and it was a "common practice". He also admitted that he sent $200.00 in francs by Staff Sergeant Marshall to his friend Lee Taub to have Taub change them into pounds and give to his wife. In the middle of December, Marshall returned and "started to give" accused $600.00 to $700.00 in pounds, from Lee Taub, but accused "was dumfounded" and refused to accept the money (R43-45; Pros. Ex. D).

c. As to Phillips: Corporal James A. Gourgouras testified that at least on two occasions in October or November 1944, he exchanged for accused at a tailor shop in Paris about 150 English pounds at a ratio of 400 or 450 francs for each pound (R28-29). Witness admitted making a prior untrue statement to the effect that accused had told him the money was for a Colonel Danker (R30).

Accused signed a voluntary pre-trial statement in which he admitted exchanging five five-pound notes for accused Santorielle for about 10,000 francs shortly after 20 December 1944. On 28 January 1945,

at the request of Lieutenant Colonel George Danker and Captain Santorielle, he carried with him to England and exchanged a total of 40,000 francs for approximately 200 English pounds, and returned the English currency to such officers about 8 February 1945. At the same time he handed Santorielle 35 pounds of his own, and later received 12,250 francs in return. About 15 February 1945 accused Santorielle took 9,000 francs to England at accused's request, and about 1 March 1945 returned to accused 13,000 francs (R39-40, Pros. Ex. C).

d. At the request of the trial judge advocate, the court took judicial notice of the Letter, Headquarters European Theater of Operations, United States Army, (AG 121 Op GA), 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, which letter prohibits all personnel subject to the jurisdiction of such headquarters from importing, holding, transferring, exporting or in any way dealing in United States or British paper currency in liberated or occupied territory, and from participating in transactions involving the purchase or sale of francs against other currencies except through official channels (R10).

4. The rights of accused as witnesses were explained to them, and Santorielle and Yaman elected to testify and Phillips elected to remain silent (R48-49).

Santorielle testified that he had served two enlistments in the regular army, had re-enlisted in February 1941, and graduated from officers' candidate school in July 1941. He served as company commander of an "OCS Company" and executive officer of a signal battalion before being transferred to the military intelligence service. He came to England early in 1944 as supply officer and came to France in November 1944. He has received nine efficiency ratings of "excellent" and two of "very satisfactory" (R53-55).

Yaman testified that he graduated from a teachers' college and taught high school for one year. He volunteered for the army in July 1941, was commissioned in 1943, and was later sent to England where, in March 1944, he became a "Headquarters Commandant" in charge of "housekeeping" for about 600 officers and men. He was twice commended in writing for his efficiency, once by the Commanding General, Central Base Section, European Theater of Operations, and once by the Commanding Officer, Headquarters Command, European Theater of Operations (R50-51, Def. Ex. 1,2).

5. The statement of Captain Santorielle supports the findings of guilty of all of the five specifications against him, and the prosecution introduced other evidence, aside from the statement, in support of the findings as to Specifications 1, 2, and 3. As to Captain Yaman there is likewise independent evidence, aside from his statement,

supporting the findings of guilty of Specifications 1 and 3 against him. As to Lieutenant Phillips, the only evidence of guilt, aside from his statement, is the testimony of Private Gourgouras relating to Specification 5.

No detailed analysis of the evidence is necessary in view of the plea of guilty by each accused, which in itself supports the findings of guilty without introduction of evidence (CM ETO 839, Nelson; CM ETO 1266, Shipman; CM ETO 2776, Kuest). As stated by the Board of Review:

> "There is no requirement of law that evidence must be taken upon a plea of guilty. The purpose of such evidence is to assist the court in fixing the punishment, and the reviewing authority in his consideration of the case. The finding of guilty may be based solely on the plea of guilty, which is no less than judicial confession that the accused committed the offense charged" (CM ETO 2194, Henderson).

The record shows that accused officers were represented by competent counsel, that the effect of the pleas of guilty were explained to them, and that they fully understood the effect of such pleas. It appears that in advising accused of the effect of the pleas of guilty, the law member stated that

> "you thereby admit that you have knowingly and intentionally committed every essential element necessary to convict you, upon presentation of proper legal proof, of each of the several specifications . . ."(R8) (Italics supplied).

While the law member probably meant that the plea of guilty admits the elements which the prosecution, but for such plea, would otherwise be required to prove, his statement might be construed as a statement that, in spite of the plea, the prosecution would nevertheless be required to prove the elements of the offenses charged. It appears, however, that in an ensuing discourse between the law member and defense counsel with reference to the necessity of presenting a prima facie case, the law member explained that no proof was required of the government upon the entry of a plea of guilty by the accused, and that some proof was usually given, as a matter of practice, for purposes of extenuation and mitigation only. Thereafter, each accused expressly entered an unqualified plea of guilty to each specification against him (R9). Under such circumstances it is clear that accused were not misled by the initial statement of the law member in explaining the meaning of the plea of guilty, and that each fully understood the effect of such plea.

The testimony of Corporal Gourgouras indicates that he did not consummate the purchase of francs as alleged in Specification 2 against Santoriello, and the testimony of Sergeant Mansour shows that he did not consummate the purchase of francs as alleged in Specification 4 against accused Yaman. Moreover, the statement of Yaman indicates that he may not have knowingly participated in the importation of the British currency as alleged in Specification 3 against him. It is recognized that when the evidence shows that the plea of guilty was improvidently entered, the court should proceed to trial and judgement as if the accused had pleaded not guilty (MCM, 1928, par. 70, pp. 54-55). However, such evidence is not necessarily inconsistent with the plea of guilty to the specifications as drawn. The testimony of Gourgouras and Mansour is self-serving in nature. After all of the evidence was in, both Yaman and Santoriello elected to testify in mitigation, without in any manner attempting to impeach their former unqualified pleas of guilty, thus indicating that they felt the pleas had been advisedly made. Under the circumstances, the court properly allowed the pleas of guilty to stand (cf. CM ETO 1670, Torres; CM ETO 1508, Moseff).

Each specification alleges facts clearly showing the contravention or violation of an important theater order, and an offense in violation of Article of War 96 (see CM ETO 11216, Andrews; CM ETO 17459, Allen). Aside from the general and common knowledge regarding regulations affecting transactions in currencies, accused were each charged with full knowledge of important and general theater directives such as are here involved (CM ETO 7553, Beadine; CM ETO 11216, Andrews).

6. The charge sheets show that accused Santoriello is 36 years six months of age and had prior service from 20 August 1925 to 19 August 1928 and from 6 September 1929 to 5 September 1932. Accused Yaman is 25 years eleven months of age and was commissioned 23 January 1943. Accused Phillips is 25 years four months of age and entered service 31 December 1942 at Dallas, Texas. No prior service is shown as to Yaman or Phillips.

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. Dismissal, fine and confinement at hard labor are authorized punishments for violation of Article of War 96. The designation of

the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sept. 1945, sec. VI, as amended).

EARLE HEPBURN, Judge Advocate

CLARENCE W. HALL, Judge Advocate

JOHN J. COLLINS, 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. In the case of Captains FRANK M. SANTORIELLO (O-1654289) and JAMES J. YAMAN (O-1309869) and Second Lieutenant EDGAR L. PHILLIPS (O-2000158), all of Headquarters, Military Intelligence Service, 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 sentences as confirmed, 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 17871. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17871).

OUT
20 NOV 1945
BOTJAG-ET

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

(So much of sentence as pertains to confinement, forfeitures, and fine is remitted. Sentence as modified ordered executed. GC MO 149, W.D., 28 May 1946).

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

BOARD OF REVIEW NO. 4

CM ETO 17872

UNITED STATES	XX CORPS
v.	Trial by GCM, convened at Starnberg, Bavaria, Germany, 24 September 1945. Sentence as to each accused: Dishonorable discharge (suspended as to Maher), total forfeitures and confinement at hard labor, Kasawich for five years, and Maher for three years. Places of confinement: Kasawich, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York; Maher, Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.
Private First Class WALTER J. KASAWICH (31188155) and Private MYLES J. MAHER (42183514), both of Company B, 636th Tank Destroyer Battalion	

HOLDING and OPINION 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, and the Board submits this, its holding and opinion, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused, with their consent and by direction of the appointing authority, were tried together in a common trial upon the following charges and specifications:

KASAWICH

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

Specification: In that Private First Class Walter J. Kasawich, Company B, 636th Tank Destroyer Battalion, acting in conjunction with Private Myles Maher, did, at or near Lauter, Germany, on

or about 20 August 1945, feloniously take, steal, and carry away 4080 German Reichmarks, value about four hundred and eight dollars ($408.00), the property of Josef Schmid.

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

Specification 1: In that * * * did, at Garmisch, Germany, on or about 19 August 1945, without proper authority, wrongfully take and use a 1/4-ton 4 x 4 truck, value more than $50.00, property of the United States.

Specification 2: In that * * * did, at or near Lauter, Germany, on or about 20 August 1945, wrongfully and fraudently represent himself to be a member of the Military Police.

MAHER

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Myles J. Maher, Company B, 636th Tank Destroyer Battalion, acting in conjunction with Private First Class Walter J. Kasawich, did, at or near Lauter, Germany, on or about 20 August 1945, feloniously take, steal, and carry away 4080 German Reichmarks, value about four hundred and eight dollars ($408.00), the property of Josef Schmid.

Each pleaded not guilty to and was found guilty of the respective charges and specifications preferred against him. No evidence of previous convictions was introduced against either accused. Both 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 places as the reviewing authority may direct, Kasawich for five years, and Maher for three years. The reviewing authority approved both sentences, ordered the sentence of Maher executed but suspended that portion thereof adjudging dishonorable discharge until his release from confinement, designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement for Maher, and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for Kasawich, and withheld the order directing execution of the sentence of the latter, pursuant to Article of War 50½. The proceedings as to Maher were published in General Court-Martial Orders Number 102, Headquarters XX Corps, APO 340, U. S. Army, 12 October 1945.

3. Evidence for the prosecution.

a. Charge I and its Specification (larceny) and Specifi-

tion 2, Charge I (impersonation of a military policeman) as to Kasawich, and the Charge and Specification (larceny) as to Maher. The only evidence introduced by the prosecution bearing upon these charges and specifications, aside from that supplied through extra-judicial statements and confessions of accused, was the testimony of Joseph Schmid, whose money is alleged to have been stolen. Accused Kasawich, together with a companion who was dressed in the uniform of an American soldier but whom Schmid was unable to identify as accused Maher (R9,10), entered Schmid's home in Lauter, Germany, about five o'clock on the afternoon of 20 August 1945 (R9-10). Kasawich was wearing a military police brassard and had with him a piece of paper bearing Schmid's name (R10). He proceeded immediately to search the house from ground floor to attic. While so engaged, he was at all times accompanied by Schmid (R10) but not by the companion who had entered the house with him (R11). The latter was standing in an ustairs hallway near the door of one of the rooms when Kasawich and Schmid arrived there (R10). Upon completing his search, which he did within approximately ten minutes (R11), Kasawich required Schmid to sign the aforementioned piece of paper, and then immediately departed with his companion (R10). Schmid did not see either Kasawich or his companion take anything while they were in the house (R11). He testified (after extended questioning) that about three or four hours after their departure, he looked in a clothes closet where money was kept, and that at that time approximately 4200 of 6000 marks which had been there when they arrived were missing (R12,13). However, before thus testifying, he had repeatedly stated and attempted to state that such knowledge as he purported to have of a shortage was based on what his wife had told him (R11-12). The money belonged to his wife and was kept by her; none of it belonged to him (R13). At one point, asked the question, "After the accused, Kasawich, and the other soldier left did you still have six thousand marks?", he replied, "I don't know, I didn't look" (R12). And in response to the question, "After the accused, Kasawich, and the other soldier left the house did you have occasion to count or check your money?", he replied, "No, I didn't" (R11). His answers, wherein he sought to tell of the activities of his wife and to quote her, were, on motion of the Trial Judge Advocate, consistently ordered by the Law Member to be stricken from the record as hearsay (R11-12). Representantive of these answers and the questions to which they were given are the following:

"Q. After the accused, Kasawich, and the other soldier left your house, did you discover anything missing?

A. No, I didn't, but my wife found that something was missing when she went to bed that evening (R11).

* * *

Q. At any time after the other soldier and the accused, Kasawich, had been in your house did you count your money?

A. No, only that evening when my wife want to bed she counted . . . .(R11).

* * *

Q. What did you miss at 2030 hours?

A. My wife came downstairs and said that money was gone" (R12).

On cross-examination defense counsel propounded the following question to Schmid:

> "Isn't it true that you didn't look in the chest and count the money, but that your wife told you about three hours later that the money was missing?"

Witness answered "Yes" (R14). Motion of the Trial Judge Advocate that this question and answer be stricken because "it required the witness to answer yes or no to hearsay testimony" was granted, and the inquiry was not further pursued (R14).

In a voluntary pre-trial statement, made orally, accused Kasawich admitted that about five o'clock on the afternoon of 20 August 1945, he searched a house in Lauter, Germany, for American property which he had been told was being concealed there (R17). He was wearing a military police brassard at the time (R17,19) and was accompanied to the house by another American soldier and two Polish soldiers (R17,18). He visited the Polish soldiers for the purpose of procuring liquor, and as a result of being informed by them that the owner of the house in question had theretofore given aid in the form of money and supplies to German SS troops and was then concealing a quantity of American boots and other supplies, searched the house, finding nothing (R17,18). Either that same afternoon or the next day, the American soldier who accompanied him gave him approximately 2000 German Reichmarks (R18).

An oral pre-trial statement made by accused Maher was also received in evidence. He stated that on the date in question he accompanied a companion (whom he did not name) and two Polish soldiers to a house in Lauter, Germany, and was present in the house while his companion searched it (R20). Having discovered a quantity of German money in an upstairs room while his companion and the owner were elsewhere in the house, he shortly thereafter informed his companion of this discovery. The latter told him to take the money while he kept the owner of the house occupied (R20). Maher thereupon took a "bundle" of the money, and on the way back to their company area divided it with his American companion (R20).

It was stipulated that the value of 4080 Reichmarks was $408 (R15).

b. Specification 1, Charge II, as to Kasawich (wrongful use of Government vehicle). On 20 August 1945 Second Lieutenant Robert Griswold, Headquarters Company, 10th Armored Division, missed a peep which had been previously assigned to him (R7). He had last used the vehicle during the morning of 19 August 1945 and had left it parked in an alley near the orderly room of Headquarters Company, about one block from Division Headquarters (R7). He did not authorize anyone to use the vehicle, and an investigation disclosed that no dispatch ticket had been issued for it (R8). A search of the area and town was made but the peep was not found

(R7-8). Lieutenant Griswold next saw the vehicle "when the company commander went to the 636th Tank Destroyer Battalion and brought it back" (R8). It was then in good mechanical condition, but the last two or three numbers of the War Department serial number had been changed (R8). Witness said that he knew of his own personal knowledge that his company commander went to the 636th Tank Destroyer Battalion and brought the vehicle back (R8). He did not see anyone take the vehicle nor did he see anyone with it when it was returned (R8-9).

In his pre-trial statement, accused Kasawich stated that about midnight on 19 August 1945, he went to Headquarters 10th Armored Division, picked out the first jeep that contained a trip ticket, and drove it away (R17). He had volunteered to procure a jeep in order that he and two other soldiers could return from Garmish to their organization at Bergen, having missed the truck on which they were supposed to return (R17). Upon reaching their organization, the jeep was placed in a stall across the street from the building in which accused was quartered (R17).

Kasawich pointed out to the officer, who initially investigated the matter, the vehicle which he had obtained as above described (R22-23). It was parked at Company B, 636th Tank Destroyer Battalion (R21). It bore no division or other unit markings from which to determine to what organization it belonged (R23). There was in the glove compartment a job order from Headquarters 10th Armored Division; and the officer stated, "it was through contacting Lieutenant Griswold and the shop order that we found out to whom the vehicle belonged" (R23).

4. For the defense.

Accused Maher, having had his rights as a witness fully explained to him, elected to remain silent (R26).

Accused Kasawich, having had his rights as a witness fully explained to him, elected to testify under oath only as to Charge I and its Specification (R24). He stated that he met Maher for the first time after they were placed in the stockade together, charged with committing the offenses here involved (R24). Maher did not ride with him in a vehicle at any time between 12 and 25 August 1945, did not accompany him to Schmid's home on 20 August 1945, and never gave him any Reichmarks (R24-25,26). Witness was accompanied to the house in Lauter by three Polish soldiers, one of whom was wearing the uniform of an American soldier (R25-26). This latter Polish soldier later gave him a considerable number of Reichmarks (R26).

5. a. As to the larcenies (Charge I and Specification - Kasawich; Charge and Specification - Maher). Maher, who did not testify, confessed to the crime of larceny in a pre-trial statement, whereas Kasawich, in both his pre-trial statement and in his testimony, merely admitted having received approximately 2000 German Reichmarks from the man who accompanied him in the search of Schmid's house, such receipt having occurred after the search had ended and both had left the premises. With respect to

Maher, therefore, the question is whether the independent evidence of the corpus delicti is sufficient to justify the receipt of his confession. With respect to Kasawich, we must determine first whether his testimony amounts to a judicial confession of the crime; if so, the conviction would be valid. If not, we must then determine whether his extrajudicial statement constitutes a confession and if it does, whether it is sufficiently supported in the matter of corpus delicti evidence. If neither the judicial nor the extrajudicial statement is a confession, the only remaining question is whether there is sufficient competent evidence, including his testimony and his statement, to support the conviction.

Taking Kasawich's conviction first, careful examination of his testimony, as well as his statement, reveals no admission of any unlawful or improper purpose in the search of the house or of any preconcert with his companion relative to the theft of the money or of any other property. Nor is there any statement that he was aware at the time or, at any later period, that a theft had occurred. There is only the admission that some time after the search had ended, he was given some money by his companion. The source of the money being entirely unexplained, it is obvious that both the testimony and the pre-trial statement fall far short of a confession of guilt of any participation by this accused in the crime of larceny and that, taken alone, they do not even tend to show that such an offense was ever committed by anyone. It is necessary, therefore, to look to the other evidence. Since Maher's confession may not be considered against Kasawich (MCM, 1928, par. 114c, p. 117), this leaves only the testimony of Schmid. His description of the search of his house coincides exactly with Kasawich's and does not suggest that it was illegal or improper in its purpose. He further testified, however, that about three hours after accused's departure, a sum of money belonging to his wife was discovered to be missing. Passing entirely the question of ownership of the allegedly stolen property (it is alleged to have belonged to Schmid and shown in the proof to have belonged to his wife), a fair examination of Schmid's testimony leads to the strong suspicion that his account of the missing money was hearsay from beginning to end. He does not purport to have witnessed the theft, and although the trial judge advocate ultimately succeeded in dragging from him a statement that some three hours after accuseds' departure, he personally checked the closet where the money had been kept and that some of the money was missing, he never testified that he made a personal check of the money itself. In so far as this is inferable from his statement, it is inconsistent with his previous but stricken testimony to the effect that his information came entirely from his wife. Even assuming that this obvious inconsistency could ordinarily be said to have been technically eliminated by the law member's action in striking Schmid's earlier direct testimony as to the source of his information or, in the alternative, that it presented a question of fact for the court, such a solution is impossible in this case. On cross-examination of Schmid, the defense counsel asked him "Isn't it true that you didn't look in the chest and count the money, but that your wife told you about three hours later that the money was missing?" Schmid replied

in the affirmative to this question and upon motion of the Trial Judge Advocate, based on the curious ground that the question "required the witness to answer yes or no to hearsay testimony", the law member excluded both the question and answer. Clearly, questions addressed to a witness for the purpose of showing that his testiony is hearsay are within the scope of legitimate cross-examination (MCM, 1928, par. 121b, p. 126). If Schmid's testimony was in fact hearsay, it was incompetent (MCM, 1928, par. 113a, p. 113), and the defense was certainly entitled to examine on the issue, for, without Schmid's evidence, the charge of larceny against Kasawich necessarily fails. Hence the law member's action in excluding the question and answer, with its inevitably resultant restriction on the right of defense to cross-examine, was error of substantial effect as far as the rights of accused were concerned (CM ETO 13125, King). Where errors of such substantial character are committed relative to the admission or exclusion of evidence, they invalidate the findings of the court on the issue in question unless such findings are supported by other evidence so compelling as to exclude any fair and rational hypothesis except that which the court adopted (CM ETO 1201, Pheil; CM ETO 3213, Robbillard). Here, Schmid's testimony as to the larceny, as distinguished from the search, is so equivocal from the point of view of its hearsay character, that it becomes impossible to say that it compels a finding of competency. It must therefore be ignored by the Board of Review and regarded as having been improperly considered by the court. Since it was vital to the prosecution's case against Kasawich, such other evidence as exists being less than compelling in probative force, the conviction of larceny as to this accused is unsupported by the record of trial (CM ETO 3931, Marquez).

The situation with respect to Maher is essentially the same. Although he confessed the crime in his pre-trial statement, his confession in order to be admissible, necessarily requires the support of independent evidence of the corpus delicti, and while it is not necessary that every element of the offense be independently proved beyond a reasonable doubt (MCM, 1928, par. 114, p. 115; CM ETO 10331, Jones), such evidence as is required must, of course, be competent. Incompetent evidence is no more acceptable for the purpose of proving the corpus delicti in this connection than it is for the purpose of proving the elements of the offense generally. In this instance, the only independent evidence of the corpus delicti of the actual commission of the theft with which Maher is charged is found in Schmid's testimony. As indicated above in the discussion relative to Kasawich, this, insofar as it relates to the larceny as distinguished from the search, must be disregarded by the Board of Review and treated as having been erroneously considered. Without it, there is nothing left from which the court could legitimately conclude that "the offense charged has probably been committed". The mere proof contained in Kasawich's testimony, and in the residue of Schmid's that a soldier and another person wearing an American uniform searched the house on what, insofar as the evidence shows to the contrary, was a legitimate mission is obviously insufficient for this purpose. Nor is the testimony of Kasawich that, after the search, his companion gave him some money sufficient, the source of such money being completely unexplained and Maher's participation in the entire transaction being specifically denied. Hence, the confession was improperly admitted

and in the absence of any other evidence of guilt the finding of guilty as to this accused is not sustained (CM ETO 10331, Jones; CM ETO 1042, Collette; CM ETO 9751, Whatley).

b. As to Kasawich's wrongful and fraudulent representation of himself as a member of the Military Police (Charge II, Specification 2). The only evidence contained in the record of trial in support of this charge is that Kasawich, at the time he reached Schmid's house, was wearing a Military Police brassard. Since there is no evidence competent against Kasawich either that his search was other than a bona fide mission or that he was not at the time legitimately functioning as a military policeman for his organization, the finding of guilty of this specification is clearly unsupported by the evidence.

c. As to the wrongful taking and using of a government vehicle by Kasawich (Charge II, Specification 1). Kasawich voluntarily confessed to the wrongful taking and using of a jeep from the 10th Armored Division Headquarters area on the evening of 19 August 1945. Since there was ample corroborating evidence that such a vehicle was taken without authority at the time and place in question, the confession was clearly admissible and the record of trial, therefore, supports the finding of guilty of this offense.

6. The charge sheet shows that accused Kasawich and Maher are 23 years six months of age and 19 years one month of age and were inducted 9 November 1942 at Gardner, Massachussetts, and 6 October 1944 at New York, New York, respectively. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Errors injuriously affecting the substantial rights of the 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 insufficient to support the findings of guilty and the sentence as to accused Maher, and legally insufficient to support the findings of guilty of Charge I and its Specification and of Specification 2, Charge II, as to accused Kasawich, but legally sufficient to support the finding of guilty of Specification 1, Charge II, and of Charge II and the sentence as to accused Kasawich.

8. The maximum penalty for the crime of taking and using a motor vehicle without the consent of the owner in violation of Article of War 96 is dishonorable discharge, total forfeitures and confinement at hard labor for five years (Section 22-2204, District of Columbia Code; CM ETO 6383, Wilkinson). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Kasawich, is authorized (AW 42, Cir. 210, WD, 14 Sept. 1943, sec. VI as amended).

Leslie A. Jamieson, Judge Advocate.

Martin A. Meyers, Judge Advocate.

John P. Anderson, Judge Advocate.

Bk Jag (121)

1st Ind.

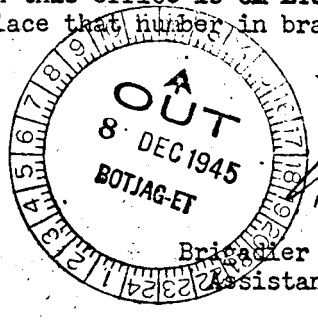
War Department, Branch Office of The Judge Advocate General with the European Theater. 7 DEC 1945 TO: Commanding General, XX Corps, APO 340, U. S. Army.

1. In the case of Private First Class WALTER J. KASAWICH (31188155), and Private LYLES J. MAHER (42183514), both of Company B, 636th Tank Destroyer Battalion, APO 403, U. S. Army, attention is invited to the foregoing holding and opinion by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Maher, and legally insufficient to support the findings of guilty of Charge I and its Specification and of Specification 2, Charge II, as to accused Kasawich but legally sufficient to support the findings of guilty of Specification 1, Charge II, and of Charge II and the sentence as to accused Kasawich. This holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as to accused Kasawich.

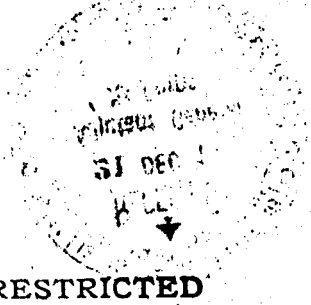
2. Since Kasawich stands legally convicted only of taking and using without proper authority a government vehicle for the purpose of returning to his station, and in view of his outstanding combat record, the sentence should be reconsidered. It is strongly recommended that execution of the dishonorable discharge be suspended.

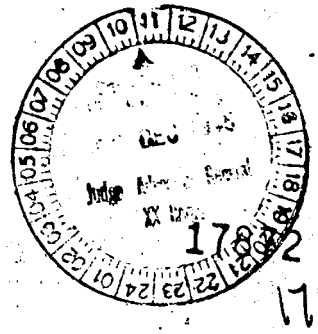
3. With respect to accused Maher, the record of trial has been transmitted to the Commanding General, United States Forces, European Theater, for appropriate action under Article of War 50½.

4. When copies of the published order as to accused, Kasawich, are forwarded to this office, they should be accompanied by the foregoing holding and opinion and this indorsement. The file number of the record in this office is CM ETO 17872. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17872).



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





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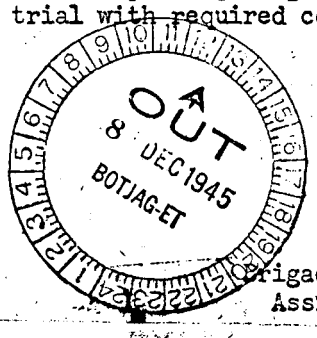
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 7 DEC 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 MYLES J. MAHER (42183514), Company B, 636th Tank Destroyer Battalion, Headquarters XX Corps, APO 340, U. S. Army.

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.



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

(Findings ans sentence vacated. GCMO 17, USFET, 7 Jan 1946).

17872

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

BOARD OF REVIEW NO. 2

12 NOV 1945

CM ETO 17884

U N I T E D S T A T E S	83rd INFANTRY DIVISION
v	Trial by GCM, convened at Vilshofen, Germany, 26 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES F. FUOCO (36831396), Company "E" 329th Infantry	

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

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

2. Accused was tried on the following Charge and specifications.

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private James F. Fuoco, Company "E", 329th Infantry, did, without proper leave, absent himself from Reinforcement Company, Casual Army, X-193-G, while enroute to Givet, France, from about 10 January 1945, to about 26 January 1945.

Specification 2: In that * * * did, without proper leave, absent himself from Reinforcement Company, 11th Depot Combat Casuals, X-A-199-C, at or near Le Harve, France, while enroute to 11th Replacement Depot, from about 4 February 1945, to about 23 February 1945.

Specification 3: In that * * * did, without proper leave, absent himself from his organization at or near Charleville, France, while enroute to the 11th Reinforcement Depot, APO 131, U.S. Army, from

about 3 March 1945, to about 22 March 1945.

Specification 4: (Nolle prosequi before arraignment)

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 upon which he was arraigned. Evidence was introduced of two previous convictions by special court-martial for absences without leave of 12 days and 31 days respectively in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

a. Specification 1:

The accused was a member of the 329th Infantry Regiment (R5). On 9 January 1945, he and other military personnel were transferred from the 10th Replacement Depot, APO 874, for staging to return to "their old units" (R5, Pros. Ex.1 and 2). At 0300 hours 10 January 1945 a roll call was taken of the men on the above order leaving for Southampton, England, from the 10th Replacement Depot. All of the men, which included the accused, were present. Later at 1700 hours, at Southampton, another roll call was taken and accused was absent without leave and did not rejoin the detachment (R5, Pros. Ex. 3). It was stipulated that accused returned to military control at or near Birmingham, England, on or about 26 January 1945 (R5, Pros. Ex 5).

b. Specification 2:

On 1 February 1945 he and other enlisted personnel were again transferred by the 10th Replacement Depot at APO 874 for staging and to return to their old units (R5, Pros. Ex 6). About 1500 hours 4 February 1945, he was present during a roll call taken of the detachment while on board ship just prior to landing at Le Havre, France. About 3 hours later on the beach another roll call was taken and accused was absent without leave and did not rejoin the detachment (R6, Pros. Ex 8). It was stipulated that accused was returned to military control at or near Paris, France, on or about 23 February 1945 (R6, Pros. Ex 9).

c. Specification 3:

On 28 February 1945, Headquarters 19th Reinforcement Depot transferred the accused, classified as a straggler, to "11th Reinforcement Depot, APO 131" and ordered him to proceed "o/a 2 Mar 45 under armed guard" to his proper station (R6, Pros. Ex 10). The detachment, including the accused, left the 19th Reinforcement Depot under guard on 2 March 1945.

About 9 A.M. on 3 March 1945 during a stop for mess at Charleville, France, the accused escaped and did not rejoin the detachment (R6, Pros. Ex 11). On 24 March 1945 he arrived at the 19th Replacement Depot and was placed in the stockade (R6, Pros. Ex. 13).

There was admitted in evidence without objection a voluntary statement signed by the accused on 17 July 1945 in which he confessed that (1) he "took off" on 10 January 1945 at Litchfield, England, before boarding a train to be shipped to France, went to Birmingham and "hung around" there until picked up on 26 January 1945; (2) on or about 28 January he was placed in another shipment for France and reached the beach at Le Havre where in the darkness he eluded his guard and went to Paris where he was picked up by military police about 23 February; and (3) after being turned over to the 19th Reinforcement Depot he left that depot about 2 March by train, and, at Charleville, France, where the train stopped for "chow", he departed without authority and went to Paris where he was picked up by the military police about 22 March 1945 (R8, Pros. Ex 14).

4. The accused, having been fully advised concerning his rights as a witness, elected to remain silent and offered no evidence (R8).

5. The evidence for the prosecution and the confession voluntarily made by the accused clearly showed that the accused did absent himself without leave at the times and places alleged in the specifications and did remain away for the periods of time alleged. All of the elements of the offenses of which he was found guilty were supported by the evidence (MCM, 1928, par 132 p.146).

6. The charge sheet shows that the accused is 23 years 9 months of age and, without prior service, was inducted at Milwaukee, Wisconsin, on 18 August 1943.

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

8. The penalty for absence without leave is such punishment excepting death as the court-martial may direct (AW 61). 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).

(ON LEAVE) Judge Advocate

Ronald D Muller Judge Advocate

John J. Collins, Jr. Judge Advocate

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

BOARD OF REVIEW NO 3 5 NOV 1945

CM ETO 17898

U N I T E D S T A T E S	CHANOR BASE SECTION, COMMUNICATIONS ZONE, UNITED STATES FORCES EUROPEAN THEATER.
v.	
Technician Fifth Grade MARE L. GLOTHON (38388209), 3900th Quartermaster Gasoline Supply Company.	Trial by GCM, convened at Rouen, Seine-Inferieure, France, 2 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

Specification: In that Technician Fifth Grade Mare L. Glothon, 3900 Quartermaster Gasoline Supply Company, did at or near Petit Couronne, France, on or about 27 May 1945, forcibly and feloniously, against her will have carnal knowledge of Madame Genevieve Alice Duboc.

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

Specification: In that * * *, did, at or near Petit, Couronne, France, on or about 26 May 1945, with

intent to commit a felony, viz,rape, commit an assault upon Mlle Jacqueline Le Landais, by wilfully and feloniously pulling her off a bicycle and dragging her into hedges near a woods, by striking her on the head with his fist, by choking her, and by pointing a gun at her.

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 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, Chanor Base Section,Communications Zone, European Theater, approved the sentence, recommended commutation, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces,European Theater, 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 life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

Charge II and Specification.

At about 1900 hours on 26 May 1945, Mademoiselle Jacqueline Le Landais was cycling along the road from Rouen to Elbeuf, France, when accused approached her and asked the direction to Elbeuf. She apparently slowed down and accused then asked her, "How much?". Thinking that he wanted to know the distance to Elbeuf she replied, "Nine", meaning that the town was nine kilometers distant (R34,35). Accused then put his hand on the bicycle, stopping it, tipped it in such a manner that Mlle. Le Landais was forced to let it drop, and then took hold of her and started to drag her into the underbrush at the side of the road. When she attempted to resist, he struck her in the face, and, despite her cries and struggles, continued to drag her into the underbrush to a spot some 150 meters from the road (R35,36). There he threw her to the ground, seized her by the throat, and drew a pistol from his belt (R36-38). When asked whether he attempted to lay himself on top of her she answered,"He was going on falling to [me] but always [I] was repulsing him" (R39).

she continued to struggle and ultimately succeeded in again getting to her feet. At this time, either because "the accused heard something, or maybe I hurt him more hard", accused released her and went away. She then ran to the road, got her bicycle, and went on to Elbeuf(R37). During the struggle, which lasted about five minutes, accused said nothing and did not attempt to lift her dress or to disrobe her (R39,40). Her father testified that when she reached home at about 1930 hours,

> "she had the head in a very bad state. The eyes were going to be black. All the hair was very upset. She came in the house of her mother crying just a nigger had been attacking her"(R41).

Charge I and Specification

The prosecution's evidence further showed that, at about 1400 hours on 27 May 1945 accused approached Madame Genevieve Duboc at a time when she had stopped along the road for a moment while cycling from Elbeuf to Rouen and, after first briefly attempting to engage her in conversation, seized her and started to drag her into the underbrush at the side of the road (R7,14,15). She tried to cry out but each time she did so accused put his hand over her mouth and threatened her with a pistol. He also pulled her hat down over her eyes (R8). After proceeding a short distance, she managed to escape from his grasp and started to run away but accused ran after her and seized her again. He then dragged her farther back into the underbrush, some 200 meters from the road, where he "dropped" her to the ground, knelt between her legs, and unbuttoned his trousers (R81). She attempted unsuccessfully to arise and also attempted to keep her legs together but accused separated them with his hands and proceeded to have intercourse with her (R8,9,13,16). She testified that during this period he had his pistol "sometimes" in his hand and "sometimes I was too terrified that I couldn't say where it was". She was "always afraid that he was killing me(R16)". When he finished, he arose, arranged his clothing and, after telling her to remain where she was until he had gone, started to leave. As soon as he stopped watching her she ran to the road where she hailed a civilian vehicle which happened to be passing at the time and was taken to a nearby military installation where she made a complaint to some American soldiers (R9,17).

The enlisted man, whom she first approached, testified that she was very nervous at the time, could hardly speak, was very pale, and had scratches on her legs (R18,19). She was examined by a medical officer some two hours later but as she was a married woman a vaginal examination was inconclusive.

Both the external genitalia and the vaginal tract appeared normal. However, the medical officer did note that Madame Duboc was upset emotionally and had certain abrasions of the lower extremities (R20-24).

Each of the complaining witnesses identified the accused as her assailant in open court (R7,35) and each also testified that she previously had identified him as the soldier in question at an identification parade held at his camp (R12,16,40). Other witnesses also testified that each woman identified the accused as her assailant at the pre-trial identification parade (R25,26, 31,32).

For further evidentiary details, see paragraph 5 of the review of the Staff Judge Advocate of the confirming authority.

4. For the defense, one of the company officers of accused's company testified that accused had performed his duties well in the past and that he would grade his character as excellent (R43,44).

After being advised of his rights as a witness, accused elected to make an unsworn statement. He stated that on "Saturday", after he had been in Rouen on pass, he started back to his station at about 2000 hours and en route encountered a girl standing by the roadside with her bicycle leaning against a tree. She spoke to him and from her conversation and demeanor he assumed that she was a prostitute. Accordingly, he "asked her for a date" and "the third time she said yes for 150 francs". He left her later and got back to camp at about 2300 hours. He further stated that on the following day he again went to Rouen on pass and started back to his camp about 1630 hours. While on his way back to camp,

> "This girl as I walked on the highway, I don't know where she came from. When I looked back she was on her bicycle. She drove up besides me. I said, "how many miles to Elbeuf?" She said something I could not understand. * * * I walks up to her and place my hands on the handle bar. She slaps me in the face. I slaps her back. She throws a rock at me and I dodge the rock. When I dodges the rock, I hits the girl and she fell on the side of the road. I walks on the way. * * * That's all I can remember, sir" (R47).

5. The evidence adduced in support of Charge II and its Specification shows that accused approached Mademoiselle Jacqueline Le Landais while she was cycling along the road, asked he "how much", pulled her from her bicycle, and thereafter dragged her some 150 meters from the road into the underbrush where he threw her to the ground, placed his hands on her throat, and threatened her with a pistol. It is thus clear that accused

assaulted Mlle. Le Landais and under the circumstances shown the court was warranted in inferring that the assault was made with intent to commit rape (cf CM ETO 3750, Bell; CM ETO 5012, Porter and Daniels; CM ETO 233183, II Bull.JAG 188). The fact accused did not attempt to lift Mlle.Le Landais' dress or otherwise try to disrobe her loses significance in view of the circumstance that his entire efforts until he finally desisted were occupied in trying to overcome the spirited and vigorous resistance offered by his intended victim. There is also substantial evidence to support the court's finding that accused had carnal knowledge of Madame Genevieve Duboc by force and without her consent, as alleged in the Specification of Charge I (cf. CM ETO 1069, Bell;). There was no impropriety in admitting third party testimony relating to the pretrial identification of the accused by the victims at the identification parade held at accused's camp (CM ETO 3837, Bernard W. Smith; CM ETO 6554, Hill; CM ETO 7209 Williams; CMETO 8270, Cook; CM ETO 12869, Dewar).

6. The charge sheet shows that accused is 22 years six months of age and was inducted 2 February 1943. No prior service is shown .

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

8. The penalty for 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).

(ON LEAVE) Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

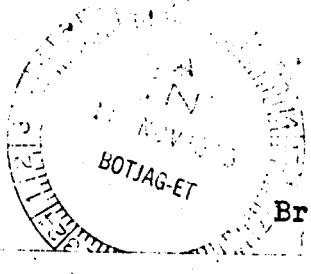
(132)

1st Ind.

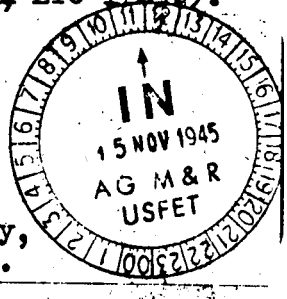
War Department, Branch Office of the Judge Advocate General with the European Theater. 10 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S.Army.

1. In the case of Technician Fifth Grade MARE L. GLOTHON (38388209), 3900th Quartermaster Gasoline Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 17898. For convenience of reference, please place that number at the end of the order: (CM ETO 17898).



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



(Sentence as commuted ordered executed. GCMO 603, USFET, 28 Nov 1945)

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

BOARD OF REVIEW No. 4 7 DEC 1945

CM ETO 17913

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	
First Lieutenant DAVID M. PETRIE (O-1315465), 39th Infantry (Special Duty with 9th Quartermaster Company)	Trial by GCM, convened at Ingolstadt, Germany, 17 May 1945. Sentence: Dismissal and total forfeitures.

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 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 96th Article of War.

Specification 1: (Nolle Prosequi)

Specification 2: In that First Lieutenant David M. Petrie, 39th Infantry, while Assistant Provost Marshal, Headquarters, 9th Infantry Division, did, at Elsenborn, Belgium, on or about 21 November 1944, wrongfully procure Private First Class Casey M. Petraitis, Military Police Platoon, 9th Infantry Division, to commit perjury, by inducing him, the

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said Private First Class Casey M. Petraitis, to take an oath before an officer competent to administer oaths and examine witnesses under oath in an investigation, that he, the said Private First Class Casey M. Petraitis, would testify truly, and, willfully, corruptly, and contrary to such oath, to testify that "He, Lt. Petrie, came to the house of prostitution in Verviers, Belgium, after I, Private First Class Casey M. Petraitis had arrived and that he, Lt. Petrie, came into the house to run me out", which testimony was false, was material and was known by the said First Lieutenant David M. Petrie and the said Private First Class Casey M. Petraitis to be false.

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

Specification: In that * * * did, at Javron, France, on or about 15 August 1944, wrongfully and unlawfully sleep with a French civilian woman not his wife in a building used to quarter officer and enlisted personnel of the 9th Infantry Division.

CHARGE III: (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 Specification 2 of Charge I and Charge I and the Specification of Charge II and Charge II and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge III with exceptions and substitutions and of Charge III he was found not guilty, but guilty of a violation of Article of War 96. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 9th Infantry Division, disapproved the findings of guilty of the Specification of Charge III and Charge III, 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, approved only so much of the findings of guilty of the Specification of Charge II and Charge II as involves findings of guilty of the offense alleged in violation of Article of War 96, confirmed the sentence but remitted so much thereof provided for confinement at hard labor for ten years, and withheld the order directing execution thereof pursuant to Article of War 50½.

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

a. Specification 2, Charge I. (Procuring enlisted man to make false statement under oath).

About 29 September 1944, Private First Class Casey M. Petraitis and two other soldiers entered a house of prostitution at Verviers, Belgium at a time when accused and three soldiers were already in the house (R6, 7, 8, 10-14, 83). Subsequently two military policemen arrived and accused stated to them that he had control of the situation, or words to that effect. He then told Petraitis to leave (R8, 9, 12, 15). Thereafter, but prior to 21 November 1944, accused had Petraitis and another soldier come to his room where they informed them they might be called to make a statement to the Inspector General, and that they should state they were in the house of prostitution when accused came into the house to chasethem out (R13, 16). Petraitis indicated he would do so (R14). On 21 November 1944 Petraitis was examined by the Inspector General and testified under oath that on 29 September 1944 accused "came to the house of prostitution in Verviers, Belgium after I had arrived and that he came into the house to run me out" (R13-15, 18, 20). He testified to this effect before the Inspector General even though the purported transcript of his testimony did not contain that statement (R18, 20; Def. Ex. 1). He made this statement knowing it was false because accused had asked him to do it, and "I thought I was helping Lt. Petrie" (R13, 14, 18). Accused was an officer in the military police platoon of which Petraitis was a member (R20). The Inspector General called for a statement from Petraitis at the request of accused while investigating "alleged trading of government property in the city of Verviers" (R22).

b. Specification, Charge II. (Sleeping with woman in a military billet).

At approximately 1400 hours or 1500 hours on 15

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August 1944, accused, the traffic officer and Assistant Provost Marshal of the 9th Infantry Division, accompanied by his driver and a young woman, arrived at a chateau near Javron, France, where a prisoner of war cage had been established. The woman was a civilian and was dressed in "shorts". (R29, 30, 34, 36, 55, 56, 60, 66, 75). The officers and enlisted men in charge of the prisoner of war cage were billeted in the chateau (R32-34, 60, 68). Accused requested permission for the woman to spend the night at the chateau, took her inside the house and then left. At about 2200 hours accused returned to the chateau, obtained some blankets and a candle, went to the room on the second floor which was occupied by the woman, and he and she then went to the third floor (R62, 63, 68, 69). When accused was awakened at an early hour the next morning she was in bed with him (R68-70). The bed was near the wall, she was on the side of the bed which was next to the wall, and a blanket was over both of them (R100). The woman was not his wife (R70, 71).

4. After being advised of his rights as a witness, accused took the stand as a sworn witness (R90). He testified that on 15 August 1944, after checking convoys in the sector of the 3rd Armored Division, he met a French civilian woman whom he considered a civil affairs case (R91, 93). He could not locate the civil affairs section so he took her to the prisoner of war installation, arranged for her to stay there and then left (R91-93, 97, 98). About two or three hours later he returned to the installation, secured some blankets and started upstairs to go to bed. The woman called to him as he passed a room on the second floor and followed him to a room on the third floor where he was to sleep. She appeared worried about a friend of hers, and she also complained that several men there had made advances toward her. Accused told her she could return to her house the next day, and that perhaps she should return to where she was supposed to stay and remain there for the evening. He then lay on the bed and went to sleep while she was standing by the door of the room. He had had almost no rest for 48 hours (R91-93, 98). When, at about 0430 hours the next morning, someone woke him he saw the woman by his side on the edge of the bed. She was dressed as she had been all the time, and there had been no intimacy between them. He is married and was not interested in her (R92-99).

Other evidence for the defense was to the effect that accused had been assigned to the 9th Quartermaster Company since November 1944, had performed his duties "very well" and had

"been very efficient" (R79, 80). Master Sergeant Elias O. Hopkins testified that he went to a house of prostitution at Verviers on 29 September and that accused was in the house when he, Petraitis and another soldier arrived. Subsequently he testified before the Inspector General, and accused did not contact him concerning the statement to be made at the investigation (R81-83).

5. a. Specification 2, Charge I. (Procuring enlisted man to make false statement under oath).

A disposition of this case does not require us to determine whether the evidence satisfies all the elements of proof for subornation of perjury inasmuch as the conduct of accused in procuring an enlisted man to make a false statement under oath was an act to the prejudice of good order and military discipline in violation of Article of War 96. (Winthrop's Military Law and Precedents, (Reprint, 1920), p.716; CM 237521, II Bull. JAG 384; cf. CM 243492, Baltisberger, 27 BR 393 (1943); cf CM 244292, Hartford, 28 BR 251 (1943)).

The testimony of Petraitis discloses that at the time and place alleged he stated under oath to the Inspector General that on 29 September 1944 he was in a house of prostitution when accused arrived for the purpose of making him leave, that this statement was false, and that it was made in compliance with accused's request. It is true that the Inspector General testified that the transcript of Petraitis' statement, which did not contain in exact language the alleged false statement, was in his opinion a complete record of what was said, but this transcript was not necessarily the best evidence of what occurred and the court was certainly not required to treat it as being of greater probative value than the parol evidence given by Petraitis. We are not dealing here with a record of former trial by court-martial, or with a stenographic report of former testimony verified by the reporter, (MCM, 1928, par. 117b, p.122), but rather with the oral assertion of one witness that in his opinion a transcript is complete and correct and with the oral assertion of another witness that it is not. The transcript itself, not being of primary evidentiary value as an exception to the hearsay rule, has no greater probative weight than the testimony of the Inspector General who believed it was complete and accurate. There was, then, a division in the evidence as to what was said, and, the subject matter being provable by parol (Annotation: 70 A.L.R. 1409), the court was warranted in believing the testimony of Petraitis. This is particularly true inasmuch

as the transcript contains no language inconsistent with the testimony of Petraitis, but merely fails to disclose that the alleged statement actually was made.

The falsity of Petraitis' statement before the Inspector General was established by Petraitis's testimony which was strongly corroborated by the testimony of two other witnesses, and the evidentiary requirements for proving the falsity of an oath were clearly satisfied (CM ETO 16044, Jamerson; Hammer v. United States, 271 U.S. 620, 70 L. Ed. 1118 (1926); Weiler v. United States, 323 U.S. 606, ____ L. Ed. _____ (1945)). Accused's solicitation of Petraitis to swear falsely before the Inspector General is proved solely by the testimony of Petraitis, but no stronger proof was required inasmuch as the subornation of a witness may be shown by the uncorroborated testimony of the perjurer (Hammer v. United States, (C.C.A. 2nd 1925), 6 F (2nd) 786; cf. Hammer v. United States, 271 U.S. 620, 70 L. Ed. 1118 (1926)), and as a conviction may rest on the uncorroborated testimony of an accomplice (MCM, 1928, par. 124a, p.132; CM 228524, Moser, 16 BR 219 (1943); CM 237711, Fleischer, 24 BR 89 (1943); cf: CM ETO 4172, Freeman Davis et al).

Although there was no direct evidence that the Inspector General was authorized to administer the oath to Petraitis at the time his statement was made, the record of trial discloses that he examined Petraitis during the course of an official investigation, and it may be inferred that he was empowered to administer oaths under the provisions of Article of War 114 (CM ETO 9573, Konick).

The record of trial is, therefore, legally sufficient to support the findings of guilty of Specification 2 of Charge I and Charge I.

b. Specification, Charge II. (Sleeping with a woman in a military billet).

The evidence clearly established that about the time and place alleged, accused took a French civilian woman not his wife to a billet used by both officers and enlisted men, where they went upstairs together and the next morning were found together in bed, and from this it was reasonable for the court to infer that accused slept with the woman as alleged. This conduct was an act compromising his position as an officer to the prejudice of good order and military discipline, and is punishable under Article of War 96 (MCM, 1928, par. 152a, p.187; CM 218647 (1942), I Bull. JAG 23 of: CM ETO 4119, Willis).

6. Defense counsel prior to arraignment called to the Court's attention the fact that the affidavit to the charge sheet was not properly completed, but interposed no objection at the time and accused pleaded to the general issue (R5). After the prosecution had presented considerable evidence the defense moved to dismiss the case and stated as grounds therefor that the affidavit was not complete (R52). The affidavit followed substantially the form set forth in Manual for Courts-Martial 1928, Appendix 3, p.233, and constituted an oath to the charges (MCM, 1928, par.31, p.21).

7. The charge sheet shows that accused is 29 years of age and was appointed a Second Lieutenant 17 March 1943 at Fort Benning, Georgia. No prior service is shown.

8. 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.

9. Dismissal and total forfeitures are authorized punishments for an officer upon conviction of an offense in violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

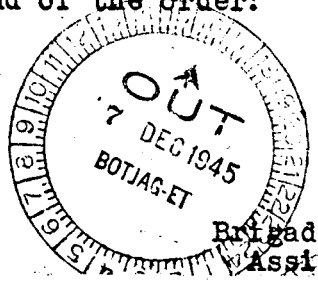
(140)

1st Ind.

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

1. In the case of First Lieutenant DAVID M. PETRIE (O-1315465), 39th Infantry (Special Duty with the 9th Quartermaster 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 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 17913. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17913).



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

(Sentence ordered executed. GCMO 627. USFET, 19 Dec 1945).

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater [redacted]
APO 887

BOARD OF REVIEW NO. 5

27 OCT 1945

CM ETO 17914

UNITED STATES	)	8th ARMORED DIVISION.
v.	)	
Major JAMES C. HARDWICK (O-229184), Headquarters 9th Infantry.	)	Trial by GCM, convened at Rokycany, Czechoslovakia, 10 July 1945. Sentence: Dissmissal.

HOLDING by BOARD OF REVIEW NO. 5
HILL, JULIAN AND BURNS, Judge Advocates.

The record of trial in the case of the officer named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty and the sentence. The wrongful and gratuitous acceptance of money for personal profit from a 17-year-old youth, a displaced person, who had been committed to the care and custody of accused in his capacity as a Military Government officer, is so clearly repugnant to basic concepts of justice, morality and honor as to constitute a plain case of conduct unbecoming an officer and a gentleman (Cf CM ETO 10361, Shinham; CM ETO 17169, MacDowell; CM 234644, Cavouette 21 BR 97; CM 235011, Goodman; 21 BR 243). A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) *Judge Advocate*

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 27 OCT 1945 TO: Commanding General, United States Forces, European Theater, (Main), APO 757, U.S.Army

1. In the case of Major JAMES C HARDWICK (O-229184), Headquarters 9th Infantry,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, 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 17914. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17914).

IN
30 OCT 1945
AG M&R
USFET

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

(Sentence ordered executed. GCMO 574, USFET, 19 Nov 1945).

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

BOARD OF REVIEW No. 4 14 NOV 1945

CM ETO 17918

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	
Private First Class JOE F. SELVERA (38552388), Company B, 36th Armored Infantry Regiment	Trial by GCM, convened at Wasseralfingen, Germany, 9, 10 October 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. 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.

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

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

Specification: In that Private First Class Joe F. Selvera, Company B, 36th Armored Infantry Regiment, did, at or near Schrozberg, Germany, on or about 21 September 1945, forcibly and feloniously, against her will, have carnal knowledge of Hildergard Rieger, a human being.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be

dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 briefly as follows:

On the evening of 21 September 1945 at about 2115 hours, Hildergard Rieger and her father, Karl Rieger, were returning to their home in Schrozberg, Germany, from the village of Konbron (R6). As they approached Schrozberg, they were approached by an American soldier who drew his pistol, loaded it and addressed Karl Rieger in a rough voice, telling him to "go back" (R7). Rieger obeyed and proceeded to his home without his daughter who was weeping (R7,8). The American soldier took her with him (R8). Rieger was unable to identify the accused as the soldier who accosted them because the night was dark and he saw him for only a moment (R6-9). He next saw his daughter at their home that evening at approximately 2330 hours, and observed that her garments were dirty (R8).

Marie Rieger, Hildergard's mother, saw her husband return alone on the evening in question at about 2130 hours, but did not see her daughter until shortly after 2300 hours (R10,14). At that time she observed her near a railroad intersection between Konbron and Schrozberg and observed that she was crying and trembling, that her garments and hair were dirty and that there was blood on her clothes, and that her underpants were missing (R10,11). Hildergard domplained that she had been struck and raped (R11).

On the following day, 22 September 1945, Hildergard was examined by a German physician whose findings disclosed an undeveloped girl of thirteen years of age whose sex organs were bloody and whose hymen showed evidence of violation. There also was blood on the inside of her legs. No vestiges of insemination could be traced. He was of the opinion that she had been a virgin and that penetration of the vagina had taken place, but admitted that the condition he found might have been created by manual manipulation. He found no bruises on her body (R23-25).

Hildergard Rieger testified that after she and her father were accosted by the American soldier whom she positively identified as accused, he took her alone into a turnip field and ordered her to lie down. She was crying and accused told her to "shut up" or he would shoot her. She refused to

lie down and he threw her on the ground. She resisted his efforts to remove her pants by striking him and by pulling them up, but he succeeded and then tried to force her legs apart. She tried to hold them together but after some effort he succeeded in forcing them apart. He then unbuttoned his pants and penetrated her sexually. She thereafter noticed blood on her clothes.(R15-23).

When questioned by his acting company commander shortly after the alleged offense was committed, accused admitted having intercourse with her, but his oral extra-judicial statement admitted no other elements of the offense (R25-28).

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

Accused, after his rights as a witness were explained to him, elected to remain silent (R35-36).

A member of accused's organization, Captain Bohme, knew accused since May 1945 and stated that his character had been excellent and that he was the kind of man he would like to have in his company (R29).

An enlisted man of accused's organization stated that he knew from personal observation that Hildergard Rieger, prior to the time in question, would voluntarily indulge in sexual intercourse with soldiers for a bar of chocolate, and that he knew she had voluntarily engaged in sexual intercourse (R31-35).

5. The prosecution's evidence that Hildergard Rieger was raped by accused at the time and place alleged is uncontradicted. The evidence of the acts comprising the actual rape consists entirely of testimony of the victim, but it is strongly corroborated by evidence with reference to the facts and circumstances immediately prior to and after its occurrence, by the expert testimony of the physician who examined her the following day, and by accused's admission of sexual contact with her. When viewed in light of its factual context, as established by the corroborating evidence, the testimony of the victim presents a plausible and consistent story, embracing all elements of the offense, and the court was clearly justified in giving it credence and in reaching its findings of guilty (CM ETO 11230, Valenzuela).

The evidence offered by the defense tended only to establish the prior good character of accused, and the prior bad character of the victim. Although such evidence might support inferences that accused was not inclined to commit the offense, and that the victim was disposed to consent, inferences of that character lie within the fact-finding province of the court; and when, as here, the findings of guilty are abundantly supported by substantial competent

evidence, the findings of the court are not subject to re-examination by the Board of Review (CM ETO 4386 Green et al)

Accused's admission of sexual intercourse with the victim at the time in question is not shown to have been made after his rights under Article of War 24 were explained to him; but, as his statement did not amount to a confession, its reception was proper. This is in keeping with the rule that an extra-judicial statement which does not accept ultimate legal guilt of a crime is admissable without proof of its voluntary nature (CM ETO 2535 Utermoehlen).

6. The charge sheet shows that accused is 19 years of age and was inducted 14 November 1944 at Houston, Texas. 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.

Lester A. Dameron Judge Advocate

Martin A. Meyer Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 3 5 NOV 1945

CM ETO 17922

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 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.
Private M.C. COWAN (38510122), 3173d Quartermaster Service Company	

HOLDING by BOARD OF REVIEW NO.3

SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 M.C. Cowan, 3173d Quartermaster Service Company did at Altefeld, Germany, on or about 29 April 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie J. Worthy, 3877th Quartermaster Gas Supply Company, a human being by shooting him with a carbine.

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

Specification 1:In that * * * did at Altefeld, Germany on or about 29 April 1945 with intent to commit a felony, viz. murder commit an assault upon Private First Class Alfred Carter, 3173rd Quartermaster Service Company, by willfully and feloniously shooting the said Private First Class Alfred Carter in the cheek and shoulder with a carbine.

Specification 2: (Nolle prosequi by direction of convening 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. Evidence was introduced of three previous convictions, one by special court-martial for committing an assault upon a non-commissioned officer by striking him on the head with a dangerous weapon, to wit, a carbine, in violation of Article of War 93, one by summary court for the wrongful disposal of government property in violation of Article of War 83, and one by summary court for breaking restriction in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, Fifteenth United States Army, 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 U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Several colored soldiers were standing around a bonfire at the side of a road in Altefeld, Germany, sometime after 0500 hours 29 April 1945 (R6-7, 13,20,33). Private First Class Alfred Carter and accused, both of 3173d Quartermaster Service Company, approached and joined the group (R12-13). An automobile was parked nearby with several persons around it among whom was Private Willie Worthy (the deceased) (R8-11, 49). Accused who was carrying a carbine, fired the weapon into the ground (R7, 13,20). Carter told him he should not fire his rifle, insisted that he give it up and obtained possession of it. He then removed the magazine which he noted was apparently full of ammunition and returned it to accused (R13-14). Accused'd condition as to sobriety at the time was variously described by witnesses as "It looked like he was drinking," he was "Talking loud too, making a lot of noise" (R10) "he wasn't drunk, he was pretty high" (R17), he was"acting normally" and "wasn't staggering or anything" (R18-19). One witness testified he was staggering" and talked "kind of loud" (R32).

After Carter had retained the carbine for a few minutes accused came to him and asked several times for its return, claiming that he was going back to the billets (R14-15, 21-22). Carter gave him the weapon and accused went to the bonfire where he remarked, "I'm going to show them who is the baddest around here" (R8) as he inserted the magazine in the gun and holding it between his shoulder and hip, fired ten to fourteen shots towards the automobile around which the several persons were standing, thus emptying the entire magazine by rapid and continuous fire (R8-9, 15, 32-34, 37). One bullet struck Carter, penetrating his jaw, while another "glazed" his shoulder (R6-7,15,17,49). After he finished shooting, accused ran across a field into a nearby woods (R9,23). No one else had been firing at this time (R33).

Upon being hit, Carter jumped or fell into a ditch where, as soon as the shooting stopped, he found the body of Private Willie Worthy who had been killed by a "gunshot wound, perforating lung, left and aorta" (R15,23,38, 50-51; Pros. Exs. C.D. and E).

Later at 1935 hours on the same day accused was found undressed in his bed, under which was a carbine which had been fired (R43, 45). Although he appeared sober he was placed in arrest for drunkeness because "psychologically it was the best thing to do" (R47).

Accused said on the day following the shooting to a soldier guarding him, "Boy, I sure broke up the meeting the boys were having around the car" (R31).

4.For the defense, it was shown by the report of a board of officers appointed to examine into the mental condition of accused that his intelligence is low with a mental level of nine years, that he has been drinking heavily to moderately for five years but at the time of the alleged offense he was free from mental defect and able concerning the acts charged to distinguish right from wrong and to adhere to the right. He told the board that he decided to have some fun by scaring the women and he shot at the tires of the automobile with no idea of hitting anyone (R51-52; Def. Ex. A).

5.After his rights were explained, accused elected to remain silent (R52-53).

6.The evidence discloses the unprovoked, willful killing of one soldier and the wounding of another as a result of accused's act in deliberately pointing a carbine at a group of people and firing several shots in rapid succession at them. There is nothing in the record to indicate that accused was not sane or that he was not responsible for his acts. Although he had been drinking at the time, the evidence showed that he was not drunk.

The shooting by accused followed the pattern of conduct noted in CM ETO 438, Smith, CM ETO 1901, Miranda, CM ETO 422, Green, CM ETO 7815, Gutierrez, CM ETO 6159 Lewis in which a sudden and unexpected shooting without any reasonable motive is the cause of the death of the victim. In accordance with these decisions and authorities therein cited, the court's findings of guilty of Charge I and Specification are fully warranted. There was also substantial evidence to support the court's findings of guilty under Charge II and Specification (CM ETO 2899, Reeves).

7.The charge sheet shows that accused is 22 years ten months of age and was inducted 1 July 1943 at Camp J.T. Robinson, Arkansas. He had no prior service.

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

9.The penalty for 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 42 and sections 275 and 330, Federal Criminal

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Code (18 USCA 454,567) and of assault with intent to commit murder 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, pars. 1b (4), 3b).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

RESTRICTED

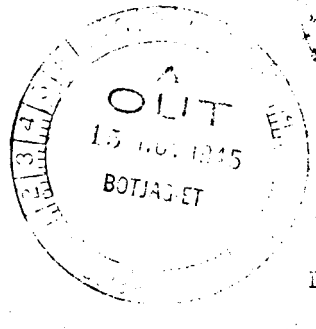
(151)

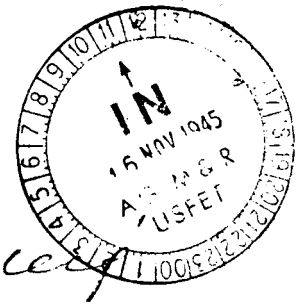
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 14 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main) APO, 757, U.S. Army.

1. In the case of Private M.C. COWAN (38510122), of 3173d Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 17922. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17922).





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

(Sentence as commuted ordered executed. GCMO 596, USFET , 26 Nov 1945).

ETO 17922 COWAN, M. C.

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

BOARD OF REVIEW NO. 1

10 NOV 1945

CM ETO 18008

UNITED STATES	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Ingelstadt, Germany, 29 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private NORMAN L. LINDSEY (35398844), Company A, 15th Engineer Battalion	

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, 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 Norman L. Lindsey, Company A, 15th Engineer Battalion, did at Hepberg, Germany, on or about August 12, 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Poeschl, a female child below the age of sixteen years.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for an unspecified length of time, disrespect to an officer, striking a non-commissioned officer and failure to obey an order in violation of Articles of War 61,63,65 and 96, and one by summary court for absence without leave for two days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania,

as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution evidence: After voir dire examination which elicited the (12-year-old (R24)) prosecutrix' appreciation of the importance of telling the truth (R18-19), she testified substantially that, on the afternoon of 12 August 1945, she went to a military camp "to get laundry" (R19). In one of the tents accused gave her chocolate in return for which he requested sexual intercourse, to which she did not agree. He lowered his trousers (R20,23), directed the girl to sit on the bed, lay upon her, and placed his finger in her vagina causing her pain (R21). She did not know what he was going to do and did not push him away (R23) or do anything (R21). He thereupon removed his finger and placed his penis under her pants and in her vagina, again causing her pain (R21-22,24). She screamed and was able to evade his attempt to penetrate her again by getting away. She cried and, on inquiry by another soldier, complained that a soldier tried to have intercourse with her (R22). She identified accused as the culprit at the office of the "Commanding Officer" and thereafter, was examined by a doctor (R22-23).

Her account was corroborated by the testimony of soldiers of accused's company that the girl ran out of accused's tent crying (R12) and frightened, held her hands between her legs (R5), and complained that an American soldier had intercourse with her (R5-6,8); that accused was thereafter seen buttoning his fly (R13-14,16); and that he remarked that he just had intercourse with a 14-year-old girl (R11) and "Does anybody want to do anything about it?" (R16). An officer of accused's battalion testified that the girl was excited, her hands shaking and her eyes red (R7). A medical officer who examined her the same day confirmed her excited condition and testified that the hymen of the immature girl was torn and there were fresh blood stains all over her thighs and abdomen, a condition caused by a blunt instrument applied with force (R18).

After being warned as to his rights on the same day, accused stated he had nothing to do with the girl except to make arrangements for laundry, and, when accused by the girl, repeated his denial of guilt (R8). On 16 August, after again being warned of his rights, he made a voluntary sworn statement to the effect that he had been drinking since 0800 hours on 12 August. He asked the girl if she had a big sister, and she replied she could take her place and sat at the foot of the bed. The next thing he remembered was that she was lying on the bed and he believed he had his finger in her vagina. After that he remembered nothing until she ran out of the tent (R25-26; Pros. Ex.1). There was testimony that accused had been drinking and was belligerent (R9,13) but was not drunk (R9) and did not behave unusually (R33).

4. The defense introduced testimony that accused drank a considerable amount of intoxicants on the morning of 12 August 1945, was staggering about noon (R27-28) and that in the afternoon he was drunk, that is, could not handle himself or know what he was doing (R29-30). After his rights were explained to him, accused elected to remain silent (R32).

5. The clear testimony of the 12-year-old prosecutrix, amply corroborated

by accused's admissions and other evidence as above demonstrated, leaves no doubt of his guilt of forcible carnal knowledge of her against her will and without her consent. Despite her initial lack of resistance, her age, immaturity, screams, flight, complaints and condition, adequately attest her lack of consent. In the opinion of the Board of Review, the findings of guilty of rape are supported by substantial and convincing evidence (CM ETO 16971, Brinley, and cases therein cited).

6. The charge sheet shows that accused is 23 years eight months of age and was inducted 7 October 1942 at Akron, Ohio, to serve for the duration of the war plus six months. He had no prior service.

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

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).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

James Porter Judge Advocate

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

BOARD OF REVIEW NO. 1

8 NOV 1945

CM ETO 18026

U N I T E D S T A T E S	) XXIII CORPS
v.	)
Technician Fourth Grade LESLIE H. PRITCHARD (32621327), 578th Field Artillery Battalion	) Trial by GCM, convened at Bad Wildungen, Germany, 8 October 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
STEVENS, CARROLL and O'HARA, 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 (CM ETO 14632, Lang).

2. Accused was charged with and convicted of forgery of five Authorizations for Allotment of Pay (Class E), on WD, AGO Form No. 29, all dated 1 September 1944 (genuine form authorized by Army Regulations 35-5520). It was established that he forged the signatures of a different allotter and the same personnel adjutant on each form. There was no proof that any of the five purported named and described allotters were actual persons, but the personnel adjutant, who had the exact name used on each of the forms, testified at the trial and stated that the five signatures of his name were not made by him orby his authority. The five forms were actually received through the mail at the Office of Dependency Benefits, 19 September 1944.

Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability (CM ETO 14632, Lang, and authorities therein cited). That accused falsely made in their entirety the five authorizations was established, and it may clearly be inferred that he did so with intent to defraud the United States Government into paying out the amounts purportedly allotted. Even though the forgery was discovered before reliance thereon, the crime was committed (CM ETO 14632, Lang, and authorities therein cited). The authorizations, which are in the nature of powers of attorney (sec. VI, par.32, AR 35-5520, 30 September 1944) falsely purport to be what they are not and are the subject matter of forgery (CM ETO 14632, Lang; 37 CJS, sec. 36, p.56). The only question is whether they "might operate to the prejudice of another" as alleged. Where the

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false document is absolutely and palpably void on its face, it cannot be the subject of forgery, but where it is apparently valid on its face and susceptible of use to defraud as intended, it is not necessary to conviction that the forged document be sufficient in itself, without extrinsic evidence or acts, to accomplish the forger's purpose; it is enough that it may, under some contingency aid in bringing about that result (Neff v. United States (C.C.A. 8th, 1908), 165 F. 273, 280). It is thus immaterial to the legality of a forgery conviction that the forged name is that of a person under legal disability or dead (37 C.J.S., sec. 18 (f), p. 46).

> "It is enough if the forged instrument be apparently sufficient to support a legal claim and thus to effect a fraud. It is well settled that the signing of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person. The public mischief, i.e., the legal tendency to defraud, is equally great in either event. Neither is it material that no person suffered loss by reason of appellant's act. * * * It is sufficient if there is an intent to defraud someone by making or altering a writing which act might prejudice another" (Milton v. United States (App. D.C. 1940) 110 F. (2nd) 556, 560-561).

> "It is not necessary that the instrument shall have actual legal efficacy, but it is sufficient that, if genuine, it might apparently have such efficacy, or serve as the foundation of a legal liability, and if it be taken as legal proof it would have such apparent efficacy. True it is there can be no forgery if the paper is invalid on its face, for it can then have no tendency to effect a fraud. If its invalidity, however, is to be made out by extrinsic facts, it may be legally capable of effecting a fraud" (Read v. United States (App. D.C. 1924)299 F. 918, 921, cert. denied 267 U.S. 596, 69 L. Ed. 805 (1925), quoting from State v. Johnson, 26 Iowa 407,417,96 Am.Dec.158).

In the instant case, the authorizations were apparently perfectly valid on their face. Their invalidity depended upon the extrinsic facts that no such persons as indicated had signed them or authorized their signatures with their names. The documents were thus capable of effecting a fraud. It is conceivable that the United States Government, through the oversight and error of one or more of its employees in the Office of Dependency Benefits or elsewhere, might have paid out money to the purported allottee banks named in the purported authorizations. This contingency and possibility,

though perhaps remote, is enough, under the foregoing authorities, to support the conviction of forgery. It is also conceivable that the personnel adjutant, whose name was forged on each form might be subjected to prosecution or assessment or embarrassment, particularly in view of his responsibility for the "correctness and completeness of allottment forms" (sec. V, par.29 (1), AR 35-5520, supra).

Accused's act clearly possessed "the legal tendency to defraud". In the opinion of the Board of Review he was guilty of forgery, as alleged. It is well established that pecuniary loss to the Government need not necessarily be involved in the forger's intent to defraud it.

> "It is enough if the acts charged * * * tend to impair or impede a governmental function" (Head v. Hunter, Warden (C.C.A.-10th 1944), 141 F, (2nd) 449, 451, and cases therein cited).

See also Johnson v. Warden (C.C.A. 9th, 1943), 134 F. (2nd) 166,167, cert. denied 319 U.S. 763,87 L. Ed. 1714 (1943), United States v. Mullin (D.C. E.D. Mo. 1943), 51 F. Supp. 785, 787.

The necessity of the above discussion would have been avoided had accused been charged under Article of War 96 with a violation of section 29, Federal Criminal Code (18 USCA 73), which denounces the false making of any writing for the purpose of obtaining money from the United States and related offenses. He clearly violated this statute.

3. Confinement in a penitentiary is authorized upon conviction of forgery by Article of War 42 and Section 22-1401 (6:86), District of Columbia Code. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec. II, par. 3a, as amended by Cir. 25, WD, 22 January 1945).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

James T. O'Hara Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater ~~of Operations~~
APO 887

BOARD OF REVIEW NO. 4

[illegible] 1945

CM ETO 18038

UNITED STATES

v.

Private First Class JASPER FIELDS (33543842), and Private LANSTON WALL (34119664), both of 4334th Quartermaster Service Company

OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER

Trial by GCM, convened at Dijon, France, 4 September 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor as to FIELDS, for seven years, and as to WALL, 12 years. Places of confinement: FIELDS, Federal Reformatory, Chillicothe, Ohio; WALL, 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 soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences.

2. Confinement in a penitentiary is authorized upon conviction of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Fields (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.25, WD, 22 Jan.1945), and of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Wall (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b) is proper.

Lester A. Danielson Judge Advocate

(DETACHED SERVICE) Judge Advocate

John R. Anderson Judge Advocate

AGPO 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO.2

23 NOV 1945

CM ETO 18047

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	
Privates LUCIOUS C.N. JOHNSON (34541383), THOMAS HENDERSON (34067991) and IRA J. SMITH (32631540) all of Battery "B", 578th Field Artillery Battalion	Trial by GCM, convened at Bad Wildungen, Germany, 10 August 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
HEPBURN, HALL and COLLINS, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Lucious C.N.Johnson, Private Ira J. Smith, and Private Thomas Henderson, all of Battery "B", Five Hundred and Seventy Eighth Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Limbach, Germany, on or about 30 March 1945, forcibly and feloniously against her will, have carnal knowledge of Fraulein Alma Schaus.

Specification 2: In that * * *,acting jointly and in pursuance of a common intent, did, at Limbach,Germany, on or about 30 March 1945, forcibly and feloniously , against her will, have carnal knowledge of Fraulein Lisel Schaus.

Each accused 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. 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 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 clearly shows that at about 2000 hours on 30 March 1945 three coloured American soldiers entered the residence of the Schaus family in Limbach, Germany (R37,38). Brandishing pistols at all times, and alternately taking turns guarding Herr and Frau Schaus, all three of the soldiers forcibly had sexual intercourse with their two daughters, Alma and Lisel Schaus (R38, 39,42,43).

Separate pre-trial statements made by each accused to agents of the Criminal Investigation Division were introduced in evidence (R35, Pros.Exs.A,B,C). Each accused admits that on the date in question the three entered a house in Limbach, Germany and had intercourse with two young girls domiciled therein. All admit having their guns in their hands either during the act of intercourse or immediately preceding it and accused Smith and Johnson admit guarding the girls'parents while the other two engaged in the sexual act with the Schaus girls.

4. Accused Smith after his rights as a witness were fully explained to him (R44,45), was sworn and testified as follows:

He had his pistol in his hand while he was with the girls' parents (R46). When he was out in the yard with the other two accused they talked about "seeing if we could go with the girls. We all agreed on it, and said we would try it"(R47). The girls did not protest going outside, although "The large girl seemed to be a bit frightened, reluctant to go out, seemed as if she would cry, but she didn't" (R48). He remained behind and "watched" the parents and then "one of the fellows called"to him to come out. He found one of the other accused having intercourse with the shorter girl so he backed the taller one up against a fence and unsuccessfully attempted to have intercourse with her. She did not resist or protest in any way. He then "motioned" for her to lie down, which she did, but again he was unsuccessful in his attempt at intercourse (R48,49). They then entered a room of the house, other than the one where the girls' parents were, where he had intercourse with the smaller girl, who cooperated in the act.

A half hour later they all returned to their battery area (R50,51). On cross-examination, he testified that the German girls, Alma and Lisel Schaus, who testified earlier in the trial (R37,41) were the girls he referred to testified he had intercourse with one girl and attempted to do so with the other. He further stated that he saw accused Johnson and Henderson either have intercourse with or attempt to have intercourse with these same two girls (R51,52).

Accused Johnson after his rights as a witness were fully explained to him (R44,55), was sworn and testified as follows:

On the evening in question, together, with accused Smith and Henderson, he "went in where these two girls and the parents were". They all went outside and discussed the matter of having intercourse with these girls. He called the larger girl and Henderson the smaller one. The girls "acted like they were frightened" but came outside. Henderson had intercourse with the smaller girl and when he was finished, he (Johnson) also had sexual relations with her. After he finished, Henderson and Smith took the girls inside the house and he remained outside for about 15 minutes. He then entered the house where he again had intercourse with the smaller girl, attempted to do so with the larger girl but was unsuccessful. He then got his helmet and they returned to the battery area. On cross-examination he testified that when they took the girls outside the "larger girl acted like she was frightened but she didn't resist". He further stated that he had his gun in his hand when he had intercourse with the girl out in the yard and Henderson had his gun in his hand as they left the room to go outside (R55-58).

Accused Henderson after his rights as a witness were fully explained to him (R44,45), elected to remain silent and no evidence was introduced in his behalf.

For a more detailed statement of the facts, reference is made to paragraph 3 of the review of the Staff Judge Advocate of the reviewing authority, which the Board of Review adopts herein.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of the female's genitals is sufficient (MCM,1928.par.148 b, p.165). The uncontradicted evidence of the prosecution and the voluntary admissions of each accused in his pre-trial statement, together with the sworn testimony of Smith and Johnson clearly establish the carnal knowledge of Alma and Lisel Schaus by each accused at the time and place alleged in the specifications.

While neither of the victims could identify any of the accused and their pre-trial statements do not refer to the girls by name, accused Smith in his sworn testimony positively identified these girls as

the persons with whom he and the other two accused had intercourse. Inasmuch as both Johnson and Henderson in their pre-trial statements admit being with accused Smith on the evening and at the time and place in question, the court was amply justified in concluding that Alma and Lisel Schaus were the persons with whom they admit they had sexual relations. The victims of the offenses testified that the sexual relations were without the consent of either. It clearly appears that sufficient force was used to effect a penetration in each incident. If 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. However, if the woman's failure to resist is induced by fear of death or great bodily harm, it is not necessary to prove resistance (CM ETO 13897, Cuffee; CM ETO 10742, Byrd). Whether the girls willingly consented to the acts as rather lamely contended by accused Smith and Johnson in their sworn testimony, or whether they were overpowered by accused and their lives and the lives of their parents threatened with pistols as related by the victims, presented an issue of fact for the exclusive determination of the court and inasmuch as there is competent substantial evidence to support its finding as to both specifications, they will not be disturbed upon appellate review (CM ETO 10715, Goynes; CM ETO 16662, Austin).

6. The charge sheet shows accused Johnson is 22 years eight months of age and was inducted 26 January 1943; accused Henderson is 25 years two months of age and was inducted 17 February 1942; accused Smith is 22 years seven months of age and was inducted 7 November 1942. (No places of induction indicated). No prior service is shown for any accused.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any 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).

Earle Hedblum Judge Advocate

Clarence W. Hall Judge Advocate

John J Collins Jr. Judge Advocate

18047

18047

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

BOARD OF REVIEW NO. 1

15 NOV 1945

CM ETO 18051

U N I T E D S T A T E S	)	69TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 417, U. S. Army, 11 July 1945. Sentence:
Private First Class DENNIS H. SHARPTON (34586746), Headquarters Company, 1st Battalion, 272nd Infantry.	)	Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 1
STEVENS, DEWEY 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Dennis H. Sharpton, Headquarters Company First Battalion, 272 Infantry, did, at Weissenfels, Germany, on or about 20 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Ervin L Saydack, a human being by shooting him with a caliber 45 pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. 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 forfeit all pay and allowances due or to become due and to be hanged by the neck until dead. The reviewing authority, the Commanding General, 69th Infantry Division, approved only so much of the sentence as provided that accused be hanged by the neck until dead and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the

case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. In summary the prosecution's evidence shows the following:

Hedwig Neustadt, of Hohenmoelsen, Germany, testified that at about 2300 hours 19 June 1945, accused who was sober and deceased who was drunk called at the home of witness, who was accused's girl friend (R28-30,38-39). Although she and her friend "Trude", another girl, did not know deceased or wish him to remain and repeatedly endeavored to persuade him to leave, and although accused on one occasion made a similar attempt, deceased became "mean", used abusive language toward accused and persisted in remaining (R31-32,39,41). At one time, deceased advanced toward accused, but witness stepped between them (R40,43). When she was in an upstairs room alone with deceased for the purpose of trying to persuade him to leave, he grabbed her, threw her on the bed, and tried to kiss her and raise her dress. When accused came into the room, deceased was lying upon her (R33-34,40). Accused said nothing, but merely lay down on the bed beside them and watched. Deceased continued to try to make advances, accused arose and asked her to accompany him, and she tore away, but deceased threw her back on the bed. Witness made no cry for aid, because accused could see the situation. Deceased made no attempt to assault him. However, accused went to the door, opened it, stepped just outside and fired about five shots at deceased with a weapon of the same type as a .45 caliber U.S. Army pistol (R34-37,40,43). During the firing of the shots deceased made no advances toward accused, but arose, slumped back, and then fell to the floor (R35,37,43). Witness thereupon went downstairs with accused, who at first left the pistol in a room there, but later retrieved it from witness. He then stated he was going to report the matter to the "commander", and departed (R37-38).

The shots were heard by guards of accused's company, to whom 10 or 15 minutes thereafter he stated voluntarily that he had shot and killed a man (R8-9,16-18). After a short time, accused voluntarily admitted, at the scene of the shooting, that he shot deceased, but stated that the latter called him a "Nazi-loving son-of-a-bitch" and made a plunge at him to attack and choke him, therefore, he was obliged to shoot deceased in self-defense (R21-22,28). Two cartridge cases fired from a .45 caliber pistol were found at the scene (R11-12,15,23). Two new bullet holes were discovered in the walls of the room, five or six feet above the floor (R26-28,41) and one, about two and one-half feet above the floor, through a window (R41). Although deceased had a carbine with him (R42), there was no weapon in his hand after the shooting (R26).

The victim died sometime before 0230 hours on 20 June, as a result of shock and hemmorrhage caused by bullet wounds in the right chest and left chest. There was a third wound through the left arm. At least one if not all the wounds were perforations (R44-45).

4. After defense counsel stated he explained to him his rights as a witness, accused elected to be sworn as such on his own behalf (R46) and

testified in material substance as follows:

Deceased was a stranger to him prior to the evening in question (R47). Deceased, whom the girls wished to leave, used abusive language towards accused and refused to leave until he had sexual intercourse (R47-48,54). When accused saw deceased on top of the girl, he (deceased) told accused he would kill him and swore at him (R49,54-55). Accused denied sitting on the bed (R54). Then

> "He started getting off the woman and I pulled my gun and cocked it and by the time he got up straight on the floor I had the gun loaded and asked him not to come toward me" (R50).

As deceased arose from the bed he reminded accused of his previous threat to kill him if he did not have intercourse with the girl. Accused did not know that deceased had a weapon, but thought he had something in his hands, and fired two shots over deceased's head to make him stop advancing (R.50). Thereupon accused backed out of the door and asked deceased not to come any closer to him, but deceased took at least two or three steps toward him, so accused fired five or six shots at him, in order "to stop him so he couldn't get a hold of" accused. Deceased fell after the last shot (R51). Deceased had threatened to choke and stomp him on the floor, but threatened only with words and while advancing did not raise his fist or have any physical contact with accused. If deceased had a weapon, accused could not have escaped him; he was afraid deceased would shoot him in the back (R54-55). After the shooting he made no effort to save deceased even though he seemed to be dying, because there was not much he could do (R56). He did not think he threw the pistol away (R55). He thereafter reported the shooting (R51-52).

5. It is undisputed that accused deliberately shot deceased thereby causing his death. Accused's defense was that the killing was done in self-defense and was therefore in law excusable. The burden of proof on this issue was upon accused (26 Am. Jur., sec. 289, pp. 353-354). Upon all of the evidence, the question was one of fact for the court whether accused

> "believed at the time that he was in such immediate danger of losing his own life, or of receiving serious bodily harm, as rendered it necessary to take the life of his assailant to save himself therefrom; that the circumstances were such as to afford or warrant reasonable grounds for such belief in the mind of a man of ordinary reason and firmness; and that there was no other convenient or reasonable mode of escaping or retreating or declining the combat" (26 Am. Jur., sec. 126, p. 242).

Hedwig Neustadt's testimony negatived the idea of any offer by deceased to assault accused and consequently of the necessity, actual or reasonably believed by accused, of killing him in order to save accused from death or serious bodily harm. If the court chose to believe her, as they might properly, they could only have concluded that accused became angry at

deceased because he refused to leave and was molesting accused's girl friend and therefore shot him maliciously and deliberately. And even accused's version falls short of establishing the defense, for he admitted he did not know whether or not deceased had a weapon when he was advancing. But the court was not bound to accept accused's story, wholly or at all (CM ETO 16655, Pagano and authorities therein cited).

The Board of Review need not decide whether the defense of prevention of the commission of the forcible crime of rape upon Hedwig Neustadt by deceased was waived by accused's exclusive reliance upon that of self-defense, as the record does not support such defense. To justify a homicide upon such theory, there must be absolute or apparent necessity for killing the putative criminal and all other means of preventing the crime must first be exhausted. The danger of the crime's commission must not be problematical or remote, but evident and immediate (26 Am. Jur., sec. 123, p. 239). The court might very properly conclude from all the evidence (1) that there was not evident or immediate danger that deceased would rape the girl and (2) if there were any danger of rape, killing deceased was not the only way to prevent it. Any physical interference with deceased, in which both accused and Hedwig participated, would appear to have been effective to prevent intercourse between her and deceased. The court, in the opinion of the Board of Review, was fully justified in finding accused guilty of murder (CM ETO 4640, Gibbs; CM ETO 14380, Hall; CM ETO 15558, Mitchell).

6. The charge sheet shows that accused is 27 years two months of age and was inducted 21 December 1942 at Birmingham, Alabama, 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 commited during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

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

Edward L. Stevens Jr., Judge Advocate.

[signature illegible], Judge Advocate.

DETACHED SERVICE, Judge Advocate.

1st Ind.

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

1. In the case of Private First Class DENNIS H. SHARPTON (34586746), Headquarters Company, 1st Battalion, 272nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18051. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18051).

OUT 15 NOV 1945 BOTJAG-ETO

IN 17 NOV 1945 AG M&R USFET

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

(Sentence as commuted ordered executed. GCMO 605, USFET, 1 Dec 1945).

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

BOARD OF REVIEW NO.3

5 NOV 1945

CM ETO 18099

UNITED STATES v. Privates EDDIE HAMPTON (34568435), and BENNIE J. ROBERSON (34620968), both of the 163rd Chemical Smoke Generator Company.	SEVENTH UNITED STATES ARMY WESTERN MILITARY DISTRICT. Trial by GCM, convened at Heidelberg, Germany, 21 and 24 September 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 soldiers named above has been examined by the Board of Review.

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

HAMPTON

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Eddie Hampton 163rd Chemical Smoke Generator Company, did, at or near Heilbronn, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anny Schnepf.

Specification 2: In that * * * did, at or near Heilbronn, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Dina Schoch.

ROBERSON

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Bennie J.Roberson, 163rd Chemical Smoke Generator Company, did, at or near Heilbronn, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anny Schnepf.

Each pleaded not guilty and, two-thirds of the members of the court concurring in each finding of guilty, each was found guilty of the respective charge and specification or specifications pertaining to him. As to Hampton, evidence was introduced of two previous convictions by summary court, one for drunkenness in camp and one for careless discharge of a firearm, both in violation of Article of War 96. As to Roberson, evidence was introduced of one previous conviction by summary court for wrongfully discharging a carbine in violation of Article of War 96. Three-fourths of the members of the court concurring at the time the votes were taken, 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 for the prosecution may be summarized as follows:

On 15 April 1945, Fraulein Dina Schoch, 30 years of age, was, together with her parents and another German woman named Frau Lina Schweikert, present in the kitchen of her home at No. 15 Gildenstrasse, Heilbronn, Germany (R8,9,17). Fraulein Schoch testified that at about 1700 hours on that date the accused Hampton, who was armed at the time, entered the kitchen, looked around, and, after going into an adjoining room, beckoned her to come with him (R9,10). When she protested and asked to be let alone, he caught her by the sleeve and started to pull her toward him. Fraulein Schoch, frightened, grasped a kitchen table but Hampton continued to pull her with such force that he moved the table and tore her clothing. At about this time she released her grasp on the table and threw herself into her father's arms, begging him to help her. Accused then fired a shot from his weapon and again seized Fraulein Schoch and started to pull her toward the room adjoining the kitchen. She refused to release her grasp on her father with the result both father and daughter were pulled into the room (R10,11,15). This accomplished, Hampton released his hold on the girl and pushed her father, who had "only one good arm", from the room and closed the door (R11,18). She testified

that he then leaned his weapon against a dressing table, "jumped to me, banged me on the chest and * * * pushed me on the sofa" (R11). By this time she was so frightened that "it was all black in * * * front of my eyes" (R18). Hampton then pulled at her clothing, tore her pants, separated her legs, opened his trousers, and had sexual intercourse with her (R11,12,16). While she did not strike or kick at him or otherwise attempt to prevent him from achieving penetration, he "went at" her so vigorously that she was powerless and, in addition, she was so frightened that she was incapable of interposing any resistance (R12,15,17,18). She remembered moaning at the time and also remembered that accused's breath smelled of alcohol when he was on top of her (R15). Upon completing the intercourse, accused took his weapon and left the room (R13).

The prosecution's evidence further showed that shortly after 1700 hours on 15 April 1945, as Frau Anny Schnepf and her sister-in-law were leaving their home at No. 25 Gildenstrasse, Heilbronn, Germany, they saw the two accused "on the corner" and, being afraid of colored soldiers, immediately started to go toward a nearby bunker or underground fortification formerly used by the German military but which was then being occupied by a number of German civilians as a habitation (R25,30,31,36). As the two women were going toward the bunker, the accused called to them and one of the accused (both of whom were armed with carbines) fired a shot. The women became more frightened and hurried on, joining several German civilians who were congregated in front of the bunker and, a short time later, the accused joined them there (R25, 29, 33,34,36). Upon arrival, Hampton first asked for schnapps and then took a watch from a Herr Hennrich, one of the men who were standing outside the bunker. When he asked Hampton to return it, Hampton replied "You will not have it back unless you give a woman to me " (R26). As Frau Schnepf knew a little English, she approached the men with the view of attempting to persuade Hampton to return the watch. When she did so Hampton "snatched" her by the arm and told her to come with him into the bunker. Although she repeatedly begged him to leave her alone, he pushed her down into the bunker and there ordered her to take off her clothing. During this time, he had his finger on the trigger of his carbine (R26). When she refused to disrobe, he drew a knife and, after telling her that he would rip open her clothing if she refused to remove it, reached down and unloosened her slacks. Thereafter, although she was "weeping bitterly and begging him to let me in peace", he pulled her on to a bed in the shelter and had intercourse with her.

When Hampton completed the act of intercourse, he immediately left and Roberson came into the bunker (R27,28). She also asked him to let her alone but he pushed her on top of a wooden packing case and had intercourse with her as well, after which he too left the shelter (R28). In neither instance did she cry out for help because, through past experience, she had learned that the construction of the bunker was such that sounds made within it could not be heard outside (R28,30-32). Further, the only men who were near by all were rather elderly and she could [illegible] no

help from them (R28,31). In each instance the soldier had thrown himself upon her, separated her legs, and forced her to have intercourse with him (R31,33). When asked whether she had assisted the soldiers in any way she replied "By God, this was the worst, the most dreadful thing. How could I do it. * * * I did not want all this" (R29,31). Both soldiers smelled of alcohol and were drunk, but were not so drunk that they staggered (R29).

Private Montrose C. Debrix testified that he formerly was in the same company as Hampton and Roberson and that on 15 April 1945 he and these two men left their company area in Heilbronn, and, after first visiting one of the smoke generator positions, went to a refugee camp where they obtained and drank champagne. After drinking the champagne, they started walking down " the street named Gildenstrasse". After proceeding down the street for some distance, Hampton left the group and went into a house. This house was No. 15 Gildenstrasse. While he was in the house, Debrix heard a shot fired and a woman scream (R64,65). When Hampton rejoined Debrix and Roberson some twenty or twenty-five minutes later, "he told us he had fucked a woman and said he was going to get another one" (R65). They then proceeded to the end of the street where Debrix saw a group of civilians standing near a bunker. Hampton and Roberson left and went toward the civilians. Debrix waited for them on the street. Shortly after they left, Debrix heard several shots. About thirty minutes later, Hampton and Roberson rejoined him, said "Let's go", and the three then returned to their company (R64,65).

Fraulein Schoch's testimony was further corroborated as to surrounding circumstances by the testimony of Frau Schweikert, and Frau Schnepf's testimony was similarly further corroborated by the testimony of her sister-in-law and Herr Hennrich.

4. Each accused was advised of his rights as a witness and each elected to testify on his own behalf. Hampton testified that on 15 April he, Roberson and Debrix left their company area at about 1300 hours, went to one of the smoke generator positions, thereafter went to a refugee camp where they drank some champagne, and then started back to their company area. En route he and Roberson entered two houses in search of something to drink but saw no German civilians. They got back to their company area at about 1900 hours that night. He had never had sexual relations with either of the complaining witnesses (R50). Roberson testified similarly and asserted that he had never had intercourse with Frau Schnepf and in fact had never seen her before the day of the trial (R58,59).

5. Little difficulty is presented by the instant record of trial. There is abundant evidence to show that each accused had carnal knowledge of Frau Anny Schnepf and that accused Hampton also had carnal knowledge of Fraulein Dina Schoch, as alleged.

There is also ample evidence to support the court's finding that neither of the complaining witnesses consented to the intercourse shown. That Hampton accomplished his purpose by the use of threats and physical violence is apparent from the face of the record. The evidence indicates that Roberson was less aggressive than Hampton but here again the use of force is sufficiently made out. Roberson was present during the display of force by Hampton and under the circumstances shown had no reason to suppose that his victim was voluntarily submitting to his demands. The record is amply sufficient to support the court's finding that each accused was guilty as charged (cf.CM ETO 9083 Berger and Bamford, CM ETO 15620 Eagans and Copeland).

6. The charge sheets show that accused Hampton is 21 years of age and was inducted on 28 January 1943 at Fort Benning,Georgia, and that accused Roberson is 22 years of age and was inducted on 4 February 1943 at Camp Shelby,Mississippi. 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 of 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 confienment,is proper (Cir.229,WD,8 June 1944 sec.II,pars. 1b (4), 3b).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

18099

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

BOARD OF REVIEW NO. 2

8 DEC 1945

CM ETO 18110

U N I T E D S T A T E S v. Privates DANIEL ELLIOTT (35830697), ROBERT WILLIAM (35738589) and ARTHUR L. CHAMPION (35837312), all of 3120th Quartermaster Service Company	ASSEMBLY AREA COMMAND, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM, convened at Reims, France, 19 September 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
HEPBURN, HALL and COLLINS, Judge Advocates

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

2. Accused were arraigned separately and were tried together upon the following charges and specifications.

Elliott

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

Specification 1: In that Private Daniel Elliott, 3120th Quartermaster Service Company, did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 19 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Alice Baudon.

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

Specification 1: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, unlawfully enter the combination cafe-dwelling house

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of Achille Baudon, with intent to commit criminal offenses, to wit, rape and assault and battery, therein.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

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

Specification 1: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, wrongfully strike Madam Purgantini on the breast and body with his hands.

Specification 2: (Finding of not guilty).

Milam

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

Specification: In that Private Robert Milam, 3120th Quartermaster Service Company, did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 19 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Alice Baudon.

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that *** having received a lawful command from First Lieutenant Alvie V. Snider, his superior officer, to give up his pistol, did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 19 June 1945, willfully disobey the same.

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

Specification 1: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, unlawfully enter the dwelling house of Achille Baudon, with intent to commit a criminal offense to wit, rape and assault and battery therein.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

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CHARGE IV: Violation of the 96th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

Champion

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

Specification: In that Private Arthur L. Champion, 3120th Quartermaster Service Company, did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 19 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Alice Baudon.

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

Specification 1: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, unlawfully enter the combination cafe-dwelling house of Achille Baudon, with intent to commit criminal offenses, to wit, rape and assault and battery, therein.

Specification 2: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, with intent to do him bodily harm, commit an assault upon Achille Baudon, by willfully and feloniously pointing a dangerous weapon, to wit, a pistol, at the said Achille Baudon, with the intent of firing said pistol at the said Achille Baudon.

Specification 3: (Finding of not guilty).

Specification 4: In that *** did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 18 June 1945, with intent to do him bodily harm, commit an assault upon R. Purgantini, by willfully and feloniously striking the said R. Purgantini on the wrist with a dangerous weapon, to wit, a pistol.

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

Specification 1: (Finding of not guilty).

Specification 2: In that *** having received a lawful order from First Lieutenant Alvie V. Snider to keep his hands up and not to move, the said First Lieutenant Alvie V. Snider, being in the execution of his office, did, at Marcilly-sur-Tille, Cote d'Or, France, on or about 19 June 1945, fail to obey the same.

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Each accused pleaded not guilty to the charges and specifications preferred against him. Three-fourths of the members of the court present at the time the vote was taken concurring as to each accused, Elliott was found guilty of Charge I and its specification, Charge II and Specification 1 thereof, Charge III and Specification 1 thereof, except the words "breast and" and was found not guilty of the excepted words and not guilty of Specifications 2,3 and 4 of Charge II and Specification 2 of Charge III; Milam was found guilty of Charge I and its Specification, Charge II and its Specifications, Charge III and Specification 1 thereof, and was found not guilty of Specifications 2 and 3 of Charge III and not guilty of Charge IV and its Specification; Champion was found guilty of Charge I and its Specification, Charge II and Specifications 1,2 and 4 thereof, Charge III and Specification 2 thereof, and was found not guilty of Specification 3 of Charge II and Specification 1 of Charge III. Evidence was introduced of one previous conviction by summary court-martial against Milam for absence without leave for two days in violation of Article of War 61. No evidence of previous convictions was introduced as to Elliott and Champion. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of Specification 1 of Charge II as to Milam, approved each of the sentences and 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:-

On the night of 18-19 June 1945, M. Achille Baudon and his wife Madame Alice Baudon were awakened by a noise at the kitchen door of their combination cafe-dwelling house (R13,14) at 5 Rue de Lac, Marcilly-sur-Tille, Cote d'Or, France, (R9,25). M. Baudon put on his trousers, turned on the lights and went to the door, and his wife put on her slip and went to call her brother, M. Roland Purgantini, and Madame Purgantini who were in a nearby bedroom in the same house (R13,25). Upon reaching the kitchen, M. Baudon was confronted by the three accused, colored soldiers (R10). Champion who was nearest the door was pointing a pistol at M. Baudon and the other two accused had flashlights. The kitchen door which had been locked earlier that night was open and a pane of glass in the door had been broken (R10,11,17,47). Champion kept the pistol pointed at M. Baudon and forced him back to the bedroom (R11,12,13). The three accused then forced Madame Baudon into the other bedroom where Madame Purgantini was (R21,26,32,39). Elliott and Milam kept the two women in this room by threatening them with revolvers while Champion with a pistol in his hand forced M. Purgantini to the cafe part of the building to look for some schnapps (R21,22,23,37,40). When M. Purgantini tried to go back where the two women were, Champion struck him on the wrist with the pistol (R40,42,43). In the meantime, M. Baudon got out of the house and went to look for the police (R14,19). Madame Purgantini tried to get out of the room where she and Madame Baudon were

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being forcibly detained and Elliott slapped her twice on the face (R21, 22,24,27). Milam then, with a pistol pointed at her back, forced Madame Purgantini into the cafe but she later escaped into the garden where she joined her husband who had already escaped from the house. (R22,23,24,29,41,42,79,80)

After Champion and Milam had rejoined Elliott at the bedroom where Madame Baudon was being forcibly detained, the three accused threatened her with pistols, slapped her, pushed her down on the bed and held her (R28,33,37). She struggled, tried to get up, cried and shouted "No,no" but all three accused held her and tried to keep her quiet by stopping up her mouth with an undershirt (R28,34,35,37). While accused were holding her down on the bed, Milam got on top of her and "violated" her, "performed the act" and succeeded in "getting in". He was followed by Champion who "violated" her while the other two accused held her arms and legs (R28,29,33,34). Champion's penetration caused her pain (R29-30) and in both instances there were emissions, some of which went on the sheet (R78,79). Before Elliott took his turn, some more colored soldiers appeared in the corridor and called the accused who left the room. Madame Baudon then left the house and went to a neighbor's house where she hid in a cellar until her husband returned (R30,36). An American doctor examined her the next day and "took a smear". Her own doctor did not "take the smear" because she had taken her "injection" (R32).

Sometime after 1:00 o'clock that night Lieutenant Alvie V. Snider, a Military Police officer, came to the cafe-dwelling at the request of M. Baudon (R43,44,53). He called to accused, told them that he was a Military Police officer and ordered them to come out of the building unarmed (R49). Accused did not come out and Lieutenant Snider entered the building (R45, 51). He was wearing his officers' uniform and insignia and the lights were on in the building. Milam had a pistol in his hands and Lieutenant Snider ordered him "to give me the pistol". Milam, who had the pistol pointing at Lieutenant Snider, told him "I am not giving this pistol to anybody" and refused to relinquish it (R46). Milam was later apprehended outside the building and disarmed (R47). Lieutenant Snider then told the other two accused that they were under arrest and ordered them to stand with their hands up over by a wall, which they did (R48). Champion then said he had not done anything, lowered his arms and stepped off in the opposite direction. Lieutenant Snider ordered him to stop and threatened to shoot him if he took another step. Champion said "I am going to take another step and I dare you to shoot". At this time the other accused began to move away and as Snider turned to stop them, Champion escaped (R48).

Lieutenant Snider testified that from their walk and manner of speech, which was somewhat incoherent, it appeared to him that accused "had been drinking" when they were arrested (R51). Madam Baudon also testified that when she first saw Elliott and Milam in her bedroom, they were walking unsteadily and were "really drunk" (R23,24).

4. The defense presented testimony substantially as follows:

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An American medical officer examined Madame Alice Baudon at about 7:00 o'clock on the morning of 19 June 1945 and found black and blue bruises in the middle of her back and a bruise on her left hip (R74, 75). An examination of her vagina showed "no pathology" on the lips or in the vagina itself (R75). Two smears were taken with an applicator from deep in the vagina and a microscopic examination of these smears revealed no sperm alive or dead (R75). The medical officer was of the opinion that if Madam Baudon had engaged in sexual intercourse within 7 or 8 hours prior to the examination and the intercourse had resulted in an emission, the examination would have revealed the presence of some sperm (R75). It was also his opinion that the bruises which he found on her were not caused by severe blows but were "evidently just a superficial vein that had been ruptured" (R75). The court recalled the medical officer as a witness and he further testified that Madame Baudon "said something about a spot on the bed" and that an examination of the sheet revealed a discoloration about two inches in diameter (R79).

Lieutenant Snider was recalled as a defense witness and testified that when he was at the Baudon House he first saw Madame Baudon on a side road near the building. At that time she had on a light colored dress which did not appear to be torn anywhere. The light was not good and he did not examine her too closely (R76). After they went to the hotel, about 4:20 o'clock that morning (R32), Madame Baudon had on a dark coat which was not buttoned. He then looked closely at her dress but did not see any torn places (R76). It was a dress and not an undergarment or slip that she was wearing (R76,77).

The accused after their rights as witnesses were fully explained to them each elected to remain silent (R77,78).

5. a. (Rape).

Each accused was convicted of rape in violation of Article of War 92 (Charge I as to each accused). Rape is defined as "the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b, p. 165). The undisputed evidence shows that at the time and place alleged the three accused, at least one of whom had a pistol, forcibly detained Madame Alice Baudon in a bedroom. She testified that they struck her, held her down on the bed, gagged her when she shouted "No,no" and tried to release herself, and that Milam and Champion each "violated" her while Elliott helped them hold her on the bed. Milam "performed the act" and succeeded in "getting in". Champion's penetration caused her pain and in each instance there was an emission. While Elliott did not have sexual intercourse with her, he was present aiding and abetting the other two accused and may be found guilty of the crime of rape as a principal (CM ETO 3740, Sanders et al; CM ETO 3859, Watson; CM ETO 18165, Lucero and Miller). Although the victim's testimony as to the actual penetration was not corroborated, her testimony was not contradictory or improbable and the accused were positively identified as her assailants. Corroboration of the victim's testimony is not required to sustain a conviction of rape (CM ETO 2625, Pridgen; IV Bull, JAG 51).

Medical testimony introduced by the defense indicated no evidence of injury to the victim's vagina or serious bodily injury and the results of smear tests made in the course of the medical examination tended to contradict the victim's contention that there were emissions. However, the victim testified that her own doctor did not make a smear test because she had taken her "injection". Whether or not there were emissions is not material, the slightest penetration without emission being sufficient (MCM, 1928, par. 148b, p. 165). There was competent substantial evidence of every element of the offense of rape as to each accused and the court's findings will not be disturbed on appeal (CM ETO 10715, Goynes; CM ETO 16662, Austin).

b. (Housebreaking).

Each accused was convicted of housebreaking in violation of Article of War 93 by unlawfully entering the combination cafe-dwelling house of Achille Baudon with intent to commit rape and assault and battery therein (Charge II, Specification I as to Elliott and Champion and Charge III, Specification 1 as to Milam). Housebreaking is defined as "unlawfully entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par. 149e, p. 169). The undisputed evidence shows that the three accused unlawfully entered the building of M. Achille Baudon at the time and place alleged. They each participated in the commission of the offenses of rape and assault and battery after entering. This was probative of an intent to commit these offenses at the time of the unlawful entry (CM ETO 3679, Roehrborn). All elements of the offense of housebreaking were thus established as to each accused.

c. (Willful disobedience).

Milam was convicted of willfully disobeying a command of First Lieutenant Alvie V. Snider, "to give up his pistol" in violation of Article of War 64 (Charge II, Specification 1). The proof required to sustain a conviction of this offense is:

> "(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command". (MCM, 1928, par. 134b, p. 149).

It was clearly established that Milam refused to obey Lieutenant Snider's command "to give me the pistol" at the time and place alleged. The evidence clearly indicates that Milam recognized Lieutenant Snider as his superior officer and his refusal to obey the order under the circumstances disclosed by the evidence was a deliberate and intentional definance of authority (MCM, 1928, par. 134b, p. 148). The findings of guilty are supported by the evidence. (CM ETO 817, Young; CM ETO 4184, Heil). The command alleged was "to give up his pistol" and the command proved was "to give me the pistol". There is no substantial difference in the meaning of the command alleged and the one proved. Accused was not misled and the technical variance is immaterial (CM ETO 2921, Span).

d. (Assault with intent to do bodily harm with a dangerous weapon).

Champion was convicted of committing an assault upon Achille Baudon (Charge II, Specification 2) with intent to do him bodily harm with a dangerous weapon in violation of Article of War 93. The evidence showed that Champion pointed a pistol at Baudon and at the point of that pistol forced him back from his kitchen to the bedroom. The pointing of a pistol not shown to be empty at a person in a threatening manner and thereby compelling that person to do something which he is not otherwise required to do has been held by the Board of Review to constitute and assault with intent to do bodily harm with a dangerous weapon (CM 274647, Trujillo, IV Bull, JAG 280). The findings of guilty of this charge an specification are therefore legally sustained by the record.

Champion was also convicted of a similar offense under Specification 4 of Charge II by striking R. Purgantini on the wrist "with a dangerous weapon, to wit, a pistol". The evidence showed that accused Champion did strike Purgantini on the wrist with the pistol which accused held in his hand when Purgantini attempted to leave the cafe and return to the bedrooms. Purgantini said the accused seized him "and hit me with the butt of it (pistol) on the wrist" (R40). There was no evidence of the force employed in the blow nor of any resulting injury. It is apparent that the pistol was being used as a club and not in the manner in which it was intended to be used as a weapon.

The proof required to sustain conviction of the offense is:

> "(a) That the accused assaulted a certain person with a certain weapon, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument or thing was used in a manner likely to produce death or great bodily harm"(MCM, 1928, par. 149m, p. 180).

The evidence clearly established (a) but it does not establish that the blow with the butt of the pistol on the wrist was likely to produce death or great bodily harm and for that reason only so much of the findings of guilty can be legally sustained as involves a finding that accused did commit an assault and battery upon R. Purgantini at the time and place alleged, by striking him on the wrist with a pistol, in violation of Article of War 96 (CM 271426, Cannon).

e. (Simple Assault and battery).

Elliott was, by exceptions, convicted of assaulting Madame Purgantini by striking her on the body with his hands in violation of Article of War 96 (Charge III, Specification 1). There is uncontradicted evidence that Elliott slapped Madame Purgantini twice at the time and place alleged while she was being forcibly detained in a bedroom. The findings of guilty of this offense are supported by the evidence.

f. (Failure to obey an order).

Champion was convicted of failing to obey Lieutenant Snider's order "to keep his hands up and not to move" in violation of Article of War 96 (Charge III, Specification 2). The evidence shows that at the time and place alleged Lieutenant Snider placed Champion in arrest and ordered him to stand over by a wall with his hands up, which he did. Champion then said he had not done anything, lowered his arms and stepped off in the opposite direction. Lieutenant Snider ordered him to stop but he made his escape. There is no material variance between the order alleged and the order proved and the findings of guilty are amply supported by the evidence.

6. There was evidence that accused were drunk at the time the alleged offense were committed but there was no indication that they were intoxicated to the extent that they were incapable of entertaining the requisite intent essential to the offenses alleged. The question of their drunkness and the effect thereof upon their legal responsibility for the offenses committed constituted an issue of fact for the court, whose findings, as approved, are supported by substantial evidence and will not be disturbed on appeal (CM ETO 14256, Barkley; CM ETO 3859, Watson et al; CM ETO 1901, Mirandi; CM ETO 9611, Prairiechief).

7. The court was appointed by the Commanding Officer, Assembly Area Command, Theater Service Forces, European Theater, on 13 September 1945. Accused were tried and the sentences were adjudged on 19 September 1945. On 22 September 1945, Area Assembly Command was discontinued and its functions transferred on that date to Oise Intermediate Section, Theater Service Forces, European Theater. The actions dated 17 October 1945, were, therefore, properly signed by the Commanding General of Oise Intermediate Section, Theater Service Forces, European Theater, as successor in command (CM ETO 4054, Carey).

8. The charge sheets show that accused Elliott is 36 years and ten months of age and was inducted 7 April 1944. Milam is 33 years and seven months of age and was inducted 12 January 1944. Champion is 28 years and eight months of age and was inducted 2 May 1944. Accused were all inducted at Fort Benjamin Harrison, Indiana, and none of them had any prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors, except as noted herein, injuriously affecting the substantial rights of any accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 4 of Charge II as to Champion as involves a finding of guilty of assault and battery upon R. Purgantini at the time and place alleged, by striking him on the wrist with a pistol, in violation of Article of War 96, and legally sufficient to support the remaining findings of guilty as approved, and the sentences.

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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); upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code; and upon conviction of assault with intent to do bodily harm with a dangerous weapon, instrument or thing 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, pars. 1b(4), 3b).

Carle Stephens, Judge Advocate.

Clarence W. Hall, Judge Advocate.

John J. Collins, Jr., Judge Advocate.

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

BOARD OF REVIEW NO. 3

5 NOV 1945

CM ETO 18122

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Munich, Germany, 21 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.
Private ROBERT H. JOHNSON (34621411), 3434th Quartermaster Truck Company	)	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Robert H. Johnson, 3434th Quartermaster Truck Company, did, at Ohrdruf, Germany on or about 12 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Frau Marianne Wustenhagen.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for wrongful driving of a military 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 by musketry. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of

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

3. The evidence for the prosecution shows that at about 2300 hours on 12 April 1945, two colored soldiers knocked at the home of Frau Marianne Wustenhagen, the prosecutrix, mother of three children, in Ohrdruf, Germany (R30-31,37). Her home was surrounded by a plank fence and locked gate, both of which had barbed wire on top. The gate had an "off limits" sign on it because one of her children was ill with meningitis (R10,32,35-36,37). Prosecutrix told the soldiers that they were not allowed to enter because of the contagious sickness, but when they continued to knock, she went with Frau Mensch and opened the door. There were no lights in the house (R30-31). The soldiers shined a flashlight in the faces of the women, one pointed a rifle from his hip, and they pushed both women back into the house. Prosecutrix attempted to push them out of the house, then ran and stood at the door of her sick child (R31-32). The soldiers followed her and one grabbed her and lifted her skirt. She struggled and hit him with her hand and held her skirt down, whereupon one soldier struck her in the face with his hand so that she "flew against the wall" (R32-33).

When she "came to" she noticed that her sleeve was rolled up and that her watch was missing. She screamed and tried to get it back, and one of the soldiers struck her on the head with the carbine. She screamed again, and one of the soldiers grabbed for her sexual organ. She was afraid, and thought she would be shot if she struggled more. However, she continued to scream, whereupon she "received two more blows with the butt of the rifle", which rendered her unconscious for about 20 minutes (R33-34).

When she regained consciousness, one of the soldiers "sprung up" from a prone position, and both soldiers left the house, taking her flashlight with them (R34). She discovered that her night skirt and gown were wet and dirty and contained stain of a yellow color, like mustard "like it wanted to get off the clothes when it was dry". Her legs were wet on the insides and she went to take a douche (R34,36). She had pain in the pelvic region of the abdomen, and had bruises on her entire body (R36-37).

Frau Mensch returned to the house with two soldiers who took both women to the military police. Private Alexander, one of the military police, testified that prosecutrix had two bruises "as large as a hen egg" over her eyes, her face was swollen, "her mouth busted open and cut", and that she had a bruised place on her neck (R7,8,34). Private Alexander returned to her house and found it in disorder, with three mattresses on the floor, a blood spot on the side of a door, and mud on the floor. There was also mud on

the barbed wire on top of the gate (R9-10).

Alexander then proceeded to accused's company, which was the only organization of colored troops in town, only 8 or 10 minutes' drive away, and reported the alleged incident to the commanding officer, who held an immediate inspection of his company (R11-12,49). In the third and last building inspected, the shoes of a Private First Class Foster and accused were found to be the only shoes in the company which were extremely muddy (R12,49). Both Foster and accused claimed they got the mud on their shoes in the motor pool (R13,15,48), but an inspection revealed that the ground there was grassy and not muddy, and there was no mud between their billet and the motor pool (R17-18,49). It had rained that night and the dirt road in front of prosecutrix' house was extremely muddy (R18,51). A watch was found in Foster's clothing and he had a bloody scratch on his nose (R14-15). Accused's coat had four or five damp, red spots on it, which appeared to be blood, and he had a freshly cut place in the palm of his right hand, which he claimed to have cut on a gas can (R16,50).

Prosecutrix identified the watch as hers and accused and Foster were placed in arrest (R17,35). Following the incident, prosecutrix found cartridges in the house which were about two inches long and which had not been there before (R36).

At about 0800 hours on 13 April, accused was warned of his rights under the 24th Article of War by Corporal Purdy and Private Alexander of the military police (R19-20,39-43). He at first denied being with Foster and asserted that he had been drunk and did not know anything about the alleged incidents (R21). Later, as they were preparing to leave the military police command post, he asked to talk with Corporal Purdy again, after which he voluntarily signed a written statement, which was received in evidence (R22-25,43-44; Pros. Ex. 1). In the statement he admitted going with Foster to the house, after drinking some liquor, climbing the fence, knocking on the door, pushing the women out of the way, and entering the house. He admitted that Foster had a carbine and ejected a cartridge on the floor, and also struck the woman several times with his fist when she tried to leave; and that both accused and Foster then lay the woman on the floor and engaged in sexual intercourse with her for 25 minutes (Pros. Ex. 1).

At the time of the trial, prosecutrix still suffered from spells of unconsciousness and had no feeling on the side of her face on which she was struck (R35). She was unable to identify accused as one of the two soldiers who were in the house, and could testify only that they were colored and very tall (R38).

4. After his rights were explained to him, accused elected to testify (R52-53). He came into Ohrdruf from a detail during the evening of 12 April. After chow he went to his barracks and waited for it to stop raining, then went to the motor pool and got his blankets from his truck. Coming back, he stopped to talk to someone in a freshly-dug, muddy, flower bed, and then went into his quarters, wrote two letters and went to bed. When he told the military police he got the mud on his shoes in the motor pool, he did not remember about being in the flower

bed (R53-54). The following day he wrote, but did not sign, a statement of his activities in his own handwriting (R55), only after Private Alexander assured him that the court would be "lighter" on him if he did so (R60-61). He admitted signing a typewritten copy of that statement, after reading it, but he denied making the statement shown in Prosecution's Exhibit 1 (R55), and would not state for sure whether he signed the exhibit or not (R55,59,60). He admitted signing other papers which were represented to him to be copies of the statement he had himself written (R55-56,62-63). He testified that he was not drinking on 12 April at all (R60).

5. The evidence sufficiently shows that accused was one of two colored soldiers who entered the home of prosecutrix at the time and place alleged in the Specification. While prosecutrix was unable to identify him at the trial, the evidence shows that shortly after the alleged act, accused and Foster were the only two soldiers in the only company of colored soldiers in the town whose shoes were extremely muddy, which fact was not satisfactorily explained by either, that the road in front of prosecutrix' house was very muddy, that mud was found over the locked gate in front of the house and inside the house, that accused had blood spots on his coat and a fresh cut on his hand, and that Foster, who slept in the same billet with accused, had in his pocket prosecutrix' watch, which had been taken from her at the time of the alleged rape, and had a scratch on his nose. This pattern of circumstantial evidence substantially inculpates accused, and "possesses inherent trustworthiness and reliability which is even more convincing than personal identification by witnesses" (CM ETO 4292, Hendricks; CM ETO 1202, Ramsey and Edwards).

In the statement received in evidence, accused admitted his presence at the house and his participation in an act of sexual intercourse with prosecutrix. This confession was not properly considered as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed (CM ETO 8234, Young et al; MCM 1928, par.114a, p.115). The violent acts of the soldiers after entering the house, the grabbing of prosecutrix and lifting of her skirt and the grabbing of her sexual organ, all prior to the time she was rendered unconscious, indicate clearly the intention of the soldiers to have intercourse with her. The additional facts that when she regained consciousness, her clothing and the inside of her legs were wet with fluid having the characteristics of semen, that one of the soldiers "sprung up" from a prone position, apparently near to or on top of her, that she experienced pain in the pelvic region of her abdomen, and went immediately to take a douche, strongly indicate that penetration of her was consummated by one or both of the soldiers. Such facts alone, aside from accused's statement, constitute sufficient proof of penetration by circumstantial evidence to sustain the conviction (see CM 249224, Hope, 32 B.R. 69 (1944), III Bull. JAG 147). Moreover, the evidence of corpus delicti need not cover every element of the charge, or be sufficient of itself to convince beyond reasonable doubt that the offense charged has been in fact committed (CM ETO 14040, McCreary; CM ETO 5805, Lewis and Sexton; MCM 1928, par.114a, p.115). Accused's contentions that he did not make the statements contained in the confession, and that he made

another statement only after being promised a "lighter" sentence, were contradicted by the testimony of Private Alexander and Corporal Purdy, and under the circumstances the court was warranted in accepting such confession (CM ETO 5747, Harrison, Jr; CM ETO 5584, Yancy).

The evidence for the prosecution, which is strongly corroborated by other testimony relating to the condition of prosecutrix following the commission of the alleged acts, shows beyond doubt that the act of intercourse admitted by accused was preceded by an extreme amount of force and violence, as well as by putting prosecutrix in fear of death or serious bodily injury, and the finding of guilty of rape is abundantly supported (CM ETO 611, Porter; CM ETO 4194, Scott; CM ETO 9083, Berger and Bamford; CM ETO 12472, Syacsure). After prosecutrix was in a state of unconsciousness, lack of consent was obviously apparent and presumed (CM 249224, III Bull. JAG 147; 44 Am. Jur., sec.9, pp.906-907). Even if accused did not actually achieve penetration, the evidence shows such a community of purpose between him and Foster to accomplish the rape of prosecutrix that accused would be liable as a principal for the rape of her by Foster (CM ETO 3740, Sanders et al; CM ETO 3859, Watson et al; CM ETO 10857, Welch and Dollar).

6. The charge sheet shows that accused is 22 years of age and was inducted 6 February 1943 at Camp Shelby, Mississippi. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon a conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the U. S. 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

Judge Advocate

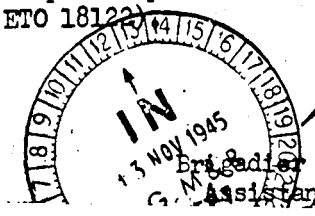
(194)

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 ROBERT H. JOHNSON (34621411), 3434th 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 18122. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18122).



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

(Sentence as commuted ordered executed. GCMO 592, USFET, 26 Nov 1945).

18122

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

BOARD OF REVIEW No. 1

8 DEC 1945

CM ETO 18138

UNITED STATES	)	100TH INFANTRY DIVISION
v.	)	
Private WALTER E. SMITH (42181107), Company G, 399th Infantry	)	Trial by GCM, convened at Stuttgart, Germany, 5 October 1945. Sentence: Dishonorable discharge, (suspended), total forfeitures and confinement at hard labor for two years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

OPINION BY BOARD OF REVIEW No. 1
STEVENS, DEWEY 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 96th Article of War.

Specification: In that Private Walter E. Smith, Company G, 399th Infantry, did, at Pforzheim, Germany, on or about 1 September 1945 procure Private First Class Adelard R. Gosselin, to

commit perjury, by inducing him, the said Private Gosselin, to take an oath before a competent tribunal in a trial by Special Court-Martial of Private First Class Walter E. Smith and Private George A. Gagnon, that he, the said Private Gosselin, would testify truly, and, wilifully, corruptly, and contrary to such oath, to testify in substance that he could not identify Private Smith and Private Gagnon as being the occupants of a certain United States Army vehicle which he, the said Private Gosselin, had seen at Nottingen, Germany, on or about the evening of 18 August 1945, which testimony was false, was material, and was known by the said Private Smith and the said Private Gosselin to be false.

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 three years. The reviewing authority approved the sentence but reduced the period of confinement to two years, ordered the sentence executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France as the place of confinement. The proceedings were published in General Court-Martial Orders Number 64, Headquarters, 100th Infantry Division, APO 447, U.S. Army, 24 October 1945.

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

On or about 1 September 1945, accused, a member of Company G, 399th Infantry, and Private George A. Gagnon were jointly tried by special court-martial at Pforzheim, Germany, appointed by the Commanding Officer, 399th Infantry, for having on or about 18 August 1945 unlawfully and without authority applied to their own use and benefit, one one-quarter ton truck, value of more than $50.00, property of the United States (R20; Govt. Ex. B). On 31 August 1945, First Lieutenant William A. Sullivan, trial judge advocate of the special court-martial that tried accused and Private Gagnon interviewed Private First Class Adelard R. Gosselin, a prospective witness for the prosecution (R28). At this interview, Gosselin told the trial judge advocate that he would testify to the facts contained in a prior statement in writing made by him (R31,39-40, 42; Govt. Ex. C). Upon the special court-martial hearing, Gosselin, called and sworn as a witness for the prosecution (R31) testified that he could not identify anyone inthe jeep (R32), and was thereupon confronted by the trial judge advocate with his written statement (Govt. Ex. C), which he

admitted having made previously (R33). The court then adjourned but reconvened on 4 September 1945 at which time Gosselin was recalled to the witness stand, and stated that he wished to change his testimony, that the facts as set forth in his previous written statement were true and correct, and that on the night in question he did in fact see the accused and Private Gagnon in the vehicle/special/ (R34-36). He further stated that he falsely testified at the original court-martial hearing that he did not recognize the men who were in the jeep because, immediately preceding the trial, accused came to him and said:

> "You better do what I told you or it will be T/S, you have got a wife and you want to go home; he said I'll be the only one who could identify him in the jeep and I had already told him that I signed a statement that I put him in the jeep, and he said your word is better than the paper" (R44).

Gosselin was afraid of accused and, because of his statements, falsely testified that he did not recognize him (accused) (R45,46).
After Gosselin testified at the first hearing, accused, accompanied by Gagnon, again told him that he would have to stick to his story or it would be "T/S". Gosselin thereupon reported the incident to a Lieutenant Young(R46).

Major Robert L. Bereuter, First Lieutenant William A. Sullivan and Technician Fourth Grade James J. Ryan each testified as to Private Gosselin's testimony at the trial by special court-martial (R20-21, 24, 31-32, 52-53, 56-59). Gagnon testified that shortly before the commencement of the trial on 1 September 1945, he overheard accused tell Gosselin in substance that his written testimony was no good in court and that if he was not positive he saw him not to go into court and say so (R60-61). Gagnon was with in two or three feet of Gosselin and accused, and heard no threats made by accused to Gosselin (R63-64).

4. Accused was advised of his rights as a witness by the law member and elected to remain silent. No evidence was offered on his behalf (R72-73).

5. The specification in the instant case alleges subornation of perjury, which is the offense of "procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited". (2 Bouvier's Law Dictionary, Rawle's 3rd Ed (1914), p. 3164). In order to convict an accused of this offense, as in the case of perjury itself, a certain quantum of proof is necessary. With reference to the offense of perjury, the following rule is applicable:

> "In order to convict a defendant of perjury it is necessary that there be more than oath against oath. Where, as in this case, reliance is upon the testimony of witnesses, there must be two witnesses against the defendant, or one witness and written documents or strong corroborating circumstances proved by independent testimony of witnesses. This is an inflexible rule of the common law applicable to every charge of perjury and must be enforced by the courts until

changed by statute". (Phair v. United States, (CCA 3rd, 1932), 60 F. (2d) 953).

"The ancient rule that required the testimony of at least two witnesses to prove the crime of perjury has, indeed, been relaxed.*** But what may be called the modern equivalent of this requirement still obtains. This general rule now requires the oath of one witness to be supported by that of another or by some other independent evidence inconsistent with the innocence of the defendant. *** Otherwise there would be but oath against oath ***. In Schonfeld v. United States (C.C.A.) 277 F. 934 *** it was made plain that, while the evidence of two witnesses was no longer required, that of one must be corroborated by independent proof of circumstances which takes the place of the evidence of the second witness and makes the proof sufficient to establish guilt beyond a reasonable doubt". (United States v. Isaacsen, (CCA 2d, 1932), 59 F (2d) 966).

A recent reiteration of this rule, as applied to perjury cases, is found in Weiler v. United States, 323 US 606, 65 Sup Ct 548, _____L. Ed_____, (1945), where, in answer to the prosecution's request that the court re-examine and abandon the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness, the court said:

"The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecutions more difficult than they otherwise would be is obvious, and most criticism of the rule has stemmed from this result.*** Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an oath against an oath. The rule may originally have stemmed from quite different reasoning but implicit in its evolution and continual vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.*** Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule".

In CM ETO 16044, Jamersen, the Board of Review applied the rule above stated in a case where an accused was charged with perjury and held that the conviction could not be supported simply upon an "oath against an oath".

That this same rule is applicable to subornation of perjury cases is shown by Hammer v. United States, 271 U.S. 620, 70 L. Ed.1118 (1926). In that case, the defendant was indicted for subornation of perjury. In the lower court, the prosecution offered in evidence the record of a bankruptcy proceeding in which one Trinz was sworn and testified. Trinz was the only witness called to prove the falsity of the testimony and the subornation. He testified that he gave the testimony alleged in the indictment, that it was not true, and that the petitioner suborned him. In passing upon the question whether this evidence was sufficient to sustain a conviction of subornation of perjury, the Supreme Court said:

"As petitioner cannot be guilty of subornation unless Trinz committed perjury before the referee, the evidence must be sufficient to establish beyond a reasonable doubt the falsity of his oath alleged as perjury. The question is not whether the uncorroborated testimony of Trinz is enough to sustain a finding that he was suborned by the petitioner. It is whether as against the petitioner, his testimony at the trial is enough to sustain a finding that his oath before the referee was false. Clearly the case is not as strong for the prosecution as where a witness presumed to be honest and by the government vouched for as worthy of belief, is called to testify to the falsity of the oath of the defendant set forth as perjury in the indictment. Here the sole reliance of the government is the unsupported testimony of one for whose character it cannot vouch - a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited. People v. Evans, 40N.Y.1.3. To hold to the rule in perjury and to deny its application in subornation cases would lead to unreasonable results. *** No such distinction can be maintained. The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases". (271 U.S. at 628, 70 L. Ed. at 1121). (underscoring supplied).

The instant case is governed by the cases cited above. It is true that there is some corroboration of Gosselin's testimony that his initial testimony at the previous trial was false. There is evidence of Gosselin's extrajudicial statement contrary to the alleged false testimony, of his oral affirmation of the truth of that statement, of the implied admission by accused that he was in fact in the jeep on the night in question, and of Gosselin's denial of the truth of his first testimony later in the previous trial. But all of this evidence emanates ultimately from Gosselin, the falsity of whose oath is the very matter in issue.

Gagnon's testimony that accused

"told Gosselin that his written testimony was no good in court so if he was'nt positive he saw them out there in the jeep *** if he was'nt positive he saw him out there not to goin and say that he was ****

is of such nebulous character as not to meet the standard of corroboration required by the courts (United States v. Isaacson, supra). No certain, specific inference may be drawn therefrom that Smith and Gagnon were in the jeep or that Gosselin in fact recognized them. Its maximum value is an indirect implied admission by accused that he was in the jeep. This possesses too great a degree of uncertainity to be reliable corroborative evidence.

The following comment of the court in the Isaacson opinion, supra, is appropiate here:

> "That is a thing [whether accused was in the jeep] so peculiarly written the knowledge of these two men (Gosselin and accused) alone that this case serves well to emphasize the value of the requirement for real corroboration of the testimony of one witness to support a verdict in a case of this kind" (p. 960).

We thus may not say that the corroboration of Gosselin's testimony is of sufficient strength, under the authorities cited above to warrant upholding the instant conviction. There is certainly no more here than mere oath against oath; there is no independent corroboration of the falsity of Gosselin's first testimony. It follows that the evidence does not support the findings of guilty of subornation of perjury.

6. The charge sheet shows that accused is 23 years eleven months of age and was inducted 2 September 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. 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 sentence.

Edward L. Stevens, Jr. Judge Advocate

[illegible] Judge Advocate

(DETACHED SERVICE) Judge Advocate

(201)

1st Ind.

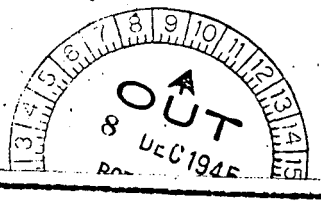
War Department, Branch Office of The Judge Advocate General with the European Theater. 8 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

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 WALTER E. SMITH (42181107), Company G, 399th 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 the sentence so vacated be restored.

3. It appears that this case could have been easily proved by proper examination of the witness Gagnon as to what transpired on the occasion when Gosselin testified he saw accused Smith and Gagnon in the jeep, but such questions were not asked.

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



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

(Findings and sentence vacated. GCMO 15, Usfet, 7 Jan 1946).

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

BOARD OF REVIEW NO. 4

14 NOV 1945

CM ETO 18159.

U N I T E D S T A T E S	) SEVENTH UNITED STATES ARMY
	)
v.	) Trial by GCM, convened at Marburg,
	) Germany, 26 September 1945.
Private DONALD E. OREM (33558035),	) Sentence: Dishonorable discharge,
Attached-Unassigned, 233rd Reinforce-	) total forfeitures and confinement at
ment Company, 72nd Reinforcement	) hard labor for life. United States
Battalion	) 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 soldier named above has been examined by the Board of Review.

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

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

Specification: In that Private Donald F. Orem, 233d Reinforcement Company, 72d Reinforcement Battalion then of Detachment 90, GFRC, did, at Euskirchen, Germany, on or about 24 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Baltimore, Maryland, USA, on or about 11 May 1945.

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

Specification: In that * * *, having been duly placed in confinement in the 90th Replacement Battalion Stockade, on or about 13 March 1945, did, at Euskirchen, Germany, on or about 24 March 1945, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of five previous convictions, three by special court-martial for absence without leave, for two, three and eleven days respectively, in violation of Article of War 61, one by summary court-martial for absence without leave for six days in violation of Article of War 61, and one by summary court-martial for losing through neglect government clothing and equipment in violation of Article of War 84. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution may be summarized briefly as follows: On or about 13 March 1945 accused was confined in the 90th Reinforcement Battalion Stockade at Euskirchen, Germany. On 24 March 1945, he was absent from the stockade, although he had not been released from confinement by proper authority, and he did not return thereto thereafter (R7,8).

The original morning report of Detachment 90, GFRC, dated 24 March 1945, was introduced in evidence without objection, showing accused "fr abs in conf 90th Repl Bn Stockade to AWOL eff 0200 hrs" (R7,8; Pros. Ex A).

It was stipulated that "accused, Private Donald E. Orem, 233d Reinforcement Company, 72d Reinforcement Battalion, then of Det 90, GFRC, was apprehended at Baltimore, Maryland, USA and returned to military control on or about 11 May 1945" (R9; Pros. Ex C). The court took judicial notice that the alleged absence of accused occurred in an active theater of operations (R9).

4. After having been informed of his rights with reference to testifying, accused took the stand under oath and stated that when he left the stockade on 24 March 1945 he intended to go to Belgium and France for a good time and then return. He had no intention of leaving the military service, nor did he intend to avoid hazardous service. He secured orders and traveled from Brussels to the United States by air, and was apprehended at Baltimore, Maryland, at which time he was dressed in "regular uniform" (R11-13).

No witnesses were called by the defense.

5. The record of trial discloses an absence without leave of 48 days duration, initiated by an escape from confinement at Euskirchen, Germany, during the progress of the war, and terminated by apprehension at Baltimore, Maryland. In effect, accused admitted under oath all essential elements of the offense of desertion, with the exception that he denied any intent to desert the service of the United States, but the court was abundantly justified in concluding from all the circumstances shown by the evidence that accused did in fact intend to desert the service (MCM, 1928, par. 130a, p. 144; CM ETO 1629 O'Donnell).

It is not necessary to determine the competency of the morning report reflecting accused's initial absence inasmuch as the oral testimony conclusively establishes that accused was in confinement and went absent therefrom without having been released, thereby adequately proving the initial absence without leave.

6. The charge sheet shows that accused is 20 years of age and was inducted 18 February 1943, at Baltimore, Maryland. 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). 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. 299, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Lester A Tamelson Judge Advocate

Martin A Krueger Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 4

14 NOV 1945

CM ETO 18161

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Wasseralfingen, Germany, 25 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOSEPH E. STANKEVICH, (36956570), Company A, 83rd Armored Reconnaissance Battalion	

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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joseph E. Stankevich did, at or near Erezee, Belgium, on or about 29 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 17 July 1945.

He pleaded not guilty to the Charge and Specification but guilty to the lesser included offense of absence without leave at the times and places alleged, in violation of Article of War 61, and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. 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 briefly as follows:

On 29 December 1944, accused's organization was engaged in combat with the enemy in the battle of the Bulge. They were disorganized and beginning to move to the rear for reorganization. Accused and two other soldiers, after a discussion of the question, decided to make their way to the rear because of the strain of battle, and on the same day, 29 December 1944, went absent without leave from their organization (Pros. Exs. A and B). They made their way to Paris by foot and truck, obtained blank traveling order forms, signed their names thereto and went by plane to London, remained there for two weeks, and, by presenting their false traveling orders, obtained surface transportation from Glasgow, Scotland, to the United States. They went by train to Glasgow, sailed therefrom the latter part of February 1945, and arrived at Boston, Massachusetts, about 3 March 1945. Accused then went by bus to his home in Chicago, Illinois, where he arrived about 7 March 1945. After reaching Chicago he engaged in no work and always wore his uniform when he left his home(Pros.Ex.D). On 17 July 1945 he was apprehended in Chicago, Illinois and was attached to and joined a military police company at Fort Sheridan, Illinois,for confinement(Pros. Ex. C).

4. Accused's rights as a witness were explained to him and he elected to remain silent (R10,11). He offered no evidence in his behalf (R11).

5. The record of trial discloses an absence without leave of more than six months duration originating in an active theater of operations at a time when accused's organization was engaged in one of the most savage and crucial battles of the European campaign, and terminating by apprehension at his home in the United States. His transportation from the theater of operations to the United States was fraudulently accomplished, and is evidence of the deliberation which attended the offense. The record of trial abundantly supports the inference that accused entertained an intent to desert the service of the United States and to avoid hazardous duty, and is clearly legally sufficient to support the findings of the court.

6. The charge sheet shows that accused is 36 years of age and was

inducted 24 March 1944, at Chicago, 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.

LESTER A. DANIELSON Judge Advocate

MARTIN A. MEYER Judge Advocate

(ON LEAVE) Judge Advocate

A TRUE COPY:

DANIEL L. O'DONNELL,
Colonel, JAGD.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater ~~of Operations~~
APO 887

BOARD OF REVIEW NO. 4

CM ETO 18162

8 NOV 1945

UNITED STATES

v.

Private JOHN H. SASS (42135758), 426th Airborne Quartermaster Company

) 101ST AIRBORNE DIVISION
)
) Trial by GCM, convened at Auxerre, France, 28 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for one year. 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 evidence with reference to Specification 2 of the Charge consists solely of an extract copy of the morning report for accused's organization dated 22 July 1945 and 27 August 1945, signed by "William P. Cianci, WOJG USA, Pers. O." As personnel officers, by reason of Cir.92, Hq USFET, 8 July 1945, were, subsequent to 8 July 1945, not authorized to sign morning reports, the record of trial is legally insufficient to support a finding of guilty of Specification 2 of the Charge.

Lester A. Danielson Judge Advocate

(DETACHED SERVICE) Judge Advocate

John K. Anderson Judge Advocate

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

BOARD OF REVIEW NO. 1

17 NOV 1945

CM ETO 18165

U N I T E D S T A T E S	) 103RD INFANTRY DIVISION
v.	)
Privates First Class WILLIE M. LUCERO (38349641) and HOMER E. MILLER (6299946), both of Company F, 410th Infantry	) Trial by GCM, convened at APO 470, U.S. Army, 6 July 1945. Sentence as to each accused: Dishonorable discharge (suspended as to MILLER), total forfeitures and confinement at hard labor, LUCERO for life and MILLER for 20 years. Places of confinement: LUCERO, United States Penitentiary, Lewisburg, Pennsylvania; MILLER, Loire Disciplinary Training Center, Le Mans, France.

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

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1. The record of trial on rehearing 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 Lucero was retried and accused Miller was tried upon the following charges and specifications:-

LUCERO

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie M. Lucero, Company F, Four Hundred and Tenth Infantry, did, at Hockenheim, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Louise Wolf of Mannheim, Germany.

MILLER

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Homer E. Miller, Company F, Four Hundred Tenth Infantry, did, at Hockenheim, Germany, on or about 8 April 1945, willfully and unlawfully aid and abet Private First Class Willie M. Lucero, Company F, Four Hundred Tenth Infantry, to have, forcibly and feloniously, against her will, carnal knowledge of Louise Wolf, of Mannheim, Germany.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring in the case of accused Lucero, and three-fourths of the members of the court present at the time the vote was taken concurring in the case of accused Miller, each was found guilty of the Specification and Charge preferred against him. Evidence was introduced of one previous conviction of accused Lucero by special court-martial for absence without leave from bed-check, assault with a dangerous weapon, and being drunk in camp in violation of Articles of War 61, 93 and 96. Evidence was introduced of three previous convictions of accused Miller, one by summary court for absence without leave for four days in violation of Article of War 61, and two by special courts-martial for being drunk and disorderly in uniform in a public place in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, Lucero was sentenced to be shot to death with musketry and three-fourths of the members of the court present at the time the vote was taken concurring, Miller 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, the Commanding General, 103rd Infantry Division, approved the sentence of accused Lucero and forwarded the record of trial for action under Article of War 48, and approved the sentence of accused Miller but reduced the period of confinement to 20 years, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence of accused Lucero, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, total forfeitures and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsulvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The proceedings as to accused Miller were published in General Court-Martial Orders Number 57, Headquarters 103rd Infantry Division, APO 470, U.S. Army, 13 July 1945.

3. About 1530 hours on 8 April 1945, the prosecutrix, a widow, was riding her bicycle in Hockenheim, Germany, where she had come to visit her mother (R9,18,20). She was ordered to halt by either or both accused, who were armed. Lucero ordered her to go to a nearby railroad station and took her bicycle away from her (R11-12). She began to cry and pleaded with them to let her go (R19), and at the entrance to the railroad station her mother approached (R12). Lucero "punched" the latter when she tried to get the prosecutrix away from him. The prosecutrix told her mother to go, thinking

that she could get assistance (R12). Lucero grabbed her and pushed her in the station and took her to a backroom therein. She pleaded with him to release her and he replied by putting the rifle at her breast because she had not removed her clothes fast enough. When she had taken them all off he indicated that she should lie down and proceeded to have sexual intercourse with her during the course of which he bit her on the neck (R13,14). Miller who had a rifle on his shoulder looked into the room several times (R14). When Lucero finished she noticed that he was "entirely bloody". There was blood both on the inside and outside of his trousers and on his shirt (R15,18). He made her lick the blood off his penis and then made her take it in her mouth. After this episode Lucero went out and Miller came in and tried to tell her something but she was unable to understand him (R15). By this time she had started to get dressed but Lucero came back again. He made her take his penis in her mouth, tried to have sexual relations with her "from behind", and then forced her to take his penis in her mouth again. During this episode Miller entered the room five or six times (R16). Finally Miller said something to Lucero and the latter left hurriedly. She let the soldier do these things to her because she was afraid he would shoot her "dead" (R18).

Meanwhile her mother had gone to the kitchen of accused's company and requested aid, whereupon the mess sergeant dispatched one of the cooks to investigate (R25, 28). When the pair approached the depot, Miller halted them and told the cook not to go in because "a boy is in there cutting a girl and its O.K.". The cook decided to go in anyway, but Miller preceded them (R29). As they started in the prosecutrix came out. There was blood on her lips, cheeks, and inside her legs (R30). The cook asked her if anyone had made her do anything, and according to him she said "all is good" and smiled (R31,32). She admitted saying "all is good" to the cook, because she was afraid he was another soldier who had come to rape her and she wanted to leave the station as quickly as possible (R17). She denied, however, that she smiled at them (R23). When she saw her mother she started to cry (R31).

Captain Henry Thompson, Medical Corps, testified that on 8 April 1945 in the course of investigating a disturbance he went to a house in Hockenheim and saw two women, one of whom was Frau Wolf. As a result of a talk with these women an identification parade was held and Lucero was selected. He had blood stains on the outside of his trousers (R35-37; Pros. Ex. A). Captain Thompson then conducted a vaginal examination of one of the women and found a small tear in the hymenal ring which was bleeding rather profusely (R38). The tear was due to the forceful entry of a hard object. She was not a virgin and such a tear in a non-virgin would not occur in normal intercourse (R39). An examination of the rest of her body revealed two small bruises on her neck "similar to bite marks" (R41).

4. Evidence for the defense:

Major Roland E. Nieman, Medical Corps, testified that he examined Lucero and as part of the examination gave him two intelligence tests, the first 12 April 1945 and the second 22 June 1945. He concluded from the first test that Lucero had a mental age of eight years three months and an "IQ" of 58 which placed him in the mental deficiency class. The second test showed him to have a mental age of 10 years and an "IQ" of 73. His improvement was

due to familiarity with the test. A person of average intelligence has a mental age of 15 years and an "IQ" of between 68 and 80 is borderline (R43). However, Lucero could distinguish between right and wrong, understand the nature of the proceedings against him and advise and assist his counsel. At the time of the offense he was not psychotic and was able to adhere to the right (R44).

The trial judge advocate testified that he saw Lucero on 2 June 1945 when he served the charge sheet on him and then about a week after that. Lucero claimed he was starving to death for lack of water. In the opinion of the witness he was crazy (R45).

Captain Steven B. Derounian, special defense counsel, testified that in preparing the case for trial he conferred with Lucero about four times. Accused did not talk rationally. When asked what he wanted he replied, "I want to make like Joe Louis made with Max Schmeling and when this thing with Japan is over, I want to go over there and help finish it". About four days before the trial he complained of having an eye in his stomach. He said it hurt him only when the witness looked at it. The conclusion of the witness was "I don't think he knows what he is talking about" (R47).

After being advised of his rights, Lucero elected to make an unsworn statement (R49). He said,

> "Me and Miller was gone down the street. We was both together and so this woman, I did not use any force on her whatsoever on her. I did not screw her against her will. I did not use any force on her" (R49).

After being advised of his rights, Miller elected to make an unsworn statement (R48) in which he said that a girl and Lucero went into a building and he remained outside. He talked to an old lady for about ten minutes and then went to the quarters of some French soldiers where he had a few drinks. He remained there about 20 minutes and when he left he saw the cook and "the old lady". He stopped the cook because he did not want Lucero to get caught fraternizing.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 149b, p.165). In examining the record to ascertain whether Lucero raped the prosecutrix and Miller aided and abetted him we look only to see whether there is substantial evidence to that effect, leaving the credibility of the witnesses and the weight to be given their testimony to the court (CM ETO 895, Davis et al).

As to Lucero, the evidence meets this test. The prosecutrix was the victim of an appallingly brutal attack. Her testimony was corroborated by the testimony of her mother, by the evidence of accused's blood-stained trousers, and by her physical condition as revealed by a medical examination. Although the testimony as to the identity of the woman examined was not too specific, still we concluded that, in all the circumstances, the court could find that it was the prosecutrix. Moreover, the accused inferentially

admitted having intercourse with the prosecutrix although denying the use of force. The record is legally sufficient to support the findings of guilty of the Specification of the Charge (CM ETO 12056, Reyes; CM ETO 16622, Moore; CM ETO 16971, Brinley; CM ETO 16901, Johnson et al).

Miller was charged with aiding and abetting Lucero in his rape, in violation of Article of War 92. He could properly have been charged as a principal (sec. 332, Federal Criminal Code, 18 USCA 550; CM ETO 5068, Rape and Holthus). There was evidence that accused repeatedly came into the room while Lucero was attacking his victim and consequently he is chargeable with knowledge of what transpired there. He halted the cook and tried to persuade him not to go into the depot. Obviously, the court was not required to believe his explanation that he was trying to protect Lucero from being detected fraternizing. The record is legally sufficient to support the findings of guilty of the Specification of the Charge (CM ETO 5068, Rape and Holthus, supra; CM ETO 4234, Lasker and Harrell; CM NATO 2121, III Bull. JAG p.235).

6. There was evidence that Lucero was insane at the time of the trial. This evidence consisted of the opinion of the trial judge advocate that accused was "crazy" and the testimony of the special defense counsel which was substantially to the same effect. The Manual provides that the court will inquire into the insanity of an accused whenever at any time it appears that such inquiry should be made in the interests of justice (MCM, 1928, par. 63, p.49). The ordering of such an inquiry was within the sound judicial discretion of the court (CM ETO 3963, Nelson, Jr.) and we see no abuse of that discretion where as here, a medical witness for the defense testified that accused was legally sane. Moreover the Manual specifically provides that

> "a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court" (MCM 1928, par. 63, p.49).

In this connection, the assertion of the trial judge advocate is entitled to no greater weight than the opinion of any other lay witness.

If the foregoing evidence is deemed sufficient to rebut the presumption of sanity and cast on the prosecution the burden of going forward with affirmative evidence to that effect (CM ETO 13376, Aasen) such burden was amply sustained by the testimony of the defense's medical witness to which we have already made reference. The fact that accused was of low intelligence is not a defense (CM ETO 6685, Burton). Mental deficiency falling short of the legal definition of insanity cannot avail him (Holloway v. United States (App DC, 1945) 148 F (2d) 665; CM ETO 9877, Balfour).

7. The charge sheets show that accused Lucero is 21 years 11 months of age and was inducted 28 December 1942 at Santa Fe, New Mexico, to serve for the duration of the war plus six months, and that accused Miller is 28 years four months of age and enlisted 8 October 1939 to serve for three years (extended to the duration of the war plus six months by the Service Extension Act of 1941). Neither had prior service.

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

9. 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 of accused Lucero (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b) and the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement of accused Miller (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 August 1945) is proper.

Edward C. Stevens, Judge Advocate

[signature], Judge Advocate

(DETACHED SERVICE) Judge Advocate

1st Ind.

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

1. In the case of Private First Class WILLIE M. LUCERO (38349641), Company F, 410th 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 as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18165. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18165).

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

(Sentence as commuted ordered executed. GCMO 619, USFET, 6 Dec 1945).

ETO 18165 LUCERO, WILLIE M.
MILLER, HOMER E.

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

BOARD OF REVIEW NO. 1

8 DEC 1945

CM ETO 18176

U N I T E D S T A T E S	)	66TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	St. Martin de Crau, France,
Captain MAX L. POWELL, JR.	)	7 July 1945. Sentence: Dis-
(O-310973), Cannon Company,	)	missal, total forfeitures and
263rd Infantry	)	confinement at hard labor for
	)	two years. Eastern Branch,
	)	United States Disciplinary
	)	Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, DEWEY and CARROLL, Judge Advocates
STEVENS, Dissenting in Part

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 Captain Max L. Powell Jr., Cannon Company, 263d Infantry, did, without proper leave, absent himself from his organization and station near Blain, Brittany, France, from about 2100 hours 7 May 1945 to about 0830 hours 8 May 1945.

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

Specification: In that * * *, was near Blain, Brittany, France, on or about 7 May 1945, found drunk on duty as a convoy commander while his unit was making a tactical move to a newly assigned area.

CHARGE III: Violation of the 94th Article of War.
(Finding of guilty disapproved by confirming authority).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of guilty disapproved by confirming authority).

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

Specification: In that * * *, did, on or about 7 May 1945 at Nantes, Brittany, France, enter a house of prostitution, an "off limits" establishment, with two (2) enlisted men of his command.

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

Specification 1: In that * * *, did, on or about 7 May 1945, near Blain, Brittany, France, wrongfully take and use without consent of the owner a ¼ ton vehicle, the property of the United States, of a value in excess of $50.00.

Specification 2: In that * * * did, on or about 7 May 1945, near Blain, Brittany, France wrongfully drink intoxicants with Private, then First Sergeant, William J. Tripp and Private, then Staff Sergeant, Sam E. Bonnefoy, enlisted men of his command.

Specification 3: In that * * *, did, at Hennebont, Brittany France on or about 4 April 1945, wrongfully borrow the sum of fifteen hundred (1500) francs, lawful money of the Republic of France, and a value of about Thirty Dollars and Twenty-six Cents ($30.26), lawful money of the United States of America, from Technician Fourth Grade Samuel A. Bacon, Cannon Company, 263d Infantry, an enlisted man.

Specification 4: In that * * *, did, at Nantes, Brittany, France, on or about 7 May 1945, wrongfully borrow the sum of One Thousand (1000) Francs, lawful money of the Republic of France, and of a value of about Twenty Dollars and Seventeen Cents ($20.17), lawful money of the United States of America, from Private, then First Sergeant, William J. Tripp, Cannon Company, 263d Infantry, an enlisted man.

He pleaded guilty to Charge I, its Specification, Charge V and Specifications 3 and 4 thereof, and not guilty to the remaining charges and specifications, and was found not guilty of Specification 1 of Charge III and guilty of all remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed

the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 66th Infantry Division, approved only so much of the sentence as provided for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, 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 Specification 2 of Charge III and Charge III, confirmed the sentence, but owing to special circumstances in the case reduced the period of confinement at hard labor to two years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution shows substantially the following:

a. Specification of Charge I - Absence without leave: On the evening of 7 May 1945, accused asked Captain Otto M. Boerner, Regimental Adjutant, 263rd Infantry, for a pass to Nantes, France. The adjutant told him the regiment was closing in tactically in a bivouac area and that no one was permitted a pass (R11-12). The adjutant was the proper person to clear officers from special units on pass (R8-11). Accused's organization was in the category of a special unit (R8). The regimental executive did not give accused authority to be absent on 7 and 8 May 1945 (R8). At approximately 2100 hours, accused, in company with three enlisted men, left the bivouac area near Blain and arrived in Nantes shortly before 2200 hours (R26-27). On the morning of 8 May 1945, accused was taken into custody in Nantes, France, by a military policeman (R42). An extract copy of the company morning report (Pros.Ex.I) was received in evidence without objection (R12) and shows a change in his status from duty to absence without leave as of 2100 hours, 7 May 1945.

b. Specification of Charge II - Drunk on duty as Convoy Commander: On 7 May 1945, accused was commanding officer of Cannon Company, 263rd Infantry. At about 1100 hours on that date, the regimental commander was directed by division headquarters to move the regiment by motor from Ploermel to near Blain, France. During the move accused was convoy commander of his organization (R7). Captain Elliot D. Moore, Anti-tank Company, 263rd Infantry, testified he observed him en route near the town of Redon (R14). Accused drank wine during the trip (R26,32,33) and offered witness a drink from an "ordinary type" wine bottle. Witness declined and accused invited witness' first sergeant and driver to have a drink. The first sergeant refused and the driver "went through the motions but did not take the drink" (R15). At the time, accused's face was flushed, his eyes were bloodshot, his voice was "rather excited", he smelled of drink, he was staggering and "did not have full control of his balance". In witness' opinion he was drunk (R11,15-16). Without any apparent reason, he stepped out in the center of the road and stopped a passing French truck loaded with beer (R16,22). In the opinion of two other officers, he was drunk (R22,25); his manner and conduct corroborated their opinion (R16,24).

c. Specification of Charge IV - Entering "off limits" house of prostitution with enlisted men: Shortly after 2100 hours on 7 May 1945, accused, in company with his then first sergeant, mess sergeant and driver went to Nantes where they entered the "House of Mirrors" located at 28 Rue Scribe, a bar and place of prostitution (R27-29,41), which was off-limits on 7 and 8 May 1945 (R42). Accused instructed the driver to return at 2230 hours (R34). Upon his return at that time, the driver saw accused and two enlisted men come out of the door of that place in the company of a military policeman. Accused and the enlisted men got into the vehicle but, after riding a short distance, accused told the driver to stop, that "they were going to stay all night and for me to come back at 8:30 in the morning" (R35). Accused, in company with an enlisted man, was arrested the next morning by military police near the House of Mirrors (R41-42).

d. Specification 1 of Charge V - Unauthorized use of government vehicle: In a special unit such as accused's it was necessary that authority for the use of governmental vehicles for recreational purposes be secured from the regimental S-1 (R9). No authority was given accused on 7 May 1945 to use a ¼-ton 4 x 4 government vehicle (R12). He used such vehicle on that date to go to Nantes (R27-28,34-35).

e. Specification 2, Charge V - Wrongful drinking of intoxicants with enlisted men: On the convoy trip from Ploermel to Blain, France, on 7 May, accused rode in a jeep with First Sergeant Tripp and the driver, Private First Class Houston (R25-26). During the first part of the trip accused and Sergeant Tripp drank a bottle of white wine. Thereafter, wine was procured and Mess Sergeant Bonnefoy joined accused and the others in the jeep and drank part of the wine (R26). The three were drinking together (R33).

f. Specification 3, Charge V - Wrongfully borrowing 1500 francs from Technician Fourth Grade Samuel A. Bacon: On 4 April 1945, accused borrowed 1500 francs from Technician Fourth Grade Samuel A. Bacon; the money was repaid by accused on the following payday (R48).

g. Specification 4, Charge V - Wrongfully borrowing 1000 francs from Private William J. Tripp: On 7 May 1945, Tripp loaned accused 1000 francs in Nantes, France. The money was repaid the next day by Lieutenant Riek (R31).

4. After an explanation of his rights, accused elected to remain silent, and no evidence was offered in his behalf (R55).

5. a. Specification of Charge I - Absence without leave: In addition to his pleas of guilty, there was abundant evidence before the court establishing the unauthorized absence, as alleged.

b. Specification of Charge II - Drunk on duty as Convoy Commander: There was a conflict in the testimony as to the drunkenness of accused while on the convoy. The record contains sufficient competent evidence warranting the findings of the court that he was drunk on duty as alleged. The issue of drunkenness was one of fact for the determination of the court. It was undisputed that accused was on a duty status at the time the offense

was alleged to have been committed (CM ETO 9423, Carr, and authorities therein cited; CM ETO 12761, Brockie).

c. Specification of Charge IV - Entering "off limits" house of prostitution with enlisted men: This Specification alleges that accused entered a house of prostitution, an "off limits" establishment, with two enlisted men of his command. Unlike the specifications under Charge V, it omits the word "wrongfully".

The rule is established by a long line of authorities that a specification, to be valid, must exclude every reasonable hypothesis of innocence.

In the case of CM 187548, Burke and Corcoran, 1 B.R.55 (1929), Dig.Op. JAG, 1912-40, sec.451(44), p.328, the Board of Review recognized this rule as follows:

> "That a specification must exclude every reasonable hypothesis of innocence - must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent - may be regarded as the settled law of this office as it is the settled law of the land (CM.No.132905, Osborn; CM.No.110347, Denham; Par.29a, M.C.M.)".

The specification in that case, as changed by the exceptions and substitutions found by the court, stated that the two accused, at the time and place alleged, did "attempt to take and carry away" a certain automobile, value about $200, the property of a named person. The Board pointed out that there were no words substituted showing that the act was done unlawfully or constituted any disorder, neglect, crime, or offense, and that it was entirely consistent with such a specification that accused attempted to take the car with authority of the owner or had rented it or had been ordered to remove it. The Board said:

> "In the absence of some word or necessary implication indicating the contrary, their acts must be presumed to have been lawful and innocent. The accused have not, therefore been found guilty of any offense in violation of the 96th or other Article of War".

Similarly, in CM 226512, Lubow, 15 B.R. 105(1943), II Bull. JAG 17, a specification alleged that accused did, at a certain time and place, "drive a motor vehicle while drunk". The Board of Review pointed out that the specification failed to allege that the driving was wrongful or unlawful or that accused drove the vehicle on a public road or highway, and that therefore, from all that was alleged, the vehicle might have been driven on private property. The Board then held that the specification failed to allege an offense.

More recently, it was held in CM 254704, Thompson, 35 B.R. 329(1944), III Bull. JAG 380, that allegations that accused was "asleep in uniform while on duty" were insufficient to state an offense,

> "under the rule that where an act charged is not per se an offense, words such as 'wrongful', 'unlawful', or the like must be used in the specification to make it an offense (CM 113535 and 130811, Dig.Ops. JAG 1912-40, sec.451(8); CM 218409, 1 Bull. JAG 18; CM 226512, 2 Bull. JAG 17)".

The Board of Review then held that the finding of guilty was not sustained.

Many of the earlier cases in this line of authorities are collected in Dig.Op. JAG 1912-40, sec.451(1), p.310 (citing CM 129373, CM 131104, CM 131120, CM 132902, and CM 128993), sec.451(8), p.312 (citing CM 113535 and CM 130811), and sec.451(31), p.321 (citing CM 125010).

Applying this rule to the instant case, the majority of the Board of Review is of the opinion that the allegation that accused did, at the time and place stated,

> "enter a house of prostitution, an 'off limits' establishment, with two (2) enlisted men of his command"

is insufficient to state an offense under Article of War 95 or any other Article.

The term "off limits" is defined in the Dictionary of United States Army Terms (TM 20-205) as follows:

> "place of locality, usually outside military areas, which military personnel are forbidden to enter, except on official business. An off limits area may be patrolled by military police" (p.189).

The majority of the Board believes that the natural and reasonable construction of the words, "off limits establishment", is that the establishment was off limits within the above definition.

Does the Specification of Charge IV exclude every reasonable hypothesis of innocence?

It is perfectly consistent with the allegations that accused rightfully entered the establishment upon official business. This hypothesis is rendered even more reasonable by the allegation that he was an officer and that he had a command, with the reasonable possibility that he may have entered the house, with the two enlisted men, to search or order out other members of his command. Other legitimate occasions for entering an off limits

place upon official business, for example, in the performance of duties in connection with military police, also readily come to mind.

Without an allegation indicating the wrongfulness of his act, it is not even inferable that accused knew or should have known that the establishment was "off limits". It is consistent to conclude from the allegations that, after entering the house, he immediately left the house upon realizing the nature of the establishment.

In the opinion of the majority, therefore, no wrongful act was alleged against accused, and the act must, therefore, be presumed to be lawful and innocent. We cannot say, as we must to sustain the Specification, that, if the allegations therein are proven, accused could not still be innocent.

The omission from the Specification of the word "wrongfully", or "unlawfully", or similar expressions that the act was wrongful, was, we think, fatal. While such words may be vague or general, they do add, in a case of this kind, the vital element that the act was wrongfully done and hence constituted an offense. It would be a vain thing to require the filing of a plea of guilty or not guilty to a charge of an innocent act. The right is fundamental not to be brought before a bar of justice, civil or military, and tried, until one is charged with the commission of an offense. This is not matter of nicety in pleadings, but a matter of substance, of fundamental right.

d. Specification of Charge V - Unauthorized use of government vehicle: The alleged unauthorized use of the government vehicle was established by the prosecution (CM ETO 14925, Bullock). While there was no direct evidence in the record that the vehicle was in fact property of the United States, it was shown that it was driven by the regularly assigned driver and the court was warranted in its inference that the vehicle was in fact the same vehicle as was used in the unit movement on that date and hence the property of the United States. The value of the vehicle was not satisfactorily shown. Prosecution Exhibit No. 4 is a stipulation in part to the effect that a certain 4 x 4 vehicle bearing the markings of "2631 - CN6" on its front bumper was the property of the United States and of a value in excess of $50.00. There is no proof in the record tending to show that this vehicle was in fact the one accused is alleged to have used without authority. However, such proof was not necessary and the court could properly find that it had a value in excess of $50.00, as alleged (CM ETO 4701, Minnetto).

e. Specification 2, Charge V - Drinking with enlisted men: The Specification alleges that accused "wrongfully" drank intoxicants with "enlisted men of his command". The proof showed that the drinking with the enlisted men took place under circumstances prejudicial to good order and military discipline. Such conduct by an officer is an offense under Article of War 96 (cf. CM ETO 6235, Leonard).

f. Specifications 3 and 4, Charge V - Borrowing money from enlisted men: Accused pleaded guilty to these two specifications and the prosecution satisfactorily established the commission of these offenses. The specifications allege that accused "wrongfully" borrowed the respective amounts and show on their face that the men from whom the money was borrowed were enlisted men of his command. In CM 221833, Turner, 13 B.R. 239(1942) at 246-247, it is said:

> "The evidence shows that the transaction /borrowing money/ occured as alleged and that the two sergeants extending the loan to the accused were members of his own organization. The act of the accused in so obligating himself to non-commissioned officers of his organization is conduct which is clearly prejudicial to good order and military discipline within the meaning of the 96th Article of War" (See also CM 230736, Delbrook, 18 B.R. 29(1943); CM ETO 2972, Collins; CM ETO 11758, Vollmar; CM ETO 11775, Porter; CM ETO 12621, Nickerson).

While the prosecution failed to prove the place of one offense laid in Specification 4, this failure of proof is here immaterial (CM 199270, Andrews, 3 B.R. 343(1932), Dig.Op. JAG 1912-40, sec.416-10), p.270; CM 238799, Dimmitt, 24 B.R. 359(1943) at p.364; cf. CM ETO 9257, Schewe).

6. The charge sheet shows that accused is 34 years two months of age, was appointed a first lieutenant, Officers Reserve Corps, 1 August 1936, and was called to active duty 4 March 1942. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge IV and Specification and legally sufficient to support all other findings of guilty and the sentence as confirmed.

8. Dismissal is mandatory upon conviction of an officer of violation of Article of War 85. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violation of Article of War 61 or 96. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

(DISSENTING IN PART) Judge Advocate

B H Levy Jr Judge Advocate

Judge Advocate

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

8 DEC 1945

BOARD OF REVIEW NO. 1

CM ETO 18176

U N I T E D S T A T E S	)	66TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at St. Martin de Crau, France, 7 July 1945.
Captain MAX L. POWELL, JR. (O-310973), Cannon Company, 263rd Infantry	)	Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

CONCURRING and DISSENTING OPINION
by
STEVENS, Judge Advocate

1. I concur with the majority of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charges I, II and V and their specifications and the sentence. I am unable to agree, however, with the conclusion that the Specification of Charge IV fails to state an offense in violation of Article of War 95, and am of the opinion that the record is legally sufficient to support the finding of guilty of Charge IV and Specification. It appears to be the settled doctrine in the Board of Review (sitting in Washington) that a specification must exclude every reasonable hypothesis of the accused's innocence so that if all facts expressly or impliedly pleaded be proved, he cannot be innocent. Every specification, in other words, must contain some word or words negativing the legality or innocence of his conduct, which is presumed (CM 187548, Burke and Corcoran (1929), 1 B.R. 55,56). Where the act charged is not per se an offense, some word such as "wrongful" or "unlawful" or the like must appear in the specification or it will not state an offense (CM 254704, Thompson (1944), 35 B.R. 329,339). Thus it has been held that among others, the following specifications failed to state offenses:

> break and enter a building (CM 125010 (1918), Dig.Op. JAG 1912-1940, sec.451(31), p.321);
>
> shoot
> with intent to kill/a soldier (CM 129373, 131104, 131120, 132902, 128993 (1919), Ibid, sec.450(1), p.310);

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with intent to do bodily harm strike R on the head with a hammer (CM 113535 (1918), 130811 (1919), Ibid, sec.451(8), p.312);

draw and issue a check, well knowing at the time that accused did not have any funds to his credit with the bank on which it was drawn (CM 130989 (1919), Ibid, sec.453(21), p.346);

drive a motor vehicle while drunk (CM 226512, Lubow (1943), 15 B.R.105,111);

in testimony before an Inspector General make under oath a statement which the accused did not then believe to be true (CM 251162, Diehl (1944), 33 B.R.143,154).

The instant Specification, in my opinion, states a military offense, and the authorities cited above do not conflict with this conclusion. In the pleading of offenses which are crimes at the civil law precision in a specification setting forth the vital elements thereof should be required. It may well be presumed that when Congress denounced such crimes in the military code ~~that~~ it intended not only should the established principles of substantive law be applied, but also that the acknowledged rules governing pleading and proof thereof should be adopted. This cannot be said with reference to indigenous military offenses. If the specification alleging such offense meets the requirement of "due process" and is intelligible in the light of usages and practices of the military service it should be sustained.

The essential purpose of the Specification is twofold: (1) to inform the accused of the precise offense attributed to him so that he may intelligently defend against it and plead his conviction or acquittal upon any subsequent prosecution for the same act, and (2) to advise the court and reviewing authority of the nature of the accusation so that they may perform properly their respective functions (Winthrop's Military Law and Precedents (Reprint 1920), pp.132-133). In addition is the requisite that the Specification state facts necessary to constitute the alleged offense. The Specification, particularly with reference to the pleading of purely military offenses, is governed by less stringent rules than the civil indictment. The former is very much briefer, simpler and less technical and artificial than the latter (Ibid). As stated by Attorney General Cushing:

"A specification does not need to possess the technical nicety of indictments at the common law. Trials by court-martial are governed by the nature of the service which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * Hence undoubtedly the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctly and accurately described in

> such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork of conviction and sentence" (Cushing, 7 Opins, 604) (Ibid, fn.5).

An example of the simplicity of pleading a military offense is found in Form 19, Appendix 4, Manual for Courts-Martial, 1928, p.241:

> "In that_____did, at_____, on or about_____, 19__, fail to repair at the fixed time to the properly appointed place (of assembly) for_____."

None would contend that such form of specification, appropriately completed, did not state an offense in violation of Article of War 61. And yet the words "wrongful", "unlawful", "without authority" or equivalent words inconsistent with innocence do not appear. Proof that the conduct was not culpable is matter of defense. Numerous instances of justifiable failure to repair may be suggested and yet they need not be negatived in the specification. The reason is that Article of War 61 denounces the very act charged without stating any exception. Although the fact that the exact words of the statute are employed affords a powerful justification for the simplicity of the language of the Specification, it does not follow that it is always the only justification. In the instant case the controlling division order, though like the statute in the case of the model form not mentioned in the Specification, directed:

> "All houses of prostitution in Nantes, France, are 'off limits' to all military personnel of this command."

No exception is made in the order. Is there not equal reason therefore, as a pure matter of pleading, which is essentially a logical process (Gould, 4, cited in Winthrop, Op. cit., p.134, note 6), for alleging simply, without mention of any of the various exculpatory exceptions, that an accused did enter a house of prostitution, an 'off limits' establishment, with enlisted men of his command? Moreover it is recognized in the Washington decisions that while culpability may not be found in a specification by mere deduction or speculation (CM 251162, Diehl (1944), 33 B.R.143,154), it may be the result of necessary implication (CM 187548, Burke and Corcoran (1939), 1 B.R.55,56), and it is not necessary that the precise words "wrongful" or "unlawful" appear (CM 254704, Thompson (1944), 35 B.R.329,339). It appears to the writer to be a wholly reasonable construction of the specification, from the point of view both of accused and of the court and reviewing authority, that the house of prostitution was "off limits" (viz, its entry was forbidden (Dictionary of United States Army Terms TM 20-205, p.189)) to accused individually as a member of the command at the time and 'place' and under the circumstances alleged. So also was it "off limits" to the two enlisted men of his command who accompanied him. Such is the fair intendment of the Specification. As to "all military personnel of this command", it was per se an offense to enter the house of prostitution declared "off limits". Situations may be imagined where an accused would not be convicted, for instance a medical officer summoned to attend a seriously wounded person.

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But even this would be a violation of the "off limits" order. A patrol or the military police might be ordered to the house to quell a disturbance or to remove soldiers, but an official order to this effect would raise the restriction as to those persons at that time and on that duty. In my opinion, therefore, the presumption of innocence did not require the insertion in the Specification of the usual inculpatory words and the Specification adequately states a military offense. The entry into an "off limits" establishment of this caliber, in company with enlisted men of his command, involving as it does gross indecorum, is a clear violation of Article of War 95 (MCM, 1928, par.151, pp.186-187). The evidence shows such entry and no evidence was presented by the defense to show that it was authorized or otherwise proper. I am, therefore, of the opinion that the record supports the findings of guilty of Charge IV and Specification.

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater, APO 887, U. S. Army. 8 DEC 19..
TO: The Judge Advocate General (for action by the Secretary of War), Washington, D. C.

1. In the case of Captain MAX L. POWELL, JR. (O-310973), Cannon Company, 263rd Infantry, attention is invited to the foregoing majority holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge IV and Specification, legally sufficient to support the findings of guilty of Charge I, II and V and their specifications and legally sufficient to support the sentence as confirmed. I hereby dissent from the views expressed by the majority of the Board of Review with respect to Charge IV and its Specification and am of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges I, II, IV and V and their specifications and legally sufficient to support the sentence as confirmed. My reasons for this conclusion are succinctly set forth in the minority holding of the Board of Review which I hereby adopt.

2. It is to be noted that the issue in this case involves the sufficiency of pleading a military offense. Most of the cases cited from the Board of Review in Washington involved civil offenses as to which a stricter view, paralleling the decision of the civil courts, may well be taken. The opinion published in 33 B.R. 143 holds insufficient a specification charging that an officer made under oath to an Inspector General a statement, which he did not believe to be true. This charges lying, which has always been an offense per se against the officer code. I think the holding is wrong and should not be followed. So here, any military person would know that the specification in issue charges a military offense and exactly what the offense was - the entry into a place where all military personnel of the command were forbidden by the Division Commander to go. I am opposed to whittling away the provisions of Article of War 37 and the doctrine of Winthrop and others expressed so well by Attorney General Cushing:

> "Trials by courts-martial are governed by the nature of the service which demands intelligent precision of language, but regards the substance of things rather than their forms".

We should avoid the technicalities of the civil courts and

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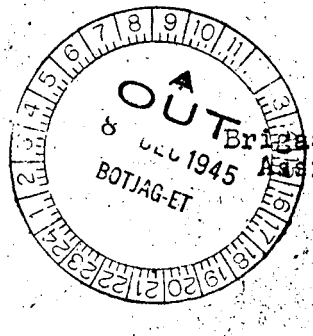
remember that "a specification does not need to possess the technical nicety of indictments at the common law". I feel sure that this specification would be sufficient for Colonel Winthrop and Attorney General Cushing, and should be upheld as a brake on the tendency to go too far in applying technical practices of the civil courts which have no application to a case such as this.



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

296097

SPJGN-ETO 18176 2nd Ind
Hq ASF, JAGO, Washington, D. C. JAN 14 1946
TO: The Secretary of War

1. Herewith transmitted for your action is the record of trial of Captain Max L. Powell, Jr. (0-310973), together with the opinion of the Board of Review, Branch Office of The Judge Advocate General with the European Theater; a concurring and dissenting opinion by one of the members of that Board of Review; and the concurring and dissenting opinion of the Assistant Judge Advocate General in charge of that branch office.

On 7 July 1945 Captain Max L. Powell, who was then assigned to the 263rd Infantry Regiment, 66th Infantry Division, APO #454, United States Army, was tried by general court-martial for a number of offenses. He pleaded guilty to, and was found guilty of, absenting himself without leave from his organization from about 2100, 7 May 1945 to about 0830, 8 May 1945, in violation of Article of War 61; and of wrongfully borrowing 1500 francs, the equivalent of $30.26 and 1000 francs, the equivalent of $20.17, respectively, from two enlisted men of his company, in violation of Article of War 96. In addition he was found guilty of being drunk on duty as a convoy commander while his unit was making a tactical move to a newly assigned area, on 7 May 1945, in violation of Article of War 85; of entering, on the same date, a house of prostitution "off limits" to his organization, in company with two enlisted men, in violation of Article of War 95; of wrongfully taking and using a Government vehicle on that date, and of wrongfully drinking intoxicating liquors on the same date with two enlisted men of his command, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years.

The reviewing authority, the Commanding General, 66th Infantry Division, approved only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of five years. The confirming authority, the Commanding General, United States Forces, European Theater, after disapproving a finding that the accused had also wrongfully disposed of two cases of "C" rations of a value of about $12, confirmed the sentence, but reduced the period of confinement at hard labor to two years, designated the Eastern Branch, United States Disciplinary Barracks, Green Haven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pending the review of the record of trial by the Board of Review and the Assistant Judge Advocate General as required by Article of War 50½.

2. The Board of Review of the Branch Office of The Judge Advocate General with the European Theater held that all of the above findings were legally sustained by the record except the finding that the accused entered a house of prostitution in company with two enlisted men on 7 May 1945, the offense described in the Specification of Charge I. The majority of the Board of Review disapproved the findings of guilty of this offense because the Specification, in its opinion, failed to state an offense, such entry not having been alleged to have been made "wrongfully or unlawfully." The dissenting member of the Board expressed the opinion that since the Specification alleging that the house of prostitution in question was "off limits," that the accused was sufficiently apprized of the indecorum intended to be charged and that, therefore, the Specification adequately stated an offense in violation of Article of War 95. The Assistant Judge Advocate General concurred in this opinion.

3. Although I do not approve of all of the statements made in the opinion of the dissenting member of the Board of Review, I concur in the general result reached that the record of trial is legally sufficient to sustain all the findings of guilty approved by the confirming authority and legally sufficient to sustain the sentence. Even though the Specification in question may have been defective in the form in which it was drawn, I am convinced that it fully apprized the accused of the nature and elements of the Charge against him, and that the evidence clearly established that the conduct alleged was "wrongful" and "unlawful" in that it constituted a violation of Article of War 95.

In an examination of the legal sufficiency of a Specification it is important to distinguish between objections raised to a Specification before and during a trial, and objections raised after a trial. When the legal sufficiency or ambiguity of a Specification is questioned prior to or at the beginning of a trial, and it is shown to be defective, the requirements of good pleading dictate that the Specification should be amended or withdrawn. On the other hand, when no objection is raised to such a defective Specification, when the accused is not in fact confused or misled thereby, and when the omission or ambiguity is clearly supplied or clarified by the evidence, the defect may be regarded as cured under the rule set forth in Article of War 37, which provides in part, as follows:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused; * * *" (Underscoring supplied).

This rule, which includes the rule of aider by verdict, is clearly recognized in our federal courts. In Coates v. United States, 59 F (2d) 173, the court stated:

> "* * * After verdict, every intendment must be indulged in support of the indictment. No objection can avail, no prejudice appearing * * *."

In view of the above principle, and since the defective Specification in no wise misled the accused or the court, I am of the opinion that the record is legally sufficient to sustain the findings of guilty of the Specification in question, and legally sufficient to sustain the sentence.

4. Although the accused's conduct in committing the offenses above described was reprehensible, it appears that they were committed in a spirit of exuberance on the eve of V-E Day and when the accused was under the influence of intoxicating liquors. In view of these facts, the previous good record of the accused, and the additional fact that the accused has already received considerable punishment as the result of his offenses, it is recommended that the findings of guilty and the sentence, as approved by the confirming authority, be confirmed, but that the forfeitures and confinement imposed be remitted, and that the sentence as thus modified be suspended during good behavior.

5. Consideration has been given to a letter from Mrs. Madeline L. Powell, wife of the accused, to a copy of a letter from Thomas Reed Powell addressed to the Honorable James V. Bennett, Department of Justice, and to copies of two letters from him addressed to Mr. John N. Martyn, Esq., Administrative Assistant to the Secretary of War, regarding clemency.

6. Inclosed herewith is a form of action designed to carry into effect the foregoing recommendation should it meet with your approval.

6 Incls
1 - Record of trial
2 - Form of action
3 - Ltr. fr. Mrs. Madeline Powell
4-6 - Copies of three letters from Thomas Reed Powell

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence as approved by confirming authority are confirmed, but forfeitures and confinement are remitted, and the sentence thus modified is suspended during good behavior. GCMO 54, W.D. 6 March 1946).

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

BOARD OF REVIEW NO. 2

24 NOV 1945

CM ETO 18182

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Weinheim, Germany, 12 July 1945, Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.
Second Lieutenant FRED E. GRIFFITH (01996640), Headquarters Company, 2nd Battalion, 334th Infantry	

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

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

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

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

Specification: In that Second Lieutenant Fred E. Griffith, Headquarters Company, Second Battalion, 334th Infantry, did, at or near Allemuehl, Kreis Heidelberg, Germany, on or about 22 June 1945, with intent to commit a felony, viz, rape, commit an assault upon Margot Weidenfeller, by willfully and feloniously beating the said Margot Weidenfeller in the face and head with his fist and tearing off her clothing.

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

Specification: In that * * * was at Eberbach, Kreis Heidelberg, Germany, on or about 22 June 1945, drunk and disorderly under such circumstances as to bring discredit upon the military service.

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

Specification: In that * * * did, at Eberbach, Kreis Heidelberg, Germany, on or about 22 June 1945, wrongfully strike Hildegunde Schreiner in the face with his fist.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of 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 dismissed the service to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 84th 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, 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 presented by the prosecution was substantially as follows:

On the morning of 22 June 1945, between 11:00 and 12:00 o'clock, accused and two enlisted men, Sergeant King and Technician Fifth Grade Peoples, left 2nd Battalion Headquarters, at Eberbach, Germany, by jeep to visit the 3rd Battalion area which was about 20 miles away (R22,48,49). They took with them at least two bottles of wine and two bottles of champagne. All of them drank during the journey (R23,24). After arriving at the 3rd Battalion area, accused visited with some of his friends and he and his friends drank two quarts of wine and a quart of champagne (R49,50). At about 2:00 o'clock in the afternoon, accused and the two enlisted men left and drove toward an officers' club located across the river at E Company. When they left "you could tell" accused had been drinking (R25,50). On the way to the officers club, accused's driver drove the jeep by the side of a cart on the street in Eberbach, stopped the jeep, took about a half dozen bottles from the cart and drove off. Accused then smashed several of the bottles in the street. This incident was witnessed by both soldiers and civilians who were attracted by the commotion (R7,8,52). After smashing the bottles, accused continued to the officers' club where he had some more drinks and became "pretty drunk" (R51).

About 5:00 o'clock that afternoon an American officer wearing a lieutenant's bar on his collar, identified as accused, and another American soldier came to the house of Frau Hildegunde Schreiner, which was located "about five minutes" from the officers club (R11,15). While in her house accused grabbed Frau Schreiner's daughter and pulled her into another room. The daughter called for help, Frau Schreiner succeeded in freeing her away from him and she left the house. Accused followed Frau Hildegunde Schreiner outside of the house and struck her in the face with his fist, cutting and bruising her lip

and inflicting other injuries about her face. He and the other American soldier then departed in the car (R12-15,18,19).

About 5:00 or 6:00 o'clock that afternoon on the road between Pleuterbach and Allemuehl, accused's car stopped in front of Margot Weidenfeller who then stood by the road. Accused got out of the car and ordered his driver to drive on (R26,27,53). He approached Margot, took some articles which she had in her hands, threw them into the ditch, struck her in the face and pulled her into the ditch (R27). He got on top of her, opened his pants, exposed his penis and as she cried for help he struck her "twenty-five to thirty times" in the face with his fist. After struggling she succeeded in getting up but he chased her, tore off part of her dress, ripped her drawers and petticoat and forced her to the ground again (R28,29; Pros. Ex. A). Frau Schenk, who was working in the woods nearby, heard Margot calling for help and came upon the scene but did not intervene because she was afraid (R30,34). Accused's driver returned to the scene (R53) and tried to restrain accused (R36). A second car, occupied by Lieutenant Thompson of accused's organization, approached and accused then entered his own car and was driven in the direction of Eberbach (R30,31,41). Lieutenant Thompson stopped and after observing that Margot's face was bleeding and swollen and her dress torn, he went on down the road where accused's vehicle was halted (R36,42). He found accused scuffling with a male civilian. He ordered accused to get into the vehicle and follow him. Accused obeyed the order (R42-44). Lieutenant Thompson "suspected" accused was "intoxicated" and "knew there must have been something wrong with him" (R43). On the way back accused was "hanging out of the jeep" vomiting (R55).

Margot Weidenfeller was examined by a medical officer later the same day and found to have multiple abrasions, contusions of the right and lower jaw, muscular strain of the right lower chest, loosening of four teeth, and a fracture of the nose (R46,47).

4. The accused after his rights as a witness were fully explained to him, elected to remain silent (R79,80).

On accused's behalf evidence was presented to the effect that his character had been excellent and his work superior (R40,61). He won the Bronze Star Medal for heroism and was awarded a battlefield commission (R8,40,41). Prior to the time of the offense charged he had requested a transfer to the Pacific Theater where his brother had been taken prisoner and he had said that he would "blow his top" if such transfer was not made. The transfer was refused him (R58,60-62). With reference to the offenses charged, several witnesses, including Sergeant King who accompanied accused on the day in question, testified that accused because of his intoxicated condition was assisted to and put to bed at his billet at 5:15 that afternoon where he remained the rest of the day and that he did not go to any house near the officers' club at about 5:00 o'clock that afternoon (R65,67,69,72). Defense

witnesses also testified that accused was drunk or dazed that afternoon (R71,72).

5. a. Charge I (Assault with intent to commit rape).

To sustain a conviction of this offense proof is required that the accused assaulted the person alleged with specific intent to have carnal knowledge of her by force and without her consent (MCM 1928 par 149 l, p. 179). The evidence clearly shows that the accused, at the place and time alleged in the Specification, assaulted Margot Weidenfeller by pulling her into a ditch, beating her in the face with his fist, exposing his penis, tearing her clothes, and trying to get on top of her in spite of her fierce resistance to his brutal attack. The victim's testimony was corroborated by other witnesses and by the physical injuries she sustained. While the defense offered evidence tending to show that accused was at his billet at about the time victim said the assault occurred, he was clearly identified as the person who committed the assault, and any conflict in the testimony as to the exact time of the assault was for the court to resolve. There was also evidence that accused was drunk at the time of the alleged assault but there was no proof that he was intoxicated to the extent that he was incapable of entertaining the requisite specific intent to commit rape. He was sufficiently aware of his surroundings to desist his attack when Lieutenant Thompson approached the scene and to obey Lieutenant Thompson's order to enter a jeep. From all the evidence the court was fully justified in finding accused guilty of the offense alleged (CM ETO 3280 Boyce; CM ETO 10728, Keenan; CM ETO 17056, Boger, et al). The finding of guilty of this offense is not inconsistent with the finding that accused was drunk and disorderly as alleged in the Specification of Charge II (CM ETO 3280, Boyce; CM ETO 7585, Manning).

b. Charge II (Drunk and disorderly).

This Specification alleges that accused was drunk and disorderly "under such circumstances as to bring discredit upon the military service" in violation of Article of War 95. While the form of the Specification is not to be commended, there was no objection or motion to make it more definite and certain and it does allege an offense in violation of Article of War 95 (CM ETO 10362, Hindmarch). To constitute guilt of the offense charged the proof must show that accused's conduct was such as to stamp him as morally unfit to be an officer or to be considered a gentleman (MCM 1928, par 151, p. 186). There was abundant evidence that accused was drunk and disorderly at the place and time alleged. His conduct in committing the brutal and malicious assault upon Margot Weidenfeller on a public road and attempting to rape her, his assault upon Frau Schreiner and his uninvited advances toward her daughter at their house, and his smashing of a number of bottles on a public street obviously constituted conduct unbecoming an officer and a gentleman. The findings of guilty are amply supported by the evidence (CM ETO 10362, Hindmarch; CM ETO 10759, Houle).

c. Charge III (Assault and battery).

Frau Schreiner positively identified accused as the person who assaulted her by striking her in the face with his fist. Her testimony was corroborated by the injuries she sustained as a result of the blow and by other evidence. Although she testified that the assault occurred about 5:00 o'clock in the afternoon and there was evidence for the defense that accused was at his billet at about that time, the conflict in the evidence as to the time of the assault was for the court (CM ETO 395, Davis, et al; CM ETO 15091, Gallahan, et al) The findings of guilty of the offense alleged are supported by the evidence (CM ETO 1177, Combess; CM ETO 3209, Palmer).

6. a. The defense raised a question as to accused's mental responsibility for the offenses charged and the prosecution erroneously stated that insanity could be proved only by "an official document from a qualified physician" (R59). The court, however, permitted the defense to introduce evidence of any "unusual actions" bearing on the state of mind or attitude of the accused (R59,60). Evidence was introduced tending to show that accused had been disappointed and irritated by his inability to obtain a transfer to the Pacific and had stated that he would "blow his top". Although the defense had opportunity to present any available evidence on the question, no other evidence concerning accused's sanity was offered and there was no showing that he was unable to distinguish right from wrong and to adhere to the right (MCM 1928, par. 78a, p. 63). It is, therefore, apparent that the defense was not misled by the erroneous statement of the prosecution and that accused's rights were not prejudiced. The court's findings on the question of accused's sanity, as reflected in the general findings of guilty, are supported by competent and substantial evidence and therefore must be accepted by the Board of Review (CM ETO 2023, Corcoran; CM ETO 3963, Nelson, Jr.; CM ETO 6685, Burton; CM ETO 9877 Balfour).

b. An evidentiary question as to the extrajudicial identification of the accused must be noticed. Major Sorahan testified that several persons identified the accused at a pre-trial "identification line-up" (R37-39). Some of the parties referred to by Major Sorahan were witnesses in the case and identified accused from the witness stand (R12,25) but others did not. The testimony concerning the pre-trial identification by those witnesses who identified accused in court was clearly competent and properly admitted (CM ETO 3837, Smith; CM ETO 8270, Cook). While it may be argued that the testimony regarding the identification of accused by those who did not identify him in court was hearsay (CM 270871, IV Bull. JAG 4), there is authority to the effect that such evidence is competent (CM ETO 8270, Cook, and cases therein cited; CM ETO 16971, Brindley). In any event, accused's rights were not prejudiced since his identity as the person who committed the offenses alleged was clearly established by other competent and compelling evidence.

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7. The charge sheet shows that the accused is 25 years, ten months of age. He enlisted at Fort Thomas, Kentucky, 7 October 1939, for three years. He was discharged and appointed a second lieutenant on 10 December 1944. He had no prior service.

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

9. A sentence of dismissal is mandatory upon conviction of Article of War 95. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violations of the 93rd and 96th Articles of War. Confinement in a penitentiary is authorized upon conviction of an 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, pars. 1b.(4), 3b.)

Earle Hepburn Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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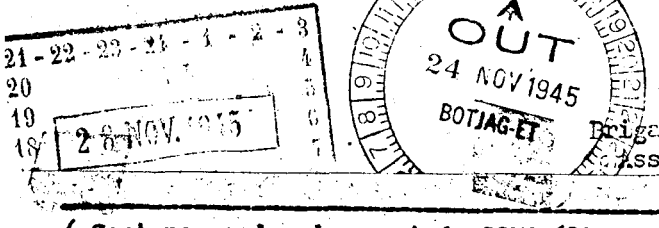
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant FRED E. GRIFFITH (O-1996640), Headquarters Company, 2nd Battalion, 334th 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. In view of accused's combat experience and his previous excellent record of six years military service, it is recommended that the place of confinement be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of trial in this office is CM ETO 18182. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18182).



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

(Sentence ordered executed. GCMO 617, USFET, 4 Oct 1945)

18182

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

BOARD OF REVIEW NO. 2

23 NOV 1945

CM ETO 18183

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	
Private JOHN D. SCALES (34301224), 1908th Quartermaster Truck Company (Aviation), 1576th Quartermaster Battalion Mobile (Aviation)	Trial by GCM convened at Liverpool, England, 11 and 12 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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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 John D. Scales, 1908th Quartermaster Truck Company Aviation, 1576th Quartermaster Battalion Mobile (Aviation), AAF 552, APO 635, did, at Prescot, Lancashire, England, on or about 26 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one James Edward Canovan, by stabbing him in the left shoulder with a knife.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for wrongfully operating a government vehicle in excess of 30 miles per hour in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay

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

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

About 10:30 PM, 26 August 1945, James Canovan (the deceased) and Martin Mannion, his brother-in-law, stood on the foot-walk along the side of Manchester Road near its intersection with Sewell Street, Prescot, England, waiting for the deceased's brother and uncle to overtake them. The four had visited various public houses in Prescot (R7). It was becoming dark at the time. Visibility was good for only 10 to 12 yards (R18). As they stood facing each other, talking, laughing and joking, the accused, a colored soldier, and an English girl who proved to be a Mrs. Annie Harmon walked past them in the street. When about 12 yards beyond them the accused suddenly returned and struck the deceased a blow. The deceased cried "he stabbed me" (R7-8). The blow was a swift downward blow with the right hand that came down on the left side of the deceased (R19). The deceased's brother in response to a call for aid ran up (R21) to them and he heard the deceased say "He stabbed me". He and Mannion approached the accused to try to take the knife away from him. The accused backed away from the English civilians threatening them with the knife held in his hand. After he had backed along Sewell Street as far as Box Alley, accused ran down Box Alley and disappeared. An ambulance came and removed the deceased to the county hospital (R8,21-22). Mannion denied that anything was said to or about the accused or accused's companion at the time they passed. He denied that he or the deceased had any weapon in their possession. As they stood on the foot-walk they faced each other, the deceased faced the highway (R10). Mannion had never seen the accused previously. He and the deceased were engaged in a conversation about boating on the lake when the accused without a word attacked the deceased (R15). As he described it, the accused, without excuse, reason, or provocation, came back and stabbed the deceased (R17). He admitted that the deceased's sister had had "an affair" with a colored soldier and had suffered a miscarriage (R17).

The deceased was admitted to the local hospital at 11:15 PM and died 2 hours later (R27-29) as a result of the stab wound in the left shoulder. The wound was about 1 inch in width and 2½ to 3 inches in depth (R27, 33,35). It severed the subclavian artery and vein causing death by loss of blood (R27-28,33). At least one edge of the instrument used was sharp (R34). Two other civilians happened along Sewell Street at the time and saw a man fall on the grass and a colored soldier being chased by two other men. The soldier backed away with a knife in his hand. A woman on the pavement shouted "It's no use, he won't put it down" (R40-41, 47-48). Only the blade of the knife was visible. It looked to be 4 or 5 inches long and an inch wide (R41). It was not a bayonet (R42).

A little after 11 PM, the accused entered the home of Mrs. Harmon. He was out of breath (R76). He related to Technician Fifth Grade Elous D. Davis, a witness for the prosecution, the following narrative:-

> He had engaged in a fight. As he and Mrs. Harmon passed two civilians on the road, they made disparaging remarks at him (R73). They called him a "black dirty, bastard" and said, "Lets go get him" (R77). Accused walked off the pavement to go past them, but they started after him. He turned to tell Mrs. Harmon to go home when one of the men struck him in the mouth. A scuffle followed in which accused cut one of the men on the shoulder (R73) as that man came up to him with his hand raised in such a manner that he could have had a knife in it (R77).

While accused talked to Davis he held a knife in his hand and wiped the knife with his handkerchief (R73-74). Davis further testified that Mrs. Harmon entered the house about 15 minutes before the accused. She had been running and was crying (R76). Accused's mouth showed evidence of having been struck a blow (R79).

The following day the accused's quarters were searched (R50) and a sheath and knife were found wrapped in socks in the bottom of his barrack bag (R51-53; Pros. Ex. 9). There was blood on the knife (R69). There was also blood on a handkerchief and on the cuff of the right sleeve of a shirt removed from and belonging to the accused (R57-59, 69, Pros. Exs. 15 and 20), but of insufficient quantity to be able to determine if it was human blood (R71). The knife was such as could have made the cuts found through the deceased's clothing (R68). The blade of the knife was 4 7/8 inches long and about 1 inch wide at its widest point (R69).

On 27 August 1945 accused was placed under arrest and shortly thereafter signed a written statement, admitted in evidence without objection (R82, Pros. Ex. 23), in which he stated, with reference to the episode under discussion, that as he and Annie Harmon walked along Manchester Road, he observed two men who stood in the dark near the shrubbery. He heard the remark, "here comes one of the black yanks" and "he's good and black". Mrs. Harmon and accused continued past the men when he heard footsteps behind him. He turned around and discovered a man behind him who attempted to kick him. Another man was further away who had his right hand under his coat. With the back of his left hand that man slapped the accused in the mouth and at the same time drew what appeared to be a bayonet and held it in his right hand.

> "He said something about being in Burma. I have had 6 months of training in Judo fighting and when the man with the bayonet attempted to strike me with it, I side-stepped and twisted his right arm to his left shoulder with the point of his bayonet facing into his body. My weight went down on his twisted arm and caused the bayonet to imbed itself in the man's body

in the region of his left shoulder. The entire action took about 15 seconds and I ended up with the bayonet in my right hand. The man I had been grappling with shouted, 'He stabbed me'.

The person who first made the kick at me ran around the injured man and came towards me, so I held my left hand extended to hold him off and raised the bayonet with my right hand so he would not come forward. The injured man also came toward me at the same time. I kept backing up until I felt my back against a wall. Anne had left the scene about a second after I had pulled the bayonet from the injured man.

The man who was not injured then called down the street to another civilian and at the same time said 'this bloody _____ stabbed my brother', I cannot recall the word that followed 'bloody'. The third man who was called to the scene tried to hold off the civilian who was coming toward me. Soon, there appeared about 10 people who stood around us. I shouted, 'Hey soldiers', to distract the crowd and when I saw my opportunity, I dropped the bayonet to the ground and ran off."

In the same statement he also declared that the knife found in his duffle bag had been placed there by him that morning (27 August 1945); that he had removed it from the field bag of T/5 Johnson to protect Johnson from being found with it; and that he did not have it in his possession on the night of the 26th of August and did not use it in the assault (Pros. Ex. 23).

It was stipulated that if T/5 Johnson were present he would testify that the knife (Pros. Ex. 9) was his and that he kept it in his duffle bag, but during June 1945, as a result of an order to get rid of all knives, he threw it and its sheath away into a field in the rear of the Station Motor Pool. Accused occupied the same room with him for the past 18 months and he never knew the accused to carry or own a knife (R85; Pros. Ex. 24).

4. For the Defense:

Annie Harmon, a resident of Prescot, testified that she had known and had frequently associated with accused for the past 2 years (R86). As he was taking her home on the night of 26 August 1945, she observed two men who stood on the narrow sidewalk of Manchester Road. They blocked the way. She and accused walked into the street to pass them. As they passed one said, "Here's a nice big dirty black bastard" and, "Lets get him" and "do to him what the boys do to them in Burma" (R87-88). The deceased reached toward his waistcoat as if to get something as he scuffled with the accused. One struck accused in the mouth and kicked him. The two men ran him "here and there". Again one said, "Let's get him". She shouted, "John get away before he does

get you. If you don't get away he'll get you". She saw something gleaming in the accused's hand and heard the deceased say "I'm stabbed". She then ran home (R89). During their 2 years of friendship she never knew accused to carry a knife (R90). She was positive that it was the deceased who "bashed him in the mouth and kicked him" (R94) and who made the remarks (R95) and who was the original aggressor (R96). When accused arrived at her home later, his mouth was swollen and bleeding (R104) and he wiped it with his handkerchief (R106). Miss Irene Taylor was also at Mrs. Harmon's house when accused entered and heard him tell about the fight in which he had been engaged. She also noticed that his lip bled and he wiped it with his handkerchief. She did not observe any knife (R109-110).

The accused having been advised concerning his rights as a witness elected to remain silent "and let his statement stand as was submitted by the prosecution" (R111).

5. Accused was found guilty of the murder of James Edward Canovan. Murder is defined as the killing of a human being with malice aforethought and without legal justification or excuse (MCM, 1928, par. 148a, p.162). 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 Criminal Evidence, (4th Ed, 1935) sec. 557, p.1090).

It was clearly established by the evidence and not denied by the accused that at the time and place alleged in the Specification he stabbed the person named therein in the left shoulder with a knife or other sharp instrument, which caused his death in about two hours. There was, therefore, substantial competent evidence to support a finding of a killing of a human being with malice aforethought and the further finding that the accused was guilty of murder (CM ETO 292, Mickles, 1BR (ETO) 231; CM ETO 1941, Battles; CM ETO 2007, Harris Jr; CM ETO 3649, Mitchell). Prosecution's evidence and that of the defense is in conflict as to the facts surrounding the homicide. According to the prosecution, accused deliberately and without cause or excuse sought deceased and stabbed him. The evidence for the defense presents a version of the affair that makes the deceased and his associates the aggressors - first, by the application of opprobious epithets to accused, and secondly by direct physical attack upon him by one of the English civilians. Had the court, as it was authorized to do, believed the evidence for the defense, a situation involving "mutual combat" would have been disclosed and a verdict of voluntary manslaughter instead of murder would have been justified (CM ETO 72, Jacobs and Farley, 1 BR (ETO) 31; CM ETO 6074, Howard; CM ETO 10338, Lamb). However, the court by its findings, rejected defense's evidence and accepted that of the prosecution. In this respect the court acted entirely within its authority. This case is one where the court is the best judge of the credibility of the witnesses and the evidential value of their testimony. The often repeated rule of the Board of Review may be quoted with particular relevancy:

> "The weighing of the evidence and determining its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate

facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence" (CM ETO 895, Davis et al, 3 BR (ETO) 59,97).

6. Consideration must be given to the question of self-defense which is strongly suggested by defense's evidence.

"To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par. 148a, p.163).

As heretofore stated the evidence discloses a sharp issue of fact. The only eyewitness produced by the prosecution related an occurrence which, if believed, clearly showed a deliberate murder of the deceased by the accused. He testified that the accused without cause, justification or provocation walked up to the deceased, a total stranger, on a public street and stabbed him to death with a knife. The accused and his woman companion contend that the deceased and another civilian resenting the fact that he, a colored soldier, was accompanying a white girl of the neighborhood attacked him, struck him in the mouth and kicked him, and in self-defense he struck the deceased with a knife or bayonet. In the statement signed by the accused for the military authorities he claimed that the deceased had a bayonet in his hand when he attacked the accused and that he himself was unarmed. His contention that he did not have a knife at the time of the altercation and his explanation regarding the knife found in his duffle bag were seriously impeached by numerous witnesses. The story told by the civilian of the unprovoked attack upon his brother-in-law appears hardly credible, unless the accused, misunderstanding their conversation and believing that they had directed insults at him, stabbed the deceased in retaliation or revenge. Such a conclusion would sustain the finding of guilty but would be contrary to Mrs. Harmon's description of the occurrence. Assuming that the court accepted her version that there was an unwarranted attack made upon the accused, the court could still legally find the

accused guilty of murder by concluding either that the accused was not justified in killing his adversary in self defense, or that he killed in revenge for the insults offered and not for the purpose of self-defense. (CM ETO 1941, Battles, supra; CM ETO 3180, Porter; CM ETO 3957, Barneclo). The court was the sole judge of the facts and if its conclusion are based upon substantial evidence of record they will not and may not be disturbed upon review by this Board (CM ETO 895, Davis et al, supra; CM ETO 4194 Scott; CM ETO 14824 Barber). Should the Board of Review venture into the field reserved to the court as the fact finding agency, it would manifestly exceed its authority.

7. The charge sheet shows that the accused is 23 years four months of age and was inducted 24 April 1942 at Fort Bragg, North Carolina. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

19 NOV 1945

CM ETO 18200

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private LAWRENCE A. DAVIS (15087122), Company A, 390th Engineer Regiment.	) Trial by GCM, convened at Paris, France, 14 and 16 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
HEPBURN, HALL 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 Lawrence A. Davis, Company A, 390th Engineer Battalion, European Theater of Operations, United States Army, did, at the Paris Detention Barracks, 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 was apprehended at Ermenonville, France, on or about 4 January 1945.

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

Specification: In that * * *, having been duly placed in confinement in the Paris Detention Barracks, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 23 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.

CHARGE III: Violation of the 93rd Article of War

Specification: In that * * *, did, at Ermenonville, France, on or about 4 January 1945, with intent to commit a felony, viz. murder, commit an assault upon Private Frank J. Woods, United States Army, by willfully and feloniously shooting the said Private Frank J. Woods with a pistol.

CHARGE IV: Violation of the 94th Article of War

Specification: In that * * *, did, at Compiegne, France, on or about 4 January 1945, knowingly and willfully misappropriate a Government vehicle, a 2½-ton 6x6 truck, of the value of more than fifty dollars ($50.00) property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty and, all 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 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 and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances, in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the 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. On 28 November 1944 the accused was apprehended by military police in the Latin quarter of Paris during a routine check. He displayed a pass which appeared to be fictitious and was taken to a checking station where he was searched (R6). Later that same day the accused and four other prisoners were taken under guard from the Caserne to the Seventh General Dispensary for medical treatment (R8). While at the dispensary the accused and one other prisoner escaped (R8,9). Between 30 November 1944 and 3 January 1945 the accused, under the name of "Solo" visited a French woman in Paris every five or six days (R17) and was identified as having eaten at a certain cafe

in Paris on several occasions during the month of December 1944 (R20).

On 4 January 1945 four members of the 1296th Military Police Company were detailed to investigate reported black market activities at the Hotel l'Ermitage in Ermenonville, France (R10,13). At approximately 1500 hours the military police detail was interrogating four colored American soldiers in the dining room of said hotel (R10,12) when the accused and another colored soldier drove up to the hotel in a 6x6 cargo army truck (R12). Two of the military policemen, Sergeant Dolloff and Private DeWilde, went out, halted the truck and required the men to dismount. Private DeWilde then drove the truck around to the rear of the hotel, and upon hearing shots ran to the front of the hotel and found that Sergeant Dolloff had been shot (R13). Another of the military policemen, Private First Class Allard, from the dining room of the hotel observed Sergeant Dolloff coming across the courtyard with two negro prisoners (R16) and proceeded downstairs to assist him. When he was half way down the stairs the two prisoners followed by Sergeant Dolloff entered the hallway at the foot of the stairs (R16). The companion of accused pulled a pistol from his jacket and fired two shots at Allard who returned to the dining room for a tommy gun (R10,16). During his absence he heard quite a few shots being fired and upon his return found Sergeant Dolloff slumped over in the hallway. He instructed Private DeWilde to take care of Sergeant Dolloff and proceeded to the courtyard where he and the accused exchanged quite a few shots, the accused escaping after Allard's tommy gun jammed (R16). Meanwhile, the fourth military policeman, Private Frank J. Woods, went out the side door of the hotel and saw the companion of accused in the cab of a 6x6 truck attempting to start it. This colored soldier was armed with an automatic pistol which he fired at Private Woods. In resulting exchange of fire this colored soldier, later identified as Technician Fifth Grade Willie Bell, was killed (R11). Shortly thereafter military police reinforcements arrived and a search of the area was made for accused who was believed to have been wounded (R10,13,16). As Private Woods was ascending a stairway leading to the attic of a house in the vicinity he was struck in the right shoulder by a bullet that came from the direction of the attic (R11,14) and was removed to a hospital (R11). A stipulation by and between the accused, his counsel and the trial judge advocate was received in evidence as Pros. Ex "B" to the effect that if Major Louis Malow, Medical Corps, were present in court he would testify that on 4 January 1945 he examined the person of Private Woods and found "wounds perforating chest, right with perforation of lung right" (R5,6). Shots were thereafter fired into the attic and other military policemen ordered the man in the attic to come down (R11, 14). Captain Garber, company commander of the 1296th Military Police Company, arrived and threatened to throw a grenade into the attic and after some conversation and after exhibiting his "MP" brassard and officer's bars at the request of accused the accused surrendered. The attic was then checked and no one else was found there (R14). A stipulation by and between the accused, his counsel and the trial judge advocate was received in evidence as Pros. Ex. "A" to the effect that the value of a 2½-ton 6x6 truck United States government vehicle is in excess of fifty dollars ($50.00) (R5,6).

On 6 January 1945, after being duly advised of his rights under Article of War 24 and that he did not have to make any statement unless he chose to do so, the accused made a voluntary statement (R21,23), which was received in

evidence as Pros. Ex. "C" over the objection of defense counsel (R22-25). In this statement the accused identified himself as a member of Company A, 390th Engineer Regiment and after an account of his activities from the time he left his organization on 5 September 1944 admitted that he was picked up in Paris by military policemen "just before Thanksgiving Day". That he was sent to the stockade and then taken to the eye clinic with some other boys and that when the guard went to look for one of the other boys the accused "took off". He secured a ride to Chartres and there "swiped" a General Motors 6x6 cargo truck and went to Cherbourg on information that his unit was there but ran into a road block and returned to Paris leaving his truck out of town. This truck was stolen and he later started for Cherbourg with one Willie Bell. The fan belt on Bell's truck broke and the two "stole" another truck. Instead of going to Cherbourg they went to St. Lo, then to Le Molay and then started for Marseilles but en route they decided to return to Paris. They stayed in a small hotel outside of Paris, hid their truck and on Christmas Day "hitched on" into Paris. Learning that police were checking everyone they left Paris and went to Reims. Later they returned to Paris and then again started toward Reims but lost their way in trying to avoid a road block at Soissons and ran out of gas. They abandoned the truck and went to Compiegne where they "stole" the last truck in a convoy they saw "setting". "This is the truck we drove to Ermonville in and the one the MPs caught us with there". They then went to the Hotel l'Ermitage where they expected to find an acquaintance and were there stopped by two military policemen and were ordered to go into the hotel. Willie started shooting and a sergeant grabbed accused as he was pulling out his gun. Willie shot the sergeant and the accused fled from the hotel and went to the village where he finally managed to get into a house and went up into the attic. While he was there Private Woods began to come up through the trap door and accused, thinking he was going to be killed, fired at Woods. He later surrendered to two "MP officers as soon as they convinced" him "they really were MP officers" (Pros. Ex. "C").

Accused took the stand under oath for the limited purpose of testifying as to the manner in which his pretrial statement (Pros. Ex. C) had been taken (R22). He testified that he was advised of his rights under Article of War 24 and understood that he did not have to make a statement and that he voluntarily made the statement that was offered in evidence. However, he contended that he made the statement only to help the investigating officer and was advised that it might not be used in court against him and that if it were he would have a right to object thereto (R23). The investigating officer admitted on cross-examination that he told the accused it was possible the statement would not be used against him in court since it contained many matters not pertinent to present charges. At the time he fully expected to secure another statement prior to trial containing only matter pertinent to the offenses charged (R24). The court admitted the statement with the qualification that it would consider only that part thereof pertinent to the charges and specifications on the charge sheet (R25).

4. The accused after being fully advised of his rights as a witness (R22,26) elected to make an unsworn statement (R26) in which he declared that he had no

intention of escaping confinement but that when the guard walked away and left him alone at the dispensary the temptation was too great because of the conditions in confinement, namely, not getting enough to eat, no heat, and sleeping on a concrete floor in the winter with only one blanket. At the time of his arrest on 4 January 1945 it was not his intention to resist arrest; that he did not know the "MPs" were military police and thought they were outlaw soldiers; that when the shooting started in the hotel he thought they were trying to kill him so he tried to get away; and that he later surrendered when an officer made it clear that he was an officer of the military police (R27).

5. a. Charge I (Desertion) and Charge II (Escape): The accused has been convicted of desertion and escape from confinement. The type of desertion charged is defined as absence without leave accompanied by the intention not to return (MCM, 1928, par. 130a, p.142). The evidence for the prosecution and the admissions of the accused showed without contradiction that the accused was a military prisoner under guard when at the time and place alleged, he escaped from custody and departed before he was set at liberty by proper authority. His act constituted an escape from confinement in violation of Article of War 69 (MCM, 1928, par. 139b, p.154) and absence without leave, thus providing one of the necessary elements of desertion. The intent not to return was properly and legally inferred by the court from the duration of his absence, its termination by apprehension, and his admitted unlawful activities during that absence (CM ETO 16880, Ferrara; CM ETO 16869, Henry).

b. Charge III (Assault with intent to murder): The accused has also been convicted of an assault with intent to murder. This offense is defined as an assault - an attempt with unlawful force to do a corporal hurt to another - aggravated by the concurrence of a specific intent to murder. It is an attempt to murder (MCM, 1928, par. 149l, p.178). The evidence clearly showed that, at the time and place alleged in the specification, accused aimed and fired a deadly weapon at Private Frank J. Woods and caused a bullet to strike him, perforating his chest. The accused did thus assault Woods. The intent to murder was properly inferred by the court from the circumstances - particularly the use made of the dangerous weapon (CM ETO 1535, Cooper; CM ETO 2297, Johnson; CM ETO 2672, Brooks; CM ETO 2899, Reeves).

c. Charge IV (Misappropriation of government property): The elements of this offense are:

> "(a) That the accused misappropriated or applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as specified". (MCM, 1928, par. 150i, p.185).

In his written confession the accused admitted that he and his companion stole the government vehicle found in their possession from a convoy in Compiegne, France, and drove it to "Ermonville" to visit or call upon another soldier known to them to be AWOL. By stipulation it was shown that the vehicle was a government vehicle and was of a greater value than $50. The proof of finding the accused, then in desertion, in possession of a government truck was a sufficient corpus

delicti to warrant the admission in evidence of his confession of the theft and his subsequent misappropriation of the vehicle by using it for his own personal purpose. All of the elements of the offense charged were therefore supported by substantial evidence of record (CM ETO 11838, Austin).

6. The charge sheet shows that the accused is 22 years four months of age and was inducted 17 December 1941 at Fort Thomas, Kentucky. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion and of an assault with intent to murder 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, pars. 1b (4), 3b).

Earle Stephens Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins Jr. Judge Advocate

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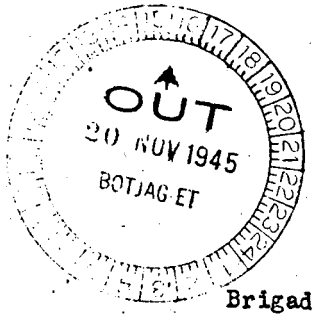
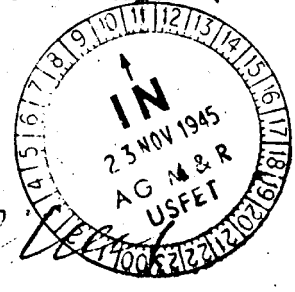
1st Ind.

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

1. In the case of Private LAWRENCE A. DAVIS (15087122), Company A, 390th Engineer Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18200. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18200).





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

(Sentence as commuted ordered executed. GCMO 612, 652, USFET, 17 Dec 1945).

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

BOARD OF REVIEW NO. 2 17 NOV 1945

CM ETO 18201

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private ADRIAN MERCHANT (36643252), 1st Reinforcement Depot, Mediterranean Theater of Operations.	)	Trial by GCM, convened at Paris, France, 19 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. The U.S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, HALL 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: In that Private Adrian Merchant, 1st Reinforcement Depot, Mediterranean Theater of Operations, United States Army, did, at or near Paris, France, on or about 21 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Paris, France, on or about 17 May 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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, United States Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48 with a recommendation that the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the sentence as provides that the accused be shot to death with musketry, but owing to special circumstances in the case and the recommendation for clemency by the reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of 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 3 January 1945 accused, who was in the military service of the United States, was confined in the Paris Detention Barracks, Paris, France. A physical check of all prisoners was taken between 21 and 23 January 1945 and it disclosed that he was absent (R5). A thorough search was made of the barracks but he could not be found (R6). About 5:30 PM of 17 May 1945 he was apprehended by the military police in Paris dressed in uniform (R6-7).

The accused voluntarily signed two statements, admitted in evidence without objection (R8-10 Pros.Ex. A and B), in which he admitted that he was arrested by military police on 25 December 1944, and that during January 1945 he escaped from confinement in the "Caserne" in Paris by hiding under an army truck; that he remained in Paris until March 1945 when he went to Nice, France, but returned later to Paris; and that a few days before his apprehension on 17 May 1945, he saw an unattended motor vehicle on one of the streets of Paris and drove it off and put it in a garage across the street from his hotel. After his arrest, he took the authorities to the garage where he had left the car and it was recovered.

4. Having been fully advised concerning his rights as a witness the accused elected to remain silent and offered no evidence (R11).

5. The evidence for the prosecution including the admissions voluntarily made by the accused showed that he was a prisoner

confined in the Paris Detention Barracks about 21 January 1945 when he absented himself without leave by escaping. He remained away from that time until his apprehension on 17 May 1945 - a duration of 116 days. Desertion is absence without leave accompanied by the intention not to return (MCM, 1928, par. 130a, p. 142). The absence without leave was clearly established. In the absence of any other reasonable explanation, the court was properly and legally justified in inferring the intent not to return from the circumstances consisting of the escape, the duration of the absence, and the termination of that absence by apprehension (CM ETO 16880, Ferrara and the cases cited therein). Its findings are therefore supported by substantial evidence of record and will not be disturbed upon review.

6. The charge sheet shows that the accused is 21 years and 2 months of age and was inducted into the service at Camp Grant, Illinois on 27 February 1943. 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). 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).

Paul Hepburn Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins Jr. Judge Advocate

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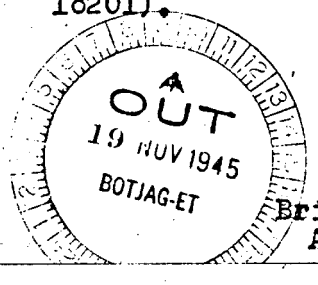
1st Ind.

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

1. In the case of Private ADRIAN MERCHANT (36643252), 1st Reinforcement Depot, Mediterranean 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 18201. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18201).



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

(Sentence as commuted ordered executed. GCMO 621, USFET, 6 DEC 1945).

ETO 18201 MERCHANT, ADRIAN

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

BOARD OF REVIEW NO. 2

15 NOV 1945

CM ETO 18202

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Wildungen, Germany, 1 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM P. CHEPELL (36628447), Company M, 15th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private William P. Chepell, Company "M", 15th Infantry, did, at Anzio, Italy, on or about 14 February 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was returned to his organization at Nettuno, Italy, on or about 8 April 1944.

Specification 2: In that * * *, did, at Pozzuoli, Italy, on or about 19 July 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: An amphibious operation against the enemy, and did remain absent in desertion until returned to military control at Rome, Italy, on or about 5 December 1944.

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

Specification: In that * * *, did without proper leave absent himself from his organization at Pagny, France, from about 20 February 1945, to about 9 July 1945.

He pleaded not guilty, and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the period of his natural life. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the original charge as involves a finding of guilty of absence without leave from 19 July 1944 to 5 December 1944, in violation of Article of War 61, 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 following evidence was adduced for the prosecution:

a. Specification 1 of the Charge

Captain Joseph W. Chandler testified that on 14 February 1944 he was a member of Company "M", 15th Infantry, then located at Isola Bella on the Anzio Beachhead (R9). On that date he and his company were being subjected to artillery and mortar fire and were engaged at all times with the enemy in very intense fighting (R10). The accused was expected to join the company with the supply sergeant on this date, but the sergeant arrived without him (R10). Witness and the supply sergeant made a search of the Service Company area but accused could not be found (R10,11). He did not see accused between 14 February 1944 and 8 April 1944 when he saw him in the company chow line at Nettuno Beach. Accused had no permission to be absent from the company during this time and if he had been given permission, witness would have known it (R11).

Duly authenticated extract copies of morning reports of company "M" were introduced in evidence without objection which showed that the accused was absent without leave from 14 February 1944 until 8 April 1944 (R8,9; Pros. Ex.A, p.1,2).

b. Specification 2 of the Charge

Captain Joseph W. Chandler testified further that on 19 July 1944, he was a member of Company M then located at Pozzuoli, Italy (R11), engaged in amphibious training, consisting of small boat exercises (R11,12). The accused participated in these exercises. It was common knowledge in the company that the organization was preparing for an amphibious landing either in Northern Italy or Southern France. An amphibious landing was made as a result of this training on 15 August (R12). On 19 July the accused was not present at reveille formation. A search of the bivouac and adjoining company

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area was made and he could not be found. Witness was present with the company between 19 July 1944 and 5 December 1944 but the accused was not present with the company during this time. He had no permission to be absent and if he had been given permission witness would have known of it (R13). Accused returned to military control at Via Del Tritone, Rome, Italy, on 5 December 1944 (R14; Pros. Ex. B).

A duly authenticated extract copy of the morning report of Company "I" was introduced in evidence without objection and an entry of 26 September 1944 showed the accused's status as AWOL since 19 July 1944 (R8,9; Pros.Ex. A, p.3).

c. Additional Charge and its Specification.

The accused's absence without leave from Pagny, France on 20 February 1945 and his subsequent return to military control on 9 July 1945 is evidenced by a duly authenticated extract copy of the morning report of Company "I", admitted in evidence without objection (R8,9; Pros. Ex. A, p.4).

4. Accused, after his rights as a witness were explained to him, elected to make an unsworn statement, as follows:-

> "I was drafted in the month of December of the year 1942 and have been placed in the Infantry with the 94th Division which was being activated in Kansas in January of 1943. Having finished basic training and some advanced training we were scheduled to leave for maneuvers in August of the same year to Tennessee. When we arrived in Tennessee an order came out for volunteers for overseas combat duty. Having lost my mother several months prior to being drafted I volunteered for combat duty overseas to do my share for my country. I joined the 3rd Division on January 8th 1944. I knew at this time that I was suffering from bad feet. Long marches, long periods of standing, damp and cold weather made me suffer unbearable pain. I remained on duty all this time up to the Anzio beachhead battle. My feet hurt me so much that I could no longer concentrate on my duties. It left me helpless and incapable to carrying my share of the burden. As a result, on the 27th of May 1944 I was hospitalized for 30 days with bad feet. At all times I have been more than willing to do my share, but the difficult duties of a combat Infantry man, which were tough were beyond my physical capacity. My feet still hurt terrible and there seems to be nothing I can do about it. Nevertheless I would like to continue my service in the Army, anywhere, in any capacity within my physical means." (R15,16).

5. The uncontradicted evidence for the prosecution clearly established that the accused absented himself without leave from his organization on the dates and at the places alleged in the three specifications and did remain absent during the times alleged therein. With reference to Specification I of the Charge it was also clearly shown that the accused absented himself without

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leave while he and his organization were being subjected to enemy fire and were engaged in intense combat. The court could properly and legally infer from these circumstances, in the absence of any reasonable explanation, that accused absented himself with the intent to avoid the hazardous duty of combat with the enemy and therefore was guilty of desertion in violation of Article of War 58 (CM ETO 13475, Pedosta; CM ETO 5958, Perry et al; CM ETO 15740, Lockwood). The accused offered no explanation of his absences other than in an unsworn statement in which he gave as his excuse for his conduct that he was suffering from bad feet. This statement was not evidence. The court is required to give it only such consideration as seems warranted (MCM, 1928, par. 76, p.61).

All of the elements of proof necessary to sustain the findings as approved were therefore supported by substantial evidence.

6. The charge sheet shows that the accused is 24 years of age, and, without prior service, was inducted at Chicago, Illinois, on December 8, 1942.

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

8. 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; 210, WD, 14 Sept. 1943, Sec. VI, as amended).

Zark Stephens Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins Jr. Judge Advocate

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

BOARD OF REVIEW No. 2 24 NOV 1945

CM ETO 18211

U N I T E D S T A T E S	FIFTEENTH UNITED STATES ARMY
v.	
Private EMIL WILLIAMS (39469186), Private CHARLES B. RICHARDSON (37736706), and Private First Class WILLIE LEE WALKER (39723923), all of 323rd Ordnance Ammunition Company.	Trial by GCM, convened at Bad Neuenahr, Germany, 19-20 June 1945. Sentence as to Richardson: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Sentence as to Walker: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania. Nolle prosequi as to Williams.

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, HALL and COLLINS, Judge Advocates

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

2. The three accused were arraigned upon and accused RICHARDSON and WALKER were tried upon the following charges and specifications:

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

Specification: In that Sergeant Emil Williams 323rd Ordnance Ammunition Company, Private First Class Willie Lee Walker, 323rd Ordnance Ammunition Company, and Private Charles B. Richardson, 323rd Ordnance Ammunition Company

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acting jointly and in pursuance of a common intent, did, at Bottenbroich, Land-Kreis Bergheim, Germany, on or about 22 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Leoni Koch Becker, a human being by shooting her with a sub-machine gun.

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

Specification: In that * * *, acting jointly and in pursuance of a common intent, did, at Bottenbroich, Land-Kreis Bergheim, Germany, on or about 22 April 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Friedrich Koch, with intent to commit a felony, viz. rape therein.

Each accused pleaded not guilty. During the trial, upon motion of the prosecution, a nolle prosequi was entered as to accused Williams (R71-72). All of the members of the court present at the time the votes were taken concurring, as to Richardson and three-fourths of the members of the court present at the time the votes were taken concurring as to Walker, accused Richardson and Walker were each found guilty of the charges and specifications. No evidence of previous convictions was introduced as to either accused. All of the members of the court present at the time the vote was taken concurring, accused Richardson was sentenced to be shot to death with musketry. Three-fourths of the members of the court present at the time the vote was taken concurring, accused Walker 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, the Commanding General, Fifteenth United States Army, approved the sentences but reduced the period of confinement to 20 years as to Walker and recommended commutation of the sentence as to Richardson, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Walker and forwarded the record of trial for action pursuant to Articles of War 48 and 50½. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence as to Richardson 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 after attending a party during the night of 21-22 April 1945, both accused, colored soldiers, drove in a jeep with Sergeant Emil Williams, another colored soldier, to Bottenbroich, Germany. Richardson did the driving (R78). At about 0200 hours they stopped near the home of Friedrich Koch, after Richardson said "that's where some girls were" (R9-10, 17-18, 74, 81). Accused, each armed with a sub-machine gun (R76), knocked first at the home of Frau Berdgen, who ran next door to the Koch home and hid, while Herr Koch and his wife locked the doors (R10, 21-23). Williams went to the front and stood there by a fence as Richardson and Walker approached the rear of the Koch home by an alley and shined a flashlight through a window into a rear bedroom, where Koch's daughter, Karoline Koch Becker, the deceased, was sleeping, clad only in a night-gown and bed jacket (R10-11, 74, 79). Deceased, whose name was Karoline but who was called Lena, awoke and ran into her mother's bedroom (R11, 14, 20). A "heavy knock" was heard at the window, which had been closed, and it came open and both soldiers entered the house and proceeded into the unlighted front bedroom (R10, 11). One of them pointed his weapon at Koch and motioned for him to step back, and the other stood near the deceased. There was "quite a bit of fighting", during which Frau Koch and deceased cried out for help (R11-13, 23). Frau Koch was slapped by one of the soldiers, apparently Walker (R19). As one soldier, apparently Richardson, stepped towards deceased, she jumped out of an open window into a flower garden (R13, 19, 23). Frau Koch also tried to jump but was pulled back, apparently by Richardson, who jumped out behind deceased (R19, 75). According to Frau Koch, he "was standing there for several minutes staring at my daughter and suddenly he fired" several shots from his sub-machine gun, hitting deceased (R19, 75), after which Walker jumped out of the window (R20, 81). According to Williams, who was standing outside the house, the shots were fired by Richardson as he was coming out of the window (R79, 81, 82). Herr Koch testified that both soldiers were outside when the shots were fired (R14). Frau Koch screamed, "Oh, God, he killed my Lena" (R20). Herr Koch ran to the flower garden, where deceased collapsed into his arms, bleeding and apparently suffering great pain (R14, 20). Both accused ran away toward the street, and deceased was carried into the house (R14).

When a German physician arrived at about 0330 hours, Lena was in a dying condition (R15, 28). She was admitted to a hospital at about 0500 hours and died later that morning at about 0800 hours (R30-32). An autopsy performed the following day revealed five bullet wounds in her body, caused by three bullets, one of which was removed from the sacrum (R38-39, 46-47, Pros. Ex. B). Her death was probably caused by one of the wounds

which penetrated the chest (R39). A photograph of her body, showing the wounds, was identified and received in evidence (R24, 27, 38, Pros. Ex. A).

None of the German witnesses identified either of the accused. Williams, who testified after being granted immunity and being dismissed from the case, was the only witness to positively identify Richardson as the person who fired the shots, and he testified that Walker came out of the house immediately after the shots were fired (R75, 79-80, 81, 82).

On 23 April, two .45 caliber cartridge cases were found at the scene of the shooting (R40-42, 45-46, Pros. Exs. C,D). Firing tests were conducted and comparisons made by a balistics expert, which showed that the cartridge cases and the bullet found in the body were fired from the same gun from which a test-fired cartridge was fired, a Thompson sub-machine gun which had been issued to accused Walker (R45-50, 84, 86, Pros. E,F,G,H). Williams' testimony shows that when accused first got into the jeep they laid their guns down between them (R76).

A sergeant of the military police testified that after Williams had been warned of his rights, he stated that he was on a street outside of the house and saw the woman standing by the window, but that he did not enter the house (R62). He also testified that after proper warning, Walker admitted entering the house through a window, going into the bedrooms, and seeing the girl jump out of the window; that he then heard something like a slap, stood by the window, then heard two shots, and jumped out of the window and was going to help the woman who was shot, but when she fell before he got to her, he ran from the scene (R64). After Richardson testified with reference to the manner in which his statement was procured, objection of the defense to the admission of his statement was sustained (R69-71, 72).

4. After their rights as witnesses were explained to them, Richardson elected to testify (R89-90) and Walker elected to remain silent (R101-102). Richardson testified that after attending a company party on 21 April, he went with Walker and Williams, at the suggestion of Williams, who promised to show them where they could get some girls, to a little town about 12 miles from their camp (R90-93, 97). They stopped at a row of houses in the town, and after some knocking on doors, all three went to the rear of one of the houses, where witness and Williams shined their flashlights in a window and Williams "pushed the window" and entered the house (R93-94, 99). Witness did not know whether the window had been open or closed (R99-100). Witness and Walker followed Williams in climbing

through the window, and they followed a girl dressed in a long nightgown into a front room, where they saw an old man and an old lady who were "hollering and screaming" (R94, 96, 99, 100). Witness did not intend to commit a rape when he entered the house (R95) but admitted that they "were after girls" (R98). When the girl jumped out of a window, he "jumped out right behind her" (R97). He "must have been" after the girl, but was not sure, for he was "kinda drunk" (R101). He testified:

> "When I jumped out of the window, I liked to have fell. I got off balance and I started to grab the fence which was pretty close and the gun went off just as I caught hold of the fence" (R94).

He did not aim the gun, and did not intend to shoot anyone (R94-95).

A written stipulation as to the testimony of four officers of Walker's company showed that his commanding officer and two other officers rated him as "excellent" and one officer rated him as "very satisfactory" in the performance of his work (R101, Def. Ex. A).

5. a. Charge II and its Specification: The evidence for the prosecution shows that accused each entered the dwelling house of Friedrich Koch through a window on the night alleged. The opening of the closed window clearly constituted a sufficient breaking for the crime of burglary (MCM 1928, par.149d, p.168). From the declared intention of accused to get "some girls", and from the actions of accused in pursuing the deceased and advancing toward her in the house, and of Richardson in jumping out of the window after her, the court was authorized to infer an intent on the part of each accused to commit the crime of rape, a felony. It is immaterial whether the intended felony was actually committed or even attempted (CM ETO 3754, Gillenwaters). Each of the elements of the offense of burglary was fully established by the evidence (MCM 1928, par.149d, pp.168-169). Under the circumstances shown, it is immaterial which of the three soldiers actually opened the window. Since both accused were clearly engaged in joint wrongful and illegal acts with a common purpose, each was responsible for the illegal acts of his partner or partners in pursuance of such purpose (CM ETO 3754, Gillenwaters).

b. Charge I and its Specification: The evidence shows without doubt that accused Richardson shot and killed Karoline Koch Becker at the time and place, and in the manner alleged.

The Specification alleges the name of the deceased as Leoni Koch Becker. The evidence shows without dispute that deceased was habitually called Lena, which name was probably intended by the drawer of the Specification, and which name is sufficiently similar in sound to that of Leoni as to probably come within the idem sonans doctrine (2 Wharton's Criminal Evidence (11th Ed.,1935), sec.1047, pp.1842-1843). Under the modern rule, such variance shown is not material unless some substantial injury was done to accused, such as that they were unable to intelligently make a defense or are exposed to the danger of a second trial on the same charge (People v. Garmach, 302 Ill. 332, 134 N.E. 756, 29 A.L.R. 1120). Since there is no doubt of the identity of the person killed and accused were clearly not misled by the variance, no fatal error resulted thereby (cf. CM ETO 16623, Colby).

The evidence fails to indicate any circumstances serving to mitigate, justify or excuse Richardson's act. Whether accused were too intoxicated to have entertained the requisite intent essential to the offenses of murder and burglary was a question of fact for determination of the court (CM ETO 1901, Mirandi; CM ETO 9611, Prairiechief). The court could have believed the testimony of Frau Koch to the effect that the soldier identified by Williams as Richardson stood for several minutes and stared at deceased before shooting her. Malice being presumed from his intentional and unlawful use of a deadly weapon in such manner (CM ETO 1941, Battles), the evidence fully supports the finding of guilty of murder as to Richardson (CM ETO 6159, Lewis; CM ETO 16397, Parent; CM ETO 17507, Votodian). Even if the court believed that Richardson fired the lethal weapon accidentally, as his testimony indicates, it was authorized to infer that an intent on his part to commit rape preceded or coexisted with the act of shooting, in which event the conviction of murder was proper (CM ETO 1453, Fowler; CM ETO 4292, Henricks; MCM 1928, par.148a, pp.163-164).

The evidence fails to show that accused Walker at any time expressly assented to or approved the act of shooting committed by Richardson. However, it does appear that he went to the house with Richardson, armed with the same type of weapon, in search of girls. They joined together in burglariously entering the house and in terrorizing the inhabitants by brandishing their w eapons and pursuing deceased in the house. Walker at no time disapproved or opposed the unlawful acts, but apparently held the parents of deceased at bay while Richardson advanced upon and pursued deceased. Whether Richardson shot to prevent deceased from summoning aid or because she resisted illegitimate demands made by

him is immaterial; for under the circumstances shown, Walker must have known and anticipated that a killing might occur at any moment and such was "fairly within the common enterprise". Under the facts shown, the court could infer that Walker assented to and approved the commission of the murder and aided and abetted in it, so as to make him guilty as a principal with Richardson (see CM ETO 1453, Fowler; CM ETO 1922, Forester; CM ETO 12652, Fladger; 1 Wharton's Criminal Law (12th Ed., 1932), sec. 258, pp. 343-344). The facts in this case are clearly distinguishable from those in CM ETO 4294, Davis and Potts, wherein it was evident that both accused had abandoned and desisted from their joint attempt to rape the victim and had left her house and terminated their combination at the time the fatal shooting occurred.

c. Following arraignment and before their pleas were entered, defense counsel moved to sever the case of each accused upon the stated grounds that the defenses of the others were antagonistic to that of each, because of Walker's desire to avail himself of the testimony of the other two accused, and because the evidence as to the others would prejudice Richardson's defense (R5). After denial of the motion, with consent of each accused, the regularly appointed defense counsel acted as counsel only for Richardson and separate assistant defense counsel were designated to represent each Williams and Walker (R7-8). During the trial the testimony of Williams was made available to each accused, and Richardson testified voluntarily. Nothing appears in the record to indicate that the two accused had antagonistic defenses or that they were prejudiced in any manner by the joint trial. Upon all the evidence, it is clear that the court did not abuse its sound judicial discretion in denying the motion (CM ETO 895, Davis et al; CM ETO 4294, Davis and Potts; CM ETO 3197, Gayles et al; CM ETO 6148, Dear et al; CM ETO 15274, Spencer et al).

d. Over proper objection of the defense, the law member permitted the nurse who attended deceased to testify that shortly after deceased was admitted to the hospital, and again about half and hour later, deceased stated,

> "I was lying and sleeping when a colored man came to the window and when he wanted to touch me, I fought him off a lot whereupon he fired on me" (R34-35).

It appeared that upon her arrival at the hospital, deceased was in great pain from three severe bullet wounds and was visited by the nurse every five minutes for about two hours. Her first words were for an injection of morphine and she asked the nurse several times if she had to die in spite of

reassurances given her by the nurse each time. She actually died about three hours after her admittance (R29-35). Under such circumstances it could properly be inferred that deceased was in extremis and under a sense of impending death when she spoke, and the statement was properly admitted as a dying declaration (CM ETO 3649, Mitchell; CM 228571, II Bull. JAG 9; MCM 1928, par.148a, p.164).

6. The charge sheet shows that accused Richardson is 21 years eight months of age and was inducted 10 March 1944 at Fort Leavenworth, Kansas. Walker is 27 years three months of age and was inducted 3 February 1944 at Fort McArthur, California. Neither accused had prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

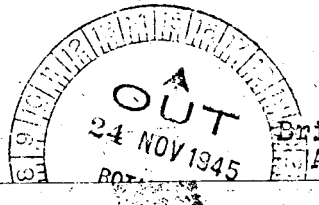
18211

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U S. Army.

1. In the case of Private CHARLES B. RICHARDSON (37736706), 323rd Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved 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 18211. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18211).



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

(As to accused Richardson, sentence as commuted ordered executed. GCMO 628, USFET, 20 Dec 1945).

18211

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

BOARD OF REVIEW NO. 1 30 NOV 1945

CM ETO 18220

U N I T E D S T A T E S	CHANOR BASE SECTION, COMMUNICATIONS ZONE, UNITED STATES FORCES, EUROPEAN THEATER.
v.	
Private HERBERT BANKSTON (34028009), 3986th Quartermaster Truck Company	Trial by GCM, convened at Rouen, Seine-Inferieure, France, 5,6,10, 11 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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1. The record of trial on re-hearing 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 Herbert Bankston, 3986th Quartermaster Truck Company (TC), did, at Rouen, France, on or about 21 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Alexander Hansboro, a human being, by shooting him with a revolver.

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

one by summary court and one by special court-martial for absences without leave for 13 and four days respectively in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Chanor Base Section, Communications Zone, United States Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. At approximately 1930 hours on the evening of 21 January 1945, accused and four other colored soldiers, Privates Hurt, Carter, Green and Holmes, left their organization in a 2½-ton, 6x6 truck for Rouen, France (R7, 26-27,37). At the time of their departure from camp, it was Hurt's opinion that accused might have had one or two drinks (R12). He and Hurt rode in the rear of the truck and the other three rode in the cab (R16). Accused had a revolver in his belt (R30-31) and en route to Rouen he exhibited it to Hurt and commented on what a good gun it was (R16-17). After arriving at Rouen, the five men went to a cafe where they each had two or three drinks of cognac (R7,13,17,22,27,31,37). Accused and several of his companions were wearing fatigues instead of the prescribed uniform (R7,74; Pros. Ex. E) and after they had been in the first cafe for 35 or 40 minutes (R37), a military policeman entered and ordered all soldiers in improper uniform to leave (R7,37).

Accused and his four companions thereupon left this cafe and drove to another, the Bar La Gare du Nord, operated by one Koch (R7,27,38,47-48; Pros. Exs. A,B,C). After parking the truck on the sidewalk in front of the cafe (R27-28), accused and the other four entered the cafe (R8,27,38,54). Present in the cafe were the proprietor, Koch, a waitress, some French soldiers and civilians, and three other American soldiers (R53-55,57,60,62,87). The five men consumed several drinks (R8,61) during which time accused approached the French civilians, showed them his revolver, and offered to sell it to them (R53-54). Shortly thereafter a colored military policeman (the deceased), wearing an "MP" brassard on his sleeve (R39), entered the cafe and directed that the truck in which the five men had arrived be removed from the sidewalk (R8,20,38). He also ordered all American soldiers wearing fatigues to leave the cafe (R8,28,58,61,88).

Carter, the driver of the truck, who was the first to leave, testified that as he was leaving, the deceased was swinging his stick from side to side and was backing and pushing the men out of the cafe (R32-33,35), and that he saw deceased hit some of the men on the arm but that he himself was not hit by deceased (R32). Hurt, who was the last to leave except for accused, testified that he was struck once on the right arm (R14) and that he saw the deceased go to accused and hit him on the head and shoulders (R8-9,14-16,19). The waitress testified that the soldiers objected to leaving and argued with

the deceased, who was forced to use his stick to get them out of the cafe and hit them on the shoulders and back (R54-55). The other three American soldiers who were in the cafe testified that accused and his companions objected to leaving. Two of them testified that the deceased only pushed and tapped the men with his stick and the third that he did not use his stick on accused at all but merely pushed him with his hands (R58-63,88-89). In the process of removing the men from the cafe, a table was overturned and the glasses on it were broken (R49,56,58). During the removal one of the three American soldiers noted that accused had drawn a revolver and shouted a warning to one of his friends (R61-62,64).

Carter turned the truck around (R8,19,28) and was followed by Holmes and Green who entered the cab with him (R20,29,39). Hurt was the next to leave the cafe and accused the last (R20,55). According to the testimony of accused's companions, the deceased followed accused to the door of the cafe, and accused stood outside of the cafe facing the door. Immediately a shot was fired and deceased fell in the doorway (R9,14,29,34,40,43). Accused at once ran to the truck shouting, "Let's go! Let's go!" (R9,11-12,21) and held a revolver in his hands (R9). The truck was driven away immediately (R22,34,41,65). The other occupants of the cafe testified that after the deceased had cleared the five soldiers from the cafe he closed the door, assisted in straightening up the table that had been overturned (R55,58,62, 65,88), questioned one soldier and searched another in the cafe (R49,58-59,62) and straightened his clothes (R62). The proprietor of the cafe, Koch, testified that prior to the arrival of the deceased, he went in search of a military policeman because the attitude of accused and his companions was very bad and he feared trouble (R48). When he returned without success, accused and his companions were out of the cafe but a truck was still in front (R48-49). The deceased was still in the cafe and the proprietor talked to him for several minutes (R50). As deceased prepared to leave the cafe, the proprietor walked with him to the door and as he opened the door a shot was fired from outside and he fell to the floor (R49-50,58,62,64,78,88).

A military police officer arrived at the cafe about 2100 hours and found the deceased, who was identified as Sergeant Alexander Hansboro, lying on the floor dead (R84). A medical officer was called and upon arriving shortly thereafter found that deceased had died as a result of a neck wound which appeared to have been made by a bullet (R86). The body was removed to the 179th General Hospital (R87) where an autopsy was performed and it was determined that death had been caused by a bullet wound in the neck from right to left. The bullet had gone through the jugular vein, crushed the fourth cervical vertebra, damaged the spinal cord and lodged in the left neck. The point of entrance appeared to be slightly higher than the point where the bullet finally lodged (R23-24).

In the rear of the truck on the way back to camp accused, still holding the revolver in his hand, told Hurt that he "never let anybody beat him and get away with it" (R18,21). Between 2130 and 2200 hours, accused and Hurt arrived back at their room which they shared with one Private Bouknight. Bouknight was awakened by their conversation and heard accused say that he had shot an "MP" and when Bouknight asked him why he had done it accused did not answer (R68). Bouknight testified that accused appeared to have been drinking but did not testify that he was drunk (R69-70), nor did any of his

companions of the evening testify that he was drunk (R14-15,33).

On 15 March 1945, after first being duly advised of his rights (R71), accused made a voluntary sworn statement to the investigating officer (R72; Pros. Ex. D). Therein he stated that on the night of 21 January 1945 he left camp at about 1930 hours with Privates Carter, Green, Holmes and "Hunt" and went to a cafe in Rouen, France, where he had five double shots of cognac. They then went to another cafe, the Bar de Gare du Nord, but he did not drink anything there as he was in town in the afternoon and drank a lot of calvados. A colored military policeman came into the cafe and said something to his four friends but he did not hear what he said and the negro then came over and hit him behind the ear with his club. He asked the negro what was wrong and why he was hitting him but he said nothing and accused tried to get out of the door but it was jammed. The military policeman then hit him on the arm and he managed to get outside of the cafe and fired at the military policeman with a revolver as he opened the door to come out. The negro fell backwards into the cafe. Carter, Green and Holmes were in the front seat of the truck and "Hunt" stood at the back of the truck which was about 10 yards from where accused stood when he fired the shot. He walked over to the truck, climbed in, and they all went back tocamp. (Pros. Ex. D)

4. Accused, after being advised of his rights (R91-92), elected to be sworn as a witness in his own behalf and testified that on the afternoon of 21 January 1945 he and Privates Green and Holmes drank a quart of cognac and the three of them, accompanied by Privates Carter and Hurt, went to the town of Rouen, France (R92-93). They first went to a cafe where they each had a double cognac and then went to a second cafe where accused did not take a drink but merely walked over and stood by a stove. They had been there about 20 minutes when a colored military policeman entered, came over to accused and, without saying a work, struck him on the head with his stick. Accused was "blind-staggered" and thought that probably the military policeman was crazy so he tried to get out the door. He had the door open when the man hit him again, knocking him down and out of the door. As he was getting up he pulled out his gun but did not know that that was the gun that went off. He then boarded the truck, returned with his companions to camp, and until the next day he did not know that he had shot anyone (R93-94). On cross-examination, he further testified that he did not remember trying to sell the gun in the cafe (R94); that he did not know that the man that hit him was an "MP" (R95); that he did not draw his gun before he left the cafe (R96); that he "hadn't gone out of the cafe about five minutes I imagine" before he shot the man (R97); that he "shot from under" his arm as he was getting up after being knocked down, did not know that he had hit the man and did not see him fall (R98); and that he "didn't know the pistol went off until the next day" (R100). No other evidence was introduced by the defense.

5. Murder is the unlawful killing of a human being with malice aforethought (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).

Clear, undisputed evidence established that at the time and place alleged accused caused the death of Sergeant Alexander Hansboro by shooting him with a revolver. It is not the function of the Board of Review to determine controverted questions of fact but rather to decide whether there is substantial evidence in the record to support the findings of guilty (CM ETO 12656, Tibbs). The Board is of the opinion that there is such evidence. The only question raised is whether the facts are such as to reduce the crime to manslaughter as a matter of law.

> "In any case where the provocation, though material, is not excessive, as where * * * the person is assailed but not seriously * * * the law will in general hold the killing to be not manslaughter but murder" (Winthrop's Military Law and Precedents, (Reprint, 1920), p. 675).

Conceding for the purpose of discussion the truth of the defense testimony tending to show the assault by the deceased upon accused immediately preceding the homicide, the court properly could have found that the deceased was at the time properly within the execution of his duties in enforcing the uniform regulations and that in view of the hostile attitude of accused and his companions he used no more force than was reasonable and proper under the circumstances.

> "A lawful arrest or detention in a lawful manner by an officer or private person will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter; nor will other lawful acts of officers while in the discharge of their duties constitute adequate provocation" (40 CJS, sec. 50a, p. 915).

It was not error for the court to conclude that the force administered by the deceased to accused, if any, fell short of the provocation necessary to reduce the homicide to manslaughter as a matter of law (CM 247055, Mason, 30 B.R. 249, (1944); cf: CM ETO 15558, Mitchell).

The record contains competent evidence warranting the court in believing that at the time of the shooting, accused had the capacity to entertain the necessary malice (MCM, 1928, par. 148a, pp. 164; CM 255162, Lucero, Jr., 36 B.R. 47, (1944); CM ETO 3180, Porter; CM ETO 7815, Gutierrez). Malice was established by the fact that the killing was done in anger, deliberately and without justification or excuse. It is confirmed by accused's statement, made shortly after the killing, that he "never let anybody beat him and get away with it". The findings of guilty of murder are fully supported by the evidence (CM ETO 4949, Robbins, Jr. and authorities therein cited; CM ETO 10740, Rollins).

6. Accused was originally tried for this offense on 18 May 1945, was found guilty, and was sentencedto be shot to death with musketry. Thereafter, on 31 May 1945, the sentence was disapproved by the reviewing authority and a

rehearing ordered. On the rehearing he was convicted and sentenced to be hanged by the neck until dead, as above indicated.

In the opinion of the Board of Review, the action of the confirming authority in confirming and commuting the sentence was proper. The sentence before us was not "in excess of or more severe than" that imposed by the court upon the first trial within Article of War 50½. It was the same in each case, i.e. death, one of the two alternative penalties prescribed for murder by Article of War 92. The penalty - death - for murder was not changed, but only the mode of producing death. The sentence was not increased by the prescription of a different mode of execution thereof (Malloy v. South Carolina, 237 U.S. 180,185,59 L.Ed. 905,907 (1915); Annotation, 55 ALR 443,450), but even assuming that it were in view of the fact that the court was obliged to prescribe the method of execution (MCM, 1928, par. 103a, p. 93), the confirming authority had power to confirm so much of the sentence as was legal, i.e. death, without approving the method of execution, and to commute the same. His action in confirming and commuting thus adequately disposed of any vice in the sentence (cf: CM 232160, McCloudy, 18 B.R. 289, 395 (1943)).

7. The charge sheet shows that accused is 25 years five months of age and was inducted 8 March 1941 at Camp Livingston, Louisiana to serve for one year. His service period is governed by the Service Extension Act of 1941. 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 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).

Edward L. Stevens, Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

Donald K. Carroll, Judge Advocate.

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 30 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private HERBERT BANKSTON (34028009), 3986th 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 18220. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 18220).

1 Incl:
R/T

OUT 30 NOV 1945 BOTJAG-ET

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

(Sentence as commuted ordered executed. GCMO 625, USFET, 8 Dec 1945).

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

BOARD OF REVIEW NO. 1

24 NOV 1945

CM ETO 18224

U N I T E D S T A T E S	70TH INFANTRY DIVISION
v.	Trial by GCM, convened at Weilburg, Germany, 30 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ROY DUNSON (34552689), Company C, 95th Engineer General Service Regiment	

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, DEWEY 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 Charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician Fifth Grade Roy Dunson, Company C, 95th Engineer General Service Regiment, did, at or near Weckesheim, Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Emilie Mucher.

Specification 2: (Finding of not guilty)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 2, and guilty of Specification 1 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

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sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 70th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. At about 2000 hours on 25 April 1945, accused, accompanied by another colored American soldier and some Poles, entered a house in Weckesheim, Germany (R6-7,13), occupied by Karl Mucher, his wife Emilie, 56 years of age (R9), their 19-year-old son and their 13-year-old twin daughters (R6-7,13). The entire Mucher family was assembled in the kitchen (R7,14). Both colored soldiers were armed and one held a rifle in his hands in ready position (R8,11,14). One had left his rifle in a railroad motor car, such as is used by railroad employees, on the railroad track four to twelve meters from the front of the house (R11,14) and was sent back by the other to get it (R14). The Muchers appealed to the Poles for help but the Poles refused and left shortly thereafter. The colored soldiers forced the son to leave the house and attempted unsuccessfully to get Herr Mucher to leave (R7,14). The son went for help to the Mayor of the town who told him to go to Assenheim, more than an hour's walk distant, since no American soldiers were stationed in Weckesheim. The boy's bicycle broke down en route and he never arrived there (R17). Meanwhile, one of the colored soldiers sat down next to one of the twin daughters and after a few minutes grabbed her arm and led her upstairs to the bedroom (R14). The other daughter was also taken up by the other soldier and their father followed them (R7,14). The girls yelled and, as the door to the bedroom could not be locked, the father walked into the bedroom and saw one of the soldiers with his jacket off on the bed with one of the twins next to him (R14). He pleaded with the negro on the bed to release the girl as she was only 13 years of age (R15) and during this time in accordance with gestures made by their father the two girls ran downstairs and hid themselves in the house of a neighbor (R8,15).

The soldiers followed the girls downstairs and accused's companion left the house looking for them, but did not find them and returned shortly, he pulled out his pistol, grabbed Frau Mucher by the arm, dragged her upstairs to the bedroom (R8) and forced her to have sexual intercourse with him (R9). Herr Mucher went to the Mayor to secure help (R11,15). During this time accused was standing guard at the staircase and when his companion had finished with Frau Mucher, he entered the bedroom (R8), threw her back on the bed and had sexual intercourse with her (R10). She testified that, except for pushing them back "once or twice", she offered little physical resistance since she was an old woman and the soldiers were young boys and she knew that she could not really do anything against them (R10,13); also, during both acts of intercourse, a pistol was lying on the night stand right next to the bed and a rifle was leaning against a chair at the end of the bed.

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After accused finished his act of intercourse with Frau Mucher, at about 2200 hours, both colored soldiers left the house (R10).

When Herr Mucher returned from the house of the Mayor, where he had not been able to secure any help, he saw accused and his companion leave in the railroad car (R16) and upon entering his house found his wife on the sofa crying loudly, "She was trembling all over her body and you hardly could feel any heartbeat whatsoever". Prior thereto she had always enjoyed good health (R16). A medical doctor who examined Frau Mucher the next day found that she had a "considerable nervous breakdown", that she was trembling and very excited and he gave her something to quiet her nerves. He did not examine her genitals as he stated that it would have been impossible to ascertain whether a woman her age had recently had sexual intercourse (R28).

Accused was identified in court by both Herr and Frau Mucher from a group of seven colored soldiers (R8,15).

4. Accused, after his rights as a witness were fully explained to him, elected to make an unsworn statement through his counsel to the effect that 25 April 1945 was his day off and he and Sergeant Gilbert took a company track car about 15 miles down the track. They turned around and started back, but stopped at "Weckesheim" between 2100 and 2130 hours because of carburetor trouble. Five or six civilians gathered around the track car while they were working on it and one of them offered the soldiers a drink which they refused. The civilians continued milling around the car and getting in the way and Gilbert hit one of them and the rest went away. Both he and Gilbert stayed on the railroad track in the vicinity of the track car and neither of them entered any civilian house. They finally made the car run after working about an hour and a half, left Weckesheim between 2230 to 2300 hours and arrived back at their organization about 2400 hours (R31). No other evidence was offered by the defense.

5. That accused had carnal knowledge of Frau Mucher at the time and place alleged was satisfactorily shown by the testimony of the victim. The only substantial issue presented is whether the act of intercourse was with her consent or was accomplished by means of force and violence upon her by accused thereby overcoming her resistance or as a result of fear of death or great bodily harm in the event she resisted him.

The lack of consent was adequately established by the circumstances attending the incident which strongly corroborate the victim's testimony. The unauthorized entry of accused and his companion, both armed, into the victim's home in the nighttime, flourishing of the weapon in a threatening manner, requiring the victim's son to leave the house, the presence of the victim's husband, the advances toward the Mucher daughters, and the physical condition of the victim thereafter all warranted the court in the finding that the intercourse of accused with Frau Mucher was accomplished through force and fear of death or great bodily harm. Under such influence she unwillingly submitted herself to accused, although her resistance was weak, accused had no reason to believe that she was voluntarily submitting to his demands. The findings of guilty of rape are fully supported by the evidence

(CM ETO 3933, Ferguson et al; CM ETO 3740, Sanders et al; CM ETO 7869, Adams and Harris; CM ETO 16971, Brinley).

6. The charge sheet shows that accused is 26 years six months of age and was inducted on 2 November 1942 to serve for the duration of the war plus six months. He had no prior service.

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

Edward L. Stevens Jr., Judge Advocate.

B K Stevens Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Technician Fifth Grade ROY DUNSON (34552689), Company C, 95th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 18224. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18224).

OUT 21 NOV 1945 BOTJAG-ET

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

(Sentence as commuted ordered executed. GCMO 610, 655, USFET, 17 Dec 1945).

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

BOARD OF REVIEW NO. 1

28 NOV 1945

CM ETO 18225

U N I T E D S T A T E S	71ST INFANTRY DIVISION
v.	Trial by GCM, convened at Augsburg, Germany, 11 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private HENRY J. DAVIS (35923019), Company B, 761st Tank Battalion	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and 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 Henry J. Davis, Company "B", 761st Tank Battalion, did, without proper leave, absent himself from his organization at APO 403, U. S. Army, from about 0600 , 5 April 1945 to about 10 May 1945.

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

Specification: In that * * * did, at or near Waldneukirchen, Austria, on or about 9 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Bertha Mayrburl, an Austrian woman.

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

Specification: In that * * * did, at or near Waldneukirchen, Austria, on or about 9 May 1945, with in-

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tent to commit a felony, viz, murder, commit an assault upon Frau Bertha Mayrburl, an Austrian woman, by wilfully and feloniously shooting the said Frau Bertha Mayrburl in the neck with a pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by special court-martial, for absences without leave for an unstated length of time and for 75 days respectively, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. 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, approved only so much of the finding of guilty of Charge I and its Specification as found the accused guilty of absence without leave from his organizatinn from on or about 5 April 1945 to on or about 30 April 1945, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Accused was not present at a formation roll call of his company and the first sergeant, after making a thorough search of the vicinity, entered him in the morning report as AWOL as of 0700 hours, 5 April 1945 (R8,40). Accused was subsequently apprehended in a civilian house near Waldneukirchen, Austria, on 10 May 1945 (R6,36). An authenticated extract copy of the morning report of Company B, 761st Tank Battalion, showing accused absent without leave from 0700 hours 5 April 1945 until apprehended on 10 May 1945 was received in evidence as Prosecution Exhibit 1 over the objection of defense counsel that the entry as to apprehension was based on hearsay (R7). The company commander admitted on cross-examination that accused was seen on or about 30 April 1945 in the vicinity of Leiblfing and detailed to guard several disabled tanks (R9-10). The tanks were recovered and returned to the organization several days later by the maintenance section but accused did not return (R11,121-123).

At approximately 1615 hours on 9 May 1945 accused, accompanied by a French girl, drove up to a cafe in Pfarrkirchen, Austria, in a civilian car, which cafe was owned by one Frau Bertha Mayrburl (R14-15, 44-45). Frau Mayrburl was walking from the garden toward the house and accused called to her "Come, come". She continued towards the house and

the accused drew his pistol, cried "Halt", walked over to her and, pointing his pistol at her, questioned her as to her name and nationality. She replied that she was an Austrian, and he permitted her to go to the well where she washed her hands (R15). When she started toward the kitchen, he called to her to come to him and when she hesitated said, "come here or I must shoot". He then stroked her hair and said "prima" and permitted her to enter the kitchen (R16). Accused followed her into the kitchen where her waitress was also present (R16,45-46). He spoke excitedly to both of them and when the waitress indicated that she did not understand, he struck her on the face (R16,46). He then threatened Frau Mayrburl with his pistol and demanded that she accompany him to headquarters (R17-18,46-47). He took her by the arm to the car in which he had driven up (R18). The French girl who had accompanied him meanwhile departed (R20,46).

Accused then proceeded with Frau Mayrburl in the direction of Bad Hall (R18). During the trip to Bad Hall accused halted the vehicle on two occasions, once when a farmer blocked the road with his wagon and accused threatened him with his pistol (R18-19), and later when another farmer was encountered along the road and accused stopped the car, jumped out and struck the farmer in the face (R19,50). After passing through Bad Hall, accused proceeded to a little country road where he turned off and drove to a farmhouse where he got out of the car and talked to the occupant of the house for a few minutes (R19,20). Accused had slept at this same house the preceding night with a French girl and on this occasion told the occupant, "I will come again to sleep within thirty minutes. Two men" (R53). The occupant of the house saw and identified Frau Mayrburl as being in the car at this time (R52).

Accused then returned to thecar, drove down a secondary road (R53) and turned off into a woods where he stopped the car and said to Frau Mayrburl, "Kiss me, kiss me". She begged to be taken home, telling him that she was married and had a small child. She noticed that accused was wearing two beaded rosaries, and asked him if he were a Catholic to which he replied in the affirmative. She then told him that if he were a Catholic he should know what he was doing. He forced her out of the car and repeated, "Kiss me, kiss me" (R21). At this moment something rustled in the foliage and accused drew his pistol and said that if anyone came he would shoot. Accused then offered her some one-hundred-mark notes if she would only love him, which she refused (R22). He then pulled out a contraceptive and told her that he did not desire to make children but that he must have love and took her by the hand and drew her into the woods (R22-23). He there forced her to the ground and when she made an effort to escape placed his pistolat her forehead(R23). He then placed the pistol in his helmet, removed her pants and had intercourse with her, effecting actual penetration of the vagina (R23,24). When accused had finished and stood up, Frau Mayrburl picked up the pistol and ran towards a meadow, screaming and endeavoring at the same time to ready the pistol for firing. Accused caught her before she was able to accomplish this and forced her to the ground where she continued to scream until he choked her until she could scream no more (R24). During this attempt at escape, Frau Mayrburl lost her shoes (R28) which were found in the meadow the following day (R58). The time was then about 1730 hours (R24) and she was again led back into the woods by accused who held her to the ground by her wrists

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(R24-25). At this time she begged him to shoot her, to which he replied, "No shooting yet, it is too early. There still is time", and again proceeded to have intercourse with her (R25).

After it was no longer light, about 2100 or 2130 hours, accused led her back to the car and they proceeded in the direction of the farmhouse for about 300 meters when he again stopped the car and took her into some bushes where he held her by one hand and holding his pistol in the other said, "Now I must shoot you" (R26-27). She pleaded with him to spare her life, but he said, "I must shoot you. You will go to headquarters and say that Karl [meaning accused] did that to you" (R27). After she swore on her knees that she would not go to headquarters if only he would let her go free, he led her back to the car where he again removed her pants and had intercourse with her for the third time (R27-28).

They then got into the car and accused indicated that he expected her to sleep with him. He proceeded in the direction of the farmhouse where he had stopped that afternoon but shortly before reaching it turned the car around and started in the direction of Waldneukirchen (R29). As another car approached Frau Mayrburl opened the car door, jumped out and ran in the direction of the other car shouting as loudly as she could but to no avail. She then heard five shots from behind her where accused was, one of the bullets struck her and she fell to the ground. She remained motionless as she heard footsteps and believed that accused was coming after her (R30). As the footsteps died away, a vehicle approached in the opposite direction from which she had come with accused (R31) so she arose and ran in front of the vehicle shouting "Halt" or "Help" (R31,61). The vehicle stopped and two American soldiers immediately alighted and asked her if the SS troops "had got her", to which she replied, "No, negro" or "No, an American negro soldat" (R31,61-62). The soldiers hurriedly checked the civilian vehicle which was standing approximately 50 yards down the street with the lights on. Finding no one in the vehicle they fired three shots into the motor to immobilize it and hastily departed to take Frau Mayrburl to a doctor who lived in the vicinity. The doctor directed that she be taken to a hospital (R31,62).

A doctor's examination at the hospital disclosed a bullet entry near the middle upper border of the shoulder blade with the point of exit at the base of the neck on the right side. The victim was also bruised on the back and both upper legs (R88). Upon being questioned at the hospital the following morning as to the identity of her assailant, Frau Mayrburl described an armored patch worn over the left shirt pocket and the rosaries worn around his neck (R32,69,79-80).

The next morning (10 May), when an officer and several non-commissioned officers arrived at the scene of the shooting, the civilian car was gone (R66), but they were informed by civilians in the vicinity that a colored soldier was sleeping in a house about one mile down the road from where the shooting had taken place (R67).

Between 1000 and 1100 hours, accused was found sleeping in the

farmhouse designated and was apprehended (R67,73). He had arrived at the farmhouse between 2330 and 0300 hours, 9-10 May 1945, and had demanded that he be given a place to sleep. Before going to sleep he stated, "Automobile is kaput, everything is kaput, schnapps is not kaput" (R72). At the time of his apprehension, he had an armored patch over his left shirt pocket and was wearing a beaded rosary (R68,71,73). Also he was in possession of a pistol of foreign manufacture containing two or three unspent rounds of ammunition. The pistol appeared to have been recently fired (R67-68,81-82). During the questioning which followed at the office of the Provost Marshal, accused took issue with the apprehending officer as to the distance between the farmhouse where he was apprehended and the place where the girl was shot by stating that it was one mile rather than 400 yards as alleged by the officer (R77-78).

On the day of his apprehension accused and several other colored soldiers were taken to the hospital where he was identified by Frau Mayrburl as her assailant (R32,79). Several weeks later she again identified him from a group of about 25 colored soldiers (R80). The pistol taken from him at time of apprehension was received in evidence without objection by the defense as Prosecution Exhibit 3 (R82).

4. Evidence for the defense was a s follows:

Accused, after being duly warned of his rights, elected to take the stand and be sworn as a witness in his own behalf (R92-93). He testified that on 5 April 1945 he was left behind at Straubing, Germany, by his company commanderto guard some disabled tanks (R94,108,117) and that he remained with the tanks "more than a week" (R108). On 8 May 1945 he was guarding 23 German prisoners which he that day turned over to a truck driver and then departed with two white soldiers in a civilian car which they found in a barn (R93-94). They proceeded to Bad Hall where he visited several cafes and picked up a French girl (R94-96). Later the same afternoon he and the two white soldiers went to a farmhouse where he made reservations for the night since he had not been able to find his unit. They then returned to town. He and one of the white soldiers picked up the girl (R96), and the soldier drove him back to the farmhouse where he spent the night with the girl (R96-97). On the morning of 9 May, one of the white soldiers returned and brought him and the girl back to Bad Hall where he left her and drove around looking for his unit (R97).

At about 1630 hours or shortly thereafter, he met several members of his company in a cafe (R98). At approximately 1715 hours he and one of the white soldiers returned to the farmhouse to make reservations for the night. They then returned to town where he and both of the white soldiers sat drinking in a cafe until 1900 hours (R99). About 2100 hours they picked up the girl again and he was dropped off at the farmhouse with her (R99,100), but the soldiers returned at 2200 hours stating that they had to go back to the division and picked up him and the girl. At this

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time the white soldiers had a white girl with them. As they were driving down the road the white soldiers stopped the car so he could take his girl into a field (R100). While he and the French girl were sitting in the field about 100 yards from the road drinking schnapps, he heard a rumbling noise and some firing from the road (R101,111). The girl with him then ran away and on failing to catch her he left the scene and went to a farmhouse where he spent the night and where he was apprehended the next morning. He stated that he owned a pistol which was taken away from him the morning he was apprehended and that he had fired the pistol on 7 May when he heard that the war was over (R101). He further testified that he was a Protestant and had never worn any rosary beads and that someone must have erased Protestant from his service record and written Catholic over it (R102-103).

The battalion motor sergeant testified in behalf of accused that while carrying out orders to recover disabled tanks he found accused guarding two Company B disabled tanks near Straubing in the latter part of April or beginning of May. The tanks were brought back to Straubing, but he did not see accused again. This witness testified that accused could not have been guarding the tanks since 5 April 1945 as they did not arrive in the area until subsequent to 26 April 1945 and were disabled for a maximum of one or two days (R120-123). Other members of the 761st Tank Battalion testified that accused was seen by them in Bad Hall at various times during the afternoon and evening of 9 May 1945; that he was in a civilian car with two white soldiers and on one occasion was with a French girl (R125-126,127,129,130-131,133,134).

5. a. Charge I and Specification - Absence without Leave:

The record of trial clearly supports the court's findings of guilty, as modified by the confirming authority.

b. Charge II and Specification - Rape:

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM,1928,par.148b, p.165). The evidence for the prosecution tends to show that three separate acts of intercourse occurred on the date alleged. It has been held that when one act is alleged by the specification and the evidence discloses 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; CM ETO 14564, Anthony and Arnold). Substantial evidence to show that the first act of intercourse constituted rape is to be found in accused's use of a pistol to compel the prosecutrix to accompany him from her cafe to an isolated spot in the forest, the placing of the pistol against her forehead and later in his helmet nearby and the subsequent violation of her person. The testimony of Frau Mayrburl is strongly corroborated by the bruises found on her legs, back and thighs upon the doctor's examination, the trampled grass and the finding of her shoes near the scene on the day following. The court could properly find the prosecutrix had been reduced to a state of unwilling submission through

fear of death or great bodily injury at the hands of accused. This was forcible rape (CM ETO 5584, Yancy; CM ETO 8450, Garries and Jackson, Jr, and cases therein cited). The question of consent was clearly one of fact to be determined by the court (CM ETO 4194, Scott), as was that of the identity of the rapist (CM ETO 11608, Hutchinson).

Third party testimony was received from prosecution witnesses showing the identification of accused as the assailant by the prosecutrix at the hospital on the day following the rape and the assault. Similar testimony was received tending to show an extra-judicial identification of accused in a line-up by one "Mitze" Mitterhuber (R47,48). As the record contains other competent, substantial evidence which convincingly establishes the identification of accused; the reception of such testimony, if error, did not prejudice the substantial rights of accused (CM ETO 6554, Hill; CM ETO 7209, Williams; CM ETO 8270, Cook).

c. Charge III and Specification - Assault with intent to Murder:

"This is an assault aggravated by the concurrence of a specific intent to murder" (MCM, 1928, par.149,p.178). Based upon accused's stated intention to kill the prosecutrix, the weapon used, the severity of the wound inflicted, the utter lack of justification, provocation, or legal excuse, the court was warranted in inferring that the assault alleged was made wantonly, willfully and with malice aforethought. Had death ensued, the homicide would have been murder. Accused was properly found guilty of assault with intent to commit murder as alleged (CM ETO 2899, Reeves; and authorities therein cited; CM NATO 1123 (1944) III Bull.JAG 11).

The denial of guilt by accused while testifying as a witness in his own behalf and the other defense testimony tending to establish an alibi raised an issue of fact. It was the duty of the court to weigh the evidence, judge the credibility of the witnesses, draw legitimate inferences from the circumstances and resolve the issue upon all the submitted evidence. The issues were resolved against accused by the findings of guilty. The findings of guilty as modified by the confirming authority in the opinion of the Board of Review, are supported by evidence which is competent, substantial and legally sufficient. Such findings may not properly be disturbed upon appellate review.

6. The charge sheet shows that accused is 26 years of age and was inducted on 2 December 1943 at Cleveland, Ohio. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

8. The penalty for rape is death or life imprisonment.

as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and of assault with intent to commit murder 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, pars. 1b(4),3b).

Edward L. Stevens, Jr. Judge Advocate

B. H. Levy Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

18225

1st Ind.

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

1. In the case of Private HENRY J. DAVIS (35923019), Company B, 761st 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 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 18225, For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18225).

OUT 29 NOV 1945 BOTJAG-ET

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

(Sentence as commuted ordered executed. GCMO 638, USFET, 26 Dec 1945).

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

3 JAN 1946

CM ETO 18250

U N I T E D S T A T E S	98TH BOMBARDMENT WING (MEDIUM)
v.	Trial by GCM, convened at Paris, France, 13 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RALPH E. SPAIN (34196397), Headquarters and Base Services Squadron, 478th Air Service Group (Spl)	

HOLDING BY BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON and BURNS, 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 record of trial is legally insufficient to support the findings of guilty of Charge II and its specification. The offense involved is that of larceny of property of the United States (blankets and clothing), furnished and intended for the military service thereof. Assuming arguendo that the evidence is legally sufficient to establish all other elements of the offense, it is nevertheless not legally sufficient to establish that accused is the person who committed the larceny. The only evidence of record tending to identify him as the guilty party is circumstantial in nature and consists of proof that about 11 p.m. on 28 July 1945, he entered the open tent from which the property was subsequently stolen, represented to inmates of the tent (to whom he was a stranger) that he was on leave and was to depart for his station on a plane which was then on the airfield, requested and was granted permission to sleep in an unoccupied bed, and actually went to bed, as did also three other occupants of the tent, and turned out the lights; that some three hours later, about 2 a.m. on 29 July 1945, both he and the property in question were missing from the tent; that instead of being on leave as he represented, he was absent without leave; and that about ten days later he was in custody at the same army installation at which the theft occurred (R8-16). In its final analysis this evidence does no more than establish that accused had an opportunity to commit the larceny and create a strong probability and suspicion that he did commit it. It does not establish that he alone had the opportunity, but is to the contrary. "Proof of mere opportunity to commit a crime is not

sufficient to establish guilt" (CM 154726, Hall; CM 197408, McCrimon 3 BR 111 (1932); CM 216004, Roberts et al, 11 B.R. 69 (1941); CM ETO 17495, La Fernier et al; CM ETO 804, Ogletree et al, 2 BR (ETO) 337). Nor can findings of guilty be sustained on mere suspicion. Since the evidence is circumstantial, it must exclude all reasonable hypothesis except that of accused's guilt (CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 13416, Wells; CM ETO 14845, Gerringer) and this, in the opinion of the Board of Review, it fails to do.

Lester A. Daniels Judge Advocate

John R. Anderson Judge Advocate

John A. Burns Judge Advocate

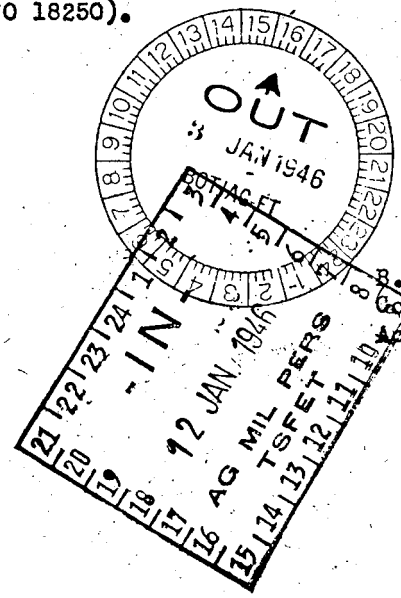
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 3 JAN 1946 TO: Commanding Officer, 98th Bombardment Wing (Medium), APO 140, U.S. Army.

1. In the case of Private RALPH E. SPAIN (34196397), Headquarters and Base Services Squadron, 478th Air Service Group (Spl), 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 specifications; legally insufficient to support the findings of guilty of Charge II and Specification and legally sufficient to support the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The remarks of defense counsel shown at pages 17 and 18 of the record of trial approaches misconduct such as was condemned by the Board of Review in CM ETO 13222, Howard, and which resulted in the conviction being set aside. In this case the determination upon other grounds of the legal insufficiency of the record to sustain the findings of guilty of Charge II and Specification eliminates the necessity of passing upon this point. However the conduct of counsel is subject to criticism and is not approved.

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 18250. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18250).



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

18250

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater [redacted]

BOARD OF REVIEW NO. 4

20 NOV 1945

CM ETO 18265

UNITED STATES v. Private First Class WALTER BUCHANAN (34744838), and Privates BRENTON F. PRATT (37670463) and HARRY SMITH (33626899), each of the 962nd Quartermaster Service Company	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM, convened at LeMans, Sarthe, France, 19 October 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Places of Confinement: as to Buchanan and Pratt, Federal Reformatory, Chillicothe, Ohio; as to Smith, 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 soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences.

2. The record of trial fails to disclose that the witness First Lieutenant Arthur Novelli was sworn (R8), but the evidence is otherwise compelling and is supported by pleas of guilty to all charges and specifications with the exception of the plea of not guilty by accused Smith to the Specification of Charge I and Charge I. In view of the fact that the testimony of the witness Novelli pertains solely to issues otherwise competently proved, no prejudicial error occurred thereby. (CM ETO 6522, Caldwell; CM ETO 9410, Loran; Dig. Op. JAG 1912-40, par. 376(3), pp. 186, 187).

3. Confinement, as to Buchanan and Pratt, in a penitentiary is authorized upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, par. 3a, as amended by Cir. 25, WD, 22 January 1945).

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

18265

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

BOARD OF REVIEW NO. 5

16 NOV 1945

CM ETO 18295

U N I T E D S T A T E S	) SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
Private SAMUEL P. JONES (36794986), 4012th Quartermaster Truck Company, and Privates VICTOR W. ALLISON (36850327) and WILLIAM LINDSAY (36598211), both of Detachment 54, Ground Force Reinforcement Command, United States Forces, European Theater.	) Trial by GCM, convened at Paris, France, 17 October 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years (JONES), and 20 years (ALLISON and LINDSAY). United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 5
HILL, JULIAN and BURNS, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences of accused Jones and Lindsay, and legally sufficient to support only so much of the sentence as to Allison as imposes dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years and three months.

Allison was properly found guilty of Specification 2, Charge I, robbery in violation of Article of War 93, for which the maximum imprisonment imposable is ten years, and guilty of Charge III and its specification, carrying a concealed weapon in violation of Article of War 96, for which the maximum term of imprisonment is three months. The record of trial is legally insufficient to support the findings of guilty, as to Allison, of Charge II, and its Specification, desertion in violation of Article of War 58. The only evidence of the initial absence was an authenticated copy of a morning report (Pros.Ex.A) which shows that the original entry was, on 26 July 1945, verified by the Personnel Officer. At that time this officer was not authorized to verify morning reports, for which reason this morning report had no evidentiary value (CM ETO 6951, Rogers; Sec.VI, Cir.92, Hq USFET, 8 July 1945; AR 345-400, 3 January 1945, par.43a).

18295

2. The penalty for desertion in time of war is death or such other punishment as a Court-Martial may direct (AW 58). Confinement in a penitentiary is authorized for desertion and robbery by Article of War 42 and Section 284, Federal Criminal Code (18 USCA 463). 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

(DETACHED SERVICE) _____ Judge Advocate

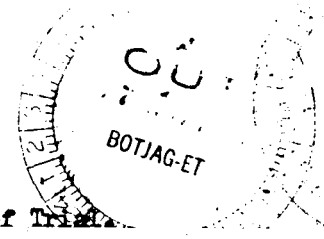
_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 16 NOV 1945 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private SAMUEL P. JONES (36794986), 4012th Quartermaster Truck Company, and Privates VICTOR W. ALLISON (36850327) and WILLIAM LINDSAY (36598211), both of Detachment 54, Ground Force Reinforcement Command, United States Forces, European Theater, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences of accused Jones and Lindsay, and legally sufficient to support only so much of the sentence as to Allison as imposes dishonorable discharge from the service, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for ten years and three months, which holding is hereby approved.

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 18295. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18295).



RECEIVED

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

1 Incl:
Record of Trial.

18295

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

BOARD OF REVIEW NO. 4

7 DEC 1945

CM ETO 18312

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	
Private WILLIE G. BENTON (14066427), 3677th Quartermaster Truck Company	Trial by GCM, convened at Kitzingen, Germany, 19 October 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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 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 Willie G. Benton, 3677th Quartermaster Truck Company, TC, did, at or near Kitzingen, Germany, on or about 2 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Neder.

CHARGE II: (Finding of Not Guilty)

Specification: (Finding of Not Guilty)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I and Charge I, and not guilty of the Specification of Charge II and 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 evidence for the prosecution, with reference to the offense of which accused was convicted, may be summarized as follows:

On 2 May 1945 Maria Neder was helping her father chop wood in the yard of their home located in Kitzingen, Germany, when a piece of wood struck him on the forehead injuring him (R7,8). With the assistance of Hilde Beck, who was with them at the time, she started to take her father, who was bleeding, into the house, when accused, who had been standing nearby with another soldier, entered the yard alone and offered to help (R8,9,17,18,42,43,48). Maria and accused then assisted her father, who was 84 years of age and sickly, into the house and to a room on an upper floor (R7,9,33). After they entered the room accused took a watch which was lying on a dresser, searched her, and began "playing around" with her clothes (R9,10). She made an effort to repel him, but when she did he held a gun in front of her (R10). She then tried to escape from him, but he followed her into the hallway with the gun where she shouted to Mrs. Barthel, another resident of the house, for help, saying, "Help, Help, Mrs. Barthel" (R11,37). Mrs. Barthel heard her cry for help three times, but could not go to her assistance because of her physical condition (R48,50). He continued to hold the gun in front of her, and then pulled up her dress and pulled down her pants (R11). When she tried to resist him, he struck her in the face with his hand and with the gun (R11). He then forced her to lie down at the point of a gun, unbuttoned his trousers and had sexual intercourse with her (R12,13). She testified positively that she felt his penis inside her vagina, and that she at no time consented to the act (R13). When the act was completed, she left accused and reported the incident, and

shortly thereafter American military personnel arrived and took accused away (R14,15,49).

First Lieutenant Robert W. Harris, who assisted in removing accused from Maria's home, testified that when he arrived accused was sitting on a sofa in a room on the third floor of the house, that he was holding a rifle across his knees and that he appeared to have blood on his trousers (R58-71). The medical officer who examined Maria on 3 May 1945 found several tears in her hymen which could have been caused by sexual intercourse within the preceding 24 hours (R52-54). There was some evidence to indicate that accused had been drinking and was under the influence of intoxicants at the time of the offense, but none of the evidence tended to indicate he was not conscious of his acts or unable to determine and adhere to a course of conduct (R63,64,67,68,73,74).

4. After his rights as a witness were explained to him, accused elected to remain silent (R75). No evidence was offered by the defense (R75).

5. The record of trial convincingly discloses that at the time and place alleged accused had carnal knowledge of Maria Neder by force and without her consent. The evidence shows that she resisted his advances, sought to escape from him, cried for help, and that the act was accomplished at the point of a gun. Substantial evidence, therefore, supports the finding of the court that sexual intercourse was accomplished without consent, and that it was attended by force (CM ETO 3993, Ferguson; CM ETO 17340, Holt). He was positively identified by the victim, and her testimony, both as to identification and the rape itself, was abundantly corroborated by Hilde Beck, who saw accused enter the house with her, by Babette Barthel, who heard her cry for help, by First Lieutenant Robert W. Harris, who found accused in her home shortly after the act occurred, and by the medical officer who found tears in her hymen the day following the offense. The testimony of the victim, when viewed in light of its factual context as established by the corroborating evidence, presents, then, a plausible and consistent story, embracing all elements of the offense, and the court was clearly justified in giving it credence and in reaching findings of guilty (CM ETO 11230, Valenzuela; CMETO 17918, Selvera).

6. The charge sheet shows that accused is 28 years of age and was inducted 6 January 1941 at Fort McPherson, Georgia. He had no prior service.

(318)

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

8. The penalty for rape is death of 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).

Lester A Davidson Judge Advocate

Quentin D Meyers Judge Advocate

John R. Anderson Judge Advocate

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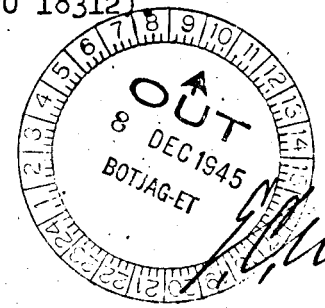
BJR jog
(319)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater 7 DEC 1945 TO:Commanding General, 79th Infantry Division, APO 79, U.S.Army.

1. In the case of Private WILLIE G. BENTON (14066427), 3677th Quartermaster Truck Company, TC, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 18312. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18312).



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

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(Sentence ordered executed. GCMO 18, USFET, 18 Jan 1946).

18312

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

BOARD OF REVIEW NO. 2

23 NOV 1945

CM ETO 18317

U N I T E D S T A T E S	101ST AIRBORNE DIVISION
v.	Trial by GCM, convened at Auxerre, France, 14 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.
Private RALPH R. BOGGS (35751861), Company I, 502nd Parachute Infantry	

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

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

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

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

Specification: In that Private Ralph R. Boggs, Company "I", 502nd Parachute Infantry, did, without proper leave, absent himself from his organization and station at Chilton Foliat, England from about 22 December 1944 to about 29 December 1944.

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

Specification: In that * * * did, at Ramsbury Airfield, England, on or about 5 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at LeHavre, France on or about 3 July 1945.

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

Specification: In that * * * having been duly placed in confinement at Chilton Foliat, England, on or about 1 January 1945, did, at Ramsbury Airfield, England, on or about 5 January 1945, escape from said confinement before he was set at liberty by proper authority.

18317

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all of the charges and specifications except the words "he was apprehended at LeHavre, France" contained in the Specification 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 U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

a. Charge I (Absence without leave). Accused was a member of I Company, 502nd Parachute Infantry, and reported about 18 December 1944 to the rigger section at the rear base at Chilton Foliat, England, to await transportation to France (R8). He was absent from roll call formation on the morning of 22 December 1944, at which the soldiers were put on trucks to be sent to the airport to be transported to France (R7). A search was made of the entire area and he could not be found. He had no permission to be absent (R8). It was stipulated that the accused was under military control on 29 December 1944 (R9).

b. Charge II (Desertion). On 5 January 1945 accused was released from the stockade at Chilton Foliat, England, to be taken to Ramsbury Airfield, England, and from there by plane to Camp Mourmelon, France, to be turned over to proper authorities. He was to remain in the custody of Staff Sergeant Chesebro during the trip. On 4 January he had been taken out of the stockade and a "dry run" had been made. He had arrived at the airport and was there for about five hours before he disappeared (R12). The area was searched but he could not be found (R10-11). He had no authority to be absent. Sergeant Louis Strenzl who was a member of the same organization as the accused and who was with the organization from March of 1945 until the date of trial (14 September 1945) did not see the accused with the organization at any time during that period. If accused had been present he would have seen him (R25). It was stipulated that the accused was under military control on 3 July 1945 (R25).

c. Charge III (Escape). Sergeant Chesebro testified that on the morning of 5 January 1945, having been ordered to pick up two prisoners at Chilton Foliat, England, and take them to France, he picked up the prisoners at the guardhouse and took them to Ramsbury Airfield. Accused was one of the prisoners. He stayed with them until dinner time when he turned them over to Corporal Mandeville (R13). Later Corporal Mandeville returned only one prisoner. He reported accused as missing. The area was searched but he could not be found. No one was authorized to release him (R13-14). He told the corporal in front of the accused that he was to go "to chow with him" (R15). Corporal Mandeville testified that he was at Ramsbury Airport, England at the time when somebody hollered "chow. We rushed to the door, got on the same

truck and went to the mess hall. We were at the same table." Accused got up from the table and walked away. At the time he understood accused was a prisoner but he himself was not guarding him in any manner. He denied that Sergeant Chesebro ever requested or ordered him to guard the accused or anyone else. After the search he told Sergeant Chesebro that one of the prisoners was gone. He said "Why didn't you watch him?" Mandeville replied "Why should I when I am not appointed as guard" (R18-19). From all appearances the accused could have been led to believe that he was not under guard. Mandeville was wearing a pistol but so were the others (R19). The pistol was not loaded (R21). There were other noncommissioned officers in the group of higher grade than Mandeville (R23).

4. The accused having been fully advised concerning his rights as a witness elected to testify in defense of Charge III. When Sergeant Chesebro took him out of the guardhouse on 5 January 1945 he gave him no instruction that he was still under guard. At chow time that day the Sergeant gave no instructions to Corporal Mandeville about him, nor did he appoint him as a guard. They all went to the mess hall in a truck. When he finished eating he got up and walked out. There was no guard (R27).

5. With reference to Charge I (AWOL) it was clearly established by the uncontradicted testimony of the First Sergeant in charge of the accused's detached service detail that he absented himself without leave at the time and place alleged in the Specification and did not return until 29 December following. All of the necessary elements of proof to sustain the findings therefore appear in the evidence (MCM, 1928, par. 132, p. 145).

With reference to Charge II the accused has been found guilty of desertion. Desertion is defined as 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). The accused's absence without leave on 5 January 1945 was clearly established by the prosecution's evidence and his own admission. The court was properly and legally justified in inferring that he did not intend to return and/or that he departed to avoid hazardous duty from the circumstances shown by the evidence surrounding his unauthorized departure. He had disappeared a few days previously when about to be taken from England to France during war time when actual combat was taking place in France. On 5 January he knew he was again to be taken to France. He was under arrest. His unexplained absence extended over a period of 6 months (CM ETO 16880, Ferraro and the cases cited therein).

With reference to Charge III the undisputed evidence shows that although accused was a prisoner during "chow" at the Ramsbury Airfield he was not under guard or any other form of physical restraint. Even if Sergeant Chesebro did, as he claimed, designate Corporal Mandeville as a guard (which was denied by both Mandeville and the accused) Mandeville did not in fact act as a guard and therefore there was no physical restraint whatsoever over the accused when he departed. One of the necessary elements of the offense of which he was convicted is "that he freed himself from the restraint of his confinement" (MCM, 1928, par. 139b, p.154). Confinement imports some physical restraint. That element is not shown by the record. Accused was not in confinement nor under any physical restraint and therefore could not be guilty of freeing himself from such

a status. It follows that the findings of guilty of this Charge and Specification cannot be sustained (CM ETO 2445 2, Humphrey, 28 BR 337).

6. The charge sheet shows that the accused is 20 years eleven months of age. Without prior service he was inducted on 26 March 1943, at Clarksburg, West Virginia.

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 except as noted herein. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge III and its Specification but is legally sufficient to support the findings of guilty of the remaining charges and specifications 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).

[signature] Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins Jr. Judge Advocate

(325)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 23 NOV 1945 TO: Commanding General, 101st Airborne Division, APO 472, U.S. Army.

1. In the case of Private RALPH R. BOGGS (35751861), Company I, 502nd Parachute Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification but is legally sufficient to support the findings of guilty of the remaining charges and specifications 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 view of the youth of the accused it is recommended that the place of confinement be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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 18317. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18317).

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

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

28 NOV 1945

CM ETO 18322

UNITED STATES v. General Prisoner MACK NAPIER (13034846), Loire Disciplinary Training Center, United States Forces, European Theater	SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM, convened at Paris, France, 23 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 insufficient to support the finding of guilty of Specification 2, Charge I, and of Charge I, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor at such place as the reviewing authority may direct for one year.

2. Inasmuch as the previous suspension of accused's dishonorable discharge was vacated by General Court-Martial Order Number 1, Headquarters, First Airborne Army, 25 May 1945, accused, as a matter of law, was incapable of committing the offense of absence without leave charged in Specification 2, Charge I (CM ETO 4029, Hopkins; CM ETO 1737, Mosser).

Wratten A. Danielson, Judge Advocate

Samuel A. Meyer, Judge Advocate

John R. Anderson, Judge Advocate

AGPD 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO. 1

1 DEC 1945

CM ETO 18338

U N I T E D S T A T E S	) CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
First Lieutenant CLYDE HULSE (O-1579820), Attached-Unassigned Detachment 50, Ground Force Reinforcement Command, Headquarters 50th Replacement Battalion	) Trial by GCM, convened at Liege, Belgium, 6 August 1945. Sentence: Dishonorable discharge, total forfeitures and to pay to the United States a fine of $2500.

HOLDING by BOARD OF REVIEW NO. 1.
STEVENS, DEWEY and CARROLL, 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 1: In that First Lieutenant Clyde Hulse, attached unassigned Detachment 50, Ground Force Reinforcement Command, did, without proper leave absent himself from his command at or near Verviers, Belgium, while en route to his said command from the 4342nd United States Army Hospital Plant, located at or near Liege, Belgium, from about 23 April 1945 to about 29 April 1945.

Specification 2: In that * * * did, without proper leave absent himself from his station, at or near Verviers, Belgium, from about 7 May 1945 to about 18 May 1945.

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

Specification 1: In that * * * did, at or near Brussels,

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(330)

Belgium, on or about 24 April 1945, knowingly and willfully apply to his own use and benefit, a truck and trailer, of a value of more than $50, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at or near Brussels, Belgium, on or about 16 May 1945, knowingly and willfully apply to his own use and benefit, a truck and trailer, of a value of more than $50, property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be "dishonorably discharged the service", to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of $2500. The reviewing authority, the Commanding General, Chanor Base Section, Theater Service Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, stating the sentence was wholly inadequate punishment for an officer guilty of such grave offenses and that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Evidence for the prosecution shows substantially the following:-

On 7 April 1945, accused arrived at Detachment 102 of the 11th Reinforcement Depot. He answered sick call and was sent to the 16th General Hospital as a patient (R15). On 22 April he was released from the hospital and ordered returned to duty through the 11th Reinforcement Depot (R8; Pros. Exs. B,E). Upon release from the hospital, he returned to Verviers, where a change of depots was in organization. He went to Brussels, Belgium, arriving on the night of 22 April (Pros. Ex. F). The next day in company with a soldier named Nelson, he met a civilian in Brussels by the name of Jean Andree with whom arrangements were made to haul some cognac from Paris. Thereafter, accused went to a car park and, by means of writing the number of a truck parked therein on an old trip ticket, he drove the truck and attached trailer to a garage located at 39 Rue De Jorez. On 24 April, accused, Nelson and Andree drove the truck to Paris, loaded it with cognac and returned to Brussels the next day. The truck was unloaded at 39 Rue Jorez. Accused and Nelson each received 25,000 Belgian francs (R10; Pros. Ex. F). Accused returned to his organization at Verviers on 29 April (R9,10; Pros. Exs. C,F). He remained with his unit at Verviers until on or about 6 May 1945 when he again left without authority and returned to Brussels, where he contacted Andree on the following day. The next day they went to Paris and returned with one-half a load of cognac for which he was paid 17,000 Belgium francs. On 16 May 1945 accused made another trip to Paris in the truck, returning with cognac. For this trip accused received 25,000 Belgian francs (R10,11; Pros. Exs. F,G). Between the dates of the two trips the truck and trailer remained at a private garage, located at

39 Rue de "Moray", in Brussels (R17). It was stipulated that if Agent Benjamin C. Chester of the 30th Criminal Investigation Division were present and sworn as a witness, he would testify that he took accused into custody and returned him to military control on 18 May 1945 at Brussels (R13). It was further stipulated that the truck and trailer referred to in Specifications 1 and 2 of Charge II were property of the United States and of a value of more than 50 dollars (R11).

4. Defense evidence:

After an explanation of his rights, accused elected to be sworn and testify as a witness in his own behalf (R13-14). He arrived at Detachment 102 of the 11th Reinforcement Depot on 7 April 1945, at which time he answered sick call and went to the hospital (R15). He was in the hospital until 22 April when he returned to Verviers. A change of depots was in organization and there was a state of confusion so he left and went to Brussels. He testified:

> "I readily carried on the activities that appear in the charges -- for the reason, I cannot state. I don't know myself why I did it. Maybe it was for the money involved, or some other reason that I cannot explain" (R15).

After his return from the first trip to Brussels he reported to the depot at Verviers, and stated he had just been released from the hospital. He checked nearly every day with the assignment section to see if they had an assignment for him "with always the result of getting a bawling out for coming into there". In the meantime he was sent on troop duty with men who had experienced combat, giving beginners classes in booby traps "which was very embarrassing at times", but he carried on with this assignment as best he could. On 6 May he checked with the depot again. They had nothing for him and he again went to Brussels (R15). He admitted in his testimony each offense charged (R14-17).

It was stipulated that Captain Nathan L. Stein, 49th Reinforcement Company, 6900th Depot, would testify that he knew accused since March 1944, when the 101st Replacement Battalion was activated at Camp Barkley, Texas; that he was a company commander and accused, battalion motor officer; that accused impressed him as a fine officer and that his work as motor officer was outstanding. On numerous occasions battalion vehicles were inspected by ordnance teams and were rated "superior". Accused never showed any traits other than those of a well-disciplined officer (R18).

5. The prosecution's evidence together with accused's testimony, established his guilt of the offense charged independent of the pleas of guilty. There is nothing in his testimony or elsewhere in the record inconsistent with his plea (Cf: CM ETO 9979, Stanley and Shepherd). The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty (CM ETO 612, Suckow; 2BR (ETO)199; CM ETO 1266, Shipman).

6. The law member's explanation of accused's plea of guilty (R7) failed to mention a fine as possible punishment. The fine is valid, however, in view of the other evidence in the case, including accused's testimony confessing the offenses. The case is thus distinguishable from CM 144220 (1921), Dig. Op. JAG 1912-1940 sec. 378 (2), p.188, where no evidence was introduced at the

trial. However, the soundness of the rule of the cited case is not to be impared by this citation and distinction.

7. The charge sheet shows that accused is 35 years six months of age and enlisted in the Regular Army at Fort Thomas, Kentucky, on 21 September 1940 to serve for the duration of the war plus six months. He was commissioned a second lieutenant 16 October 1942 and was promoted to first lieutenant on 10 June 1943. He had no prior service.

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

9. The court sentenced accused "to be dishonorably discharged the service". The sentence should have been that he "be dismissed the service" but, since both forms import that the severance from the service is under dishonorable conditions, the substantial rights of accused were not prejudiced by the form used, and it will be construed as though the proper phraseology has been employed (CM 251162, Diehl, 33 B.R. 143, 156 (1944); CM ETO 6961, Risley).

10. Dismissal and total forfeitures are authorized upon conviction of an officer for violation of Article of War 61 and 94. The imposition of a fine in addition to total forfeitures in the sentence of an officer is also authorized by Articles of War 94 (CM ETO 11072, Copperman).

Edward A. Stevens, Jr. Judge Advocate

DETACHED SERVICE Judge Advocate

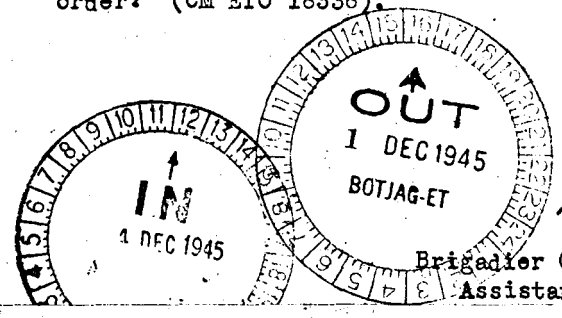
Donald K. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of First Lieutenant CLYDE HULSE (O-1579820), Attached-Unassigned Detachment 50, Ground Force Reinforcement Command, Headquarters 50th Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 18338. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18338).



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

(Sentence ordered executed. GCMO 609, 653, USFET, 17 Dec 1945).

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

BOARD OF REVIEW NO.1

8 DEC 1945

CM ETO 18339

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v	
Major ROBERT E.E.SHERMER (O-395536), Quartermaster Corps, 4258th Quartermaster Composite Battalion	Trial by GCM convened at Lille, Nord, France, 11,25,26,27 June 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for three years, and $1,000 fine, with additional confinement at hard labor until fine is paid, but not to exceed one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO.1
STEVENS, DEWEY and CARROLL, 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 94th Article of War.

Specification 1: In that Major Robert E. E. Shermer, 4258th Quartermaster Composite Battalion, did, at or near St Amand, Nord, France, on or about 19 March 1945, wrongfully and knowingly sell one 14 pound can of bacon, value about $3.65, twenty pounds of flour, value about $0.80, thirty-five cans of fruit, value about $7.35, one box of powdered eggs, value about $1.40, one #10 can of pineapple, value about $0.63,

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eleven cans of tomatoes, value about $1.65, forty-eight cans of milk, value about $4.80, a total value of about $20.28, property of the United States furnished and intended for the military service thereof.

Specification 2: In that *** did, at or near St Amand, Nord, France, on or about 28 February 1945, wrongfully and knowingly sell fifty-five pounds of meat, value about $16.50, six chickens value about $6.84, fourteen cans of milk, value about $1.40, forty oranges, value about $1.00, thirty-three pounds of coffee, value about $6.93, and one box of powdered eggs, value about $1.40, a total value of about $34.07, property of the United States furnished and intended for the military service thereof.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

CHARGE II: Violation of the 95th Article of War

Specification: In that *** did, at or near St Amand, Nord, France, from on or about 20 February 1945 to on or about 19 March 1945, wrongfully employ and induce Technician Fifth Grade Walter J. Sullivan, 4258th Quartermaster Composite Battalion, to perform work of a private, non-military and wrongful nature, to wit, transporting and disposition to civilians of food, gasoline, oil and cigarettes furnished and intended for the military service.

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

Specification 1: (Finding of not guilty).

Specification 2: In that *** did, at Douai, France, on or about 11 April 1945, violate Administrative Memorandum No.35, Supreme Headquarters Allied Expeditionary Forces, 25 October 1944, revised 7 December 1944, and Letter AG 121 OpGA, European Theater of Operations, 23 September 1944, by wrongfully importing, holding, and possessing British paper currency, to wit, about 898 one pound English notes.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

He pleaded guilty to Specification 2 of Charge III and not guilty to all other charges and specifications, and was found not guilty of Specifications 3 and 4 of Charge I and Specifications 1,3, and 4 of Charge III, guilty of the Specification of Charge II with the exception of the words"gasoline, oil and cigarettes", and guilty of all other specifications and all 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, to be confined at hard labor, at such place as the reviewing authority may direct, for three years, to pay to the United States a fine of $1,000, and, in addition to the period of confinement already adjudged, to be further confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but for not more than one year. The reviewing authority, the Commanding General, Chanor Base Section, Communications Zone, European Theater of Operations, approved only so much of the findings of guilty of Specification 1 of Charge I as involved a finding that accused did, at the time and place alleged, wrongfully and knowingly sell one 14 pound can of bacon, value about $3.65, 20 pounds of flour, value about $0.80, 14 cans of fruit, value about $2.47, one #10 can of pineapple, value about $0.63, five cans of tomatoes, value about $0.75, and 48 cans of milk, value about $4.80, a total value of about $13.10, property of the United States furnished and intended for the military service thereof, and only so much of the findings of guilty of Specification 2 of Charge I, as amended, as involved a finding that the accused did, at the time and place alleged, wrongfully and knowingly sell six chickens of some value, 14 cans of milk, value about $1.40, 40 oranges of some value, and about 30 pounds of coffee, value about $6.30, a total value of about $7.70, property of the United States furnished and intended for military service thereof. He approved the sentence but, in view of the fact that medical reports indicated that accused had a maximum life expectancy of three years, he recommended that the confinement be remitted, 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 Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution: On 10 February 1945, accused and a detachment of ten enlisted men under his command were stationed in St Amand, France (R50). From 16 February through 15 March, he drew "Class A" rations for these men and for two other units from the Class 1 Depot at Lille (R14-21; Pros.Exs 1-11). These rations consisted of canned milk, powdered milk, bacon, fresh meats, citrus juices, canned pineapple and various other items (R25) and were the property of the United States Government (R29).

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About 20 February, accused approached Technician Fifth Grade Walter J. Sullivan, a member of his detachment who was billeted with him in a chateau, and asked him if he wanted to make some "easy money". Accused told Sullivan that they were only "small operators" compared to the "big'brass'" in Paris and that Sullivan might make $1000 per month (R54,58). Toward the end of February accused had another conversation with Sullivan in which he stated that they had a "good set up" because both the police and fire chiefs were involved in it (R57). On 23 or 24 February accused instructed Sullivan to load some food on a truck and to deliver it to a dry goods store through the back way. Sullivan complied and was assisted in unloading the truck at the store by the fire chief. After he delivered these goods Sullivan was given a sum of money by accused (R56). In fact, Sullivan received $400 or $500 from accused for this sort of work (R53).

About the middle of March, accused asked a waiter in the unit's mess at the Hotel de Paris, St. Amand, whether he wanted to buy some foodstuffs. As a result of this talk the waiter purchased some items of food from accused among which were approximately 50 cans of milk, flour, and cans of peaches and meat (R33-38). The waiter and Sullivan loaded the food on a truck and took it to the waiter's house, whereupon the latter gave Sullivan 6200 or 6300 francs (R53). Some of the food the waiter brought from accused was recovered from his home by an agent of the Criminal Investigation Division (R71-78; Pros.Exs.12-18). It consisted of one bag of white flour weighing approximately 25 lbs. (Pros.Ex.12); one can of bacon 14 lbs net, packed by the Withington Company, Providence, Rhode Island(Pros. Ex.13); 31 cans of milk, #1 size (Pros.Ex.14); one #10 can of peaches (Pros.Ex.15); one #10 can of pineapple (Pros.Ex.16); six cans of "Yolo Brand" peaches, packed by California Conserving Co., and seven cans of "Mother's Kitchen" peaches, packed by the Oakland Canning Company, Oakland, California (Pros.Ex.17); three cans of tomatoes, two "Wayco Brand" packed by the New Madison Canning Company, New Madison, Ohio, and one "Red Rose Brand" packed by the Tom Corwin Can Company, Lebanon, Ohio(Pros.Ex.18). The tin of bacon, the cans of milk, and one of the cans of peaches were similar to those used at the mess (R34, 35,37). In addition, all of the items listed above were similar to those issued to accused by the ration depot and "Wayco Brand" tomatoes and "Yolo Brand" peaches were drawn by him as part of the rations (R81,82,85).

On 18 March, accused told M.Georges Levan, proprietor of the Hotel de Paris, that he and his detachment were leaving and asked him whether he was interested in buying the meat that was in the cellar, Levan then purchased from accused some beef, six chickens, 12 or 14 cans of milk, 30 or 40 oranges, 10 or 12 kilograms of coffee, and some odd items of foodstuffs, not described, for 6000 francs (R46,47).

The court took judicial notice of the official price list, Office of the Chief Quartermaster, European Theater, concerning the various items

of foodstuffs involved (R50).

Toward the end of February, Major Robert W.Black, Quartermaster Corps, accused's superior, told him that he was contemplating closing the installation at St. Amand. Accused asked Major Black to permit him to remain in St.Amand for about six weeks and promised him $5000 if he could arrange it. When asked why he wished to remain there, accused stated that he was acquainted with some very wealthy people who were desirous of converting francs into pounds. He offered to permit Major Black to participate in these transactions and requested that the latter make arrangements for him to return to England (R96).

Accused went to England and returned on 7 April (R102). On 11 April he was interviewed by two officers of the Theater Provost Marshal's Office. After the interview, accused, the two officers, and Major Black had dinner together. Accused finished dinner before the others and asked to be excused for the reason that he wished to go to the toilet(R96,97). He then told one Sergeant Dunkleberger to go to his room and get rid of a package he would find in a valise. Dunkleberger secured the package as directed but became apprehensive about the part he was playing and finally took action which resulted in the package coming into the hands of military police officers (R90,91,93,98). The package contained 896 one-pound English notes (R101; Pros.Ex.20). The court took judicial notice of Administrative Memorandum Number 35, 25 October 1944, revised 7 December 1944, Supreme Headquarters, Allied Expeditionary Forces, and letter AG 121 OpGA, Headquarters, European Theater of Operations, United States Army, 23 September 1944 (R103).

4. Evidence for the defense: Testimony by enlisted members of accused's unit dealt with specifications of which accused was aquitted and need not be summarized here. They did state, however, that the rations which accused drew were kept at the Hotel de Paris, the meat in a wine cellar, and the other foodstuffs in cupboards. M.Levan had the key to the wine cellar and one of the enlisted men had the key to the cupboards (R111,116).

Accused, after an explanation of his rights, elected to be sworn and testify (R151). He admitted drawing rations from Lille and stated that he drew them for other units as well as his own (R153,154). He specifically denied the allegations of each of the specifications for which he was on trial except that dealing with the possession of English pounds(R157,158). As to the latter, he denied offering Major Black $5000 to insure his remaining at St.Amand, asserting that Major Black had no control over his assignment. He admitted having the money in his possession when he arrived at Le Havre on 7 April and maintained that it was an accumulation of gambling winnings and pay. Similarly he admitted that he attempted to have Sergeant Dunkleberger dispose of the package containing English currency but contended that he was taken by surprise when told that court-martial charges were pending against him (R158-160).

5. a. Specfication 1 and 2 of Charge I: These specifications charged accused with wrongfully selling certain foodstuffs, property of the United States, furnished and intended for the military service. There was substantial evidence based on the testimony of the vendees and Sullivan that accused

did sell foodstuffs. Whatever conflict there was in the evidence between the testimony adduced by the defense and the prosecution on this point was for resolution by the court (CM ETO 895, Davis, et al). In addition, there was substantial evidence that the property so sold was the property of the United States, furnished and intended for the military service thereof. Accused was drawing rations and these were stored at the hotel. On one occasion the property sold was removed from the room where the rations for accused's unit were kept. The food sold was similar to and of the same type as that issued to accused for rations and a substantial portion of it obviously came from the United States. The record is legally sufficient to sustain the findings of guilty of the specifications (CM ETO 6232, Lynch et al; CM ETO 6268, Maddox; CM ETO 11497, Boyd; CM ETO 11702, Copperman; CM ETO 13406, Weiskopf).

b. The Specification of Charge II: This specification alleged that accused wrongfully employed an enlisted man to perform work of a private, non-military, wrongful nature in the disposition to civilians of food furnished and intended for the military service. Such specification states an offense under Article of War 95 (Winthrop's Military Law and Precedents (Reprint, 1920), p. 716). There was substantial evidence tending to prove that accused employed Sullivan as alleged. The conflicts in the evidence were for the court to resolve (CM ETO 895, Davis et al).

c. Specification 2 of Charge III: This specification charged accused with a violation of certain theater directives in importing, holding and possessing British currency. The accused's plea of guilty and the evidence fully sustain the findings of guilty of this specification (cf. CM ETO 7553, Besdine; CM ETO 10418, Blacker).

6. Accused submitted to the reviewing authority a "plea in revision" assigning as a basis for reversal of his convictions numerous errors allegedly committed at his trial. The Board of Review has considered all the points so raised therein and finds them without substantial merit, except for those since corrected by action of the reviewing authority.

7. The Charge sheet shows that accused is 34 years of age and was commissioned a second lieutenant on 15 June 1940. No prior service is shown.

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

9. A sentence of dismissal is mandatory upon conviction of Article of War 95 and with total forfeitures and confinement at hard labor is authorized upon conviction of Article of War 94 or 96. Imposition of a fine is authorized upon conviction of an officer of Article of War 94. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven,

New York, is proper (AW 42 and Cir.210. WD, 14 Sept.1943. sec.VI, as amended).

Edward L. Stevens, Jr. Judge Advocate

(Detached Service) Judge Advocate

Judge Advocate

BJR jwj 8 Dec

ETO 18339 SHERMER, ROBERT E.

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1st Ind.

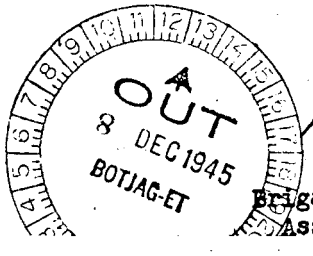
War Department, Branch Office of The Judge Advocate General with the European Theater. 8 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Major ROBERT E. E. SHERMER (O-395536), Quartermaster Corps, 4258th Quartermaster Composite 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I have seriously considered the statements contained in the neuro-psychiatric report that accused is suffering from an affliction diagnosed as "Amyotropic Lateral Sclerosis" (otherwise defined in the Clinical Abstract of the 30th General Hospital as "Chronic Spinal Muscle Atrophy, chronic, moderate") with respect to the sentence imposed upon accused, I cannot recommend at this time any reduction of the period of confinement, but in view of accused's condition I will invite the attention of the Judge Advocate General to the case so that prompt remedial action may be taken if the facts so justify, upon the arrival of the accused in the United States.

However, I do recommend that the Commissioner of Internal Revenue be notified of accused's money transctions to the end that the Government will be able to investigate the case from the stand point of tax liability.

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 18339. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18339).



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

(Sentence ordered executed. GCMO 4, USFET, 11 Jan 1946).

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

BOARD OF REVIEW NO. 2

5 DEC 1945

CM ETO 18365

UNITED STATES	) 69TH INFANTRY DIVISION
v	) Trial by GCM, convened at APO 417, U.S. Army 28 July 1945. Sentence: Dismissal, total forfeiture and confinement at hard labor for (1) year
2nd Lieutenant BRADLEY BARNES (O-1330254), Company G, 273rd Infantry Regiment	)

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

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

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

CHARGE I Violation of the 93rd Article of War

Specification: In that Second Lieutenant Bradley Barnes, Company G, 273d Infantry, having taken an oath in a trial by Special Court-Martial of Private First Class Nathaniel Alston, attached unassigned to Company G, 273rd Infantry, before First Lieutenant Donald J. Horkan, 273rd Infantry, a competent officer that he would testify truly, did at Borna, Germany, on or about 23 June 1945, willfully, corruptly, and contrary to such oath, testify in substance that to the best of his knowledge he did not take the picture of Private First Class Nathaniel Alston and Three German girls which testimony was a material matter and which he did not then believe to be true.

CHARGE II: Violation of the 95th Article of War

Specification: In that * * * having taken an oath in a trial by

Special Court-Martial of Private First Class Nathaniel Alston, attached unassigned to Company G, 273d Infantry, before First Lieutenant Donald J. Horkan, 273d Infantry, a competent officer that he would testify truly, did at Borna, Germany, on or about 23 June 1945, willfully, corruptly, and contrary to such oath, testify in substance that to the best of his knowledge he did not take the picture of Private First Class Nathaniel Alston and three German girls which testimony was a material matter and which he did not then believe to be true.

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

Specification: In that * * * did, at Groitzsch, Germany, on or about 9 June 1945, fraternize by having his picture taken with three German civilian girls, namely, Anita Waldenburger, Johanna Schoene, and Hertha Hinz, which was a violation of a standing order of this company.

He pleaded guilty to Charge III and its Specification and not guilty to the remaining charges and specifications. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all of the charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one (1) year. The reviewing authority, the Commanding General, 69th 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, approved only so much of the findings of guilty of the Specification of Charge I and Charge I as involves a finding that accused, having taken an oath as alleged, did, at the time and place alleged, willfully, corruptly, and contrary to such oath, testify in substance that to the best of his knowledge he did not take the picture of Private First Class Nathaniel Alston and three German girls, which testimony he did not then believe to be true, in violation of Article of War 96, and took the same action as to the finding of guilty of the Specification of Charge II, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence, pursuant to Article of War 50½.

3. Evidence for the Prosecution: It was stipulated that the accused was a witness at the trial of Private First Class Nathaniel Alston by special court-martial on 23 June 1945 at Borna, Germany and that all statements made by him before the court as a witness were made under a properly administered oath. It was also stipulated that on or about 9 June 1945, there was a standing Order in Company G, 273d Infantry, that no members of the company would speak or associate with German civilians, unless on official business (R7). Accused was

a member of Company G, 273rd Infantry (R7).

Major Fred W. Craig, as the President of the special court testified that the accused, in his testimony before the Special court, stated that on or about 10 June 1945 he was the only officer present at a sports arena in Groitysch, Germany, where some athletic events were taking place in which members of Company G participated and that he, the accused, was in charge. When asked if on that date he took any pictures of Private Alston (the accused in the case) and some German civilian girls standing together, he stated that he did not. He was also asked (1) if he had taken any pictures, (2) if he had any pictures of himself with German girls taken, and (3) if he had directed Private Alston to take his picture with the civilian girls. He replied in the negative to each question (R8). He was later recalled and asked if he had taken a certain picture that was used in evidence at the trial. He replied that he was not sure; that he did take some pictures, and that he may have taken that picture. He reiterated that he did not have his own picture taken at that time and place (R9).

Second Lieutenant Edward W. Hill, a member of the same court, testified that when accused was asked as a witness whether he had taken any pictures at Groitysch, the witness understood the question to pertain only to the accused then on trial (Alston) and not to include the entire afternoon. The accused, limiting his answer to the time when the accused Alston was alleged to have had his picture taken, at first answered that he had not, but when recalled later and asked the same question, he said he was not sure (R11-12). When first asked if he had had his own picture taken accused said that he had not. Later, when recalled, he said he was not sure but that he did not think that he had (R11-12). This witness was not sure whether accused was asked whether he had taken a picture of Alston (the accused in the case) and three German girls, but accused did deny that he took a picture of Alston (R12). In the opinion of the witness the questions asked above were material to the issue as Alston was being tried for fraternizating and the questions pertained to a picture taken of Alston and three German girls at the ball game (R13).

Private First Class Thomas E. Oliver testified that he knew the accused and was present at the ball park in Groitysch on or about 9 June 1945 and saw accused and Private Alston take photographs in the presence of female civilians. He saw accused take a photograph of Alston with "these females", and Alston take one of the accused with the same females (R14-15). Private First Class Scotty S. Stein testified that he also was there and he himself took a photograph of accused and two German girls with a camera handed to him by the accused. He also saw accused take a photograph of Alston and two German girls (R16). The President of the Special Court-Martial testified upon recall that the question asked the accused at the trial were material in that case because "we were trying to establish the fact that an order had or had not been given the man to take the picture" (R18). The three girls who appeared in a photograph with Alston appeared as witness in the Alston trial and identified themselves in the photograph (R17).

4. The accused having been advised concerning his rights as a witness elected to testify in his own behalf (R19). His best recollection of the question and answers at the Alston trial was that:

> "I was called in and asked the question, "Did you take the picture of Alston and three German girls?" I said I did not. I was asked the question, "Did Alston take any pictures of you?" I said he had not. The next time I was called back in I was told by the president of the court that my testimony differed from the testimony of some other witnesses. The president of the court asked me if I would like to change any of my testimony. I told him that the questions I answered were to the best of my knowledge. I said, "I am not positive about the pictures, but I don't think so". The court would not accept that as an answer and I answered "to the best of my knowledge I did not". Since that time I have been going over that afternoon and trying to put it all together and I still feel that I did not take that picture to the best of my knowledge".

5. The accused's plea of guilty of fraternizing by having his picture taken with three German civilian girls in violation of a standing order of the company of which he was a member is alone sufficient to legally support the findings of guilty of Charge III and its Specification (CM ETO 17871, Santoriello and the cases cited therein). No further discussion is deemed necessary.

6. As the specifications of Charges I and II are identical and as the findings of guilty of each depends upon the sufficiency of the same evidence, they will be discussed together. Needless to say if the accused is guilty of false swearing as approved by the confirming authority, his conduct was unbecoming an officer and gentleman and constituted not only a violation of Article of War 96 but also a violation of Article of War 95, and he may be properly convicted of violating both Articles of War by the same act (MCM, 1928, par 151, p.186). Although charged with and found guilty of perjury the confirming authority approved only so much of the findings as finds the accused guilty of false swearing in violation of Article of War 96. False swearing contains all of the elements of perjury in cases of this kind except that of the materiality of the false testimony to the issue before the court. It is therefore a lesser included offense of perjury. The elements of the offense applicable to the case under discussion are: (a) That accused was sworn in a proceeding; (b) that such oath was administered by a person having authority to do so; (c) that the testimony given was false, as alleged; and (d) the facts and circumstances indicating that such false testimony was willfully and corruptly given (MCM, 1928, par. 152c, p. 191).

Elements (a) and (b) are admitted by stipulation. With reference to (c) it is necessary to determine (1) what testimony of the accused was alleged to be false; (2) that accused gave such testimony; and (3) whether the prosecution has proved that it was false.

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As to (1) the specification alleges that accused testified falsely when he testified that "to the best of his knowledge he did not take the picture of Private First Class Nathaniel Alston and three German girls" (Underscoring supplied). The issue, therefor, concerned a certain picture not pictures generally.

As to (2) the record clearly established that the accused testified that to the best of his knowledge he did not take the picture of Alston and the three German girls. The President of the court testified that the accused made that statement when recalled as a witness in the Alston case and asked if he had taken "the picture that was used as evidence in the trial" (R9). The accused admitted in testifying in his own behalf at this trial that he so testified and added that he still felt "that I did not take that picture to the best of my knowledge " (R19).

(3) Was this statement proven to be false? As the event took place on or about 9 June 1945 and the Alston trial took place on 23 June 1945, it is reasonable to assume that if the accused had taken the picture in question on the 9th, he must have known that he did when asked on the 23rd. For reasons not appearing in the record the picture itself was not produced or offered in evidence at the instant trial. It was the real subject matter of the trial and yet the Trial Judge Advocate did not produce it nor explain his inability, if such were the case, to do so. In an effort to prove that accused took a certain photograph he called two witnesses who did not have the photograph before them. The witness Stein said he saw accused take a photograph of Alston and two German girls (R16). Such a statement has no probative value in the issue under discussion. The other witness, Oliver, said he saw the accused take a photograph of Alston with female civilians (R14). Such testimony also has no probative value in the issue under discussion. It did not prove that accused took the photograph of Alston and the three German girls. The picture that he saw accused taking might have been of Alston and other female civilians. The testimony of the two witnesses to prove the point under discussion was also objectionable for another reason: It was clear that all these witnesses saw the accused do was to operate a camera in such a manner that if the camera was properly loaded and operated, if the film was properly developed, and if the print from the film properly made, the resulting print would show Alston and some German female civilians. To be of any value it would have to be shown that the print produced at the Alston trial was made from a film in turn made by the camera used by the accused. The Trial Judge Advocate was undertaking almost the impossible by not producing the print or photograph in court.

The testimony of Oliver and Stein proved that accused "took" pictures at the time and place stated by them, but it did not prove that accused "took" "the picture of * * * Alston and the three German girls". It must necessarily follow that the prosecution failed to prove that the testimony of the accused during the Alston trial alleged in the Specification was false. (Cf. CM ETO 16044, Jamerson; MCM 1928, par 149 i, p. 175). So it is very evident that the prosecution failed in proving the most important element of the offense.

In view of this conclusion it is not necessary to discuss element (d) above. The finding of guilty of Charges I and II and their specifications as approved are not legally supported by record of trial.

6. The charge sheet shows that the accused is 21 years and 6 months of age. He was inducted 4 May 1943 and was commissioned Second Lieutenant, Infantry, Army of the United States on 6 January 1945. He had no prior service.

7. The court was legally constituted and had jursidiction of the accused and the offense. Except as herein noted no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge 1 and Charge II and their respective specifications, but is legally sufficient to support the findings of guilty of Charge III and its Specification and the sentence.

8. The penalty for failing to obey an order in violation of Article of War 96 is such punishment as the court-Martial may direct. (Article of War 96).

Earle Hepburn Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

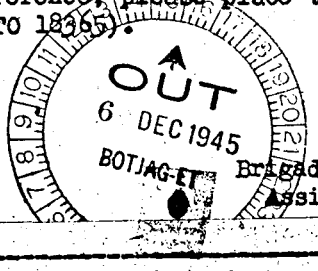
1st Ind.

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

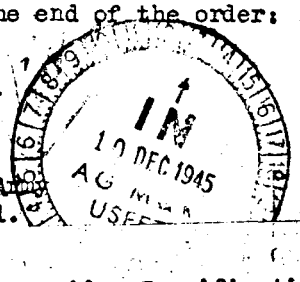
1. In the case of Second Lieutenant BRADLEY BARNES (O-1330254), Company G, 273rd Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and Charge II and their respective specifications, but is legally sufficient to support the findings of guilty of Charge III 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. In view of the legal insufficiency of the record to sustain the two most serious offenses the appropriateness of the present sentence should receive consideration.

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 18365. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18365).



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



(Findings of guilty of Charge I and Charge II and their respective Specifications vacated. So much of sentence as provides for confinement and forfeiture remitted. Sentence as modified ordered executed, but dismissal suspended. GCMO 21, USFET, 7 Jan 1946).

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

BOARD OF REVIEW No. 1

13 DEC 1945

CM ETO 18381

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	
	)	
Private GILBERT F. NEWBURN (17016532), 46th Quartermaster Graves Registration Company	)	Trial by GCM, convened at Heidelberg, Germany, 16,17 October 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
STEVENS, DEWEY 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 charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
(Finding of guilty disapproved by reviewing authority)

Specification: (Finding of guilty disapproved by reviewing authority)

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

Specification: In that Pvt Gilbert F. Newburn, 46th Quartermaster Graves Registration Company, did, at Auerbach, Germany, on or about 21 August 1945, forcibly and feloniously against her will, have carnal knowledge of Ingrid Collet.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for one day in violation of Article of War 61.

Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, 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 shows that about midnight on the night of 20-21 August 1945, after long knocking on the door without gaining admission, an intruder broke into the home of Frau Erna Collet, in Auerbach, Germany (R6-7,19,25). Frau Collet heard footsteps and then heard a muffled cry from her daughter Ingrid, three years of age, whom she had previously put to bed in her crib (R7-8,13). About 0500 hours, 21 August, accused (whowas in the habit of visiting Frau Heppes, an inmate of the house (R18)) was discovered lying beside and parallel to Ingrid in her crib (R9,20-21,25-26). The child's head, which was close to that of accused, was at the opposite end of the crib from the end where it was placed when she was put bed (R14,15). None of her clothing was removed, but she was naked from the waist down (R9,10). There was blood on her body and legs but no open wound, and blue marks were present on her back. She was sleeping as if exhausted (R10-11,21,26). Accused was fully clothed except for his trousers which were on the floor and on the front of which was blood (R10,20, 22-24).

He left about 0900 hours but returned shortly thereafter and repaired a hole in the house door resulting from a broken window pane (R22-23,26). About 1700 hours, he again returned and inquired why the matter was reported to an officer and stated a number of times that he(accused)was very drunk and could not remember what happened. When informed that the child must receive extensive medical treatment at the hospital and that the family was poor (R28), he said the family"should go to an officer and he would give them the money for the treatments"(R29).

Medical examinations of the child made on 21 August by a German physician and an American medical officer, disclosed extreme swelling of the genital organs, slight injury to and discharge from the vagina, clotted blood in the vicinity, incontinence of feces and of urine and two tears, which showed recent bleeding, extending from the labia toward the anus (R30,33-34). In the opinion of each medical witness, there had been penetration of the vagina, which could have been caused by a rigid penis (R30-32,34-36).

Accused made two extra-judicial statements dated 26 and 30 August respectively, as to the voluntariness of which competent evidence was introduced (R37-51; Pros. Exs. A,B). One of the Criminal Investigation Division agents testified that accused was duly warned, that no promises were made or duress

or threats used (R38,41), that both statements were read to accused (R39,41) that he (accused) read the second one (R41), and that Agent Sirkus told accused it might be wise to give his side of the story (R43-44). Accused appeared to know what the whole affair was about (R44,50). Neither agent told accused it would go easier for him if he made a statement or pleaded not guilty or that they were to help "GI's". At one point witness mentioned they had witnesses "to the contrary" (R47,49). After the first statement, Sirkus told accused to think it over and maybe he could remember more details about the incident. The second statement was taken because both agents believed he would remember and give them more details (R48). Accused did not state that he did not understand these things and that he desired an officer to explain the matter. Sirkus did not tell him what happened and then put it into the(second) statement (R49). Sirkus specifically stated he was not promising anything to accused (50). In the first statement accused admitted his presence at the house on the evening in question, that he knew where the crib was and slept in it after removing his trousers and that he offered to pay the baby's medical expenses but stated he did not know what was wrong with her (Pros. Ex. A).
In the second statement he said he had an appointment with Frau Heppes which she did not keep, so he went to her house, banged on the door for a long time and entered by breaking the window. He entered the crib thinking the mother and baby slept together there. Then, "thinking the baby was the mother, I inserted my penis into her vagina" (Pros. Ex. B).

4. For the defense, accused testified in his own behalf, first on the issue of the voluntariness of his statements (supra) (R51-58), and then, after an explanation of his rights (R60), upon the merits (R61-75). On the first issue, he testified that Agent Sirkus told him he wished to help him because they were both soldiers, that he (accused) told Agent Leichter (who testified for the prosecution) that he could remember nothing of the incident. Although the agents read the Article of War 24 to him, he did not know of what he was accused or whether or not he was guilty. Sirkus would not allow him to obtain the assistance of an officer in the matter and stated the first statement "wouldn't sound so good in court" (R52), and that accused might as well stand guilty, as there were five witnesses who would testify to his guilt. He told accused it would be easier if he made a (second) statement, because he would get a death sentence anyway. Accused made neither statement willingly. He understood his rights, but the statements showed merely what the agents told him took place. He did not know whether they were true (R53). He signed them because the agent told him he was trying to help him, and he never read them (R55,56). He insisted to the agent he knew nothing about the affair(R58).

On the merits, accused testified that he did considerable drinking on 20 August and the last he remembered was drinking schnapps about 2130-2200 hours (R61,62-63). He remembered nothing further until he was awakened in the house the next morning (R61,63). Because people there indicated he broke a window and on his first sergeant's suggestion, he returned and repaired it and a woman told him "that was all" (R61). He volunteered to pay the child's medical expenses because he was accused of breaking the window(R65). He returned to the house in the evening because he wished "to know what it was all about" (R70,72-73), yet he did

not ask them what it was about (R73). He denied that he was ever in the child's room before; that when he was awakened his trousers were off (R63) or he was in the crib (R64); that he ever saw blood on any of his clothing; that he asked the woman why she went to the officer (R65); that any of the people at the house told him he had injured the child (R62); and that his statements (Pros. Exs. A,B)were wholly true (R66). He admitted sending his shirt and trousers to Frau Heppes for laundering and that they were never returned to him, but denied that there was any blood on them or that he washed any blood off them previously (R73-74).

An officer of his company testified that accused was drunk at about 1500 hours on 20 August (R75,76) but that he did not see him (accused) again that day (R76,77). Testimony of soldiers of accused's company was stipulated to the effect that he drank a large quantity of schnapps on the evening in question and was drunk, and that thereafter he stated that he remembered nothing of the incident of which he was accused (R77; Def. Exs. 1,2).

5. The testimony of the prosecution's witnesses and accused's statements showed clearly that at the time and place alleged he forcibly had carnal knowledge of Ingrid Collet, a three-year-old baby. Her tender age alone attests her lack of consent even without the evidence of her muffled cry and the convincing medical testimony as to injuries to her sexual organs. It should be noted that at common law all sexual intercourse with a girl of tender age was criminal as she was conclusively presumed not to have consented (44 Am. Jur., sec. 19, p. 913). Accused's guilt of the crime of rape was convincingly established (CM ETO 5747, Harrison,Jr; CM ETO 16971, Brinley). His testimony as to the involuntariness of his pretrial statements squarely conflicted with that of the agent and raised a pure issue of fact for the court's determination, which may not now be disturbed in view of the substantial evidence of voluntariness (Cf, CM ETO 13279, Tielemans et al). Accused's attempted defense, which boils down to extreme intoxication, was controverted by his own pretrial statements which evidenced detailed recollection of his criminal actions on the evening in question. It is thus unnecessary to consider the question whether intoxication in any degree short of psychosis ever constitutes a defense for rape.

6. The charge sheet shows that accused is 26 years six months of age and enlisted 5 March 1941 for three years service. His period of service is governed by the Service Extension Act 1941. He had no prior service.

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

8. The pealty 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).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

Donald W. [illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

15 DEC 1945

CM ETO 18399

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private VERNON P. SAVO, (42091418), 474th Reinforcement Company, 94th Reinforcement Battalion	Trial by GCM convened at Paris, France, 7 May 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, HALL 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: In that Private Vernon P. Savo, 474th Reinforcement Company, 94th Reinforcement Battalion, European Theater of Operations, United States Army, did at his organization on or about 16 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 17 April, 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of 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 by musketry. The reviewing authority, the Commanding General, Seine Section, European Theater of Operations,

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

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

Over the objection of defense counsel there was admitted in evidence an authenticated extract copy of the morning report of "Det 94 GFRS" containing an entry dated 17 September 1944 to the effect that the status of the accused changed from duty to AWOL as of 0800 hours 16 September 1944. The entry was made by a Lieutenant Bristol who designated himself as "Asst. Adj" (R5, Pros. Ex. A). On 17 April 1945 at Paris, France, the accused was turned over to the military authorities by the local French police. He was dressed in civilian clothes. He admitted his identity and offered no resistance (R5,6). Without objection there was admitted in evidence a voluntary statement signed by the accused on 17 April 1945 (R8, Pros. Ex. B) in which he admitted that on 17 September 1944 he went AWOL from the 9th Reinforcement Depot then located at Fontainbleau. He "shacked up" with different girls in Paris who supported him for a while. During February and March he made his living by stealing coats and hats in cafes and restaurants. He donned civilian clothes about the first of April and threw his uniform away. He was apprehended by the French police when carting away some cloth stolen from a railway yard.

4. Having been fully advised concerning his rights as a witness the accused elected to testify in his own behalf (R9). He stated that he was in the military service of the United States; his age was 21; his home town, Buffalo, New York; and that after he reached the 8th grade in school he was raised in an orphan's home. He spent 3 years in jail for stealing an automobile. He was inducted in the army in January 1944 and came overseas in July 1944 in a replacement packet. He was never in a permanent unit but went AWOL on the 16th or 17th of September 1944 (R9-10). The statement he gave the CID agents (Pros. Ex B) is true. He made no effort to avoid arrest. He figured his time was up and he wanted to come back to the army and start a new life. This was his first court-martial (R11).

5. The accused has been convicted of desertion. The type of desertion charged is defined as absence without leave accompanied by the intention not to return (MCM, 1928, par 130a, p.142). The accused in his pre-trial statement and in his testimony under oath during his trial admitted that he absented himself without leave from his organization on or about 16 September 1944 and remained away in that status from that time until he was apprehended by the French police on 17 April 1945. The absence without leave alleged in the specification was therefore conclusively proved without the necessity of giving any probative value to the entry made in the morning report (Pros. Ex.A) by the Assistant Adjutant, who at that time had no recognized authority to

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make such an entry. It is therefore unnecessary to pass upon the admissibility in evidence of that document.

In the same manner it was shown that the accused spent his time in Paris while his country was at war, living with prostitutes and engaging in stealing as a means of livelihood. In spite of his contention that he intended to return to the service of the Army, the court was properly and legally justified in inferring from the duration of his unlawful absence, his illegal activities, his civilian apparel, and the termination of his absence by apprehension, that he did not intend to return and was therefore guilty of desertion (CM ETO 16880, Ferarra and the cases cited therein).

6. The charge sheet shows that the accused is 21 years of age and was inducted in the service on 13 January 1944 at Camp Upton, 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 (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).

(ON LEAVE) Judge Advocate

Clarence N. Hall Judge Advocate

John J. Collins Jr. Judge Advocate

18399

(359) 10

1st Ind.

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

1. In the case of Private VERNON P. SAVO, (42091418), 474th Reinforcement Company, 94th Reinforcement 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 18399. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18399).

OUT 20 DEC 1945 BOTJAG-ET

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

(Sentence as commuted ordered executed. GCMO 6, USFET, 11 Jan 1946).

18399

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

BOARD OF REVIEW NO. 1

22 DEC 1945

CM ETO 18404

U N I T E D S T A T E S	17TH AIRBORNE DIVISION
v.	Trial by GCM, convened at Vittel, France, 27 July 1945.
Private First Class ALFRED L. SZCZUTKOWSKI (32029589), Headquarters Company, First Battalion, 194th Glider Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and 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 Alfred L Szczutkowski, Headquarters Company, First Battalion, 194th Glider Infantry, did, at or near Luneville, France, on or about 21 June 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Laurice L. Mathews, Company H, 194th Glider Infantry, by shooting him with a pistol.

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

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, 17th Airborne Division, approved the sentence, and forwarded the record of trial for action under Article of War 48, with the recommendation that, if the sentence be confirmed, it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's 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 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. Competent, substantial evidence established that on 21 June 1945 at about 2100 hours, Private Maurice L. Mathews was shot in a cafe at Luneville, France, the bullet causing a hemorrhage resulting in his death. No witness testified to seeing accused or anyone else fire the shot. The serious question then raised in this record is the identification of the killer. The evidence for the prosecution relevant to this issue is substantially as follows:

Private Fred L. Dominquez testified that earlier that evening he was playing "horse shoes" with accused who "said something" about selling a gun to pay a debt he owed. They later went to a cafe, where accused said he had a gun and "wasn't going to take any shit off of anybody" (R53). They left this cafe and went to a civilian house where they had three glasses of wine. During an argument over charges for the wine, accused pulled out the gun and shot one round into the floor. Witness told him to put the gun away and said that they should leave in order to stay out of trouble (R54). They left the house and, with four other soldiers they had met, went to a bar where each had a "shot of cognac", after which the six soldiers went to the cafe where the homicide occured. A soldier and witness had an argument after which the two drank a beer at the bar, when witness heard the sound of a shot coming from the back room. He and the other soldiers in the cafe ran out of the door. As he reached the door, he heard accused, who was outside, say, "I shot a guy. I didn't go to. Let's go" (R56). Then witness walked away from the cafe with accused and Private Michael Prokurat (R57).

Private Edward N. Weitzel testified that he was in the back room of the cafe in the company of deceased and had an argument with Dominquez, who struck witness on the chin, the blow glancing off and hitting deceased, whom Dominquez then seized. Deceased told him to take his hands off and repeated this a second time, when "a pistol shot went off" (R15). Just before the shooting, a soldier behind Dominquez said in a sarcastic manner to Mathews, "We don't go for that shit. Take your hands off" (R20-21).

Another soldier in the cafe testified that he saw the flash on deceased's right, almost directly in front of him and a little to the right (R25).

Private Michael Prokurat saw accused earlier that evening with a pistol, seemingly of .25 caliber, in his hand, at which time accused asked if he should take it or not (R31). Later in the cafe he heard a shot and saw accused and Dominquez coming from the back room. Witness followed them out of the door. The three then walked away from the cafe, with witness five or six paces behind the other two. About a block from the cafe he saw a pistol fly over a wall (R33) and it seemed to him as if Dominquez threw it over. A half block further on, Dominquez left and witness continued on with accused toward the camp. While they were walking,

> "Accused told me he had shot a man and he asked me how come it have to happen to him. So he told me he had a pistol and he asked me how come. He tried to get me to back him up that he didn't have any pistol on him" (R34).

When they reached the gate of the camp, accused told him he was going to turn himself in next morning. The next morning accused gave him a .25 caliber pistol, magazine and holster. This gun was similar to the pistol accused had before they went to town on 21 June 1945. Accused had more than two such pistols (R35-36).

Technician Fourth Grade Kasmir J. Sparks testified that on the evening in question, while he was standing outside the cafe, accused came running out, said, "Sparky, I just shot a man," and showed him a weapon which seemed to be of .25 caliber. At the time he said this, accused looked scare and pale (R43-44). The next morning accused said to him, "Sparky, what did I do last night" and witness replied, "Well, you told me your shot a man". Accused then said, "Well, if I shot a man I might as well give myself up. They got the wrong man in the guardhouse" (R45).

Private John W. Wojewoda testified that after the shot was fired, he saw Dominquez leaving the back room, followed by a "fellow" who showed him a weapon in his hand, but because of the darkness, witness could not swear to the identity of this person (R48-49).

4. On behalf of the defense, a stipulation was entered into (R66) that Monsieur Clement, proprietor of the cafe, would, if present, testify that a person of about the build of Dominquez made a motion as if to draw a pistol from inside his coat, although Clement did not actually see the gun (Def. Ex. 1).

Accused, after his rights a witness were explained to him, elected to remain silent (R69).

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 for human life (40 CJS, sec. 44, p. 905; sec. 79b, pp. 943-944). The uncontroverted substantial evidence shows that accused had a gun both before and immediately after the fatal shooting; that prior to such shooting he had fired a shot into the floor of a civilian house; that his companion had an argument with the deceased just before the fatal shooting; that immediately after the fatal shot was fired, accused ran out of the room where the homicide occured; that when he was outside the cafe, he was heard by two witnesses to say that he had shot a man; and that shortly thereafter, while walking back to his camp, he told a third witness he had shot a man. There can be no question as to the admissibility of accused's statements. The statement made just after he had run out of the cafe was admissible as part of the res gestae (MCM, 1928, par. 115b, p. 118) and as a statement (whether considered as a confession or as an admission against interest) voluntarily made. The statement that he shot a man made while walking back to his camp, was also admissible on the latter ground. Both statements were made to other enlisted men under circumstances clearly showing their voluntary nature (MCM, 1928, par. 114a, p. 116; CM ETO 16874, Miller, and authorities cited therein). There is ample independent evidence of the corpus delecti in the record to support the admission of these statements (CM ETO 14040, McCreary).

The vital question before the court was the identification of Mathews' slayer. In the state of the evidence it was peculiarly the function of the court to determine this question. There is substantial competent evidence that identified accused as the soldier who committed the homicide and under such circumstances the Board of Review on appellate review must accept the findings as conclusive (CM ETO 3200, Price; CM ETO 3837, Smith; CM ETO 12656, Tibbs; CM ETO 16971, Brinley). The case is not of the pattern of CM ETO 7867, Westfield; CM ETO 9306, Tennant; and CM ETO 13416, Wells where the evidence left the question of the identity of the culprit in such condition that the hypothesis of innocence was equally as reasonable as that of guilt.

The Board of Review is therefore of the opinion that competent substantial evidence established every element of the crime of murder as alleged, and that the record of trial is legally sufficient to support the findings of guilty and the sentence (CM ETO 11231, Mitchell; CM ETO 11269, Gordon; CM ETO 18051, Sharpton).

6. The charge sheet shows that accused is 28 years of age, and was inducted 9 January 1941 at Buffalo, New York, to serve for the duration of the war and six months. He had no prior service.

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

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

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

Edward L. Stevens, Judge Advocate.

[illegible], Judge Advocate.

(TEMPORARY DUTY), Judge Advocate.

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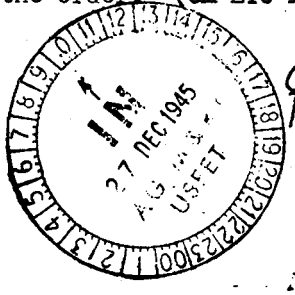
1st Ind.

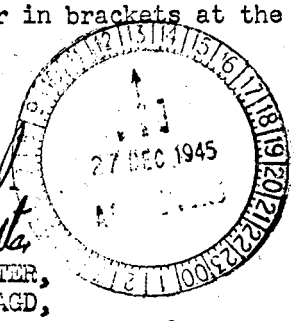
War Department, Branch Office of The Judge Advocate General with the European Theater. 22 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class ALFRED M. SZCZUTKOWSKI (32029589), Headquarters Company, First Battalion, 194th Glider 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. Under military law there are no degrees of murder. In that respect military law differs from the statutes denouncing murder in most of the civil jurisdictions of the United States. The evidence in this case established the crime of murder, but its pattern is that of second degree murder and not that of premeditated homicide - a characteristic of first degree murder. I believe that it will be consonant with justice if the period of confinement is reduced to 20 years, and I so recommend.

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 18404. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18404).





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

(Sentence as commuted ordered executed. GCMO 16, USFET 15 Jan 1946).

18404

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

BOARD OF REVIEW NO. 1

16 DEC 1945

CM ETO 18408

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
First Lieutenant NORRIS E. LOOP (O-532214), Company C, 716th Railway Operating Battalion	Trial by GCM, convened at Paris, France, 12,13 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Norris E. Loop, Company B, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, and at or near Dreux, France, and at or near Paris, France, and at various and sundry places between said places, between 29 August 1944 and 30 November 1944, in conjunction with other members of the 716th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own

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joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and to other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at the time and places herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit. (as amended)

Specification 2: (Nolle prosequi).

Specification 3: In that * * *, did, between Dreux, France and Paris, France, on or about 4 September 1944, wrongfully receive and convert to his own use one (1) box "PX" (post exchange) rations, property of the United States and intended for use in the military service thereof, thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of vital supplies during a critical period of combat operations.

Specification 4: In that * * *, did, between Dreux, France and Paris, France, between 1 September 1944 and 30 November 1944, wrongfully receive and convert to his own use one (1) carton of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 5: In that * * *, did, at or near Dreux, France, and at or near Versailles, France, and at or near Paris, France, between 2 September 1944 and 30 November 1944, fail and neglect to perform his duties in preventing the known wrongful taking and disposing of rations, cigarettes, and other supplies, property of the United States, and intended for use in the military service thereof, from supply trains operating between Utah Beach, Frane, and Paris, France, thus permitting the diversion of such food, cigarettes, and supplies from the purpose for which intended and contributing to a shortage thereof, during a critical period of combat operations.

He pleaded not guilty, and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. 87

3. At the outset of the trial (R5) the defense moved to strike Specifications 1 and 5 because of indefiniteness and further moved to strike Specifications 3 and 4 because they were improperly brought under Article of War 96. The motions were denied, and properly so. So far as the motion sought to attack Specification 1 and 5 for lack of definiteness the case is governed by CM ETO 895, Davis et al and CM ETO 8234, Young et al; so far as it sought to attack Specifications 3 and 4 as being improperly laid under Article of War 96, that ground has been covered before in cases arising from accused's organization (see cases cited in next paragraph).

4. a. Specification 1 of the Charge. This is one of the so-called "Railroad Conspiracy Cases" of the same general nature as (CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al; CM ETO 12203, Bruce et al; CM ETO 12303, Jennings et al; CM ETO 13143, Frew; CM ETO 13155, Busby et al; CM ETO 13403, Challoner et al).

The details of the situation existing in the 716th Railroad Operating Battalion have been discussed in the cases above cited and there is no necessity for repeating same. Suffice it to say that the evidence now, as then, disclosed wholesale pillaging of United States Government property, furnished and intended for the military service thereof, by members of that battalion from trains which they operated, and that this looting and pillaging contributed to a shortage of military supplies during a critical period of combat operations.

In the Young, Fleming, and Hart cases, it was held that such evidence established the corpus delicti of a conspiracy, as alleged, so as to warrant the introduction of the accuseds' extra-judicial statements connecting them with that conspiracy. Here accused made no such admission, extra-judicial or otherwise, and his membership in the conspiracy must be found in the evidence of other witnesses relative to his activities.

There was evidence that on 4 September 1944, accused was on a train en route to Paris from Dreux. About two hours out of Dreux the train was flagged because of some difficulty on the line and accused got off it. He was next seen in the caboose with a box. In response to a question he said the box had come from a train going in the other direction. He opened the box and took three cartons of cigarettes, the remaineder being split up among the crew (R37).

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Sometime in September, accused entered the billet of Private James J. Cupp, a member of Company C, 716th Railway Operating Battalion. There were from six to ten cartons of cigarettes lying on Cupp's bunk. Accused demanded a carton. Cupp indicated that he did not wish to give him one, but after a short conversation accused left with a carton given to him by Cupp, saying he could probably trade it for a couple bottles of cognac (R42,47). 87

On another occasion in September, accused and a crew of enlisted men, having just finished a run from Dreux to Paris, went to their billets in the Batignolles Yards. Five of the enlisted men had just taken cigarettes from cases on the train - although not in accused's presence - and were unpacking them from their bags in accused's presence. He said nothing at the time although the next morning he was heard asking for cigarettes (R46-57).

On 11 November 1944, Second Lieutenant Robert P. O'Reilly, an agent of the Criminal Investigation Branch, Corps of Military Police, who had been assigned to the 716th Railway Operating Battalion for undercover work, was playing the role of a student fireman on a run from Dreux to Paris. In the cab with him were accused, an unidentified sergeant, and the regular crew. They were using British engines and about four miles out of Dreux had some trouble with them, which necessitated their stopping. The conductor came up from the rear and accused asked him "if we were carrying anything worthwhile tonight." The conductor replied that they were handling heavy Signal Corps equipment and one carload of flashlights. Accused told him to find out the location of the car containing the flashlights. Accused then said that he was not going to ride any further, but the sergeant told him that he was going on for a few more stops to "see if he could get at this carload of flashlights" (R22,23,30).

There is thus substantial evidence tending to establish accused's participation in the conspiracy. Indeed this evidence also tends to reinforce the conclusion that a conspiracy existed, a conclusion which, as we have said, was warranted by evidence which we saw no occasion to repeat in detail. The evidence here set out shows that accused participated in the looting and that he permitted others to pillage. Accused either denied or gave testimony in explanation of these incidents and, in this connection, he was corroborated by the testimony of several enlisted men of the battalion. In addition, the credibility of the prosecution's witnesses was severely attacked. It has been repeatedly held, however, that the resolution of conflicts in the evidence, the determination of the credibility of the witnesses, and the weight to be accorded their testimony, are matters for the court. Present substantial evidence in the record to support the findings of the court, we are powerless to disturb them even where, as here, we feel that the conviction, at least as to some counts, is against the weight of the evidence (CM ETO 1554, Fritchard; CM ETO 1631, Pepper). The record is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge (CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al; CM ETO 13155, Busby et al).

b. Specification 3 of the Charge. This specification charges accused with the conversion of a box of post exchange rations on 4 September 1944. The evidence establishing the commission of this offense by accused is set out above. "Such supplies /Post Exchange/ were at that stage of handling and distribution property of the United States" (CM ETO 8234, Young et al). The record is legally sufficient to support the findings of guilty of this specification (cf. cases cited in par. 4a, supra). 87

c. Specification 4 of the Charge. This specification alleges that accused wrongfully converted one carton of cigarettes, property of the United States, furnished and intended for the military service, between 1 September and 30 November 1944. This covers the Cupp incident. The court could properly infer from the fact that when accused demanded the cigarettes from Cupp, and perservered in his demands after Cupp indicated an unwillingness to comply with them, that he realized the cigarettes were stolen by Cupp and that the latter, accordingly, was in no position to resist his demands.

d. Specification 5 of the Charge. This specification in substance charges accused with neglect of duty from 2 September to 30 November 1944 in failing to prevent the looting and pillaging to which we have already referred. This states an offense under Article of War 96 (CM ETO 11500, Hulett). From the evidence as to the wholesale looting of supplies and, more specifically, from the evidence that certain enlisted men unpacked cigarettes in accused's presence, the court was warranted in inferring that he knew, or should have known, of these depredations. There is no evidence that he did anything to stop them, nor did he claim to have taken any steps in that direction. The record is legally sufficient to sustain the findings of guilty of this specification.

5. Accused, after an explanation of his rights, elected to be sworn and testify (R60). His testimony in a large measure consisted of a denial of the prosecution's evidence. The ultimate thrust of this evidence was to create issues of fact for resolution by the court. Inasmuch as the court's findings are supported by competent substantial evidence, they must be accepted by the Board of Review as final (CM ETO 1554, Pritchard; CM ETO 1631, Pepper). In this he was corroborated by testimony of other witnesses. In addition there was an abundance of evidence as to his good character and the resolute, energetic and efficient manner in which he performed his duties as a railroad man.

6. Accused, an officer, was sentenced to dishonorable discharge which was obviously improper. This however, has been construed as equivalent to dismissal (CM ETO 6961, Risley; CM ETO 18338, Hulse).

7. The charge sheet shows that accused is 47 years four months of age and was commissioned 19 August 1943. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the

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

9. A sentence of dismissal, total forfeitures and confinement is authorized upon conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is proper (AW 42;Cir. 210, WD, 14 September 1943, sec. VI, as amended).

Edward L. Stevens, Judge Advocate.

[signature], Judge Advocate.

(TEMPORARY DUTY), Judge Advocate.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant NORRIS E. LOOP (O-532214), Company C, 716th Railway Operating Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The accused was over 45 years of age when he accepted an offered commission in the army. He did not seek a commission and he received but four weeks of officer training. Primarily a railroad technician, he did excellent work in France. He has already served eleven months confinement in the Paris Detention Barracks awaiting trial and appellate review of his case. Five of the prison staff officers, the trial judge advocate and the defense counsel have recommended clemency. I refer to my indorsement in CM ETO 18418, Springer, with reference to this accused's failure to take preventive action with respect to the looting of railroad trains by his subordinates. My comments with respect to Springer apply equally well to this accused. There is no doubt of the instant accused's guilt of the specifications upon which he was tried but after a careful reading of the evidence in the case I cannot believe that the ends of justice require imprisonment for any extended term. Considering the fact that the accused is a mature man and has spent his life in railroading, the punishment of dismissal is a heavy one. It may seriously affect his standing with his civilian employer and deprive him of all seniority and retirement rights which his years of service have earned. I believe this aspect should be borne in mind by the military authorities. When comparison is made with approved sentences imposed upon the enlisted personnel, the period of confinement in this case cannot be defended. I believe the same should be substantially reduced and to that end suggest that a period of two years will suffice to vindicate the processes of justice and discipline, with the further provision that the unexecuted portion of the sentence (including dismissal) be suspended.

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 18408. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18408).

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

(Sentence ordered executed. GCMO 664, USFET, 13 Nov 1945).

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

BOARD OF REVIEW NO. 1

16 DEC 1945

CM ETO 18418

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
First Lieutenant JOHN W. SPRINGER (O-337067), Company C, 716th Railway Operating Battalion	)	Trial by GCM, convened at Paris, France, 29,30 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant John W. Springer, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 30 September 1944, in conjunction with other members of the 716th Railway Operating Battalion , and other railway operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual

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inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and to other military forces of the United States during a critical combat period in the theater of active military operations; and pursuant thereto, did, at the time and place herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit.

Specification 2: (Motion for finding of not guilty granted).

Specification 3: In that * * * did, at or near Versailles, France, on or about 15 October 1944, wrongfully receive and convert to his own use five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 4: In that * * * did, at or near Versailles, France, on or about 3 November 1944, wrongfully receive and convert to his own use one (1) pair green pants, property of the United States and intended for use in the military service thereof, thereby diverting supplies from use in the theater of operations and contributing to a shortage of supplies during a critical period of combat operations.

Specification 5: In that * * * did, at or near Versailles, France, on or about 25 November 1944, wrongfully received and convert to his own use:

160 rolls Life Savers	229 boxes safety matches
11 boxes book matches	135 razor blades
35 packages gum	2 tubes tooth paste
1 pair combat boots	2 cans tooth powder
7 Hershey chocolate bars.	

property of the United States and intended for use in the military service thereof, thereby diverting

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vital supplies from use in the theater of operations andcontributing to a shortage of vital supplies during a critical period of combat operations. (as amended)

Specification 6: (Finding of guilty disapproved by confirming authority).

Specification 7: In that * * * did, at or near Dreux, France, and at or near Versailles, France, between 2 September 1944, and 30 November 1944, fail and neglect to perform his duties in preventing the known wrongful taking and disposing of rations, cigarettes, and other supplies, property of the United States and intended for use in the military service thereof, from supply trains operating between Dreux, France, and Paris, France, thus permitting the diversion of such food, cigarettes, and supplies from the purpose for which intended and contributing to a shortage thereof, during a critical period of combat operations.

He pleaded not guilty and was found guilty of all specifications and the Charge, with the exception of Specification 2, as to which the defense motion for a finding of not guilty was granted. 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 35 years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved only so much of the findings of guilty of Specification 5 as involved a finding of guilty of wrongful receipt and conversion, as alleged, of "Life Savers", book matches, gum, combat boots, chocolate bars, safety matches, razor blades, tooth paste, and tooth powder, 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 Specification 6, confirmed the sentence, but, owing to special circumstances in the case, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. There are three fundamental procedural questions which first require attention:

a. The court was appointed by paragraph 5, Special Orders 28, 28 January 1945 (hereinafter referred to as the "appointing order") which by its terms withdrew from the court appointed by paragraph 2, Special Orders 16 (hereinafter referred to as the "original order"), all unarraigned cases

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and assigned them to trial before the court it appointed. By paragraph 3, Special Orders 29, 29 January 1945 (hereinafter referred to as the "additional order"), three officers were detailed as members of the General Court-Martial appointed by "par 5, SO 16, this Hq, cs, for the trial of the United States vs 1st Lt JOHN W. SPRINGER, 0337307, TC, only". By paragraph 10, Special Orders 30, 30 January 1945 (hereinafter referred to as the "correcting order"), that portion of paragraph 3, Special Orders 29 which read "aptd by par 5, SO 16, this Hq, cs" was amended to read "aptd by par 5, SO 28, this Hq, cs". The court which tried accused met on 29 January 1945 and the three officers who were mentioned in paragraph 3, Special Orders 29, 29 January 1945, sat on the court, two of them until excused as a result of challenges, and the third during the entire proceedings. Paragraph 5, Special Orders 16, 16 January 1945, did not appoint a court-martial nor did it deal with that subject.

Manifestly if the "additional order" did not effectively and legally constitute the three officers named therein as members of the court appointed by the "appointing order", the "correcting order" would be ineffective to cure the matter as to proceedings occuring before the date on which it was issued, 30 January 1945, and the court would be without jurisdiction to try and to sentence accused (CM ETO 16886, Robinson, and cases cited; CM 238607, Mashburn, 24 B.R. 307 (1943)). As stated above, the court convened on 29 January 1945 and one of the members named in the "additional order" sat during the entire proceedings while the other two sat until successfully challenged by the defense. The jurisdiction of the court to try accused must stand or fall, then, on the basis of the legal effect of the "additional order".

This order contained the correct paragraph number of the "appointing order" and the correct special order number of the "original order". The combination, was meaningless, since the paragraph and order referred to had nothing to do with the appointment of courts-martial. When the orders are viewed in their entirety therefore, it becomes clear that there is a patent mistake and the question to be decided is whether there is sufficient evidence of the appointing authority's intent to constitute the officers concerned members of the court on which they sat.

We think that that question must be answered in the affirmative. The mistake was made in failing to designate either the correct special order number (i.e. 28) or the correct paragraph number (i.e. 2). If the mistake was made in the order number, then the intention was to appoint these officers to the court which tried accused. If the mistake was made in the paragraph number, then the intention was to make them members of the court appointed by the "original order". The former seems to us to be the more reasonable construction. The "appointing order" withdrew from the court appointed by the "original order" all unarraigned cases and assigned them for trial to the court thereby constituted. According to the customs of the service that court had for all practical purposes ceased to function as a court, except for the disposal of cases involving such accused who had already been arraigned, or for sitting in proceedings in revision (AW 40; MCM, 1928, par. 83, p. 69). It is neither usual nor desirable to issue a formal order dissolving a court (Dig. Op. JAG, 1912-1940, sec. 395(38), p. 228) and the practice followed in this

case is well-nigh the universal method of terminating a court's work. In the instant case this termination was accomplished on 28 January 1945 by the "appointing order". Unless we are to construe the "additional order" as intended to reassign this case to the court from which it had been withdrawn the previous day, it becomes quite clear that the mistake was made in the number of the order rather than in that of the paragraph. There is nothing in the "additional order" to warrant such a conclusion and only by assuming the point at issue can it be construed as referring at all to the court appointed by the "original order". On the other hand, the court constituted by the "appointing order" had just come into being the day before. Presumably it had cases to hear and an order modifying its personnel is understandable, particularly when the modification is merely for the purpose of trying an officer.

CM ETO 16886, Robinson is distinguishable, although similar. There the "additional order" appointed two officers to the court constituted by the "original order" - referring to it accurately by paragraph, number and date - for the trial of Robinson only. There was then no mistake in the designation of the paragraph and order apparent on the fact of the orders, and we had no alternative but to hold that the presence of these two officers on the court which tried the accused, a court constituted by an order which was in all respects similar to the "appointing order" in this case, was unauthorized and that the court was without jurisdiction. We conclude, therefore, that the court was legally constituted and had jurisdiction of the person and the offenses.

b. Accused challenged the array on the grounds that they had "participated in the trial of a closely related case" (MCM, 1928, par. 58e, p. 46) (R2-3). Six members of the court were then questioned by the defense as to the effect these previous trials might have on their decision after having been specifically challenged. A seventh was similarly questioned without a specific statement that he was challenged. One of the seven was excused when it developed that the prior trials might influence his decision. The other challenges were not sustained. At the conclusion of the proceedings relative to its challenge of the seventh member, the defense stated that it had challenged enough members to reduce the court below a quorum if its challenges had been sustained and renewed its challenge to the remaining four members as a group (R15). When accused was asked if he was willing to be tried by the court as then constituted, the defense replied in the affirmative "subject to its original challenge for cause as presented" (R16). The court was then sworn and proceeded to the arraignment and trial of accused.

It was held in CM ETO 8234, Young that (1) a challenge to the array was not permitted in courts-martial and, (2) the fact that a member of the court had sat at the trial of a closely related case was not per se a ground for challenge. Insofar, then, as the defense's action be regarded as a challenge to the array it was properly denied. Insofar as it involved a challenge "to the favor" of the members interrogated by defense, the record demonstrates

that the procedure followed was that prescribed by the manual (MCM, 1928, par. 58f, p. 46) and the rulings of the court were proper.

c. At the outset of the trial (R18-19) the defense moved to strike Specification 1 as indefinite. The motion was properly denied (CM ETO 18408, Loop, and cases therein cited).

4. a. Specification 1 of the Charge. This is one of the so called "Railroad Conspiracy Cases" involving the 716th Railway Operating Battalion, others of which are (CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al; CM ETO 12203, Bruce et al; CM ETO 12303, Jennings et al; CM ETO 13143, Frew; CM ETO 13155, Busby et al; CM ETO 13403, Challoner et al; CM ETO 18408, Loop; CM ETO 18443, Olson).

In the Young case it was held that the evidence established the corpus delicti of a conspiracy among members of that battalion to defraud the United States by conversion, pillaging, and mutual inaction, of property of the United States furnished and intended for the military service, and that the looting and pillaging pursuant thereto contributed to a shortage of such supplies during a critical period of combat operations. With the corpus delicti thus established, the admission in evidence in the Young case of the extra-judicial statements of the accused then on trial, which prove their participation therein, was approved. Most of the evidence in the Young case which proved the basic conspiracy also was introduced at this trial. There is no necessity to repeat it here. We hold that, as in the Young case, it establishes the conspiracy as alleged, and it remains but to discuss the evidence which the prosecution introduced for the purpose of connecting accused with the conspiracy, evidence which of course also tends to prove its existence.

On 15 October 1944, accused and seven enlisted men, riding in a jeep, picked up two boxes of Post Exchange rations which had been removed from a caboose in the Matelot yards (Paris) and took them to a hotel in Versailles where accused was billeted (R30). It was agreed that he was to keep one box and the other was to be divided between two sergeants (R35). At least one of the boxes remained in accused's room at the hotel for two days and then was removed by a sergeant (R43,46).

About the end of September 1944 or the beginning of October 1944, Sergeant Anthony J. Palmero, Company C, 716th Railway Operating Battalion, was told by accused to move into his room at the Confort Hotel at Versailles. During the month of October, accused told Palmero to "break down" two boxes containing "Government" cigarettes and to take 50 cartons of cigarettes therefrom and sell them. Palmero, accordingly, sold the cigarettes for 25,000 francs ($500) and gave the money to accused. The latter offered him part of it, but he did not accept it (R59-60).

At some unspecified time, during the course of a conversation in their room, accused told Palmero that some of the personnel were sending home

money they had gained by selling pilfered articles. In fact, accused named four men who were actively engaged in looting trains. He censored mail of the personnel stationed at Versailles (R62).

On another occasion, apparently about 15 November 1944, one Kelly, an enlisted man of accused's organization, removed two pairs of combat boots from a train. He asked accused what size he wore and when accused told him the size, left one pair of these boots in accused's office. About the same time accused told Kelly to "keep out of cars; that it was getting pretty hot" (R32).

Accused made two extra-judicial statements which were properly introduced in evidence (R70; Pros. Exs. 5,6). In these he admitted that on 10 September 1944 he became acquainted with the fact that officers and enlisted personnel were looting trains; that from 1 October to the end of November 1944 he received about 20 to 30 cartons of cigarettes from people whose names he did not recall; that he knew that cigarettes were among the items being stolen from trains; that about 3 November he learned that there was a carload of officer's clothing in the yard at Matelot and that on going down to this car he was given a pair of "green" pants by an enlisted man; and that at various times he accepted from enlisted men a pair of shoes, an overcoat, a box of Post Exchange rations, and two pairs of combat boots, either knowing they were stolen, or suspecting that they were and, in the latter case, not bothering to make inquiries as to their origin.

There is thus presented substantial evidence of accused's complicity in the general conspiracy. He participated in the division of the spoils, and he did nothing to prevent the looting although fully aware of what was transpiring. Indeed, he went so far as to warn an enlisted man to discontinue looting, not because it was wrong, but because he might be detected. Lastly, he profited financially from the sale of stolen cigarettes. While most of the prosecution's evidence was disputed by accused, and the credibility of some of its witnesses was severly attacked, the resolution of conflicts in the evidence, the credibility of the witnesses, and the weight to be accorded their testimony was for the court (CM ETO 1554, Pritchard; CM ETO 1631, Pepper). The record is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge (CM ETO 8234, Young et al; CM ETO 8599, Hart et al; CM ETO 13155, Busby et al; CM ETO 18408, Loop).

b. Specification 3 of the Charge. It is alleged herein that accused on 15 October 1944 wrongfully received and converted 500 packages of United States Government cigarettes. This is the incident to which Palmero testified. Accused flatly contradicted Palmero (R93) but under the principles discussed above the court's finding of fact is conclusive on the Board of Review. The court could infer that the cigarettes were Government property from accused's admission from the testimony as to his receipt of Post Exchange rations, and from Palmero's testimony. In this connection, it should be pointed out that "such supplies [Post Exchange]

were at that stage of handling and distribution property of the United States" (CM ETO 8234, Young et al). The record is legally sufficient to support the findings of guilty of this Specification (cf. cases cited in par. 4a, supra).

c. Specification 4 of the Charge. This charges accused with wrongfully receiving and converting to his own use one pair of pants. The evidence established, and accused admitted, the conversion as alleged. The record is legally sufficient to support the findings of guilty of this Specification (cf. cases cited in par. 4a, supra).

d. Specification 5 of the Charge. As modified by the reviewing authority, accused was found guilty of the wrongful receipt and conversion of a miscellaneous collection of articles in unspecified quantities. Palmero testified that a miscellaneous collection of such article (Pros. Exs. 1,2,3,4), which were taken from accused's room belonged to accused (R61,67,68). In his testimony accused admitted that a certain portion of such articles which were described in Prosecution's Exhibits 1,2,3, and 4 (R70) were his property. He admitted that he obtained them from soldiers and "surmised" that the soldiers had taken them from trains. The record is legally sufficient to support the findings of guilty of this Specification as approved.

e. Specification 7 of the Charge. In this Specification accused is charged with neglect of duty in failing to prevent looting and pillaging. In his extra-judicial statement (Pros. Ex. 5), to which reference has already been made, accused said, "I feel I have been neglectful in my duties", although at the same time he contended that, inasmuch as his superiors knew about the pilfering and took no action, there was little he could do. In addition to this admission, all of the evidence heretofore recited which established his participation in the looting, and, consquently, his knowledge of it, together with his warning to the men that "it was getting pretty hot", forms a substantial basis from which it can be inferred legitimately that accused neglected his duty. The record is legally sufficient to sustain the findings of guilty of this Specification (CM ETO 11500, Hulett; CM ETO 18408, Loop).

5. Accused, after an explanation of his rights, elected to be sworn and testify (R86). Reference has already been made above to relevant parts of his testimony. He detailed the nature of his duties from his arrival in France to his relief-duties which necessitated his working long hours to ensure the movement of supplies and which left little time for supervision of personnel (R90-91). He knew that pilfering was going on and reported it to his superior officers. On 17 October 1944, the 716th Railway Operating Battalion sent a letter to the Commanding General, Loire Section, listing members of the organization who had sent large amounts of money home and suggesting that an investigation be made (R94-95; Def. Ex. A).

Major O. E. West, Executive Officer, 723rd Railway Operating Battalion, testified as to the volume of business that his and accused's battalion handled; that at least 50% of the supplies moved in open cars; and that if

the trains were to be operated at maximum efficiency it was impossible to prevent looting (R79-81).

Second Lieutenant Carloss F. Gregory, 723rd Railway Operating Battalion, testified substantially to the same effect. He particularly described the onerous duties of a yardmaster - accused's job - during the months in question and stated "the yardmaster's duties, if he is doing his job, leaves him very little time to be running along the side of a train checking for pilferage" (R85).

6. Accused, an officer, was sentenced to dishonorable discharge, which was obviously improper. This, however, has been construed as equivalent to dismissal (CM 249921, Mauer 32 B.R. 229 (1944); III Bull. JAG, p. 281; CM ETO 6961, Risley; CM ETO 18338, Hulse).

7. The charge sheet shows that accused is 43 years four months of age and entered on active duty 29 October 1942. No prior service is shown.

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

9. A sentence of dismissal, total forfeitures and confinement is authorized upon conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

Edward L. Stevens Jr., Judge Advocate.

B H Levy Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

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B/R Holding

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant JOHN W. SPRINGER (O-337067), Company C, 716th Railway Operating 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 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. The undersigned was the author of the opinion in CM ETO 8234, Young et al, which is the controlling decision in the so-called "Railroad Conspiracy Cases". He has actively participated in all the deliberations and consultations of the Boards of Review and General McNeil involving these cases. Therefore, he can speak with full knowledge of this litigation.

The evidence in the instant case exhibits moral turpitude in the conduct of the accused. He was an active participant in the diversion and conversion of military supplies. I believe emphasis should be placed on this facet of the evidence rather than upon his failure to take preventive action with respect to the theft and unlawful disposition of government property. The officers of these railroad operating battalions were fundamentally railroad men. They had none of the experience and tradition of the service behind them and it is clearly evident that they were not familiar, except in a most minute degree, with their command duties. Pressure was placed upon them continuously to increase the operating efficiency of the railroad to the end that critical supplies might be delivered to the combat troops. It therefore appears that there was a degree of responsibility upon higher command in this matter in its failure to provide for competent administrative assistants for these railroad technicians. In determining the degree of culpability of Lieutenant Springer in his failure to perform his military duties, this fact, in my opinion, should be considered. However, this does not excuse his participation in the unlawful acts. He did not act as an honest man. When this analysis is made of the evidence, I believe the conclusion must be that while accused should suffer some confinement that the period included in the confirmed sentence is excessive. I have considered the sentences imposed upon enlisted personnel as punishment for the commission of offenses similar to those for which this accused stands convicted and have also placed in the balance the fact that accused's Battalion Commander was acquitted of the neglect of duty charge - a fact that seems to be wholly inconsistent with the conviction of accused of the specification charging neglect of duty. While it is difficult to arrive at a formalized equation by the application of the foregoing factors, nevertheless they are helpful

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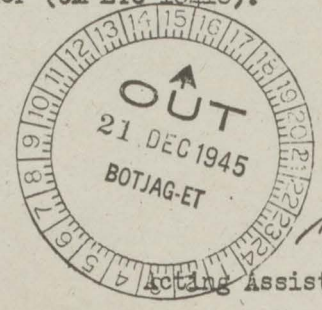
(Continued).

in the solution of the problem. The fixing of a just and proper period of confinement is not free from difficulties, but I respectfully suggest that confinement at hard labor for three years will meet fully the demands of justice and discipline.

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 18418. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 18418).



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

(Sentence ordered executed. GCMO 5, USFET , 11 Jan 1946).

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