E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 12007

CM ETO 13476

VOLS. 25-26

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.,
JAGC, EXEC. ON 26 FEB 52

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 25 B.R. (ETO)

including

CM ETO 12007 - CM ETO 12784

(1945)

Office of The Judge Advocate General

Washington : 1946

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.,
JAGC, EXEC. ON 26 FEB 52

CONTENTS FOR VOLUME 25 B.R. (ETO)

ETO No.	CM No.	Accused	Date	Page
12489	285757	Atherton, Cherovsky	12 Jun 1945	233
12515	395700	Frenya	28 Jun 1945	235
12551	288769	Malone	26 Jun 1945	239
12552	288485	Long	26 Jun 1945	245
12580	286610	Groin	15 Jun 1945	249
12586	301168	Kinsey	23 Jun 1945	253
12592	294708	Kolanko, Sanchez	8 Sep 1945	257
12594	305670	Lechinsky	26 Jun 1945	261
12604	294709	Mendez, Rego	15 Sep 1945	269
12608	293852	Hammond, Stogsdill		275
12617	294326	Baliko	30 Jun 1945	285
12618	283522	Czyzewski	15 Jun 1945	289
12619	287982	Hatfield	1 Sep 1945	291
12621	287345	Nickerson	27 Jul 1945	295
12650	300017	Combs, Shimmel	23 Jun 1945	301
12652	305571	Fladger	23 Jun 1945	307
12656	305057	Tibbs	10 Nov 1945	315
12661	298014	Wise	28 Jun 1945	325
12662	283925	McDonald	19 Jun 1945	331
12683	294745	McCullough, Wetherspoon	18 Aug 1945	335
12691	289364	McArdle	20 Jun 1945	343
12696	293844	Parsons	27 Jun 1945	347
12726	300444	Dye	9 Oct 1945	351
12729	294718	Lanoue	25 Aug 1945	357
12749	298728	Scalamonti	24 Aug 1945	361
12758	298623	George	1 Aug 1945	367
12759	300059	Traynor	18 Aug 1945	377
12761	285386	Brockie	29 Jun 1945	387
12770	299305	Williams	31 Aug 1945	393
12784	295478	Brown	30 Aug 1945	397

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

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 12007

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened at Dalking, Germany, 28 April 1945.
Private First Class CHARLES W. PIERCE (18080312), Company F, 359th Infantry	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Loire Disciplinary Training Center, Le Mans, France.

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

---

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

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

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

Specification: In that Private First Class Charles W. Pierce, Company F, 359th Infantry, did, in the vicinity of Itzbach, Germany, on or about 9 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engagement with the enemy, and did remain absent in desertion until he returned to military control on or about 14 January 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guard Platoon, on or about 14 January 1945, did at Wallmerath, Germany, on or about 5 February 1945, escape from said confinement before he was set at liberty by property authority.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 60 years. The reviewing authority approved the sentence but reduced the period of confinement to 30 years and ordered the sentence as thus modified executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 32, Headquarters 90th Infantry Division, APO 90, U. S. Army, 12 May 1945.

3. On 9 December 1944, the mission of accused's company was the "tactical operation" of crossing the Saar River in the vicinity of Dillengen, Germany at 0330 hours. The company commander issued boat numbers, boat orders, and the order of march from the "assembly area" to the river line (R7). Accused was present at an "orientation" conducted by his platoon sergeant where he was told the "situation" and the nature and type of the "operation" ordered (R12-13). He was present with the company just before it moved out from the "assembly area"in Siersdorf, Germany(which authentic maps show to be about two miles from the Saar River and about three miles from Dillengen). He was not present when a check of personnel was made 500 yards short of the river line and could not be found despite search (R7,12,13). There was some "confusion" in the crossing, and some of the men in the company were mingled with those of other units (R8). That the absence of the accused was without leave and continued until 14 January 1945, was proven by competent morning reports (R8,9; Pros.Exs.A,B). A statement by the accused at the time of return to the company that he "took off" because he "couldn't stand it any longer" was excluded by the court on defense objection (R9-10). Accused was placed in confinement pending trial, and on 4 February escaped by breaking through a barricaded window (R14-15).

4. Accused stated that his rights as a witness were explained to him by the defense counsel and that he elected to remain silent. No evidence was introduced in his behalf (R15).

5. The question in this case is whether substantial evidence sustains the court's finding that accused had the requisite intent to avoid hazardous duty at the time the clearly proven unauthorized absence began. The apparent difficulty arises from the fact that the evidence does not disclose specifically the location of enemy troops. Reference to official maps (sheet U1, Neunkirchen, 1/100,000, Map Series GSGS No. 4416 (1944))shows that Dillengen, Germany, is about two miles north of Saarlautern, five miles from the French border and about one mile east of the Saar River. The Board of Review will take judicial notice of the following: that the point so located was within the German West Wall or Siegfried Line, a belt of fortifications which extended from Switzerland to the North Sea and which was not traversed by our troops south of the Luxembourg border until the Spring of 1945 and that the battle of Saarlautern was in progress in the first half of December 1944. These are general facts of history, published in the press throughout the world as they occurred, and therefore common knowledge of which judicial notice is proper (CM ETO 8358, Lape and Corderman; CM ETO 7413, Gogol; CM ETO 6637, Pittala). Thus the evidence, specific as to place and time, when focused within the facts of common knowledge is that of an impending night river crossing amidst Siegfried Line defenses about two miles from the combat area at Saarlautern.

The evidence is also that the crossing was a combat action against the enemy. Among military men certain professional terms have a technical meaning, as exact and determinative as the technical terms of other professions. The record of trial, wherein court, counsel and witnesses were combat soldiers, is replete with such terms. For the convenience of the lay reader, some of these from the record have been underlined in the statement of the evidence in paragraph 3 above. Technical Manual 20-205, Dictionary of United States Army Terms, 18 January 1944, contains the following definitions:

Operation: Military action; carrying out a military mission (p.190).
Tactical operation: Combat operation (p.276).

Assembly area: Area in which the elements of a command are assembled preparatory to further action (p.28).

In addition "orientation" may be judicially defined as the process of instructing personnel as to their environs and duties, and "situation" as the location and combat relation of our troops and those of the enemy at a certain time, or as the tactical or strategic picture at such time.

With commonly known facts judicially noticed and terms defined, the clear proof in this case is: Accused was told the location of the enemy troops, and that a combat military action of crossing the Saar River to the east was ordered. He was present about two miles from the river at Siersdorf where the company was assembled preparatory to action, but absent after the march then made to the river. The crossing of this stream in the Siegfried fortifications began at 0330 hours in a confused manner about two miles north of the active sector in Saarlautern. Thus properly considered, the record of trial shows beyond all reasonable doubt that hazardous duty, of which he must have known, was imminent at the crossing or soon thereafter, and the court was justified in inferring that he left his organization to escape the dangers he feared (CM ETO 9862, Irwin; CM ETO 12619, Hatfield; CM ETO 8519, Briguglio; CM ETO 8172, St. Dennis; CM ETO 6637, Pittala). The following language from the St. Dennis case is applicable:

> "The prosecution was not required to prove that certain definite, specific hazards were immediately in prospect and that accused was cognizant of same. It sufficed if the evidence showed that accused was a member of and present with an organization which was engaged in a military mission where the hazards of death and bodily injury or of imprisonment would be involved in the usual course of events and that accused knew that these undisclosed perils awaited him and it was these perils he sought to avoid.
>
> It would be a frustration of the purpose of Articles of War 58 and 28 if under the circumstances here disclosed the prosecution was required to prove that particular and specific hazards immediately awaited accused's organization in the performance of its prescribed mission and that accused had knowledge of the same. The statute does not require such restricted interpretation. Article of War 28 denounces absence without leave 'to avoid hazardous duty'. If the prosecution proves that accused was engaged in the performance of a duty where these hazards - although the

time and place of their occurrence or existence were unknown when an accused left his organization - existed and that by course of prior events or as a result thereof he must have known of their future existence the burden of proof is sustained by the prosecution".

There is likewise substantial evidence to support the court's findings of guilty of escape from confinement as alleged in Charge II and its Specification.

6. The charge sheet shows that the accused is 25 years three months of age and was inducted 12 March 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.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr., Hq. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug.1945).

Wm. J. Lynch Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Cook Judge Advocate

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

BOARD OF REVIEW NO. 1

5 JUN 1945

CM ETO 12043

UNITED STATES	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad
	)	Mergentheim, Germay, 15 April 1945.
Private BILL NOE	)	Sentence: Dishonorable discharge,
(35667151), Company	)	total forfeitures and confinement
C, 22nd Infantry	)	at hard labor for life. Eastern
	)	Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

---

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

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

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

Specification 1: In that Private Bill Noe, Company "C", 22nd Infantry, did, in the vicinity of Villebaudon, France, on or about 1 August 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control in the Seine Base Section, France, on or about 11 January 1945.

Specification 2: In that * * * did in the vicinity of Medernach, Luxembourg, on or about 0915, 28 January 1945, desert the service of the United States and did remain absent in desertion until

he was apprehended in the vicinity of the City of Luxembourg, Luxembourg, on or about 1130 28 January 1945.

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

Specification: In that * * * having been duly placed in arrest at Klausburg, Luxembourg, on or about 26 January 1945, did, in the vicinity of Medernach, Luxembourg, on or about 28 January 1945, break his said arrest before he was set at liberty by proper authority.

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

3. The present case is a companion of the case of Private Solomon Friedman (CM ETO 12045), who was tried and convicted under charges and specifications identical in all respects with those involved in this case. The prosecution in the instant case proved the guilt of accused Noe beyond all doubt (See authorities cited in CM ETO 12045, Friedman).

4. The charge sheet shows that accused is 22 years 11 months of age and was inducted 4 November 1942 at Fort Thomas, Kentucky, to serve for the duration of the war plus six months. He had no prior service.

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

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

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

/s/ Martin Kelly Judge Advocate

Wm. F. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 12044

5 JUN 1945

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Mergentheim, Germany, 15 April 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CARLTON J. MAY, SR. (35757212), Company A, 4th Engineer Combat Battalion	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Carlton J. May, Sr., Company "A", 4th Engineer Combat Battalion, did at Gagny, France, on or about 28 August 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat engineer work, and did remain absent in desertion until he was apprehended at Lagny-sur-Marne, France, on or about 26 February 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. 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, the Commanding General, 4th Infantry Division, approve the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. This is a typical case of mischarging. Accused was absent without leave from his organization from 28 August 1944 to 26 February 1945 - a total of 182 days. The evidence would have fully sustained a charge of accused's absence without leave from his company with intent permanently to quit the military service of the United States (CM ETO 6435, Noe; CM ETO 10713, Clark; CM ETO 10741, De Witt Smith). However, the allegations of the Specification here involved charged absence without leave with intent to avoid hazardous duty. Such allegations will not support proof of general desertion. The proof must follow the theory of the pleading. Although desertion may be properly charged without an allegation of specific intent, nevertheless when a certain specific intent is alleged it must be proved (CM ETO 5958, Perry and Allen, and authorities therein cited).

b. The primary question for consideration is whether the evidence in the instant case showed that accused intended to avoid hazardous duty at the time he absented himself from his organization without leave (Ibid). The testimony of First Lieutenant Robert N. Blane, who commanded accused's platoon of Company A, 4th Engineer Combat Battalion, showed that the platoon, prior to 25 August 1944, had been attached to the 1st Battalion of the 8th Infantry in support of its motorized march through France after the Saint Lo "break through". The principal work of the platoon involved clearing road of mines set by the enemy, the repair of bridges and roads and general engineering work. In the performance of its duties, part of the time it was dismounted from its vehicles and proceeded afoot. In the advance it met "pockets" of enemy resistance and came under enemy fire (R6-8).

On 25 August the day Paris fell, the platoon received orders which detached it from the 8th Infantry and directed that it report to the company area in Gagne, France. The bivouac of the platoon on that date was on the outskirts of Chelles, France, in the vicinity of Paris but a considerable distance from the location of the company. A pocket of enemy resistance had been met near Chelles, and at the time here involved one squad of the platoon was forward with the infantry removing mines. When the platoon was ready to move from its bivouac to the company area, the commander discovered that four of his enlisted men (one of whom was accused) were missing. He returned to Chelles, found them and brought them back to the platoon bivouac. Accused entered a

building where the platoon was billeted, but again disappeared and was not with the platoon when it returned to the company (R5,6) and he was not with his organization for the ensuing 182 days. He was apprehended at Lagny-sur-Marne, France, on or about 26 February 1945 (R10).

The platoon, after joining the company, enjoyed a rest period of about three or four days. There then followed the operation of crossing the Oise river, but Company A moved as a single unit and the platoon had no separately assigned duties (R6). Accused's platoon did not participate in the river crossing operations. It was not under any enemy fire which Lieutenant Blane could remember and was not in contact with the enemy immediately after 28 August 1944. However, as it proceeded in its normal operations, it eventually encountered "pockets" of enemy resistance and did engage in its normal work of clearing the roads of mines (R7).

When Lieutenant Blane received orders to return his platoon to the company area, he informed accused's squad leader concerning the order and sent him to find his men (R6). With respect to the return to the company, the officer testified:

> "I never told my platoon that we were going to have a rest, however, I did tell them to return to the company area, and that is considered more or less of a rest. * * * I would say that the general impression would be that we were probably returning to the company for three or four days for a rest" (underscoring supplied) (R6).

The commencement of accused's unauthorized absence is alleged to have been on or about 28 August 1944. It is obvious, however, that he left his organization on 25 August 1944. Such variance will not necessarily be fatal if other material elements of the prosecution's case are proved. It can hardly be suggested that the return to the company area by the platoon involved hazardous duty - not in the face of the platoon commander's testimony "that [a return to the company] is considered more or less of a rest" - such as contemplated by the 28th Article of War. Therefore, such particular movement must be put out of consideration in determination of accused's guilt.

The four elements of the offense charged against accused are:

> "(a) that accused absented himself without leave as alleged;
> (b) that his unit was under orders or anticipated orders involving hazardous duty;
> (c) that notice of such orders and of imminent hazardous duty was actually brought home to him; and

(14)

(d) that at the time he absented himself he entertained the specific intent to avoid hazardous duty (CM ETO 5555, Slovik, and authorities therein cited; CM ETO 5565, Fendorak)" (CM ETO 5958, Perry and Allen, p.6).

The evidence showed that accused's platoon had been attached to the 8th Infantry in pursuit of the enemy after the Saint Lo "break through". Immediately prior to accused's departure his platoon was engaged in mine removal work and was in the spearhead of the pusuit of the Germans. That such duty was hazardous will not be gainsaid. Accused had been engaged in such work. It is therefore a fair and just inference that accused was actually engaged in hazardous operations when the order was received by the platoon to return to the company. There is no substantial evidence that he knew of the order to return to the company and not a scintilla that such return meant that the platoon's hazardous duties were indefinitely suspended. Rather the evidence supports the conclusion that all members of the platoon understood that any return to the company area meant there would be a temporary rest period of three or four days and then the platoon would resume its usual operations of perilous mine removal work in pursuit of the enemy. Such interludes of rest between periods of hazardous duty are the common lot of combat engineer battalions with infantry divisions. The inference is most impressive that accused knew and understood clearly the consequences involved in the return to the company and that continued hazardous duties lay ahead. These were the perils and hazards he sought to avoid. The situation thus presented is of the same nature as that of a typical battleline desertion case. The "enemy" which accused faced were not German soldiers in battle array but the dangerous mines planted by them on the roads to prevent and hinder the American advance. Accused had actually engaged in this highly perilous work and knew the risks involved. He left his command without authority in the midst of a hard campaign at an opportune time in order to avoid these certain future hazards. His guilt was proved (CM ETO 5565, Fendorak, and authorities cited in paragraph 5(d) of CM ETO 5958, Perry and Allen). See also CM ETO 5079, Bowers which involved a member of an Engineer Combat Battalion under circumstances similar to the instant case.

The instant case must be distinguished from the Perry and Allen case above mentioned. In that case the accused's division was in a rest period of indefinite duration. It was awaiting the arrival of the remainder of the division from Brest and was engaged in cleaning and repairing its equipment. Passes were issued to personnel allowing them to leave the organization's area to visit neighboring units. No orders or contemplated orders were received prior to the departure of the accused and all that was known was that the organization at some future indefinite date would engage in "operations * * * towards Nancy with the Third Army". In the instant case the overall evidence showed that the return to the company

meant but a temporary surcease from the perils ahead and that those perils were not only imminent but certain to occur.

6. The charge sheet shows that accused is 31 years of age and was inducted 29 June 1943 at Clarksburg, West Virginia, 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 desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

5 JUN 1945

CM ETO 12045

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Mergentheim, Germany, 15 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class SOLOMON FRIEDMAN (32244343), Company C, 22nd Infantry	

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

---

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

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

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

Specification 1: In that Private First Class Solomon Friedman, Company "C", 22nd Infantry, did, in the vicinity of Villebaudon, France, on or about 1 August 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control in the Seine Base Section, France, on or about 11 January 1945.

12045

Specification 2: In that * * * did, in the vicinity of Medernach, Luxembourg, on or about 0915, 28 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of the City of Luxembourg, Luxembourg, on or about 1130, 28 January 1945.

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

Specification: In that * * * having been duly placed in arrest at Klausburg, Luxembourg, on or about 26 January 1945, did, in the vicinity of Medernach, Luxembourg, on or about 28 January 1945, break his said arrest before he was set at liberty by proper authority.

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

3. a. Charge I, Specification 1: Accepting accused's statement that he was confined in the stockade of the 707th Military Police Detachment at Cherbourg, France on or about 15 September 1944 as a fact, he was absent without leave from his organization from 1 August 1944 until the date of his alleged confinement - a period of approximately 45 days. Such absence in an active theater of war at a time of critical military operations, which is unexplained, fully sustains the charge of desertion (CM ETO 1629, O'Donnell; CM ETO 10741, De Witt Smith; CM ETO 10713, Clark).

b. Charge I; Specification 2: Accused's unauthorized absence from his organization of over two hours on 28 January 1945 was accompanied by circumstances and overt acts which clearly demonstrate his intention to desert the military service. He had been returned to his organization on 26 January 1945 after a long absence and placed under arrest in quarters. He had been informed by his company commander on the evening of 27 January of expected combat movement on the next morning. Taking advantage of the confusion incident to the movement of his organization on the morning of 28 January, he left without authority. He was apprehended within a few miles to the rear of the bivouac. This evidence clearly supports the inference that he intended to desert the service (CM ETO 5596, Reynolds; CM ETO 8300, Paxton).

c. Charge II and Specification: Accused was placed in arrest in quarters on 26 January 1945 with instructions not to leave the company area without permission. He broke arrest on 28 January. His guilt is clear (CM ETO 8162, Yochum; CM ETO 11468, Baggett).

4. The charge sheet shows that accused is 25 years two months of age and was inducted 3 March 1942 at Fort Dix, New Jersey, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

29 SEP 1945

CM ETO 12056

U N I T E D S T A T E S	75TH INFANTRY DIVISION
v.	Trial by GCM, convened at Werdohl, Germany, 30 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private SEVERO C. REYES (38159818), Battery B, 440th Antiaircraft Artillery Automatic Weapons Battalion (Mobile)	

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

---

1. The record of trial in the case of the soldier named above has been examined 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 Severo C. Reyes, Battery B, 440th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), did, at or near Schaag, Germany, on or about 8 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Veikes.

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

Specification 1: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Anna Veikes.

Specification 2: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do her bodily harm, commit an assault upon Anna Veikes, by pointing at her with a dangerous weapon, to wit, a revolver.

Specification 3: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do her bodily harm, commit an assault upon Gertrude Obschruff by pointing at her with a dangerous weapon, to wit, a revolver.

Specification 4: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do him bodily harm, commit an assault upon Heinrich Veikes by pointing at him with a dangerous weapon, to wit, a revolver.

Specification 5: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do him bodily harm, commit an assault upon Johann Syben by pointing at him with a dangerous weapon, to wit, a revolver.

Specification 6: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do him bodily harm, commit an assault upon Franz Bos by pointing at him with a dangerous weapon, to wit, a revolver.

Specification 7: In that * * * did, at or near Schaag, Germany, on or about 8 March 1945, with intent to do him bodily harm, commit an assault upon Franz Bos by willfully and feloniously striking him on the eye with his hand.

Specification 8: In that * * * did, in conjunction with Private William R. Waldroupe, Battery B, 440th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), at or near Schaag, Germany, on or about 8 March 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Franz Bos, a watch, the property of Franz Bos, of some value.

Specification 9: (Finding of not guilty).

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

Specification: In that * * * did, in conjunction with Private William R. Waldroupe, Battery B, 440th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), and Private Leon N. Endsley, Battery B, 440th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), at or near Schaag, Germany, on or about 8 March 1945, wrongfully and unlawfully enter civilian German homes and did wrongfully and unlawfully associate therein with Anna Veikes, Gertrude Obschruff, Heinrich Veikes, Johann Syben, Peter Syben, Franz Bos, and Maria Pollmanns, all being civilian German nationals, in violation of standing special orders for German-American relations of the Commanding General, Twelfth Army Group.

He pleaded guilty to the Specification of Charge III, except the words "wrongfully and unlawfully" and "Heinrich Veikes, Johann Syben, Peter Syben, Franz Bos and Maria Pollmanns", guilty of Charge III, and not guilty to Charges I and II and all their specifications. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of Specification 3 of Charge II, and, all of the members of the court present at the time the vote was taken concurring he was found guilty of Specification 7 of Charge II, except the words "with intent to do him bodily harm", and as to such Specification not guilty of Charge II but guilty of a violation of the 96th Article of War, not guilty of Specification 9 of Charge II, and guilty of all charges and all remaining specifications. Evidence was introduced of three previous convictions by special courts-martial; one for absence without leave for nine days in violation of Article of War 61; one for willfully disobeying a lawful order of a non-commissioned officer who was in the execution of his office and threatening to strike the non-commissioned officer with his rifle in violation of Article of War 65; and one for absence without leave for four days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, 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 following evidence was adduced for the prosecution:

At about 1400 hours, 8 March 1945, accused and two other soldiers entered the home of Johann Syben, a German citizen, in Schaag, Germany (R8). All of the soldiers were armed (R9). Accused pointed a pistol at Syben and

forced him to search for something to drink (R10). He fireda shot at Syben, which missed him (R11,13).

At about 1600 hours the same day, accused and two other soldiers entered the home of Heinrich Veikes, a German citizen, in Schaag, Germany (R14,24,41,94). Present in the house with Heinrich was his wife, Anna, a child three years old and a neighbor, Gertrude Obschruff (R14,25,41). Accused pointed a pistol at Gertrude Obschruff (R42,50). He also pointed a pistol at Heinrich (R15,25,28) and Heinrich was definitely afraid (R16,20). He then, with pistol in hand, took Heinrich's wife, Anna, upstairs (R16-17). The pistol was toward her back and she felt it (R28,29). Anna was eight months pregnant and gave birth to a child on 18 April (R18). Once upstairs, accused tore Anna's pants and pulled them down. She cried and was afraid (R29). He inserted his penis into her and forced her to have intercourse (R30) while she cried and tried to push him back (R31). He had an emission (R31,95). He then forced her to have intercourse a second time (R31). He tore off her blouse (R32). He subsequently pulled her into another bedroom and pushed her onto the bed, took his penis and put it into her mouth (R33). He pushed on her head until she had it in her mouth. He then pushed her back on the bed and again had intercourse with her (R34). He tore off all of her clothes. Accused took out his pistol, threw himself on Anna, put his penis into her mouth and touched her sex organ with his mouth (R35). He then had intercourse with her again. She was tired and could not defend herself anymore (R36). On examination by the court, she testified:

> "Anybody would have been afraid. He looked so dangerous, and he was very mad, and he always had a pistol in his hand, and he was drunk" (R55).

Between 1900 and 2000 hours the same evening, accused and two other soldiers entered the home of Peter Syben, a Prussian-German citizen, in Schaag, Germany. Accused held a pistol against his chest and demanded schnapps (R57-58). Accused was seemingly drunk (R58).

Between 2000 and 2030 hours, accused and two other soldiers entered the home of Franz Bos, a German citizen, in Schaag, Germany. Accused pointed a pistol at Bos and demanded schnapps. One of the soldiers with accused took a watch and a mandolin (R59,61) and while accused pointed a weapon at Bos, the other soldier (Private William R. Waldroupe) took a watch from his person. Accused struck Bos in the face with his hand and on the eye with his fist. The soldiers left the house taking the mandolin and the two watches (R60-61). On 15 March 1945, two watches and a mandolin were found in the quarters occupied by accused and three other soldiers (R21-22;Pros.Exs.B,C,D). Bos identified the watches and mandolin in open court (R61-62). It was stipulated that the watches and mandolin were of some value, each being less than $20 (R99).

At about 2045 hours, accused and two others entered the home of Maria Pollmanns, a German citizen, in Schaag, Germany. Accused was armed but did not remove his weapon from his pocket. He ate food prepared by Maria (R63-64).

12056

4. The following evidence was adduced for the defense:

After his rights were explained to him, accused elected to be sworn and testify (R81-82). On 8 March 1945, Waldroupe, Endsley and he were looking for weapons and found about five bottles of something to drink. Accused rank more than his companions and enough to get drunk (R82-83). They went into the home of Heinrich Veikes to trade wine for cognac with soldiers who were then in the house (R84). Accused stayed in the house for about 20 minutes, drinking and smoking. He was drunk. He had his rifle between his legs and took his revolver out, examined it and returned it to the holster (R84-85). After leaving the house he did not remember what happened until he later met Waldroupe and Endsley on the road (R85). They then returned to the battery and accused went on guard. Accused denied intercourse or sodomy with either woman in Veikes' house (R86).

Waldroupe testified (R71-81) and it was stipulated that Private Leon N. Endsley would testify (R93;Def.Ex.2) to facts which substantially corroborated the story related by accused. It was stipulated that Major H. E. Ratcliffe, Regimental Surgeon, if present, would testify that on 9 March 1945, he examined Anna Veikes; that he found no conclusive evidence of recent physical injury; and that whether or not there had been recent sexual intercourse could not be determined (R92;Def.Ex.1). It was further stipulated that a Dr. Schwarzbach, if present, would testify that on 19 March 1945, he examined Anna Veikes; that at that time there were no bruises on her body and no indication of shock; and that she did not say she had been attacked, although she did state that she had had sexual intercourse with an American soldier (R94).

5. a. Our function in reviewing a record is to ascertain whether there is substantial evidence in the record to sustain the findings of the court with the limitation that it is not for us to determine the credibility of the witnesses or the weight to be given their testimony (CM ETO 895, Davis, et al). Since more than one act of intercourse occurred we assume the prosecution relied on the first one (CM ETO 14564, Anthony and Arnold). Substantial evidence of rape is to be found in the accused's use of a pistol to compel the prosecutrix to accompany him to the bedroom, his use of force to effectuate copulation and her advanced state of pregnancy. The record is legally sufficient to sustain the findings of guilty of the Specification of Charge I and Charge I (CM ETO 12180, Everett; CM CM ETO 14596, Bradford et al).

b. The offense of sodomy with Frau Veikes falls into the same pattern. The offense, complete upon penetration of her mouth with his penis, as proven, was aggravated by the same compulsion, force, and ineffective resistance. The record sustains the findings of guilty of Specification 1 of Charge II (CM ETO 8511, Henry Smith).

c. Specifications 2-6 inclusive of Charge II allege that accused committed assaults with intent to do bodily harm with a dangerous weapon on various named Germans. Specification 7, as modified by the findings of the court, alleges that accused committed an assault and battery upon one of the Germans in violation of Article of War 96. The evidence shows that accused pointed his pistol at the persons named in Specifications 2-6 and made various demands on them which he had no right to make. In CM ETO 7000, Skinner, we said

> "When a menacing gesture with a dangerous weapon accompanies a demand which accused has no legal right to make, the assault is complete (CM ETO 3255, Dove)".
>
> "When an assault with a dangerous weapon is accompanied by a demand or condition which the assailant has no legal right to make or impose an intent to do bodily harm may be inferred" (CM 170158 (1926), Dig. Op. JAG, 1912-40, sec.451(10), p.313).

The record is legally sufficient to sustain the findings of guilty of Specifications 2-6 of Charge II. The evidence also establishes that accused committed an assault and battery on Bos by striking him as alleged. The allegation that it was done feloniously may be treated as surplusage (Cf: CM ETO 15197, Blackburn). The record sustains the findings of guilty under Specification 7 (CM ETO 4607, Gardner).

d. Specification 8 of Charge II alleges robbery of a watch of some value. The evidence shows that Waldroupe removed the watch from Bos' pocket while accused held him at bay at gunpoint. As an aider and abettor, accused was thus equally guilty with Waldroupe of the offense (CM ETO 5764, Lilly et al). The evidence sustains the finding of guilty of this Specification (CM ETO 78, Watts).

e. The Specification of Charge III alleges that accused wrongfully entered German homes and associated with certain named German civilians in violation of special orders of the Commanding General, Twelfth Army Group. We take judicial notice of these orders as the court itself was authorized to do (CM ETO 1538, Rhodes). The evidence shows that accused entered German homes, but that he associated, i.e. joined as a companion, with only Maria Pollmanns. His contacts with the Veikes, Obschruff, the Sybens and Bos were all of a violently criminal character. We have repeatedly held that such conduct is not fraternization (CM ETO 10501, Liner; CM ETO 10967, Harris; CM ETO 11854, Moriarty and Sberna). Nor is it association. His plea of guilty to association with Frau Veikes and Fraulein Obschruff is not controlling (CM ETO 10967, Harris).

6. The charge sheet shows that accused is 25 years of age and was inducted on 8 June 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 the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge III as involves a finding that accused did at the time and place alleged, in conjunction with the persons alleged, wrongfully and unlawfully enter civilian German homes and wrongfully and unlawfully associate with Maria Pollmanns in violation of the special orders of the Commanding General, Twelfth Army Group, as alleged, and legally sufficient to support all other findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct. 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 sodomy by Article of War 42 and section 22-107, District of Columbia Code (See CM ETO 3717, Farrington, and authorities therein cited); upon conviction of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455); and upon conviction of 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).

Wm. J. Brennan Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

12056

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

BOARD OF REVIEW NO. 2

31 AUG 1945

CM ETO 12070

U N I T E D S T A T E S	9TH ARMORED DIVISION
v.	Trial by GCM, convened at Apolda, Germany, 4 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private LEROY K. MISTIER (35080774), Reconnaissance Company, 656th Tank Destroyer Battalion	

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

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

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

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

Specification: In that Private Leroy K Mistler, Reconnaissance Company, 656th Tank Destroyer Battalion, did, at Etzoldshain, Germany, on or about 18 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrud Becker.

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

(30)

Specification: In that * * * did, at Etzoldshain, Germany, on or about 18 April 1945, unlawfully enter the dwelling of Gertrud Becker, with intent to commit a criminal offense, to wit, rape therein.

Accused pleaded not guilty to all specifications and charges and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all specifications and charges. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 13 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, 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 prosecution introduced evidence substantially as follows:

At about noon, 18 April 1945 (R7,9), accused, a member of the military service (R14), appeared in the yard of Gertrud Becker, Etzoldshain, threatening with two pistols a woman whose bicycle he had taken. Gertrud Becker told accused to allow the woman to ride her bicycle whereupon he got the bicycle and in riding it fell off, scratched and got dirt on his hand. Accused asked Gertrud Becker to get him some water so he could wash and shave himself. When Gertrud Becker went into the house to get a basin and water, accused threatened her with two pistols and followed her, uninvited, into the house, into a room and pushed her onto the sofa. Gertrud Becker resisted by saying "Don't, don't", but accused continued to point the guns at her and when she "wanted to yell" put his hands over her mouth. Accused pulled down her underdrawers and had "intercourse" with her while she kept saying "busted, busted". A neighbor appeared in the doorway, saw Mrs. Becker crying (R12), and said she was going to get some officers. Accused got up and wanted a glass of water and went into the kitchen with Gertrud Becker. After drinking a glass of water, accused then took her by the arm and led her to the couch and shoved her onto it and again had "intercourse" with her while she kept saying "Don't" and "Kaput", a German slang word for "busted". Gertrud

Becker did not scream because accused had his hand over her mouth although not all the time; she was weeping and could not cry out for excitement. Accused put the pistols on a cabinet near the couch during the acts of intercourse (R9-11). Gertrud Becker did not scream when accused was removing her underdrawers because she was afraid that he would get his pistol again (R21). The victim testified that accused was too strong for her and also that he was slightly "high" which interpreter stated did not mean drunk (R11).

An officer from accused's organization, in response to the request of a civilian, at about 1:30 p.m. 18 April, entered a house and found accused being pushed up from a couch by a woman of approximately forty years of age who was in a half reclining position. The woman's dress was up to her hips, her legs separated, and she was excited and sobbing. The accused did not appear excited (R14,15). Accused started to button up his pants immediately after getting up whereupon the officer requested him to exhibit his penis which was semi-wet and dripping a white fluid (R15,17).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent (R20). A medical officer was called as a defense witness who testified that he had examined the accused on 18 April and found evidence of recent irritation of the penis. The officer at about 2:30 also examined a woman supposedly involved in the same incident and found a slight reddening of the vagina, practically no secretion but a fairly large quantity of male semen in the outer portion of the vagina. A portion of semen was also found in the deepest portion of the vagina but this could have been carried there from the outer portion by the speculum used in the examination. The woman repeatedly told him on questioning through an interpreter that she did not know whether she had actually had intercourse, whether there had been any penetration or not. At the time of the examination, the woman was very calm and collected (R18,19,20).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not * * * Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient when there is in fact no consent" (MCM, 1928, par. 148b, p.165).

The record contains evidence that the victim unwillingly submitted to accused by reason of fear of the pistols which accused pointed at her. Submission under these circumstances negatives any inference of consent which might otherwise be drawn from her failure to offer greater physical resistance (CM ETO 9083, Berger). Evidence of penetration rests in the victim's testimony that accused "had intercourse with her" and the medical officer's testimony, introduced by the defense, that male semen was found in the outer portion of the vagina little more than an hour afterward. The victim's statement to the medical officer, shortly after the incident, that she didn't know whether she had actually had intercourse, may reflect on the truth of her testimony later in court, but the credibility of witnesses was within the sole province of the court to determine.

> 6. "Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein. * * * it is not essential that there be a breaking" (MCM, 1928, par.149e, p.169).

The evidence is uncontradicted that accused entered the house of Gertrud Becker; the evidence indicates that the entry was unlawfully accomplished by following Gertrud Becker, uninvited, and while menacing her with two pistols. The actual commission of a criminal offense in the building entered, in this case rape, is probative of an intent to commit the same at the time of the unlawful entry (CM ETO 3679, Roehrborn).

7. The charge sheet shows the accused to be 22 years eight months of age. He was inducted 12 April 1944 at Fort Thomas, Kentucky, with prior service from 16 November 1942 to 3 September 1943 at which time he was discharged by reason of dependency.

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

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 for rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and upon conviction of housebreaking by Article of War 42 and sections 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

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

BOARD OF REVIEW NO. 2

28 JUL 1945

CM ETO 12096

U N I T E D S T A T E S	) 102ND INFANTRY DIVISION
v.	) Trial by GCM convened at Erz, Anst, Krefeld, Rhine Province, Germany, 24 March 1945. Sentence: Each - dishonorable discharge, total forfeitures and confinement at hard labor, Amlaner for ten years Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, and Jedrzykiewicz for life, United States Penitentiary, Lewisburg, Pennsylvania.
Privates First Class MICHAEL J. AMLANER (33474344) and EDWARD W. JEDRZYKIEWICZ (36544080), both of Battery B, 927th Field Artillery Battalion.	)

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

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

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

AMLANER

CHARGE: (Withdrawn by direction of appointing authority).

Specification: (Withdrawn by direction of appointing authority).

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

Specification: In that Private First Class Michael J. Amlaner, Battery B, 927th Field Artillery Battalion, did, without proper leave, absent himself from his command and station at Krefeld, Germany from 1600 6 March 1945 to about 1800 6 March 1945.

12096

(36)

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

Specification: In that * * * did, near Krefeld, Germany, on 6 March 1945, unlawfully enter the dwelling of Henrich Boos, Wilhelmina Boos, Emilie Boos, Henrich Faahsen, and Else Gantenberg with intent to commit a criminal offense, to wit, robbery, therein.

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

Specification: In that * * * was, near Krefeld, Germany, on 6 March 1945, insubordinate, in that he did wrongfully enter the dwelling place of Henrich Boos, Wilhelmina Boos, Emilie Boos, Henrich Faahsen, and Elsa Gantenberg, enemy German civilians, for the purpose of wrongfully fraternizing therein, to the prejudice of good order and military discipline.

JEDRZYKIEWICZ

CHARGE: Violation of the 92nd Article of War.

Specification: In that * * * did, at Krefeld, Germany, on or about March 6, 1945, forcibly and feloniously, against her will, have carnal knowledge of Emilie Boos.

ADDITIONAL CHARGES I, II and III and their specifications are identical with those against Amlaner similarly numbered except only as to the name of accused.

(In the accompanying papers but not included in the record of trial is an order of the appointing authority directing a common trial for both accused). The court did not inform accused that they each were entitled to challenge any member of the court other than the law member, peremptorily, but the defense made no challenges whatever and "the accused were then asked if they objected to any other member present, to which they replied in the negative". Each pleaded not guilty. A directed verdict (of not guilty) was given each accused as to Additional Charge II and its Specification. Two thirds of the members of the court present when the vote was taken concurring, each accused was found guilty of the remaining charges and specifications against him. No evidence of previous convictions was introduced as to Jedrzykiewicz. Evidence of one previous conviction of Amlaner was announced as read to the court but it is neither included in nor attached as an exhibit to the record of trial. Accused Amlaner was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for ten years. Three-fourths of the members of the court present when the vote was taken concurring, accused Jedrzykiewicz was

sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. As to Jedrzykiewicz, the reviewing authority disapproved the findings of guilty of Additional Charge I and its Specification, and as to both approved only so much of the findings of guilty of the Specification and Additional Charge III as involves a finding of guilty of wrongful fraternization at the time and place and in the manner stated, in violation of Article of War 96. He approved the sentences and designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of Jedrzykiewicz, and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement of Amlaner. He forwarded the record oftrial pursuant to Article of War 50½.

3. Emilie Boos, 29 years old, was on 6 March 1945, living with her parents, her 37 year old brother, her sister and a woman, Elsa Gantenberg, in a one family house at Am De Plank 50, Krefeld, Landwehr 36 (Germany) (R9). About five o'clock in the afternoon of that day, she came home with her sister and found in the house two American soldiers (the accused) who had been drinking. Shortly after their arrival Jedrzykiewicz started to molest her by holding her arm and putting his hand on her legs under her dress. When her mother then started to leave the room, Amlaner pulled her back (R10,11,25,31). Everyone was sitting at the table (R11) in the kitchen (R12,24) except Emilie who was standing. Both accused had carbines (R11,12,25) and Amlaner opened his so that a bullet fell out which he put back in, motioned that they should all sit down and pointed his weapon at them. Emilie was crying and begged them not to shoot (R11,12,26,31). Jedrzykiewicz, who had put his carbine in the corner before this and did not have it with him (R11,12), then pushed Emilie through (R12) an open (R13) door into a bedroom, opened his pants and pushed her over on the bed. Although she testified she was afraid he would shoot her, she resisted him. He took off her pants (R12) pulled up her clothes and got upon her and despite her struggle, inserted his sex organ into hers (R13) and after about ten minutes (R22) completed the act of sexual intercourse (R14,21). He was in her only for a moment. He ejaculated on the front of her dress (R13-15). She had never seen accused before (R22) and was afraid not knowing what was happening in the next room (R23).

After Jedrzykiewicz and Emilie left the kitchen, her mother had a "nervous breakdown" and Amlaner sent Elsa Gantenberg for a blanket (R26,32). She went in the bedroom for it and saw Emilie naked with her clothes up to her arms (R26), resisting (R29), and Jedrzydiewicz on top of her (R26,29). Emilie called to her for help (R19,27,28) but she could do nothing (R28).

The two accused were members of a search party in Niersen, given the mission of clearing out a section, collecting any German prisoners of war and recovering any weapons of use to the enemy. Both were discovered missing at 1800 hours long after the trucks used by the

party had returned (R33). Before the detail left on their mission, all, including both accused, were assembled and especially cautioned about non-fraternizing and drinking and were reminded of the directives against looting, rape and fraternizing.

Two other American soldiers on the detail arrived at the same house that afternoon and their knock on the door was answered by one of the women (R36). Amlaner was standing with his carbine in his hand in the middle of the room where the old lady was lying on a couch, the others were standing around (R37). Each identified Jedrzydrewicz as the man they saw on top of Emilie in the bedroom (R36,41). Her dress was drawn up to her hips and her body exposed (R37), she was making a gasping or choking noise (R38). One of them testified that she was crying, moving around and kicking her leg (R41-44).

Accused's commanding officer testified that they went on this mission on the morning of 6 March 1945 and that the trucks carrying the detail returned at 1400 hours. At 1800 hours notice was given that the battery would be paid but when the pay officer arrived neither of accused was present although no leave or passes had been given them and neither had permission to visit 50 Am De Plank, Krefeld, which was outside the boundries of their area. Both were absent without permission and he did not see them until their return the next morning by the military police (R32-35).

4. The defense evidence showed that an examination of Emilie Boos by the battalion surgeon about six o'clock on the same day disclosed no mark or bruises on her body and as she was having her menstrual period, the examination of her sexual organs was unconclusive. She was not a virgin (R45-46). She was "in a hysterical state and was very nervous and crying" which would indicate some emotional strain which, in the surgeon's opinion, was the "aftermath of violence" (R47). She could have been raped without the examination disclosing it (R48).

On being advised as to their rights as witnesses, Jedrzydrewicz elected to remain silent. Amlaner however was sworn and testified that they (both accused) wanted some wine to drink and entered the house because Elsa Gantenberg had given them 2 bottles the day before. They were given some wine. Emilie Boos arrived later. She and Jedrzykrewicz disappeared for a short time during which the mother had a nervous attack. He just sat in the room with his carbine between his legs. He saw no one else and nothing else occurred (R49-57), except three soldiers came to the house. He had had four or five drinks of whiskey but was not very drunk, not staggering, and knew everything that was going on (R58).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 149b, p.165). The only question here involved is that of consent. This is a question of fact solely within the province of the court to decide upon the evidence and the proper and reasonable inferences to be drawn from it. Their findings that

rape was committed upon Emilie Boos by Jedrzykrewicz is supported by very substantial evidence and will not be disturbed. In fact the evidence strongly indicates that Amlaner guarded the other occupants of the house with a loaded gun to prevent their interference during the rape and to prevent their going for aid. He might well have been tried as a principal on the same charge of rape.

The uncontradicted evidence shows the absence of both accused as charged as well as their admitted acts of fraternizing prior to the arrival of Emilie.

6. The charge sheet shows that Amlaner is 33 years of age; he was inducted, without prior service, on 10 December 1942 at Philadelphia, Pennsylvania. Jedrzykiewicz is 27 years of age and that, without prior service, he was inducted on 12 November 1942 at Hamtramick, Michigan.

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

8. A sentence of death or life imprisonment is mandatory upon a conviction of rape (AW 92) and confinement in a penitentiary is authorized (AW 42; sec.278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

12096

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

BOARD OF REVIEW NO. 2

1 SEP 1945

CM ETO 12120

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WALTER T.CAMPBELL (36787222), 3418th Quartermaster Truck Company	Trial by GCM, convened at Paris, France, 6 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Walter T. CAMPBELL, 3418th Quartermaster Truck Company, European Theater of Operations, United States Army, did, at his organization, on or about 22 August 1944, desert the Service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 21 January 1945.

(42)

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

Specification: In that * * * did, at Boulogne, Seine, France, on or about 1 December 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private First Class William P. CAREY, 331st Station Complement Squadron, European Theater of Operations, United States Army, a .45 caliber United States Army colt automatic pistol #946841, of the value of less than fifty dollars ($50.00), the property of the United States Army furnished and intended for the military service thereof.

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

Specification: In that * * * did, at Boulogne, Seine, France, on or about 18 January 1945, unlawfully carry concealed weapons, viz. a live United States Army handgrenade and a French model .38 caliber pistol.

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

3. The prosecution's evidence shows that accused was a member of the 3418th Quartermaster Truck Company (TC) (R4; Pros.Ex.A). The morning report of that unit, admitted in evidence without objection (R4), shows that the accused absented himself without leave on 22 August 1944 (Pros. Ex.A).

During part of the period of his absence accused was often observed in the vicinity of Boulogne, Seine, France (R5-8). At that place on the evening of 1 December 1944, he flagged down a jeep and asked where

he could obtain gasoline for a weapons carrier in which he was riding (R8,12). He was then wearing a soldier's uniform but an officer's cap, and gave his name as "James T. Vaughan", producing identification papers made out to a soldier with that name (R8,11). The jeep contained military policemen, and after some preliminaries, two of them set out to return accused to his alleged unit, an ordnance company a few blocks away (R9). After the military policemen and accused had gone a short distance, the latter, who was riding in the rear seat of the jeep, displayed a pistol and forced the driver to stop the vehicle (R9). He took the .45 caliber pistol which one military policeman was carrying, compelled both to get out of the jeep, searched the other soldier, then ordered them to get back into the jeep and drive away (R9). The military policemen complied with accused's order, and later returned to the area with additional weapons, but were unable to find accused (R9). After accused's apprehension, and later at the trial, one of the military policemen positively identified him as the soldier who had displayed the gun and taken his pistol (R9,10).

Accused was apprehended and returned to military control on 21 January 1945 in Boulogne, France (R13). Concealed on his person were found a "live" United States Army hand grenade and a fully loaded, French model, .38 caliber pistol (R13, and Pros.Ex.B). At the time of his apprehension he readily admitted his identity and stated that he was looking for a ride toward the battlefront, to Belgium or Holland (R14-15).

4. After the accused's rights as a witness had been fully explained to him, he elected to testify (R15-16). He categorically denied that before his apprehension he had ever seen the military policeman whose pistol he was accused of taking, and that he had ever had a government pistol, but admitted that he owned an officer's cap and had worn it in Paris (R16-17,19,23), and also that he was absent without leave "back and forth in Paris about three months". He did not turn himself in to the Military Police because he thought that they would send him to a Replacement Center and prevent his return to his own unit (R18,22). He testified that during his absence he had gone to Omaha Beach and to Rheims, looking for his company, but without success, and further stated that on the day of his arrest he had arranged with a sergeant of the company where he was found to get a ride to Belgium (R17).

Accused admitted his possession of the pistol and hand grenade and contended that he was carrying the former for "protection" (R20).

5. a. "Desertion is absence without leave accompanied by the intent not to return * * *" (MCM, 1928, par.130a, p.142). The undisputed evidence, and accused's admission, clearly establishes his absence

without leave for 152 days. During that prolonged period he was in Paris where he had many opportunities to return to military service, and, from his failure to do so, the court properly concluded that he absented himself from his unit with the intent of permanently abandoning the military service (CM ETO 7663, Williams; CM ETO 13956, Depiro).

b. With reference to Charge II and the Specification thereunder, the identification of accused as the negro soldier committing the robbery on 1 December 1944 was flatly denied by him, and an issue of fact was thereby presented. The determination of this issue was within the exclusive province of the court, and it may not be disturbed by the Board upon appellate review (CM ETO 4194, Scott).

c. c. Accused's admitted possession of concealed weapons, as alleged in Charge III and Specification, constituted a clear violation of Article of War 96 (CM ETO 3649, Mitchell).

6. The charge sheet shows accused to be 25 years and five months of age. Without prior service, he was inducted 15 September 1943 at Chicago, Illinois.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized on conviction of desertion by Article of War 42, and of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (Cir.210, WD, 14 Sep.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3 20 JUL 1945

CM ETO 12128

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MARSHALL L. BAILEY (36420917), 796th Anti-aircraft Artillery Battalion	Trial by GCM, held at Headquarters, Seine Section, Paris, France, 21 March 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. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

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

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

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

Specification: In that Private Marshall L. BAILEY, 796th Anti Aircraft Artillery 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 8 January 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 14 January 1945.

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

Specification: In that * * * having been duly placed in the custody of Corporal Lonnie E. YOUNG, Company B. 397th Military Police Battalion, Com Z, European Theater of Operations, United States Army on or about 8 January 1945, did, at Metz, France on or about 8 January 1945, break such confinement before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for seven days in violation of Article of War 61, and two by special court-martial for respective absences without leave for five days and 25 days in violation of Article of War 61, and for breach of restriction and breach of parole, respectively, in violation of Article of War 96. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but 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 forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 8 January 1945 accused and 13 other "stragglers", all in the custody of three military police guards, were being escorted by truck from the Paris Detention Barracks to the Third Army Collecting Base. While en route, near Metz at about midnight, the 14 prisoners were removed from the truck at a hospital where they were to be quartered for the night, and were marched under guard up about three flights of unlighted stairs. While so proceeding, accused escaped in the darkness and could not afterwards be found (R5-8,9-11). According to a "slip" held by the corporal in charge of the guard, accused had one day's absence without leave charged to him at the stockade (R6).

Accused was apprehended on 14 January 1945 by a sergeant of the military police while on a flight of stairs in the rear of a cafe in La Villete (Paris). He made no attempt to escape, showed identification as to his name and serial number, and was in an American uniform. The sergeant did not check for a "pass to be in Paris", but checked accused's papers "and there didn't seem to be any in his pockets". He had no papers or authorization for traveling, and no identification tags or pay book were found. The sergeant asked

accused "how long he had been AWOL, and he didn't come out with it to begin with, and I kept after him and he finally came out with it". Accused stated he had been absent for about 30 days and that he had "jumped transportation back to his organization", which "was a front line organization". He did not state any "reason why he left" (R12-16).

4. Accused, having been warned of his rights by the law member, elected to remain silent (R16).

5. a. Charge II and Specification

The evidence is undisputed that accused escaped from the custody of military police while he was being transported under guard from a detention barracks to a collection base. Eluding his guard under the circumstances shown constitutes an escape from confinement within the meaning of Article of War 69 (CM ETO 3153, Van Breemen).

b. Charge I and Specification

The evidence fails to show beyond a reasonable doubt, however, that the accused intended to desert the service of the United States on 8 January 1945. Without considering the statements which accused made to the arresting sergeant, which, if they be regarded as showing intent to desert, were tantamount to a confession and manifestly inadmissible as such, the only proof of desertion is the showing that accused escaped from confinement from his escort guard of military police and remained absent without leave for a period of six days. There is no proof that accused was under charges in his own organization and no specific proof that his prior absence therefrom was without authority. There is no proof as to the location or duties of his organization. The statement that he was with a "front line organization" is too indefinite and general to show beyond a reasonable doubt that accused was attempting to avoid hazardous duty at the time he made his escape. When apprehended, he was not attempting to conceal himself or to resist arrest. He gave his correct name and serial number. He continued to wear his uniform. His statements indicated no intention of deserting, and he was not engaged in crime, unlawful acts or in any gainful occupation. In the opinion of the Board of Review, the evidence is sufficient to show that accused absented himself without leave from 8 January 1945 until 14 January 1945, but it fails to show circumstances from which it reasonably may be inferred that he entertained the intent necessarily required for a finding of guilty of the serious and cowardly offense of desertion (See CM ETO 1395, Saunders; CM ETO 1567, Spicocchi).

(48)

6. The Specification of Charge I alleges that accused deserted the service at the Paris Detention Barracks. The proof shows that he escaped from confinement at a hospital near Metz. This slight variance as to place was not prejudicial to the substantial rights of accused (CM 230827, Sheffler, 18 B.R. 59 (1943)).

7. The charge sheet shows that accused is 21 years of age and was inducted 20 January 1943 at Camp Grant, Illinois. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that accused did, on 8 January 1945, absent himself without leave until 14 January 1945, in violation of Article of War 61, and legally sufficient to support the remaining findings of guilty and the sentence as approved.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1

15 JUN 1945

CM ETO 12162

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Frohburg, Germany, and Pilsen, Czechoslovakia, 1-2, 10 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HAROLD S. GROSE (15069746), Company K, 38th Infantry	)	

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

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

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

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

Specification 1: In that Private Harold S. Grose, Company K, 38th Infantry, APO #2, European Theater of Operations, U. S. Army, did, at Waldbardau bei Grimma, Germany, on or about 25 April, 1945, lift up a weapon, to wit, a pistol against Captain John S. Calhoun, 38th Infantry, his superior officer, who was then in the execution of his office.

Specification 2: (Finding of not guilty).

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

Specification: In that * * * did, at Waldbardau bei Grimma, Germany, on or about 25 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Helga Bechstein.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 2 of Charge I and guilty of the other specifications and charges. Evidence was introduced of one previous conviction by special court-martial for behaving with disrespect towards a superior office in violation of Article of War 63. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence of a most convincing and substantial quality supports the findings of the court that accused at the time and place alleged engaged in sexual intercourse with Helga Beckstein, a female of German nationality. All of the elements of the crime of rape, viz (a) penetration of the female's vulva (b) with force and without her consent are present. From the evidence, it is clear that the young woman not only resisted to the extent of her powers under the circumstances, but also that accused by display of firearms and the administration of physical violence terrorized the girl into submission, which was not a real consent as contemplated by law. The finding of accused's guilt is sustained by substantial evidence (CM ETO 8837, Wilson, and authorities therein cited).

4. The accused pointed his pistol at Captain Calhoun and demanded that the jeep in which he was riding be stopped (R73,76,86). The officer was obviously in the execution of his office, and the evidence is clear that accused knew Captain Calhoun and was conscious of his acts. The offense (Charge I, Specification 1) was proved beyond reasonable doubt (CM ETO 106, Orbon; CM ETO 2904, Smith).

5. The charge sheet shows that accused is 19 years seven months of age and enlisted 16 August 1941 at Fort Hayes, Ohio, to serve three years. His service period is governed by the Service Extension

Act of 1941. He had no prior service.

6. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92), and for lifting a weapon against a superior officer in time of war is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B. Franklin Riter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 12169

U N I T E D S T A T E S	) 1ST AIR DIVISION
v.	) Trial by GCM, convened at AAF Station 103 (England), 4,5,6 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN E. NOLD (12085587), 1209th Quartermaster Company Service Group (Aviation) (RS)	)

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

1. The record of trial in the case of the soldier named above has been examined 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 E. Nold, 1209th Quartermaster Company Service Group (Aviation) (RS), AAF Station 128, APO 557, U. S. Army, did, at AAF Station 128, APO 557, U. S. Army, on or about 27 March 1945, with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation kill one First Lieutenant Jerome M. Weiner, Quartermaster Corps, a human being, by shooting him with a German Luger automatic 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 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 withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence is clear, substantial, and undisputed that at about 0940 hours on 27 March 1945 accused entered the quartermaster office at his station in England, pointed a German Luger pistol at First Lieutenant Jerome M. Weiner, his acting company commander, and fired six times. Lieutenant Weiner died almost immediately, with eleven bullet wounds in his body. Ample evidence, independent of accused's voluntary pre-trial confession, supports the court's findings that accused was guilty of murder (MCM, 1928, par.148a, pp.162-164; CM ETO 11178, Ortiz: CM ETO 12850, Philpot; and authorities therein cited).

The record is replete with evidence from which the court could properly find express or implied malice. The day before the shooting, accused had had an argument with deceased regarding his request for an emergency furlough because of his father's operation for a brain tumor, the officer explaining that there was not "much chance" to get leave because a Red Cross cablegram had stated that there was no immediate family problem. Accused asked to be transferred out of the company and that he be broken from his grade as Staff Sergeant (R13,14). On the same date an order was published reducing accused to the grade of private "at his own request" (Pros.Ex.7). On 27 March, about 15 or 20 minutes before the shooting, accused engaged in an argument with deceased and pleaded to be transferred to the infantry rather than to an ordnance company on the station as he did not want to remain at the station, but the officer stated that it was too late as the orders had been cut (R9,22). Accused then went to his barracks, started to pack his clothes, came across the Luger, put six cartridges in the gun, and walked to the Quartermaster Office, (Pros.Ex.9). About three to five minutes before the shooting, he came into a laundry room, shook a friend's hand, and said words to this effect: "So long, I'll be seeing you" (R93). Accused said in his voluntary pre-trial confession that, after walking to the Quartermaster office:

"I went into the hallway and heard some voices in Lt. Weiner's office, so I waited in the hallway. I guess I knew I intended to shoot Lt. Weiner, or else I couldn't have taken the pistol there. I stood in the hallway only a couple of seconds when some officers came out of Lt. Weiner's office, passed me, and went outside. I first looked outside after them and then I pulled the slide on the gun back, letting it go forward and so charging the gun, and then I opened the door to Lieutenant Weiner's office" (Pros.Ex.9).

For further details of the evidence, reference is made to paragraph one of the review of the staff judge advocate of the appointing authority.

4. The serious question raised in this case is that concerning the sanity of accused. Several enlisted men testified as to his eccentric habits, including the fact that several times some months before while sober he had beat his head against the walls of his barracks, causing some damage, although one soldier testified that some of the men in the outfit "used to kid around, hit their heads against the wall and say, 'I want to go home'" (R106).

A defense witness, Captain Edward F. Falsey, Chief of Neuro-Psychiatric Section, 303rd Station Hospital, testified at length regarding a psychiatric examination he had made of accused on 31 March (R120-136). His opinion was that accused presented a clinical picture of a constitutional psychopathic state, manifesting emotional instability (R123), that at the time of the shooting accused knew the difference between right and wrong, but would have much more difficulty adhering to the right "than would an individual of normal character, temperament and impulse structure" (R126,128). With reference to accused's hitting his head against the wall, the witness said that he judged

"that those actions were manifestations of emotional instability in the phase of frustration, that they were analagous of the temper tantrums of a child whose immediate desires were not satisfied. By that, I mean I don't think the accused derived any peculiar egotistic pleasure from hitting his head against the wall. I think he just became angry and did it" (R125).

In rebuttal, the prosecution offered as a witness Major Phillip H. Gates, psychiatric consultant, 805th Hospital Center, who testified that two week's observation and an examination of accused on 14 April by himself, led to the conclusion that his general condition was constitutional psychopathic state, emotional instability; that he was sane, although having an emotional instability characterized by violent outbursts of temper; that the act of shooting was carried out during such an outburst and at that time he was without complete control of his actions; that both before and subsequent to the act he was able to distinguish right from wrong and was able to take responsibility for his actions; that he is able to stand trial" (R137-139). His conclusion was further clarified with the statement:

> "That the outburst of anger during which the act occurred did not constitute a period of insanity, and that during the outburst of anger he was as able to distinguish right from wrong and to adhere to the right as is to be commonly found in conditions of extreme anger" (R139).

The Manual for Courts-Martial provides:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par.78a, p.63).

This definition of insanity is based on the rule which has been adopted by the United States Supreme Court (Davis v. United States, 160 U.S. 469, 40 L.Ed. 499 (1895) and other Supreme Court cases cited in CM ETO 739, Maxwell). In Davis v. United States, supra, the Supreme Court held that, in order for an accused to be absolved from responsibility, it is necessary that

> "his will * * * the governing power of his mind, has been otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control" (160 U.S. at p.477, 40 L.Ed. at p.502).

The Board of Review has held that it is no defense to a charge that an accused had difficulty in adhering to the right (CM ETO 3717, Farrington; CM ETO 5747, Harrison;

CM ETO 9424, George E. Smith, Jr.). These holdings are in harmony with the holdings of the civil courts (Cf: 14 Am.Jur., sec.32, pp.788,789, and other authorities cited in CM ETO 9424, George E. Smith, Jr., supra). As the court said in Bast v. Commonwealth, 124 Ky. 747, 99 SW 978:

> "It is the duty of /such/ men who are not insane or idiotic to control their evil passions and violent tempers or brutal instincts".

They are the class of persons who need most the restraint of the fear of punishment.

The question of accused's legal sanity was essentially one of fact for the court, and since substantial, competent evidence supports the court's findings, they will not be disturbed by the Board of Review upon appellate review (CM ETO 739, Maxwell, supra; CM ETO 9424, George E. Smith, Jr., supra, and authorities therein cited).

5. The charge sheet shows that accused is 23 years seven months of age and that he enlisted 6 June 1942 at New York City, New York, for the Air Corps, unassigned, to serve for the duration of the war plus six months. He had no prior service.

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

7. The penalty for 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).

Wm. T. Burrows Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald P. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1

29 AUG 1945

CM ETO 12180

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Saverne, France, 1 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Private First Class LAWRENCE J. EVERETT (34203769), 93rd Quartermaster Company (Railhead)	)	

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

---

1. The record of trial in the case of the soldier named above has been examined 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 Pfc Lawrence J. Everett, 93rd QM Co (RHD) did at Molsheim, France, on or about 3 December 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs Aline Scheuer.

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

Specification: In that * * * did, at Molsheim, France, on or about 3 December 1944, wantonly and recklessly discharge a U.S. .30 Cal. Carbine in or near the home of Mr and Mrs Emil Rauner.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. All 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, the Commanding General, Seventh United States Army, 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 credible testimony of the 23 year old prosecutrix establishes that, at the time and place alleged, shortly after occupation by American troops, accused, a colored soldier, whom she had never seen before, engaged in two acts of sexual intercourse with her, to which she submitted without her consent because of fear of death at the hands of accused, who continually threatened herself, her parents, and her 22 months old baby, with his carbine and fired the same several times from the house. Her testimony as to his terrorization of herself and her family is corroborated by that of her parents. Accused testified that he engaged in one act of intercourse with her (the second testified to by her), but asserted that he had visited the house on several occasions prior to the day in question and had made a date with the woman; that on that day he fired his rifle about 50 yards away and not at the house; and that she not only consented to intercourse with him but actively assisted in its consummation. The implicit denial of the first act of intercourse, upon which the prosecution must be deemed to have relied for its proof of the Specification of Charge I (CM ETO 7078, Arthur L.Jones), created an issue of fact for the determination of the court (CM ETO 11376, Longie; CM ETO 11608, Hutchinson), as did accused's assertion that intercourse was with consent (CM ETO 7869, Adams and Harris, and cases therein cited). The cited cases and CM ETO 14040, McCreary, are authority that the court's determination of these issues against accused in its findings of guilty of rape are supported by substantial evidence.

4. The evidence leaves no doubt that accused wantonly and recklessly discharged his carbine, inferentially of the description alleged, as charged in the Specification of Charge II, in violation of Article of War 96 (CM ETO 866, O'Connell and Haza; CM ETO 3677, Bussard; CM ETO 3801, Edward H. Smith).

5. The charge sheet shows that accused is 22 years of age and was inducted 25 April 1942 at Camp Blanding, Florida. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

7. 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).

Wm. T. Sarnow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

David R. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1 27 JUN 1945

CM ETO 12203

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Technicians Fourth Grade CLYDE E. BRUCE (37725687) and MURAT T. FORDYCE, Jr. (38583803), Technician Fifth Grade RICHARD W. REHNERT (33488948), and Privates WILLIAM E. SHARPE (35923691), JOHN G. HOWE (31296031), and TONY SHYMANIK (36779895), all of Company C, 716th Railway Operating Battalion	) Trial by GCM, convened at Paris, France, 19 March 1945. Sentence as to each accused (suspended as to all accused except Rehnert): 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. 1
RITER, BURROW and STEVENS, Judge Advocates

---

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

2. This case belongs in the same category as CM ETO 8234, Young, et al.; CM ETO 8236, Fleming, et al.; and CM ETO 8599, Hart, et al. The accused were charged with the crime of conspiracy to defraud the United States of supplies and equipment furnished and intended for the military service in combat with the enemy. They were acquitted of this crime. In addition, however, it was charged that each accused severally and separately

> "did * * * wrongfully dispose of * * * '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 supplies during a critical period of combat operations".

These allegations differ in minor details from similar specifications involved in the Young, Fleming and Hart cases, but

> "* * * when considered as a whole [they] allege something more than the unauthorized disposal of Government property furnished or intended for the military service thereof under the 9th paragraph of the 94th Article of War " (CM ETO 8234, Young, supra).

The clause:

> "thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of supplies during a critical period of combat operations"

alleges an additional element which the prosecution must prove and there is thereby stated an offense of greater gravity than the offense under the 94th Article of War of wrongful disposing of Government military property. It is of the same degree of seriousness as the offense of destroying and injuring national defense materials as denounced by Congress in the Act of April 20, 1918, c.59, sec.5, as added by Act Nov. 30, 1940, c.926, 54 Stat. 1220 (50 USCA sec.105). The Board of Review concludes that the principles announced in the Young, Fleming and Hart cases control the instant case.

The proof of this additional element in the instant case is almost identical with the proof contained in the Young, Fleming and Hart cases and meets the test therein prescribed.

3. a. Prosecution's evidence showed that accused Bruce, Rehnert, Shymanik and Sharpe and another soldier named Kelly, removed five cases of post exchange rations from a railroad car in Matelot Yard, near Versailles, France, on or about 15 October 1944; that the cases were deposited in a motor truck and were immediately hauled away from the yard. The allegation that these accused "did * * * wrongfully dispose" of the property was literally proved. Beyond doubt the record of trial is legally sufficient to support the findings that each of said accused was guilty of the offense alleged in the Specification preferred against him.

b. The evidence which supports the conviction of Fordyce showed that he removed on one occasion two cases of post exchange rations from a railroad train and placed the same in an empty railroad car. At another time, five or six cases of cigarettes were seen in the locomotive which Fordyce operated. With respect to Howe, he was seen to take one box of post exchange rations from a railroad car and place it in his duffle bag.

It was therefore proved beyond doubt that Fordyce and Howe were each guilty of larceny. But was it shown that each of them wrongfully disposed of government property? A sharp distinction must be made between the disposition contemplated by the 9th paragraph of the 94th Article of War and the disposition which is involved in the instant case. As to the latter, the Board of Review has said:

> "The allegation that accused wrongfully disposed of the cigarettes in effect specifies that accused wrongfully diverted them from the usual and proper channels of distribution" (CM ETO 8234, Young, et al, supra).

There is therefore, no difficulty in concluding that Fordyce and Howe were each guilty of a wrongful diversion of Government property and are guilty of the offense charged against each of them individually.

4. The charge sheet shows that Rehnert is 22 years two months of age and was inducted 25 January 1943 at Allentown, Pennsylvania, to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2 21 JUN 1945

CM ETO 12205

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WILLIAM JONES (33801100), 3110th Quartermaster Service Company	Trial by GCM, convened at Neiderbreisig, Germany, 11 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 William Jones, 3110th Quartermaster Service Company, did, at or near Trohe, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Edith Rockenhaupt.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for absence without leave for three hours during an emergency alert, and one by special court-martial, for absence without leave for two days, both in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the

service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 3 April 1945, accused was a member of the 3110th Quartermaster Service Company, which organization was stationed near Trohe, Germany (R7,12,15). Some time between 1400 and 1500 hours on this date, he entered the flat of Wilhelm Hedrich, a German civilian, pointed his carbine at Herr Hedrich, his housekeeper and his daughter Edith Bockenhaupt, all of whom were present in the kitchen (R15,18,19,23). He told Herr Hedrich and the housekeeper to sit down and to remain there (R15,25) following which he grabbed the girl, Frau Bockenhaupt, by the hand and "dragged" her across the hall and into a bedroom about four steps from the kitchen (R15,20-24). Leaving the girl in the bedroom, he returned to the kitchen, with his weapon in his hand, and discovered that the German man and woman were still there. He then returned to the bedroom, seized the girl, threw her on the bed, threatened to shoot her if she tried to get up, "forced" her to remove her pants, and had intercourse with her against her will and consent, and an emission (R16-17,21-22). During this time accused had his carbine lying beside him on the bed (R17,18). Following the intercourse he went into the kitchen again to see if they were still there and finding them left the flat descending by way of the backstairs (R17,24).

About an hour later the victim, Frau Bockenhaupt, was examined by a civilian physician who discovered no wounds or semen but found her "very nervous" and "highly excited" (R24,27,28). As a result of the incident being reported to an officer of an American infantry unit stationed nearby, a detail of three men were sent to guard the house. The following day, 4 April 1945, two colored soldiers, carrying carbines, were seen by members of this guard, approaching the house from across a field (R7,8,9,24). Both of the soldiers entered the Hedrich flat by way of the back door. One of the soldiers waited on the stairs while the other mounted the stairway and entered the kitchen, placed several bars of chocolate candy on a table and indicated to Frau Bockenhaupt that they were intended for her, but she refused the gift (R9,10,18). The detail guarding the house had followed them into the house and then disarmed both of the soldiers and placed them under guard. One was the accused, who was positively and definitely identified by the women and her father as the American soldier present at their house the preceding day and by the girl as her assailant. He

was recognized by his face and by the fact that he was tall and erect. He was also identified in court (R9,15,25).

4. Accused after his rights as a witness were explained to him, elected to be sworn as a witness in his own behalf. He testified that on 3 April between 1400 and 1500 hours he went to the supper room of his organization to buy rations and to leave some money with the supply sergeant (R29-30). He returned to his barracks and remained there until 1800 hours when he went on guard duty (R30). He denied that he left camp on the day of the alleged assault (R31). He admitted going to the village on 4 April 1945, stating that he and his friend carried chocolate bars and cigarettes with them which they intended to trade for wine or cognac (R29,30,32). He went in the Hedrich flat and up the steps because that was the only place where he observed a light (R31,33). He said that he had been to the village about twice before (R31) and later testified that he had never been there previously (R36,37,38). He denied knowing the woman to whom he offered the chocolate bars and insisted that he had no knowledge that she had been attacked (R32).

Staff Sergeant Maren F. McDowell and Corporal Lee Dorsey, both members of the 3110th Quartermaster Service Company, corroborated accused's testimony that he obtained his PX rations and left some money for safekeeping sometime after the 1st of April and that he was seen on guard between 4 and 4:30 pm, 3 April 1945 (R39,40,42,43).

5. There is competent and substantial evidence to establish the commission by accused of the crime of rape as charged. He was identified by the woman and her father as the American soldier present in their apartment on the afternoon of 3 April 1945. His identification was established by positive and convincing testimony. He was also identified in court. On the day following the assault accused returned to the flat of the victim, accompanied by another colored soldier. He admitted being present in the Hedrich house on the latter date at which time he was apprehended, disarmed and placed under guard. Although he denied being present in the flat the preceeding day and attempted to establish an alibi, the testimony other than his own fails to account for his presence at any place at the time of the rape, other than at the place of the crime. It is reasonably possible for accused to have secured his PX rations and to have been on guard in camp between the hours of 4 and 4:30 pm and to also have been present at the residence of the victim nearby when the rape was committed between 2 and 3 o'clock pm, 3 April 1945. The fact that on the following day, he carried chocolate PX rations with him and walked across the fields directly to the house in question tends to support the statements of the German witnesses and to contradict and discredit accused's testimony. Questions concerning the credibility of witnesses and the resolving of disputes of fact are issues for the sole determination of the

court and their findings, where supported by substantial evidence will not be disturbed by the Board of Review on appellate review (CM ETO 1953 Lewis; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). Every element of this crime was fully and legally established (CM ETO 6224, Kinney and Smith; CM ETO 9611, Prairechief; CM ETO 11267, Fedico).

There was received in evidence some incompetent testimony concerning the father's statements to the civilian doctor and army authorities which was clearly hearsayand inadmissible. As the competent evidence on the points upon this hearsay was received was clear and definite, the admission of this incompetent testimony did not prejudice the substantial rights of the accused. The legal evidence was of "such quantity and quality" as practically to compel in the mind of conscientious and reasonable men the finding of guilty (CM ETO 1693, III Bull. JAG 185; CM NATO 2519, III Bull. JAG 278).

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

7. The charge sheet shows that accused is 22 years and four months of age and was inducted 4 October 1943 at Philadelphia, Pennsylvania. He had no prior service.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

20 JUL 1945

CM ETO 12210

U N I T E D S T A T E S	THIRD ARMORED DIVISION
v.	Trial by GCM, convened at Darmstadt, Germany, 16 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 35 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROBERT H. BLACK (35295571), Company H, 36th Armored Infantry Regiment	

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

---

1. Accused was charged with violating Article of War 75 in that he sought safety in the rear while his company was engaged with the enemy. In presenting its case, the prosecution elicited testimony from accused's squad leader as follows:

"TJA: May it please the court, the next question I want to ask will bring out certain facts concerning Black's past actions. Now I do not want to introduce this evidence to try to convict him for past offenses. I understand that he is on trial only for the incident in question. However, I would like to introduce this evidence solely for the purpose of showing a pattern of past behavior which will throw light on the nature of his intent in the present instance.

IM: Ask the question.

Q. Would you tell about Black's reactions to combat operations in the past?
A. Most of the time he would be absent when we were about to take off to engage the enemy.

12210

(72)

Q. About what percent of the combat operations would you say he had been in with your Company?
A. About one-fourth.

Q. About how long of period have you been working with him?
A. From about the middle of August.

Q. Would you say that this present incident was any different in any way than others in the past?
A. No sir" (R9).

The following testimony also was elicited from a fellow member of accused's squad:

"Q. How long have you been associated with Black?
A. Since September sir.

Q. What had been his reactions to combat operations?
A. It seems he was of a nervous type.

Q. Did he complete most of the combat operations?
A. No sir" (R11).

2. While it is probable (although not here definitely decided), that evidence of prior acts of misbehavior before the enemy may, if properly presented, be introduced to show the intent motivating the specific act of misbehavior charged (MCM, 1928, par.112b, p.112; 1 Wharton's Criminal Evidence, (11th Ed., 1935), sec.350, p.516), great care should be taken in the manner of its presentation (1 Wharton's Criminal Evidence, sec.360, p.567). As was stated in Paris v. United States (CCA 8th, 1919), 260 F. 529, at p.531,

"The general rule is that evidence of the /commission/ by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. * * * To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to

prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. * * * Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial. * * *

'Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case'".

3. It is the opinion of the Board of Review that, even if evidence of prior derelictions was admissible to show the character of accused's intent and his absence of innocent purpose in going to the rear as here charged, such evidence was not properly developed in this case. Specific instances were not related, the circumstances surrounding the prior acts were not shown, and the testimony given in effect amounted to no more than the broad statements of two witnesses that accused was habitually cowardly in combat. As such, whatever probative value the evidence of prior misconduct may have had was outweighed by the dangers attendant upon the manner of its presentation and the evidence, as presented, should have been excluded (Cf: CM ETO 3811, Morgan; Fish v. United States (CCA 1st, 1914), 215 F. 544; Gart v. United States (CCA 8th, 1923), 294 F. 66; MacLafferty v. United States (CCA 9th, 1935), 77 F (2nd) 715; Paris v. United States (CCA 8th, 1919), 260 F. 529, supra). However, although prejudicial error was committed, other evidence of record compellingly shows that accused, although his initial departure may have been for a legitimate purpose, thereafter sought safety in the rear and failed to do his whole duty before the enemy by remaining at the company motor park instead of returning to his platoon at the front. It is accordingly concluded that the record of trial is legally sufficient to support the findings and the sentence (Cf: CM ETO 1404, Stack; CM ETO 1693, Allen; CM ETO 4093, Folse).

B R Sleeper, Judge Advocate

Malcolm C. Sherman, Judge Advocate

B K Sheeley Jr, Judge Advocate

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

BOARD OF REVIEW NO. 2

1 SEP 1945

CM ETO 12220

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Tolbnannshof, Germany, 30 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHARLES H. MONKS (6982577), Company A, 315th Infantry.	

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

---

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Charles H. Monks, Company "A", 315th Infantry, then Private First Class Charles H. Monks, Company "A" 315th Infantry did, at the vicinity of Scheibenhardt, Germany on or about 19 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at the vicinity of Riedseltz, France on or about 27 December 1944.

Specification 2: In that * * * did, at the vicinity of Reipertswiller, France on or about 14 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 returned to military control at Dombasle, France on or about 1 March 1945.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by special court-martial of absence without leave for twenty days in violation of Article of War 61, and breach of arrest in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused was a member of Company A, 315th Infantry, which on 18 December 1944 was located in Niederlauterbach, Germany, on the front line (R7). That day accused was informed that at 0500 on the following day his platoon would move forward to attack the enemy, but the next morning he could not be found, although search was made (R7,8). He had no permission for the absence which continued until he returned to his unit at Riedseltz, France, on 27 December 1944 (R8).

On 14 January 1945, when the accused's platoon was located about two-hundred yards from the enemy, near Reipertswiller, France, protecting a possible route of approach, accused was discovered to be absent from the unit and was not found on search being made (R9,10). He remained in a missing status until his return to military control at Dombasle, France, on 1 March 1945, and during no part of that time had he been given permission to be absent (R10-12).

4. On being advised of his rights as a witness, accused elected to remain silent (R12,13). No evidence was presented by the defense except a stipulation agreed to by the prosecution that if the division neuropsychiatrist, who had examined the accused before the trial, were present he would testify as follows:

"Soldier shows no evidence of being mentally ill and was mentally responsible for his actions at the time of both offenses. His explanation was that on the

occasion of the first offense he saw no opportunity of getting a furlough, even though he had seen four years overseas service. On the second occasion, he states that he was put in the line without a rifle and ammunition" (R12).

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

Under Article of War 28 any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter. The undisputed evidence shows that during both periods alleged in the specifications accused was absent from his organization without proper leave. It was further shown by inference that on the occasion of each absence he intended to avoid military duty involving active combat with the enemy. In the first case, accused absented himself after being informed that on the following day his platoon would move forward to the front line to attack the enemy. In the second case he and his unit were engaged in actual combat operations against the enemy which was only two-hundred yards distant. His intent in each instance to avoid hazardous duty is clear (CM ETO 6549, Festa; CM ETO 8083, Cubley; CM ETO 5953, Myers).

Though the prosecution failed to prove, as alleged in Specification 1, that accused deserted "at the vicinity of Scheibenhardt, Germany," instead of at Niederlauterbach, Germany, as revealed by the evidence (R7), the variance is immaterial, since the place of desertion is not of the essence of the offense (CM ETO 15154, Sohn).

6. The charge sheet shows accused to be 25 years of age. Without prior service, he enlisted 1 March 1940 at Newark, New Jersey.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

1 SEP 1945

CM ETO 12222

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Rixingen, Belgium, 21 February 1945.
Private DANIEL PACHECO, (31370987) Company E, 315th Infantry.	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Daniel Pacheco, Company "E" 315th Infantry, then Private First Class Daniel Pacheco, Company "E" 315th Infantry did, at the vicinity of Crion, France on or about 28 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit; combat with the enemy, and did remain absent in desertion until he returned to military control at the Foret de Parroy, France on or about 7 October 1944.

Specification 2: In that * * * did, at the vicinity of Manonviller, France on or about 7 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at Bayon, France on or about 11 November 1944.

12222

(80)

Specification 3: In that * * * did, at the vicinity of Menil-Flin, France on or about 12 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit; combat with the enemy, and did remain absent in desertion until his return to military control at Luneville, France on or about 23 December 1944.

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 specifications and the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, 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 and 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. Staff Sergeant Caruso C. Lagrimas, Company E, 315th Infantry, the only witness for the prosecution testified substantially as follows:

Accused was on 28 September 1944 and at the time of trial, a member of Company E, 315th Infantry regiement (R6). On that date, the company was just entering the Parroy Forest, near Manonviller, (R10). After the company entered the Forest, on 28 September, accused was missing (R7). The company was in contact with the enemy and receiving artillery fire. A quick checkup was made and accused could not be found in the area occupied by the platoon. He did not have permission to be absent, and was not seen again until 7 October when he was one of the two men sent up to the company still located in the Forest (R7).

Later on 7 October, the entire platoon area was searched and accused could not be found. The unit was still in the Forest and in contact with the enemy. He had no permission to be absent and was not seen again until 11 November at which time he was brought to the company, which was then at Bayon, by the military police (R8,9).

The company was preparing to leave Bayon about 5:30 or 6:00 o'clock on 11 November when accused was returned, and it did move toward the front about two hours later. Accused accompanied the unit when it moved out. They reached Menil-Flin about one o'clock in the morning on 12 November. The accused could not be found in the area when the company detrucked (R9). He did not have permission to be absent and was not seen again by witness until the day of trial. It was stipulated that accused was returned to military control at Luneville, France on 23 December 1944 (R10).

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

5. With respect to all three specifications of the Charge, the absence without leave for the respective periods alleged is clearly established. As to each period, a witness present with accused's organization through-out the entire time testified that accused could not be found and that he did not have permission to be absent.

In order to support the findings of guilty of the offense charged the record must contain substantial evidence of the notification to accused of imminent hazardous duty (CM ETO 8300, Paxson). As to Specifications 1 and 2, the evidence is undisputed that the accused's unit was in contact with the enemy in the Forest Parroy; on 28 September, it was entering the forest and receiving artillery fire; on 7 October, the unit was in the same forest and "still in contact with the enemy". The inherent tactical situation was notice to him of the existence and imminence of battle hazards and perils (CM ETO 8300, Paxson, supra). As to Specification 3, the accused was returned to his organization at Bayon on 11 November 1944. The company was preparing to and did move out toward the front during the night time. It is not shown that accused knew before departure where or in which direction his company was going; however, the accused departed with his company and was not found to be missing until about five hours later when the unit arrived at the detrucking area in the vicinity of Menil-Flin. The movement of the company was generally in the direction of the area from which accused had twice before deserted his unit while in combat; the movement was during darkness presumably to avoid detection by the enemy. The court was justified in inferring that accused knew after departure of his company that it was moving toward the front for the purpose of again engaging in combat and under these circumstances was warranted in concluding that accused absented himself to avoid hazardous duty (CM ETO 6934, Carlson).

6. The charge sheet shows that accused is 20 years of age and that he was inducted without prior service on 11 August 1943 at Boston, Massachusetts.

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 violation of Article of War 58 in time of war is death or such other punishment as a court-martial may

(82)

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

24 SEP 1945

CM ETO 12224

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JEROME M. CIULLO (36570676), 445th Reinforcement Company, 85th Reinforcement Battalion, 19th Reinforcement Depot	Trial by GCM, convened at Paris, France, 16, 17 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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 Jerome M. CIULLO, 445th Company, 85th Battalion, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization on or about 23 December 1944 desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 28 January 1945.

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

Specification: In that * * * did, at 67 Rue Baudricourt 13th Arrondissement, Paris, France on or about 18 January 1945, with malice aforethought will-

fully, deliberately, feloniously and unlawfully kill one Mademoiselle Alfreda "Lola" Cartier, a human being, by shooting her in the head with a 9 millimeters P-38 pistol.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for disobeying an order and fraudulently obtaining prisoner of war property in violation of Articles of War 65 and 94, and one by summary court for failure to repair to properly appointed place for guard duty 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. The evidence, including accused's testimony at the trial and his two sworn pretrial statements, the admission of which was made proper by adequate proof of the corpus delicti of each offense charged, which except as indicated is uncontraverted, shows the following:

Charge I and Specification:

On 23 December 1944, accused took all of his clothes, left his organization (at the 19th Replacement Depot) without leave, and went to Paris for the purpose of joining a black market gang composed of civilians and American soldiers. There he lived with a prostitute and engaged actively with the gang in the theft and sale of large quantities of American army gasoline. Events of 18 January 1945 and thereafter, discussed below, culminated in his apprehension by military police in Paris on 28 January. Even aside from those events, the evidence fully supports the findings of guilty of desertion (CM ETO 15343, Deason, and cases therein cited).

Charge II and Specification:

Shortly after going to Paris, accused began living with Alfreda (locally known as "Lola") Cartier, the deceased, a prostitute. Early in January they took a room at 67 Rue Baudricourt, 13th Arrondissement, Paris. Accused, who was quick tempered and had recently contracted a venereal disease, and the members of the gang he joined were distrustful of each other, and deceased's jealousy with respect to accused was manifested by her concern that he was consorting with other women. He customarily kept a P-38 pistol, as well as an American .45, under his pillow. About 10 am on 18 January 1945, accused, who was in bed with deceased in their room, awoke, drew the P-38, which

contained a loaded clip and with whose operation he was familiar, from under the pillow, pointed it about the room, pulled back the hammer and pulled the trigger several times. He then pointed it at deceased's head and she laughingly told him to continue to point it as she was not afraid. Accused then pulled back the extractor and the slide moved forward, thereby inserting a bullet in the chamber. He thereupon pulled the trigger, and shot deceased between the eyebrows above the nose. The bullet, which made its exit at the rear left center of the head, was the cause of death. Accused immediately left the room, thereafter returned to take deceased's money (5200 francs) and most of his own belongings, and left Paris with other members of the gang. The essence of accused's defense was that he was not thinking when he pulled the extractor, which he knew would load the weapon, and that the shooting was unintentional and accidental. The issue of fact thus presented was resolved by the court against accused in its findings of guilty of murder. Malice is shown by the evidence that accused, about two weeks prior to the shooting, argued with deceased and slapped her; that he failed to summon medical aid after the shooting; and that he immediately fled the scene. It is significant that in his pretrial statement, accused stated that a "Papa Russky" was in the room while accused was pulling the trigger before shooting and deceased asked accused to point the pistol at her. After "Papa Russky" testified that while he was in the room deceased was asleep and that he did not hear the trigger pulled or conversation between deceased and accused, the latter, on the stand, changed his story. He testified that it was not until after he pulled the trigger several times and deceased said to point it at her that "Papa Russky" entered the room. The court was fully justified in disbelieving accused's version of the affair. In view of the overwhelming evidence that the shooting was deliberate and malicious, the findings may not now be disturbed (CM ETO 15200, Bobo).

4. a. The Specification of Charge II follows the "common form" for murder (MCM, 1928, App.4, Form 86, p.249), except that it omits the customary words "and with premeditation". The Specification even without these words, is sufficient in form to charge murder in violation of Article of War 92 (CM ETO 6074, Howard).

b. A member of the gang testified that deceased

> "told me some Frenchman had called her out and she went out to the Georges Cafe and some soldier jumped on her and beat her, an American soldier, and she came back. She told me that Jerry [accused] was mad at her and Jerry said that he was going to shoot her. That's what she told me in a separate room.
>
> Q. What did Jerry say about that?
> A. Jerry never told me that he was going to shoot her about that but I told Jerry if they didn't want her around there they should let her go before the trouble started.

Q. You told Jerry that if he didn't want her around, he should let her go?
A. Yes, sir.

Q. What did Jerry say about that?
A. He said it was his business, I should stay out of it or he would put a slug in me. So when Jerry told me that I knew he was quick tempered and I didn't want to argue with him" (R38).

The testimony that deceased informed witnesses that accused had threatened to shoot her, and of the occasion for the threat, was hearsay and inadmissible because not shown to be part of the res gestae or a dying declaration (1 Wharton's Criminal Evidence (11th Ed., 1935), sec.437, p.685). It may be assumed, without deciding, that the testimony that accused threatened to shoot witness, under the general rule, was inadmissible because, under the circumstances, irrelevant to accused's attitude toward deceased (Cf: 20 Am.Jur., Evidence, sec.347, p.322). In view of the strong competent evidence of malice, however, neither error, in the Board's opinion was prejudicial.

5. The charge sheet shows that accused is 20 years five months of age and was inducted 12 February 1943 at Fort Custer, Michigan, to serve for the duration of the war plus six months. No prior service is shown.

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

7. The penalty both for desertion in time of war and for murder is death or such other punishment as a court-martial may direct (AW 58,92). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42 and for 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).

Wm. T. Swaim Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1

5 JUN 1945

CM ETO 12228

UNITED STATES v. Privates CHARLES N. BOGGS (35219967), 446th Reinforcement Company, 85th Reinforcement Battalion, 19th Reinforcement Depot (formerly 446th Replacement Company, 85th Replacement Battalion, 19th Replacement Depot) and WALTER A. GEVEDA (32007986), Company A, 29th Infantry	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 5 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

2. With reference to the charges of uttering the fraudulent post-exchange ration cards the following quotation is pertinent:

> "To 'utter' is offering a forged instrument, knowing it to be such, whether such offer is accepted or not, with a representation, by words or actions, that it is genuine, and with an intent to defraud; and it is a public offense. As the acceptance is immaterial, and constitutes no part of the offense, the crime is committed, even though the person, to whom the forged instrument is offered, discovers the forgery from the clumsiness of its execution or the behavior of the one offering it, and, for such reason or any other, refuses to be defrauded. It is therefore patent that whether or not the forgery was such as likely to deceive is wholly immaterial, so far as the utterance is

concerned" (Commonwealth v. Fenwick, 198 S.W. 32, 34, 177 Ky.685, L.R.A. 1918B, 1189; Johnson v. Commonwealth,14 S.W. 492, 90 Ky. 488; 43 Words & Phrases (Permanent Ed.) 588-589).

B. Franklin Riley Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

30 AUG 1945

CM ETO 12239

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RAYMOND D. BLACKSHEAR (38465730), 3rd Reinforcement Depot	Trial by GCM, convened at Paris, France, 18 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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.

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Raymond D. BLACKSHEAR, 3rd Reinforcement Depot, European Theater of Operations, United States Army, alias Private John D. Thomason, did, at St. Gobain, France, on or about 20 September 1944, 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 15 December 1944.

Specification 2: In that * * * did, at Paris Detention Barracks, Hq Seine Section, European Theater of Operations, United States Army, on or about 2 April 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 14 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. Evidence was introduced of two previous convictions by special courts-martial, one for wrongfully striking a sentinel who was then in the execution of his office, and disobeying an order of such sentinel in violation of Article of War 96, and one for threatening a soldier with a knife, unauthorized taking and use of a Government truck and absence without leave for part of a day, in violation of Articles of War 96 and 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. An extract copy of a competent morning report established accused's initial absence without leave on 20 September 1944 (R5; Pros.Ex.A). He was apprehended in a routine checkup at a Paris bar on the night of 15 December, and at such time carried three pistols on his person (R5,6). He gave his name as John D. Thomason and was confined under this assumed name in the Paris Detention Barracks, but broke confinement 2 April 1945 (R6-7). He was apprehended again in a bar at about 2030 hours on 13 April, but he and his companion by gun play which involved his wounding of one of the apprehending military policemen, commandeered their jeep and escaped. Later that night at about midnight, he and others were surrounded in a house and brought under military control (R8-14).

Accused by pretrial statement after due warning of his rights admitted absenting himself without leave in November 1944, and escape from confinement on 2 April 1945 by assault and overpowering a guard, but claimed that the wounding of the military policeman at the time of the first apprehension on 13 April was accidental (R17,18; Pros.Ex.B). The statement was introduced in evidence over the objection of accused on the grounds that it

was a certified copy, not the original and not signed by the accused, and taken while accused was in a house of solitary confinement (R18). The testimony of the agent taking the statement was: that it was a true copy (R17); that he watched the certifying officer compare it (R15); that it set forth in substance what accused told the witness (R18); that the warning of rights was full; that it was taken in the supply room of the solitary confinement building (R16); and that originals of such statements were customarily forwarded to the Provost Marshal (R15). The trial judge advocate stated that the prosecution had made effort to secure the original (R15).

4. Accused after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R19).

5. The copy of the pretrial statement of accused was not admissible in evidence over objection by the defense. The reason is that there was no proof of reasonable diligence to procure the original or that the original was lost or destroyed (MCM, 1928, par.116a, p.119; CM 134547 (1919); CM 160570 (1924); Dig. Op. JAG 1912-40, sec.395 (25), pp.218-219; U.S. v. Reyburn, 6 Pet.352, 8 L.Ed.424 (1832); Minor v. Tillotson, 7 Pet.99, 8 L. Ed.621 (1833); note to Bouldin v. Massie's Heirs, 7 Wheat.122, 5 L.Ed.414 (1822); Cf: CM ETO 8690, Barbin and Ponsiek). This error, in the admission of evidence, however, was not fatal under the provisions of the 37th Article of War, because excluding its contents, there was substantial and compelling evidence of the accused's guilt as charged. The rule is that erroneous receipt in evidence of an extrajudicial confession will not require holding the proceedings of a court-martial invalid, if the evidence of accused's guilt, outside of the confession, is compelling (CM 160986 (1924), Dig.Op. JAG, 1912-40, sec.395 (10), p.206; CM ETO 1201, Pheil; CM ETO 4701, Minnetto; CM ETO 6302, Souza).

6. Disregarding entirely the pretrial statement, we are of the opinion that all the elements of the two desertions were proven by competent, substantial and compelling evidence. Each of the absences alleged, having been originally without authority, was presumed to have continued in like status until termination thereof was shown. Each was terminated by apprehension and at a time when accused was heavily armed. When first apprehended he gave a false name. The first absence was for a long period of 86 days, and the second began with escape from confinement and its termination was accompanied by resistance by force of arms. The offenses occurred in an active theater of operations. The court could reasonably infer that the absences were intended to be of permanent duration (CM ETO 4701, Minnetto; CM ETO 5406,

Aldinger; CM ETO 6093, Ingersoll; CM ETO 7379, Keiser; CM ETO 9843, McClain). Indeed, any other inference would be unreasonable.

7. The charge sheet shows that accused is 21 years of age and was inducted 12 February 1942 at Muskogee, Oklahoma. He had no prior service.

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

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

Wm. T. Sumner Judge Advocate

Edward K. Stevens Jr. Judge Advocate

Daniel K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 3

24 AUG 1945

CM ETO 12261

U N I T E D S T A T E S	)	XII CORPS
	)	
v.	)	Trial by GCM, convened at Bayreuth, Germany, 26 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RICHARD WILLIAMS (35577618), Battery A, 452nd Antiaircraft Artillery Automatic Weapons Battalion (Mobile)	)	

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DENEY, 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. a. Under Charge II and Specification, alleging that accused violated Article of War 75 in that, while before the enemy, he "quit his post at Alters Germany, on or about 1000 B hours, 7 April 1945, for the purpose of plundering and pillaging", the prosecution showed that while on duty as an antiaircraft gunner on an "M-51 mount" near Roedergrund, Germany (R20,23,27,42) on 7 April 1945, accused absented himself without leave (R13,15,18,19). It was not known where the enemy was. Once a machine gun was heard in woods 300 yards away (R16). There was no enemy aircraft activity (R16-17). Accompanied by another soldier, accused went to the town of Roedergrund. They drank schnappe, wine and beer either with the occupants of various houses (R20-22,27,37) or in their presence (R25-26,41-42). Accused became drunk and "smelled from whiskey" (R22,37). At the home of the burgermeister they found some rifles, which accused broke in pieces (R25).

b. For the defense, it was shown that accused and Private William E. Whitfield of his battalion went to Roedergrund at the time alleged and "started a canvass of the different houses looking for something to drink" (R49-50). They were successful and drank

liquor given them by various people in the town (R51-52). Accused broke some rifles that they found before it was explained that the weapons had been collected by the burgermeister in accordance with instructions given him by an unidentified American officer (R51).

c. After his rights were explained (R53-54), accused testified and described the manner in which he and Whitfield went to various houses, obtained liquor by asking for it, drank and smoked with different civilians and broke up some rifles that they found. Accused "shot at some chickens" (R54-58).

3. To sustain a finding of guilty of Charge II and Specification, the prosecution was required to prove that (a) at the time he absented himself, as alleged, he was serving in the presence of the enemy and (b) that he left with the intention of plundering and pillaging (MCM, 1928, par.141a, p.156). It was very apparent from the subsequent conduct of accused that he went with Whitfield to the town, not to plunder and pillage, but to drink liquor, which they obtained for the asking in substantial quantities and of some variety (Cf: CM ETO 5445, Dann; CM ETO 5446, Hoffman). The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the court's findings of guilty under Charge II and Specification (CM ETO 4565, Woods; CM ETO 4691, Knorr). It is unnecessary to consider whether or not the Specification contains an allegation of a lesser included offense of absence without leave in violation of Article of War 61, since such offense was already alleged under Charge I and Specification and of which accused was found guilty.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E L Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 1

5 DEC 1945

CM ETO 12271

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U.S. Army, 11 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 75 years. Loire Disciplinary Training Center, Le Mans, France.
Private AUGUSTINE CUOMO (31041088), Service Company, 180th Infantry	

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Augustine Cuomo, Service Company, 180th Infantry, did, at or near Ciebry, France, on or about 14 September 1944 desert the service of the United States by absenting himself without proper leave from his organization and did remain absent in desertion until he was returned to military control at or near Rehainviller, France, on or about 26 February 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. 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 75 years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders Number 106, Headquarters 45th Infantry Division, APO 45, U.S. Army, 19 May 1945.

3. Prosecution's evidence was substantially as follows:

The following extract copy of entries in the morning reports of Service Company, 180th Infantry, was introduced:

"21 November 1944.
31041088, Cuomo, Augustine Pvt.
Reasgd & not Jd Co fr 7th Repl. Depot
to AWOL 14 Sept./44.
/S/ H. G. WELLS
Capt., Infantry
Personnel Officer.

26 February 1945.
31041088, Cuomo, Augustine Pvt.
AWOL dropped fr rolls to dy 1630
26 Feb./45
/S/ H. G. WELLS
Capt.,Inf., Pers. Off." (R3; Pros. Ex. A).

Staff Sergeant Chester E. Blundell, of the Service Company, testified that on or about 14 September 1944, the company was near Epinal, France, and that he was supply sergeant and company headquarters section platoon sergeant (R3,5). At that time, accused was not present for duty with the organization (R5), and the last he knew of accused's status, it was absent sick in the hospital (R7). Witness was with the organization from 24 September 1944 to 26 February 1945, but during that period accused was never present for duty but, as far as he knew, was in the hospital (R8). On 26 February 1945 accused reported back to the company for duty. In response to inquiries by witness, who was then acting first sergeant, accused stated he had been at Marseilles, where he was "having a nice time", and that part of the time he was in a hotel and at other times he slept in barracks of enlisted personnel of military police and other units in the area (R6-7).

First Lieutenant James E. Stodgel, who investigated the case, testified that on 4 March 1945, accused, after a warning as to his rights, signed a sworn statement which was introduced and read in pertinent part as follows (R8-10):

"I came into the Army on 20 January 1942 and joined the 180th Infantry in May 1942 at Fort Devens. I was in the S-2 section of Headquarters Company, 2nd

Battalion, until 25 December 1943. Then I was assigned to Service Company. I worked at the switch board until it was abandoned. Then I worked on different details around Company Headquarters. I went to the hospital the last part of July. I was there about 2 weeks when I was sent to the Replacement Depot. I was there about three days when I caught malaria. I went back to the hospital for 21 days. Then I went back to the Replacement Depot and came to France with them. I stayed with them for awhile and took off about eight days after we hit France. I stayed in Marseille. I stayed in a hotel part of the time and had women once in awhile. I don't know why I took off. I intended to return in March. I did not want to stay away too long. I could not get any news from home. I was picked up in Toulon on or about 23 February and returned to my organization on 26 February 1945. Since that time, I have been working in the laundry. I did realize that I would be in trouble when I was AWOL so long. I will not go AWOL again" (R10; Pros. Ex. B).

4. Evidence for the defense was in material substance as follows:

Captain Charlie G. Weaver, evidently commanding officer of the Service Company, testified that accused, formerly of the "I and E" platoon, was sent to the company by 2nd Battalion Headquarters as a semi-exhaustion case. He was an average soldier and never caused trouble. When the company went to Anzio he was assigned as switchboard operator and performed his duties satisfactorily. About 1 August 1944, the last date witness heard of him, he was hospitalized because of a rash or fever and was dropped from the rolls. When the unit was in Southern France, a company clerk in the rear echelon received a pencil notification that accused had been reassigned to duty with the company. Because he never reported there, witness wrote a letter through channels to the base hospital requesting information as to accused's duty status (R12). Witness believed his company clerk received a special order showing accused's return to duty from the 2nd Replacement Depot, and picked him up as absent without leave. He was returned by military police to the company at Rehainviller (France), on 26 February 1945. Witness concluded, from the receipt of the order and the fact accused did not report, that he was a deserter and so informed him, but placed him on duty in a clothing exchange provisional upon his good behaviour. He received no word that accused had been provided with transportation to the company pursuant to the order (R12-14).

Sergeant John W. Davis, of the Service Company, testified that commencing in February, accused worked under him in the clothing exchange service and performed his duties in an excellent manner (R14-15).

After an explanation of his rights, accused elected to remain silent (R15).

5. a. Accused was charged with and convicted of simple desertion

commencing on or about 14 September 1944 and terminating on or about 26 February 1945. There is no competent documentary evidence in the record showing the initial date of absence without leave, one of the two elements of the offense. The morning report entry of 21 November 1944, recording him as absent without leave on 14 September, was signed by the regimental personnel officer, and was therefore incompetent as he had no such authority before 12 December 1944. Its incompetency was not waived by the statement of the defense that there were no objections to its admission in evidence (CM ETO 6107, Cottom and Johnson; CM ETO 6951, Rogers; CM ETO 7686, Maggie and Lewendowski). The testimony of Sergeant Blundell tends to indicate that accused was in a military hospital on 14 September. The only other evidence with respect to the date of inception of unauthorized absence is accused's extra-judicial statement, which admits an absence without leave commencing (as indicated by a computation of the approximate number of days preceding it referred to in the statement) some time after 14 September and terminating at the earliest 23 February 1945. That he was apprehended by American military police on that date, thus terminating his unauthorized absence, is fairly inferable from the testimony of Captain Weaver that he was returned to the Service Company by military police three days later (R13) (see Infra).

b. Accused's statement was an extra-judicial confession of the offense of absence without leave, a lesser included offense within that charged. The fact that he was charged with the greater inclusive offense of desertion does not alter its character as a confession rather than a mere admission. It was an acknowledgment of guilt (MCM, 1928, par. 114a, p.114) of the lesser offense, of which alone he might have been found guilty and guilt of which is includedin the instant findings. An accused can not be convicted legally (even of a lesser included offense) upon his unsupported confession (MCM, 1928, par. 144, p.115). All the reasons requiring evidence, aliunde a confession, of the corpus delicti of the offense, are present in this case to the same extent as if accused had also confessed an intent not to return to military service. To hold otherwise would be to ignore these reasons and to evade the rule requiring independent corroboration of the corpus delicti of an offense confessed.

Such corroboration is present in the instant record. The morning report entry of 26 February 1945 showed a change in accused's status from absent without leave dropped from the rolls to duty on that date. This entry, signed by the personnel officer, was competent evidence of the information recorded and was presumably made upon his personal or at least official knowledge (CM ETO 14362, Campise). It is thus immaterial that the Service Company Commander's information as to accused's status was based upon hearsay. In any event, it was his unqualified duty to know who were assigned to his organization and their status (CM 199270, Andrews 3 BR 343, 344 (1932)) and the morning report entry was not "obviously not based on personal knowledge" (CM ETO 14362, Campise, supra). In addition to this proof of absence without leave late in February, there is the testimony of Sergeant Blundell and Captain Weaver establishing accused's absence for the entire period alleged. Accused was returned by military police to the company at Rehainviller, France (a considerable distance from Epinal) on 26 February. The combined effect of this evidence is to

raise the probability of a protracted unauthorized absence. It is thus sufficient evidence of the corpus delicti to warrant admission of accused's confession of absence without leave (MCM, 1928, par. 114a, p. 114; of CM ETO 527, Astrella; CM ETO 14040, McCreary). The statement shows that accused,

> "went to the hospital the last part of July. I was there about 2 weeks when I was sent to the Replacement Depot /about 14 August/. I was there about three days when I caught malaria /about 17 August/ I went back to the hospital for 21 days. Then /about 7 September/ I went back to the Replacement Depot and came to France with them. I stayed with them for awhile and took off about eight days after we hit France. * * * I don't know why I took off. I intended to return in March. I did not want to stay away too long. I could not get any news from home. I was picked up in Toulon on or about 23 February and was returned to my organization on 26 February 1945. * * * I did realize that I would be in trouble when I was AWOL so long" (Pros. Ex. B).

The reasonable interpretation of the foregoing statement is that accused returned to the Depot, remained with it "awhile", went to France with it and went absent without leave eight days thereafter. The Board of Review may not take judicial notice of the date on which the "Replacement Depot" moved to France even were we informed by the record which Replacement Depot was involved.*

> "Such matters are not of common or general knowledge to the world at large, nor to the military establishment, * * * can now be determined only from secret reports * * * and judicial notice thereof would be improper (CM ETO 6226, Ealy)" (CM ETO 8358, Lape and Corderman).

It is thus utterly impossible to determine at what date accused went absent without leave, which date, according to his statement, was about eight days after he reached France with the Depot. There is no authentic method of measuring in days the phrases "for a while" and "so long". Particularly is this true in this case in view of accused's statement:

> "I don't know why I took off. I intended to return in March. I did not want to stayaway too long. I could not get any news from home" (Pros. Ex. B; underscoring supplied).

The entire statement, together with accused's oral admission that he had a "nice time" in Marseilles, part of which he spent in hotels and part with

---

* The incompetent morning report entry of 21 November 1944 mentions "7th Repl. Depot" (Pros. Ex. A); Captain Weaver testified that the order received by his clerk assigned accused to the company from the 2nd Replacement Depot (R14).

military units, indicates that his absence without leave prior to his apprehension on 23 February 1945 was of substantial duration but not necessarily long enough to support an inference of an intent never to return to military control. The burden was upon the prosecution to prove the initial date of accused's unauthorized absence. This burden it failed to discharge. but it did establish, through accused's statement, that he was absent without leave on 23 February 1945, and for a substantial but indeterminate period prior thereto. Defense testimony shows that he was returned by military police to his organization three days later. This is insufficient evidence to support an inference that the unauthorized absence continued after his apprehension. Rather, the inference is more reasonable that he was apprehended by military police, in whose custody he remained until his delivery to the company.

In CM ETO 9204, Simmers, the accused was charged with simple desertion commencing 3 October 1944 and terminating 26 December 1944. The only competent evidence with respect to the initial date of his unauthorized absence consisted of his apprehension by a military policeman on 26 December 1944 and an unsworn statement by accused through counsel admitting absence without leave and stating

> "he realizes that he made a mistake in being absent from his outfit for such a long time".

The Board of Review there held:

> "the admissions shown constitute admissions of absence without leave only and are not sufficiently broad to establish that the period of absence without leave admitted was the same as the period of absence without leave charged (Cf: CM ETO 7381; Hrabik). In the last analysis, the only fact which the instant record can be said to show with certainty is that accused was absent without leave on the day of his apprehension, i.e., 26 December 1944".

In the instant case, accused's confession makes it abundantly manifest that his unauthorized absence continued for a substantial but undetermined period, commencing after 14 September 1944 and terminating with his apprehension on 23 February 1945. Accordingly, in the opinion of the Board of Review, the record is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for such period.

6. The charge sheet shows that accused is 24 years of age and was inducted 20 January 1942. His service period is governed by the Service Extension Act of 194. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. Except as herein indicated, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is

legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for a substantial undetermined period commencing after 14 September 1944 and terminated by apprehension on 23 February 1945, in violation of Article of War 61, and legally sufficient to support the sentence.

8. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is authorized (Ltr. Hq. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 August 1945).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

Donald K. Gould Judge Advocate

(102)

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. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private AUGUSTINE CUOMO (31041088), Service Company, 180th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave for a substantial undetermined period commencing after 14 September 1944 and terminated by apprehension on 23 February 1945, in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings of guilty so vacated, viz: conviction of desertion in time of war, be restored.

3. In view of the reduction of the offense from desertion involving an absence without leave of 165 days to absence without leave for a substantial undetermined period, it is recommended that the period of confinement be reduced to a term not exceeding 10 years. In the event that you agree with this recommendation, the enclosed forms of action and GCMO should be modified accordingly. Please return the record of trial with required copies of GCMO.

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

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

(Findings of guilty of Charge and Specification, except so much as involves A.W.O.L. in violation of A.W. 61, vacated. Period of confinement reduced to five years, GCMO 663, USFET, 21 Dec 1945).

12271

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

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 12320

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	
Private First Class ARTHUR L. NORRIS (34428589), Headquarters and Headquarters Squadron, 42nd Air Depot Group	Trial by GCM, convened at APO 149, U.S. Army and Luxembourg, Grande Duche of Luxembourg, 7 and 15 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Arthur L. Norris, Headquarters & Headquarters Squadron, 42nd Air Depot Group did, at or near Loirve (Marne) France, on or about 16 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Eugene C. Walker, 1958th Quartermaster Truck Company (Avn), APO 149, U. S. Army, a human being by shooting him with a Sub-Machine Gun.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. All members of the court signed a recommendation that the sentence be reduced to 10 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution established that the body of a colored soldier, Sergeant Eugene C. Walker, was found along the side of a road near a bridge in Loivre, France, at about 0020 hours on 17 March 1945. A small amount of blood was running out of his mouth and he had 13 holes across his chest. His heart did not appear to be beating and he was cold (R21-23). The body was taken to a military hospital, where it was determined that the immediate cause of death was the perforation of the left ventricle by a missile (R28).

Paul J. Harold, an agent of the Criminal Investigation Division, testified that on 18 March 1945, in witness's presence, accused was warned of his rights by an agent named Gould, who later left the room, after which witness questioned accused for an hour and took a written statement from him.

In his statement, after a prefatory statement signed by him that he had been warned of his rights under Article of War 24, accused said that at about 2300 hours on 6 March 1945 he drove his jeep to a cafe in Loivre and asked for something to drink. A colored soldier with buck sergeant stripes entered the cafe. After an argument, this soldier struck him over the right eye and knocked him down on the floor. A fight ensued during which the sergeant bit accused on the thumb and forefinger of his right hand. Accused then left the cafe, returned in his jeep to Station A-62, and picked up his Thompson sub-machine gun which was in his tent. He drove back to the cafe, then turned back in the direction of Station A-62 and saw the colored sergeant walking along the side of the road a short distance beyond a bridge. He stopped his jeep beside him, picked up his machine gun, aimed and cocked it, and "let him have it". He did not know how many shots he fired at the colored soldier ("Govt" Ex.1a-f).

Accused asked to be sworn to testify at the trial only as to the voluntariness of this statement. He testified that Agent Gould had told him that "if I wanted to take that attitude, I would go straight to the firing squad" and that "the colonel is mad at you. I will have him down here on you". Then Agent Gould "got mad and left the building" (R16). Accused did not testify, however, that Agent Harold used any force or threats. Harold denied that such statements were made by Gould (R12,13).

Major Humphrey P. O'Leary, investigating officer of the charges, testified that he explained accused's rights under Article of War 24, after which accused made and signed a written statement. This statement, which was dated 9 April 1945, is substantially the same as the statement taken by Agent Harold, again acknowledging that he aimed and shot his machine gun at the colored sergeant (R24-25; "Govt."Ex.2a-b).

4. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness. He testified that when he was eight years old, his father had been killed by a "colored fellow" (R34). On the night in question he drank about a quart and a half of champagne and about a half glass of whiskey. He drove to the cafe, and the events occurred which were described in his pre-trial statements. He did not know why he had his weapon with him when he came back from Station A-62 to the cafe the last time (R36).

Other witnesses for the defense testified to the "very good" reputation of accused (R38,39) and his superior rating (R39). It was stipulated that records showed that accused left Station A-62 at 2325 hours on 16 March 1945 (R30-31).

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

The first question raised is as to the voluntariness of the pre-trial statement of accused taken by Agent Harold. An issue of fact was presented to the court, and its determination that this statement was voluntarily made is supported by substantial evidence (CM ETO 13279, Tielemans, et al). A similar statement was taken by Major O'Leary three weeks later without any question being raised as to its voluntary nature. This statement was in any event competent and decisive (Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct.1208, 88 L.Ed. 1481 (1944)).

The next question raised is as to whether there is sufficient evidence of the corpus delicti independent of confessions. In the opinion of the Board of Review, the present case comes squarely within an example given in the Manual for Courts-Martial as follows:

> "If unlawful homicide is charged, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible" (MCM, 1928, par.114a, p.115; see also CM ETO 14040, McCreary).

Here there is further evidence showing accused had an opportunity to kill deceased, in addition to accused's sworn testimony at the trial as to the altercation and his securing of his weapon.

There was substantial evidence in the record to sustain the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite intent and to support the court's finding that accused was guilty of murder under Article of War 92 (CM ETO 11269, Gordon; CM ETO 12850, Philpot). It was the function and duty of the court and the reviewing authority to weigh the evidence and to determine whether drunkenness, or passion under adequate provocation, not cooled by the passage of time, reduced the crime from murder to manslaughter, and, since sufficient evidence in the record supports the court's findings, the Board of Review is powerless to disturb such determination (Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); CM ETO 6682, Frazier; CM ETO 11958, Falcon).

6. The charge sheet shows that accused is 36 years eight months of age and was inducted 30 September 1942 at Camp Shelby, Mississippi, to serve for the duration of the war plus six months. He had no prior service.

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

Wm. F. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald F. Cavell Judge Advocate

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

BOARD OF REVIEW NO. 3

8 SEP 1945

CM ETO 12329

U N I T E D S T A T E S	)	VIII CORPS
	)	
v.	)	Trial by GCM, convened at Possneck,
	)	Germany, 27 April 1945. Sentence:
Private WALTER P. SLAWKAWSKI	)	Dishonorable discharge, total for-
(32828457), 511th Engineer	)	feitures and confinement at hard
Light Ponton Company	)	labor for life. United States Peni-
	)	tentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Walter P. Slawkawski, 511th Engineer Light Ponton Company, did, at Oberneisen, Germany, on or about 1 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Minna Schaefer.

Specification 2: In that * * * did, at Oberneisen, Germany, on or about 1 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Marie Weil.

12329

He pleaded not guilty and, four-fifths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. Four-fifths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the period of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

At about 2030 hours on 1 April 1945, accused and Private First Class Joseph H. Benefield, while returning to their battery area after having secured and consumed wine at several farmhouses on the outskirts of Oberneisen, Germany, got slightly off the road in the darkness and fell into a small stream or ditch. Shortly thereafter, they passed the house of Herr Karl Schaefer and asked him by means of gestures and broken German if they might enter for the purpose of drying their wet clothing (R8,17,22). Both men were armed, accused with a Garand service rifle and Benefield with a Colt .45 automatic pistol which he was carrying in a shoulder holster (R6,14, 36). After being admitted into the kitchen, accused leaned his rifle against the wall and both men undertook to get themselves dry at the stove (R11,13,18,22). Schaefer's wife, Frau Minna Schaefer, was present in the kitchen at the time (R22,32). Shortly after being admitted into the kitchen, accused asked Benefield for his pistol and when Benefield gave it to him, he loaded it and pointed it first at Schaefer and thereafter at Benefield "who raised his hand" (R9,22,26, 32,33). Then, after telling Benefield he felt ill, he left the kitchen. Herr and Frau Schaefer testified that, upon leaving, he "went in front of the house door and shot one time" (R22,27,32,36). Benefield testified that during the time accused was outside the house he heard a noise similar to the sound produced when a weapon is fired (R9). When accused came back into the kitchen some three or four minutes later he returned the pistol to Benefield who unloaded it and replaced it in his holster (R13,14,18). Some four or five minutes later, accused pointed at Schaefer, said "raus", and walked into a hallway outside the kitchen. Schaefer understood that he "had" to accompany him and did so. When accused and Schaefer left the kitchen, Benefield closed the door leading into the hallway (R33). Once in the hallway, accused made Schaefer understand that he "wanted to go with the woman into the bed". Schaefer protested in German, telling the accused that he "should better kill me", but accused indicated that he did not understand what Schaefer was saying and ordered him to call his wife from the kitchen (R23,27). Although accused did not threaten Schaefer and did not have his rifle with him at the time, Schaefer was afraid both for his wife and himself, stating

that "the penetrating glance of the eye which he gave to me and my wife made me fear him" (R27-29). He accordingly called his wife from the kitchen in accordance with accused's demands and thereafter, also in accordance with the orders of the accused, returned to the kitchen (R23,29). Accused then went into an adjoining bedroom with Schaefer's wife (R23,24).

Frau Schaefer testified that, after being called into the hall, accused asked her to go to bed with him and that "my husband did not want to allow it and I did not want to do it, but how could we defend ourselves" (R34,37). Accused took her into a bedroom on the ground floor in which her three children, of whom the oldest was six years of age, were sleeping. There, he directed her to lie down by pointing at the floor (R34,37,38). She took a pillow from the bed, placed it on the floor, and complied with his directions (R34,38). When asked why she placed the pillow on the floor before lying down, she testified that in her excitement "I did not know what he was trying to do with me and he wanted to lock the door and it couldn't be locked" (R38). She also testified that she voluntarily removed her pants and did so because "I was not well and wanted to show him that, and he put the lights out" (R35). She told accused that she was not well and that she did not want to engage in intercourse. However, accused indicated that he did not understand what she was saying and proceeded to have sexual intercourse with her (R35). She did not cry out or attempt to push him from her (R35,39). When asked why she did not cry out she stated that "He put his tongue in my mouth so I could not do it". She testified that she did not resist because "I could not do it and I thought he would shoot my children and my husband" (R38). She thought he might shoot her husband because "my husband told the soldier to shoot him before he does it" and her children because "he had the pistol in his hand before". She admitted, however, that accused made no threatening gestures toward the children (R35).

Herr Schaefer testified that after he was sent back to the kitchen by the accused, he started several times to go to the door leading in to the hallway but that each time he did so Benefield, who had remained in the kitchen, motioned and "made the noise 'pst'", by which he understood he was not permitted to leave (R24). He stated that he heard no cries while his wife was in the room with accused but added, "My wife was very excited. I don't think that she could cry any more" (R24).

After the act of intercourse, both the prosecutrix and the accused returned to the kitchen (R13,35). Benefield testified that Frau Schaefer's clothing was not disarranged and that she did not appear nervous, excited, or to have been physically mistreated (R13). Schaefer testified that his wife could "almost not speak for excitement" and that, when he asked her whether the soldier had used her, she replied in the affirmative and burst into tears (R24,25). He also testified that she "cried all night after the soldiers left"

(R27). When accused returned to the kitchen, he offered Schaefer a cigarette "which I did not want to accept and he put it into my mouth" (R25). Then, after hurriedly putting on some of the wet clothing which he had previously removed, accused retrieved his rifle from its resting place near the stove and the two men left the house (R10, 24,26,36). On the following morning, "as soon as we were allowed in the station", Schaefer reported the occurrences of the previous night to the Burgomeister (R26,36).

After leaving the Schaefer house, accused and Benefield again resumed their progress toward their battery area. Upon passing a house where a light could be seen in one of the upstairs windows, apparently in violation of blackout regulations, accused said he was going to see about it and both men then went to the house to investigate the matter (R10,11,14,40). This house was occupied by Heinrich Diefenbach, the owner, and by Frau Marie Weil, an evacuee then living temporarily in one of the upstairs rooms (R39,43). Upon being admitted by Diefenbach, accused went upstairs presumably, according to Benefield, to "check on the light" (R11,40).

Frau Weil testified that at about 2330 hours on 1 April, after she had gone to bed with her small daughter, she heard various sounds on the floor below followed by the sound of footsteps on the stairs. Shortly thereafter, accused entered her bedroom, which was dark, and said something about electricity (R44,46,47). When she attempted to get up to turn on the lights, he pushed her back into bed (R45,47). After asking her whether there were any German soldiers in the house, he struck several matches and looked in the closet in her room and searched one of the adjoining rooms. After he returned from the adjoining room, Frau Weil's daughter wanted to go downstairs and, although accused at first wanted to prevent her departure, after it was explained to him that she wanted to go to the toilet he permitted her to leave. He then closed "the connecting door to the stairs" and came back into the bedroom, putting his helmet on a chair and his rifle, which he did not point at Frau Weil at any time, near the door (R44). Frau Weil's bed was in the corner of the room in such a position that both "the head piece and the length" were against a wall (R53). As sleeping garments, she was wearing her nightgown and "a pair of drawers" (R45). After placing his rifle near the door, accused approached the bed and remained standing there for a moment. Frau Weil stated that she made no attempt to arise at this time because accused "was standing in front of my bed" and also "I could not do it because I was too excited" (R45,48). While the exact sequence of events next occurring is not entirely clear from the record, it appears that accused next leaned over the bed, put his hands on either side of Frau Weil's head "right and left * * * on the pillow" and kissed her (R45,48). She stated that she could not turn her head or otherwise prevent this because of the position of accused's hands on the pillow (R48). He then started to get into bed with her. She pushed him back at least three or four times and several times told

him to leave her in peace because she was not well (R45,47,53). However, she was unable to hold him back and he laid himself on top of her (R45,53). Then, with his feet "in the bed and with one hand holding himself on the bed" he raised her nightgown (R45,53). After this, he pushed her pants to one side and had intercourse with her (R45,49). She testified that she ceased resistance after he laid himself on top of her because she "could not do anything against such a heavy man" (R53). When asked whether he forced her legs apart she testified,

> "Yes, he did. Such a man is stronger than I am. I could not resist such a man because the man was stronger than I am" (R49).

When the question was repeated, she stated "What does force mean? Such a man is stronger than I am and I cannot do anything against such a man" (R49). She admitted that accused did not hit her or otherwise physically harm her and that the only injuries she suffered were "personal" (R45,46). When asked by the trial judge advocate whether she at any time gave her consent to the act of intercourse, she replied, "No", and when asked whether she resisted him to her full ability she replied, "Yes" (R46). After accused completed the intercourse, he noticed that she was trembling and told her, "You don't have to make so, I want (sic) do anything". Then, after promising to return the following night with some chocolate, he left the bedroom (R46). After he rejoined Benefield downstairs, the two men left the house (R11,41,48).

4. For the defense, the man with whom accused shared quarters on 1 April testified that accused returned to the billet at about 2300 hours on that date and went to bed shortly after his return. The witnesses noted nothing unusual about the accused's appearance and nothing unusual about his clothing except that it was somewhat damp. Accused explained that he had fallen into a creek during the course of the evening. Although they conversed for a while before going to sleep, accused did not indicate that any other unusual event had occurred that night (R50-52).

Defense counsel stated that accused's rights as a witness had been explained to him and that he elected to remain silent.

5. There is ample evidence in the record to show that accused had sexual intercourse with both of the complaining witnesses at the time and place alleged. However, in view of the nature of the force employed by accused and the quality of the resistance offered by each prosecutrix, some question arises whether the acts of the accused constituted rape.

At common law, three elements are necessary for the commission of the offense--carnal knowledge, force and the commission of the act without the consent and against the will of the prosecu-

trix (see 140 ALR at 380). With reference to the element of force, it should be remembered that

> "It is not essential that the force employed consist of physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or grievous bodily harm or other injury * * * " (Winthrop's Military Law and Precedents (Reprint, 1920), p.678).

Further, while resistance by the woman is usually required as showing that the act took place without her consent and against her will, and while the generally accepted rule in this connection is that

> "if the woman at the time was conscious, had the possession of her natural, mental, and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must appear that she did resist to the extent of her ability at the time and place and under the circumstances" (44 Am. Jur., sec.7, p.905),

it is important to note that

> "absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance would be useless if not perilous" (Winthrop's Military Laws & Precedents (Reprint, 1920), p.678),

and that

> "Resistance is necessarily relative. It is accordingly not necessarily illogical for courts to apply the requirement of most vigorous resistance to common cases and to modify it in varying degrees and peculiar circumstances, and to refuse to apply it to exceptional cases" (44 Am.Jur., sec.7,p.905).

In the instant case, the resistance offered by Frau Schaefer consisted of verbal protestations only. She failed even to offer token resistance and readily permitted accused to have intercourse with her when he took her into the bedroom. Isolated from its setting, her conduct at that time would indicate that she consented to the act. However, it must be remembered that accused, to her a soldier of an enemy force, previously not only pointed a pistol at her husband but significantly demonstrated that he was capable of using it by

going outside the house and firing it. This conduct probably was intended to convey an implied threat to use violence unless the occupants of the house submitted to his demands and, in any event, it was easily susceptible of such a construction by Frau Schaefer. Further, the testimony of Herr Schaefer indicates that in addition to the handling and firing of the weapon the conduct of the accused generally was menacing. When Frau Schaefer was taken into the bedroom a few moments later, the door was closed and the possibility of aid from her husband cut off not only by accused's prior conduct but by the presence of Benefield in the kitchen. Under these circumstances, it is easily possible that Frau Schaefer was not only terrified by threats but felt herself in such a position that resistance would have been useless as well as dangerous. While she did not testify in so many words that she at no time gave her consent to the act of intercourse, her testimony that she did not want to engage in intercourse amounts in substance to an assertion of lack of consent. And, keeping in mind that her position was to her apparently hopeless, that the intercourse took place on the floor of a bedroom in which her three small children were sleeping, that her husband was directly across the hall, that she was menstruating, and that she cried all night after the men left, there is little reason to doubt this testimony.

Frau Weil's resistance, while more vigorous than that of Frau Schaefer, was none the less comparatively feeble. Yet, here again, the mere fact that her resistance was of a comparatively minor quality does not necessarily show that she consented to the act of intercourse. Accused, an armed enemy soldier, entered her room without authority or permission after she had retired for the night. When she tried to arise, he pushed her back into bed. After searching her closet and an adjoining room, he returned to her room and closed the door leading to the stairway. He then leaned his rifle near the door. Her bed was in such a position that only one side of it opened out into the room. After standing in front of it for a moment, he made advances toward her despite her repeated efforts to push him away. He then laid himself, not on the bed, but directly on top of her at which she ceased resistance because she could do nothing against "such a heavy man". She expressly testified that she did not consent to the act of intercourse and there is nothing improbable about such testimony; she had never seen the accused before and there is no reason to suppose that she would have consented under the conditions shown. Further, despite the minor quality of the resistance offered, in neither instance was there any reason for accused to suppose that he was accomplishing a seduction nor any legitimate basis for an honest and reasonable belief on his part that the prosecutrix in question was yielding her will freely to the commission of the act (see 44 Am.Jur.,sec.12,p.909). He none the less proceeded to have intercourse with each. For the reasons stated above, the Board of Review is of the opinion that, in view of all the circumstances shown, the court could find that accused had carnal knowledge of each prosecutrix by force and without her consent and that the

record is accordingly legally sufficient to support the findings of guilty (Cf: CM ETO 8837, Wilson; CM ETO 9083, Berger and Bamford).

6. The charge sheet shows that accused is 22 years ten months of age and was inducted 9 March 1943 at New York, New York. He had no prior service. There is attached to the record of trial a letter signed by each member of the court recommending clemency and suggesting dishonorable discharge, total forfeitures, and confinement at hard labor for ten years as an appropriate sentence for the offense of which accused was convicted.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

28 SEP 1945

CM ETO 12331

U N I T E D S T A T E S	) 84TH INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Salzwedel,
	) Germany, 7 May 1945. Sentence:
Private First Class BROOKS A. JOHNSON (34530595), 784th Ordnance Light Maintenance Company	) Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Brooks A. Johnson, 784th Ordnance Light Maintenance Company did, at Arendsee, Germany, on or about 20 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Helmut Schonberg, a human being by shooting him with a carbine.

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

12331

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

On 20 April 1945 at about 1600 hours, accused and another soldier visited the house of Herr Helmut Schonberg in Arendsee, Germany. Present in the house were Herr and Frau Schonberg, two children, and a relative, Frau Krause. While in the house the soldiers drank some liquor with the family. During the visit accused was always fidgeting with his rifle, and at one time some of the cartridges came out (R27,37). Just before they left, accused arose from a couch on which he was sitting, patted the hands of Frau Krause, and tried to make motions for her to come outside, leading her to understand from his motions and gestures "that I was supposed to have a baby with him" (R43). The soldiers left about 1800 hours (R27) and returned at about 2000 hours, at which time Herr Schonberg's father and a Pole, Francinki Chorzempa, were also present in the house. At about 2045 the soldiers left again (R28).

A few minutes later accused returned alone to the house, entered, asked Herr Schonberg and Chorzempa to come out with him, pushed them in front of him (R28-29), and told them to go forward and to stand at attention (R48). They raised their hands and Chorzempa shouted "Comrade, don't shoot". Accused then placed under his arm pit the carbine he was carrying and placed a bullet in the chamber. When the bullet was inserted, Chorzempa, who was standing beside Schonberg, walked backwards seven or eight meters (R49-50) and saw accused fire a shot (R55). Chorzempa ran towards the side of the house and into the nearby woods (R49). About About five shots were fired (R29,50). Upon hearing the shots Frau Schonberg jumped out of a window (about three feet from the ground), saw her husband lying on the ground, raised his head, and gave him some water. At that time she saw accused approach her with his carbine in front of him. She jumped back through the window, grabbed her two children, and, with Frau Krause, went into the woods (R30).

The next day the body of Herr Helmut Schonberg was examined by an American Army surgeon and found to be in complete state of rigor mortis, with two bullet wound entrances. In his opinion, the man had been dead between 12 and 24 hours, the death had been caused by bullet wounds, and the bullets had been fired from a carbine (R8,9).

4. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness (R55-56), and testified that on 20 April in the afternoon he and Corporal Spears had visited a house where they found "two women, two kids and an old man". Later they returned to the company. After supper they saw a Pole who murmured something.

> "Spears walked off to the right and the Pole motioned me down to the house. About 100 yards to the house and I decided I would go no further. He went on down towards the house. I had been there

about 5 minutes when I heard rapid fire. In the meantime I was walking toward where Spears was and I hollered for Spears two or three times and didn't get an answer, so I decided to go back to the company and see if he was there and I went up the company" (R56).

He ordinarily had around 12 to 13 rounds in his carbine, which he was carrying on the evening in question. In answer to the question "How do you account for the fact that you usually carry 12 or 13 and the next day you only had 7?" he said, "I had fired some rounds at the town we had moved from" (R60-61,64).

No other witnesses appeared for the defense.

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

Every element of the crime of murder as alleged was proven by clear, substantial evidence (Cf: CM ETO 11958, Falcon; CM ETO 12377, Graham; CM ETO 12850, Philpot; CM ETO 14380, Hall). There was ample evidence in the record from which the court could properly/beyond a reasonable doubt that accused committed the crime alleged. That it was in part evidenced by enemy witnesses cannot affect its sufficiency as a matter of law, for Congress has not accorded to Board of Review sitting in foreign theaters the power to weigh evidence. While the precise motive for the crime is not definitely shown in the record, lest it was to remove all obstacles to rape of Frau Krause, the proof is nevertheless sufficient(26 Am. Jur., sec. 36, p.180; 1 Wharton's Criminal Law (12th Ed., 1932) sec.156, pp.210-211). Again, while there were some inconsistencies in the testimony of Chorzempa, it was the function and the duty of the court and reviewing authority to weigh the evidence and, since there is sufficient evidence in the record to sustain the findings, the Board of Review is without power to disturb such determination (Stevenson v. United States, 162 U.S. 313, 40 L. Ed. 980, 16 S. Ct. 839 (1896); CM ETO 6682, Frazier; CM ETO 11958, Falcon; CM ETO 16581, Atencio).

6. The charge sheet shows that accused is 33 years eight months of age and was inducted 15 November 1942 at Camp Blanding, Florida. He had no prior service.

7. The court was legally consituted 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, 8 June 1944, sec.II, pars.1b(4), 3(b).

Wm. J. Lemmon Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald P. Connell Judge Advocate

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

BOARD OF REVIEW NO. 3

1 SEP 1945

CM ETO 12350

U N I T E D S T A T E S	102nd INFANTRY DIVISION
v.	Trial by GCM, convened at Stendal, Stendal, Prussia, Germany, 24 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ANTHONY G. SPINELLI (35913535), Company A, 406th Infantry.	

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

---

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

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

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

Specification: In that Private Anthony G. Spinelli, Company A, 406th Infantry did, without proper leave, absent himself from his command from about 9 December 1944 to about 17 February 1945.

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

Specification: In that * * * did, at Welz, Germany, on or about 23 February 1945 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: the crossing of the Roer River to attack Boslar, Germany, and did remain absent in desertion until he was apprehended at Liege, Belgium on or about 26 March 1945.

He pleaded not guilty to, and was found guilty of, all charges and specifications. Evidence was introduced of one previous conviction by special court for absence without leave for 57 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 8 December 1944, while a member of a "detail of men" on pass in Paris, accused failed to report at the designated assembly area for return to his organization (R9). The remainder of the group returned without him, arriving on the 9th. Accused's company commander satisfied himself that accused was not then present, and did not see him thereafter until he was returned to the company on 20 February 1945, whereupon he was at first placed under guard but released from arrest the following day at Baseweiler, Germany, "in order that he could accompany the organization in an attack" (R7-8). When he released accused, the company commander "informed him he was to make the attack with the company and if he attempted to leave his organization without proper authority he would be considered deserting from military service with the intent to avoid hazardous duty" (R8). Accused was apprised of the tactical situation, including the crossing of the Roer River as an initial phase of the attack. The company, with accused present, moved toward the Roer, halting at Welz, Germany, for a rest. There his absence without leave was first discovered and an unsuccessful search made for him forthwith (R10-11). He was returned to military control at Liege, Belgium, on or about 26 March 1945 (R15).

4. The only evidence adduced on behalf of the defense was the testimony of accused, summarized as follows: He joined the company as a reinforcement in November 1944 and participated in the battle of Linnich, "leading a squad of mortarmen" (R16-17). After his return from an absence without leave on or about 17 February 1945, his "platoon leader, Lieutenant Smith, told me that the company had permission to release me in order that I might participate in the coming attack, and if I pulled through the attack it would be much easier on my coming trial. He went with the company from Baseweiler to Welz, Germany, having spent the interval between then and his return "in the backyard of the house in which we were staying digging six-by-sixes." He heard no plans or discussion of the impending operation, but was digging holes all the time (R17). At Welz, the company commander gave orders for everybody to rest for awhile (R17-18). Some of the men went into cellars, some moved off on the side of the road. Accused "dozed off" in a cellar and was asleep when the company left. "Sometime in the morning," he woke up and "couldn't" find the company, so he went back to Baseweiler, thinking he might find the company there. He was "unable to find anyone to help me, so I started back to the depot that had shipped me up so that they could help me locate my outfit"(R18).

12350

On cross examination, he testified that he knew his company would ultimately join the attack, but not that it was preparing to jump off at Welz, because it was then in reserve (R19). When he left the cellar after waking up, and found his company gone, he returned to Baseweiler, leaving his rifle in the cellar at Welz. From Baseweiler, he went in search of a replacement depot, thinking that "they could get me back to my company." He went first to St. Tronn, Belgium, thence 17 miles further to Liege, the trip consuming about two weeks (R20). He did not report his status to any military organization or officer - or to anyone at all after leaving Baseweiler, where he inquired of an enlisted "medic" if the latter knew the whereabouts of his organization (R20-21). In Liege he was "picked up" by military police (R22).

5. The Specification, Charge I, alleges that accused was absent without leave from his command from 9 December 1944 to 17 February 1945; but omits any allegation of place. The unauthorized absence from his organization was proved. As place is not of the essence of the offense, the Specification is not fatally defective (CM ETO 9257, Schewe). Competent evidence established every element of the offense of desertion to avoid hazardous duty (MCM, 1928, par.130a, p.143) alleged in the Specification, Charge II. All findings of guilty are legally sustained.

6. The charge sheet shows that accused is 19 years 8 months of age. With no prior service, he was inducted 10 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 desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

12350

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

BOARD OF REVIEW NO. 1 1 SEP 1945

CM ETO 12377

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER
v.	
Private HERBERT GRAHAM (34027262), Company A, 41st Engineer General Service Regiment	Trial by GCM, convened at Marseille, France, 16 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 Herbert Graham, Company A, 41st Engineer General Service Regiment did, at Calas France on or about 12 December 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Wilfred L. Broussard, a human being by stabbing him with a knife.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for six hours in violation of Article of War 61 and failure to obey an order of a non-commissioned officer in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. 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. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States 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 established that at about 2000 hours on 12 December 1944 accused, Privates Amos Buckines and George White, and three other soldiers, all colored members of the 41st Engineer General Service Regiment, were drinking at a table in the Bar Tabacs at Calas, France (R10,25,26). There were about eight or ten colored soldiers in all, but most of the soldiers present in the cafe were white, the total number of soldiers being variously estimated by the witnesses at from 35 to 92 (R15,27). A fight developed between White and a white soldier (R11,41,44). Someone said, "Let all the peaceful soldiers get out," and the soldiers in the cafe started leaving by the front and side doors (R21). Accused was seen to arise from his table and go toward the side door. He and a white soldier were then seen fighting together (R12,15). The only eyewitness to the fight, Buckines, did not know whether or not the white soldier involved was the same one who had previously fought with White (R20). Accused grabbed the clothes of the white soldier with his left hand, and stabbed him three times in the rear of the left shoulder with a long hunting knife (variously estimated at from six to 12 inches (R14,29,43)), which accused held in his right hand. The white soldier fell near the side door of the cafe, through which accused then made his exit (R12-14).

Accused made a voluntary written pre-trial statement in which he said that he was starting toward the side door when a white soldier stood in his way and said, "You son of a bitch, you are not going out".

> "I then saw this same soldier grab a short bayonet from inside his jacket with his left hand. He was about to pass the bayonet to his right hand when I pulled out a black handled knife from my right trouser pocket. I then grabbed the right hand of this white soldier with my left hand and pulled him closer to me and stabbed him in the back two times" (Pros.Ex.3).

About 2330 or 2400 hours the body of a dead white soldier, identified as Private Wilfred J. Broussard (R48,49,52,53,70,71), was found in the cafe. A post mortem examination showed that the direct cause of death was a hemorrhage resulting from a tear in the aorta apparently produced by a sharp instrument. There were two wounds, one in the right chest and one in the left chest, with the points of entry in the back (R74,76,80).

Outside of accused's pre-trial statement, there was no evidence that Broussard had a weapon of any kind. Buckines, the only eyewitness to the fight between accused and the white soldier, testified that he did not remember seeing at any time a knife in the latter's hands (R12). No weapon was later found on the body of Broussard (R58). A white soldier, who was with Broussard in the cafe, did not see a bayonet on him that night (R70). Two colored soldiers, however, testified that some of the white soldiers in the cafe had short bayonets or knives with them (R36,44) There was other fighting in the cafe at the time, and Broussard's companion was hit with a chair when he was going through the front door (R72).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R83). The sole witness for the defense was the first sergeant of accused's company, who testified that accused was a satisfactory soldier (R86).

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

of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

The defense at the trial moved for a finding of not guilty on the ground, among others, that there was insufficient proof that accused was the one who killed Broussard because of the showing that other fights occurred in the cafe, with the possibility that some one else killed Broussard while the soldier stabbed by accused may have later left the cafe (R81). In the opinion of the Board of Review, however, there is sufficient substantial and certain evidence from which the court could properly infer that accused was the one who stabbed Broussard. The evidence established that accused stabbed a white soldier in the back with a long hunting knife either two or three times. The body of Broussard was found in the cafe at about 2330 or 2400 hours with two deep wounds in the back, apparently caused by a sharp instrument entering from the rear. There was no evidence that a sharp instrument was used by anyone else in any other fight in the cafe that night. No other body was shown to have been found in or near the cafe. Sufficient evidence establishes that the corpse found was that of Wilfred L. Broussard, the human being alleged in the Specification to have been killed by accused.

In the opinion of the Board of Review, clear, substantial evidence proves the corpus delicti to support accused's pre-trial confession (CM ETO 14040, McCreary), which confession, together with such evidence, amply supports the court's finding of guilty of murder, as alleged.

Accused's contention, as expressed in his pre-trial confession, was that he was acting in self-defense in stabbing the white soldier because he saw him take a short bayonet from inside his pocket. There was no evidence, outside this confession, to support accused's contention. Buckines, the only eyewitness, saw no weapon in the white soldier's hands. Broussard's companion testified that he did not see deceased with a bayonet. No weapon was found on Broussard's body. Under this state of the record the question of whether accused was acting in self-defense was one of fact for the determination of the court (CM ETO 3180, Porter; CM ETO 4640, Gibbs; CM ETO 9410, Loran; CM ETO 11178, Ortiz; and authorities cited therein).

The court was within its province in finding accused guilty of murder rather than manslaughter. It was justified in holding from the evidence that accused

stabbed deceased as a result of malice and not the heat of passion engendered in a mutual combat. The evidence established that accused was dangerously armed and it contradicts his pre-trial statement that deceased was armed (Cf. 40 CJS, sec.48b, pp.912,913).

6. The charge sheet shows that accused is 23 years four months of age and was inducted 20 March 1941 at Fort Jackson, South Carolina, to serve for one year. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

8. The penalty for 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).

Wm. F. Sorrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Boyd Judge Advocate

(130)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private HERBERT GRAHAM (34027262), Company A, 41st Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12377. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 12377).

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

(Sentence as commuted ordered executed. GCMO 420 USFET, 19 Sept 1945).

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

BOARD OF REVIEW NO. 5

30 AUG 1945

CM ETO 12381

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHNNIE L. PORTER, (38032598), Headquarters and Service Company, 388th Engineer General Service Regiment (TC).	Trial by GCM, convened at Paris, France, 2 January 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

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

Specification: In that Private Johnnie L. Porter, Headquarters and Service Company, 388th Engineer General Service Regiment, European Theater of Operations, United States Army, did, at or near Paris, France on or about 24 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Vincennes, France on or about 26 October 1944.

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

Specification: In that * * * at or near Paris, France, on or about 25 October 1944, did wilfully dispose of

12031

gasoline, military property of the United States, thereby wrongfully diverting such property from use in military operations in a theater of war.

He pleaded not guilty and all the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge II as involves a finding of guilty of "wilfully attempting to dispose of gasoline, military property of the United States, thereby diverting such property from use in military operations in a theater of war", approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in this case and the recommendation for clemency by the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Paragraphs 5 and 6 of the review of the Staff Judge Advocate of the European Theater of Operations, attached to the record of trial, contain an adequate and fair summary of the evidence introduced by the prosecution and by the defense.

Accused absented himself without leave on 24 September 1944 and remained so absent until he was apprehended near Paris on 25 October 1944. His unit was stationed at Omaha Beach. He took with him, without authority, the truck he was driving for his organization. At the time of his arrest he and two other soldiers were in possession of an Army truck loaded with an undisclosed number of five-gallon cans of gasoline they had stolen from a gasoline dump near Paris. The gasoline was property of the United States. Accused and his companions intended to sell the gasoline for their own benefit. He had participated in similar activity during the period of his absence.

4. The length of the unauthorized absence in an active theater of war, its termination by apprehension, and the criminal transactions in which he engaged in order to obtain funds, justified the court in drawing the inference that accused intended to remain permanently away from his organization. The finding that he deserted the service was therefore warranted by the evidence (MCM, 1928, par. 130a, p.143; CM ETO 952, Mosser, CM ETO 1629, O'Donnell).

The reviewing authority approved a finding that accused wilfully attempted to dispose of gasoline, military property of the United States,

"thereby diverting such property from use in military operations in a theater of war". The willful attempt to dispose of the gasoline was amply proved by the evidence.

5. The charge sheet shows that accused is 24 years and eight months of age and enlisted 29 May 1941 at Fort Sam Houston, Texas. No prior service is shown.

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

7. 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).

John Rannbtell Judge Advocate

Jr L. Irwin Judge Advocate

Anthony Julian Judge Advocate

(134)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 31 AUG 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private JOHNNIE L. PORTER (38032598), Headquarters and Service Company, 388th Engineer General Service Regiment (TC), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support findings of guilty as approved and the sentence as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12381. For convenience of reference, please place that number in brackets at the end of the order. (CM ETO 12381).

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

(Sentence as commuted ordered executed. GCMO 424, USFET , 19 Sept 1945).

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

BOARD OF REVIEW NO. 3

23 AUG 1945

CM ETO 12393

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Bickendorf, Germany, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Private First Class JOHN C. KOHLENBURG (33733990), Company A, 36th Armored Infantry Regiment	)	

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 with the European Theater.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Pfc John C. Kohlenberg Company A, 36th Armored Infantry Regiment, did, in the vicinity of Baclain, Belgium, on or about 15 January 1945, misbehave himself before the enemy by refusing to advance with his command, which had then been ordered forward by Captain Walter I. Berlin, to engage with the German Army, which forces the said command was then opposing.

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

bers 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, 3rd Armored Division, approved the sentence, recommended commutation, and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence 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. Accused was charged with misbehavior before the enemy by refusing to advance with his command, which had been ordered forward by Captain Walter I. Berlin, to engage with the German army. The uncontradicted evidence shows that, at the time and place alleged, accused, stating he "could not take it", refused to accompany his platoon on its assigned mission of dismounting from half tracks, moving forward, and maintaining a road block southeast of Baclain to furnish flank protection to American troops then engaged in combat with the enemy (R6-7,15). The road block was subject to enemy artillery, mortar, and "a little" small arms fire (R7). Learning that the accused had remained at the assembly area with the unit vehicles - about a mile from Baclain - Captain Berlin, the company commander, sent a verbal message to him by the driver of a truck going back for rations, ordering accused to report to his captain at the latter's command post in Baclain and to return with the driver (R7-8,10-11). Accused refused to go, again stating that "he could not take it" (R10-11). He remained at the assembly area until the following day when he moved up to Baclain with the vehicles (R8-9). It thus clearly appears that, being tactically before the enemy, accused culpably refused to participate in the mission which his platoon had been ordered to perform of going forward to engage - by maintaining a road block against - components of the German Army. While there is no direct testimony that it was Captain Berlin who issued the order to the platoon, as alleged in the Specification, it may reasonably be inferred that he did from the showing that the order was issued and complied with, that he was the company commander, and that, upon learning that accused had not accompanied his platoon to the road block, he ordered him forward to report to him at his command post in Baclain. The conduct alleged and shown constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 4820, Skovan; CM ETO 7391, Young).

4. The charge sheet shows that accused is 19 years of age and that, with no prior service, he was inducted at Baltimore, Maryland, 25 August 1943.

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

6. Penitentiary confinement is authorized by way of commutation of a death sentence (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E C Stevens Jr Judge Advocate

CONFIDENTIAL

1st Ind.

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

1. In the case of Private First Class JOHN C. KOHLENBURG (33733990), Company A, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved.

2. Accused is 19 years old. He was not interviewed by the division staff judge advocate and nothing in the record or accompanying papers throws any substantial light on his background, character or army record. According to Lieutenant Boom's testimony, he said he had been in combat "quite a while" and Captain Berlin rated his prior service as fair and recommended that he not be eliminated from the service. In view of his youth and the absence of any indication that association with him would be detrimental to misdemeanants and military offenders, I recommend changing the place of confinement from the United States Penitentiary, Lewisburg, Pennsylvania, to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, and this indorsement. The file number of the record in this office is CM ETO 12393. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12393).

E. C. McNEIL

Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 391, USFET, 6 Sept 1945).

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

BOARD OF REVIEW NO. 3

23 AUG 1945

CM ETO 12394

UNITED STATES	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth,
	)	Germany, 21 March 1945. Sentence:
Private AUBREY C. STEELE	)	Dishonorable discharge, total for-
(18125369), Company B, 32nd	)	feitures and confinement at hard
Armored Regiment.	)	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 upon the following Charge and Specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Aubrey C. Steele, Company "B", 32d Armored Regiment, A.P.O. 253, U.S. Army, being on guard and posted as a sentinel at Cologne, Germany, on or about 2100, 6 March 1945, did leave his post before he was regularly relieved.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Armored Division, approved the sentence but recommended that, if confirmed, it be com-

CONFIDENTIAL

12394

muted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The Commanding General, European Theater of Operations confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 6 March 1945, accused's company moved into Cologne, Germany. That evening, by order of battalion headquarters, the company set up road blocks at various places in the city to observe and guard against enemy infiltration (R7,20-22). At some time between 1900 and 2045 hours, a light tank moved into a position forming one of such road blocks at an intersection on one of the main streets of the city. The four-man crew of this tank, commanded by Corporal Boomer, included Technician Fifth Grade Hearne, driver, Private Woolery, gunner, and accused as loader (R6-7,11,13). Inasmuch as the crew had not slept the previous night, Corporal Boomer set up a system of rotation of guards, instructing the crew that each man would remain on guard for 35 to 40 minutes, until he became sleepy, and then would awaken the next man who would relieve him. While no definite time was set for a particular tour of duty, the instructions were that one man would remain awake and on guard at all times (R7-8,11, 16,17). At Woolery's suggestion, accused agreed to take the first guard tour, and was to awaken Woolery, who would relieve him (R8,16-18).

After accused had stood on guard in the tank for 10 or 15 minutes, he said he was going to the latrine. Woolery stood guard until he returned, at which time accused told Woolery he would continue with his tour of duty and agreed to wake Woolery when he became tired (R8-9, 19). Woolery then, at about 2100 hours, got inside the tank to sleep with the other crew members, leaving accused on guard outside (R8,10,12,17). Shortly thereafter, when he did not hear accused moving around outside, he looked out and could not see accused, although it was possible to see for 50 feet in all directions. He and Corporal Boomer then called accused, and Boomer looked about in the vicinity of the tank, but accused could not be found. Thereupon Woolery went on guard and rotated with the other two crew members during the remainder of the night (R8,10,12,15).

Accused was not seen again until 1000 hours the following morning, at which time he came walking up to the tank, which was still in its position (R9,12,18). Woolery did not know where he had been (R9). Corporal Boomer testified that while from past experience he knew that accused did not readily understand instructions, he did not believe it possible that accused could have misunderstood the instructions relative to the guard plan on the night of 6 March (R13-14).

It was stipulated that Captain Malcolm Block, if present, would testify that as division neuropsychiatrist he examined accused on 15 March 1945, and found that he suffered from no psychosis. In his opinion accused "is fully cognizant of the difference between right and wrong and is sane and responsible" (R21).

4. Defense counsel stated that accused's rights had been explained to him and that accused elected to remain silent. No evidence was introduced in his behalf (R22).

5. The evidence shows that after accused had verbally accepted the duties of first relief as a one-man sentinel posted at a tank guarding a road block in an active combat zone in observation against the approach of the enemy, and had actually entered upon his tour of duty, he deliberately left his post without apparent excuse, and without notice to the rest of the guard without having been regularly relieved, and remained away for more than 12 hours. His guilt of the offense charged was not dependent upon his being formally "posted" as a sentinel for any particular length of time by a non-commissioned officer (MCM, 1928, par. 146a, p. 160; SPJGJ 1942/1033, III Bull. JAG 99). It was clearly shown that he was on "guard" and was on post charged with the duties of a sentinel. The evidence abundantly supports the findings of guilty (CM ETO 4443, Dick; CM ETO 9144, Warren).

6. Charges were served on accused on 20 March 1945 and he was brought to trial the following day at 1547 hours. In open court the prosecution stated that military necessity demanded trial at the particular time, and the defense counsel expressly waived any necessity of further time between service of charges and trial (R6). Apparently all of the witnesses who had any personal knowledge of the acts constituting the alleged offense were present in court and were cross-examined by the defense. In the absence of objection by accused or a showing of prejudice to him as a result of trial upon the short notice, the findings of guilty will not be disturbed (CM ETO 3937, Bigrow; CM ETO 5255, Duncan; CM ETO 5445, Dann; CM ETO 5466, Strickland).

7. The charge sheet shows that accused is 22 years of age and enlisted 17 August 1942. No prior service is shown.

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

9. The penalty for violation of Article of War 86 in time of war is death or such other punishment as a court-martial may direct. Confinement in a penitentiary is authorized by Article of War 42 for sentences in excess of one year imposed by way of commutation of a death sentence. The designation of the United States Penitentiary,

Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, W.D., 8 June 1944, sec.II, pars.1b(4),3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. J. Lewy Jr. Judge Advocate

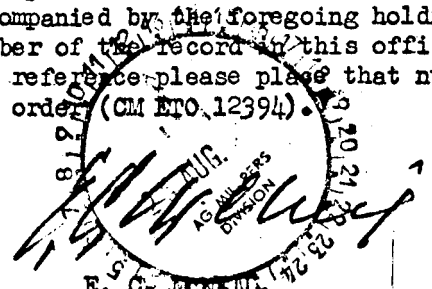
1st Ind.

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

1. In the case of Private AUBREY C. STEELE (18125369), Company B, 32nd Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. As it does not appear that being held in association with the prisoner will be detrimental to misdemeanants and military offenders nor that the purposes of punishment demand penitentiary confinement, I recommend that the designation of the place of confinement be changed from the United States Penitentiary, Lewisburg, Pennsylvania, to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12394. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 12394).



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

(Sentence as commuted ordered executed. GCMO 386, USFET , 5 Sept 1945).

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

BOARD OF REVIEW NO. 2

7 SEP 1945

CM ETO 12410

U N I T E D S T A T E S	26TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 26, U. S. Army, 14 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private VIRGIL L. ROMANS (35629181), Battery C, 390th Anti-Aircraft Artillery Automatic Weapons Battalion	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Virgil L. Romans, Battery C, 390th Anti-Aircraft Artillery Automatic Weapons Battalion, APO 403 c/o Postmaster, New York, New York, did, at Klein-Auheim, Germany, on or about 28 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Louise Schmidt.

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

12410

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

3. The prosecution's evidence identifies accused as a member of Battery C, 390th Anti-Aircraft Artillery Automatic Weapons Battalion (R29). At about 2100 on 28 March 1945 he was discovered by other American soldiers to be in a bedroom in the Freiderich Yung residence, Schloss Street, Klein-Auheim, Germany (R6,8,19,44). The Yung house was the residence of Mr. Yung, his daughter Maria Kaufer, his granddaughter Elizabeth Kaufer, a nine-months-old baby, and the complaining witness, Louise Schmidt, a friend of the Yung family (R30,34,37,40). Mrs. Schmidt was 43 years of age, married, less than five feet tall, and weighed less than 100 pounds (R44,48). Her health had not been good prior to this time (R54).

On the evening in question, the three women named were in the kitchen on the first floor washing, when they heard a knock at the front door (R34,35,44). Mr. Yung opened the door and was confronted by the accused and two other soldiers (R35). One of the three asked for wine or schnapps, but, after being told by Mr. Yung that he had none, pushed him aside with his pistol, and all three soldiers entered the house (R40,41). The first man to enter approached Maria Kaufer and with his pistol stopped her when she said that she was going "to the police and the military commander" (R35-36). She escaped from him by jumping out of the kitchen window and ran for help, and the soldier who was molesting her then left the house (R36,42).

The other two soldiers shone their flashlights in the faces of Elizabeth Kaufer and Louise Schmidt and with their weapons drove them into the bedroom (R46). When accused pointed his weapon at her, Louise Schmidt thought that they were going to be shot and begged for mercy that "he should not kill [her]" (R47,48). In the bedroom were two beds. Accused pushed Mrs. Schmidt to the more distant one and directed her to lie down on it (R47). At that time, he had his weapon slung on his shoulder and was wearing his helmet (R47,49). He opened his trousers and exposed his penis, then grabbed the legs of the complaining witness and pulled off her underdrawers (R48-50). She begged and resisted by trying to push him away, but "he moved [her] hands away", pulled her by the legs toward him, and inserted his penis in her vagina (R50). He removed his helmet and unslung his rifle and laid the weapon on the bed near the woman, then laid down on top of her and put his mouth on her mouth (R50,51). She did not "enter into the act of intercourse" or respond or consent thereto (R52).

Accused was interrupted by the return of Maria Kaufer with several American soldiers (R52). The first man to enter the house heard screaming and crying from the bedroom, and, when he entered the room, saw accused on the more distant bed with Louise Schmidt (R7,8). Accused immediately got up off the bed and tried to get out of the room, but was restrained by other soldiers (R8). When asked what they were doing in the house, accused and his companion told one of the soldiers that they

were looking for snipers (R15). Mrs. Schmidt was excited and crying and screaming (R21).

4. On being advised of his rights as a witness, accused elected to make an unsworn statement (R54). He stated that he had entered the house and talked with the women therein who were friendly and not afraid; that he went into the bedroom with one of the women and while there kissed her several times, she returning the kisses; that he put his arms about her and they sat down on the bed, then she lay on the bed and together they removed her underpants; that he took off his helmet and placed it beside the bed, then placed himself on top of the woman who did not resist in any way and enjoyed it; that he kissed her several times; that when he heard someone coming, he jumped and put on his helmet; that he did not rape the complaining witness; that his fly was not open and he did not have his penis out of his pants; that any advances he made were returned, and he was not in the house longer than ten minutes (R55).

5. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b,p.165). The commission of that offense is clear from the corroborated evidence of the prosecutrix, and the physical circumstances lend strong support to her testimony (CM ETO 9083, Berger). Accused, in his unsworn statement, denied both the fact of carnal knowledge and the want of consent, but the court resolved the conflict in the testimony against him, and there being substantial, competent evidence supporting its conclusion, the same may not be disturbed by the Board of Review (CM ETO 5869, Williams; CM ETO 895, Davis).

6. The charge sheet shows accused to be 20 years and five months of age. Without prior service, he was inducted 17 February 1943 at Columbus, Ohio.

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

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

(TEMPORARY DUTY) Judge Advocate

EARLE REPBURN Judge Advocate

RONALD D. MILLER Judge Advocate

12410

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

BOARD OF REVIEW NO. 2

14 JUL 1945

CM ETO 12413

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Echt, Holland, 17 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ALBERT A. BELZIL (31110958), Company A, 117th Infantry	

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Albert A. Belzil, Company "A", 117th Infantry, did, without proper leave, absent himself from his organization at Warden, Germany, from about 23 November 1944, to about 30 November 1944.

(150)

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Kerkrade, Holland, from about 1200, 1 December 1944, until he was apprehended at Heerlen, Holland, on or about 2000 1 December 1944.

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

Specification: In that * * * did, at Warden, Germany, on or about 17 December 1944, desert the service of the United States by absenting himself, without proper leave, from his organization, with intent to avoid hazardous duty, to wit: engagement with the enemy, and did remain absent in desertion until he was apprehended at Kerkrade, Holland, on or about 20 December 1944.

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

Specification: In that * * * did, at Geromont, Belgium, on or about 16 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; engagement with the enemy, and did remain absent in desertion until he was apprehended at Spa, Belgium, on or about 28 February 1945.

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

Specification: In that * * * having received a lawful command from Colonel Walter M. Johnson, his superior officer, to report to Company "E" for duty, did at Geromont, Belgium, on or about 16 January 1945, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all the charges and specifications, except Additional Charge II and its Specification he was found guilty of the Specification except the words "desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engagement with the enemy, and did remain absent in desertion", substituting therefor the words "absent himself without proper leave from his organization and did remain absent", of the excepted words not guilty, of the substituted words guilty, and not guilty of

12413

Additional Charge II, but guilty of a violation of the 61st Article of War. Evidence was introduced of three previous convictions, two by special court-martial, for absences without leave of eight and 16 days respectively and one by summary court-martial for absence without leave for two days, all in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 a rifleman (R10,11) in the second platoon, Company A, 117th Infantry (R8). On 23 November this platoon was located at Warden, Germany (R10), and after breakfast that morning accused, who had been sent to the kitchen with his mess gear, failed to return. The area was searched and he could not be found. He was missing from 23 November 1944 to 30 November 1944, although he did not have permission to be absent (R8,9,11). In response to a call from the military police on 1 December 1944 a guard was sent out and accused was brought to Headquarters Company at Kerkrade, Holland. He was placed in a room and instructed to stay there until transportation could be obtained. He was brought back from dinner by a guard and shortly after 1200 hours he was missing. He had not been given permission to leave and could not be found in the area (R13).

About 1130 hours on 17 December 1944 accused's platoon leader told his squad leaders to alert their units and have them stay in the area because they were to move out to meet the German break-through. The assistant squad leader conveyed this information to the squad and accused was present at this time. It was general knowledge in the company that there was a break-through and that they were going to check it. Some time after 1400 hours that day accused was missing from his unit and, although a search was made he could not be found. He did not have permission to be absent. On 20 December 1944 he was taken into custody by the Military Police at Kerkrade, Holland (R9, 10,11,12,16). A duly authenticated extract copy of the morning report of accused's organization was received in evidence showing accused from duty to absent without leave on 17 December 1944 (R16; Pros.Ex.2).

Accused was brought to the 117th Infantry Regimental headquarters at Geromont, Belgium, on 16 January 1945 and the commanding officer of that unit, Colonel Walter M. Johnson, gave him a direct order to report to his company commander of Company E for duty. Accused was asked if he understood the order and when he failed to reply, the order was repeated. He then admitted he understood it and when asked if he was going to obey the order, he replied that he "didn't know". The order was again repeated and he was taken away (R8,11). Accused did not at any time report to Company E for duty. The area of Headquarters Company was searched on the 16th or 17th of January 1945 and he could not be found. He was taken into custody on 28 February 1945 at Spa, Belgium, by the military police (R14,15,16).

It was stipulated by the accused, defense counsel and the prosecution that if the investigating officer were present in court and sworn as a witness he would testify that accused, after his rights under Article of War 24 were fully explained to him, made a sworn statement to him on 7 January 1945. This statement was then offered and received in evidence, the defense stating it had no objection. It is as follows:

"

7 January 1945

STATEMENT (SWORN)

I Albert A. Belzil, Pvt. Co A 117th Inf. after being fully warned of my rights do make the following sworn statement:

I admit that on the 23 Nov. 1944 I absented myself from my organization at Warden, Germany without proper leave and did remain absent until 30 Nov. 1944.

I further admit that on 1 Dec. 1944 I absented myself from my organization at Kerkrade, Holland without proper authority from about 1200, Dec. 1 1944 until I was apprenended at Herleen, Holland at about 2000, 1 Dec. 1944.

I further admit athat I absented myself from my organization at Mariadorf, Germany without proper authority from 17 Dec. 1944 until I was apprehended at Kerkrade, Holland on or about the 20th Dec. 1944.

I further admit signing the statement marked Ex. B. before Capt. Kent, Co.A. 117th Inf. and violating said statement.

Albert A. Belzil (S)

Signed before me on 7 Jan.1945
Claude Spelman Jr. (s)
1st Lt. 117th Infantry" (Pros.Ex.I, p.1).

4. The accused after his rights as a witness were fully explained to him (R17), elected to remain silent and no evidence was introduced in his behalf.

5. The offenses of absence without leave as alleged in Specification 1 and 2 of the Charge and the Specification of Additional Charge II are established by substantial and compelling evidence. With reference to the last absence, the facts surrounding the inception of this absence clearly demonstrate that it was unauthorized (CM ETO 8242, Bradley), inasmuch as accused had just been ordered to report to his company for duty, which order he disobeyed. The finding of the court with respect to the offense of willful disobedience of an order of a superior officer as charged in the Specification of Additional Charge III is also sustained by compelling evidence.

Concerning the finding of guilty of desertion to avoid hazardous duty as alleged in the Specification of Additional Charge I, the record contained substantial evidence of all the elements of this offense (MCM, 1928, par.130a, pp.142,143; AW 28; CM ETO 10968, Schiavone).

Prosecution's Exhibit I is a confession by accused covering the offenses alleged in the specifications to the Charge and Additional Charge I. This confession was admitted after it was stipulated that accused made a sworn statement to the investigating officer on 7 January 1945. It is marked page one of Prosecution's Exhibit I and another statement by accused, dated 4 March 1945, is marked page two of this exhibit and is also attached to the record of trial. The latter statement is a confession of guilt as to the offenses charged in the specifications of Additional Charges II and III. Inasmuch as this second statement was never offered or received in evidence and is obviously not covered by the stipulation as to what transpired on 7 January 1945, its submission to the court was highly irregular. In view of the compelling nature of the evidence of these last mentioned offenses, excluding the confession dated 4 March 1945, it cannot be said that the substantial rights of accused were prejudiced by this irregularity and the findings of the court will not be disturbed.

6. The charge sheets shows that accused is 25 years of age and was inducted 29 July 1942 at Manchester, New Hampshire. He had no prior service.

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

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

(ON LEAVE) Judge Advocate

1st Ind.

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

1. In the case of Private ALBERT A. BELZIL (31110958), Company A, 117th 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 12413. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12413).

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

(Sentence as commuted ordered executed. GCMO 287, ETO, 26 July 1945).

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

BOARD OF REVIEW NO. 3

20 JUL 1945

CM ETO 12428

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Second Lieutenant WILLIAM J. DAVIS (O-1298332), 437th Port Company, 501st Port Battalion, Transportation Corps	Trial by GCM, convened at Rouen, France, 14 March 1945. Sentence: Dismissal.

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

---

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

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

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

Specification: In that Second Lieutenant William J. Davis, 437th Port Company, 501st Port Battalion, having been restricted to the limits of his camp and the area of his immediate employment did, at Rouen, France, on or about, 26 December 1944, break said restriction by going to the Red Cross Building in Rouen.

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

Specification: In that * * * did, at Camp Champs de Course, Rouen, France, on or about 31 December 1944, behave himself with disrespect toward Major Floyd T. Taylor, Jr., commanding officer 501st Port Battalion, his superior officer, by wrongfully replying to him in a return indorsement, as follows, to wit: "It is the opinion of the undersigned that the Commanding Officer, 501st Port Battalion, is not competent to render just and adequate decision in this case or any other case affecting the undersigned".

He pleaded not guilty to, and was found guilty of, the charges and specifications. Evidence was introduced of one previous conviction by general court-martial for absence without leave and failure to repair in violation of Article of War 61, and for disrespect toward a superior officer in violation of Article of War 63. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five years. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence but remitted the forfeitures of pay and confinement at hard labor. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved and modified, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused and other members of the 437th Port Company stationed at Camp Champs de Course, Rouen, France, on 22 December 1944 were "restricted to their camp or station and the area of immediate employment" from 1200 hours on 22 December until 1200 hours on 24 December 1944. The restriction, an order from higher headquarters, was an alert against possible enemy action. The restricting order, which was posted on the company bulletin board, also recited that it was expected that at 1200 hours on 24 December the restriction would be continued for a like or longer period of time (R7-9,29; Pros.Ex.1).

On 24 December most of accused's company was performing guard duty at Mantes, France. Accused remained at Camp Champs de Course in command of about 79 men (R11,21,26,31). Just before noon on 24 December the company clerk received a "buckslip" from higher headquarters which stated that the restriction was continued until further notice. He "looked up and said that the restriction was still on". He believed, but was not certain, that accused was present in the orderly room at that time, and knew that accused was "in and out" of the orderly room all that day. He initialed the "buckslip" and

12428

wrote a note containing the information, which he put on the first sergeant's desk (R9-10,21-24; Pros.Ex.2). The first sergeant put the note in the "in basket" on the company commander's desk and notified all the enlisted men about the continuation of the restriction (R26-28). A short letter giving notice of the extension of the restriction was also sent from higher headquarters to the 437th Port Company on 24 December (R10-11,27; Pros.Ex.3). Similar information was customarily brought to the attention of company officers by placing it on the officers' bulletin board or by leaving it in the "in basket" on the commander's desk. Prior to 24 December accused had received official communications from this basket, and it was a practice of the company officers to read the contents of papers in the basket (R28,31-32). Neither the first sergeant nor the company clerk could testify positively that the notice of the continuation of the restriction was actually brought to accused's attention (R24,31-32).

At about 2130 hours on 26 December, while the restriction was still in effect, accused was seen by his battalion commander, Major Floyd T. Taylor, Jr., in the Red Cross Club in Rouen, France (R11-12,16-17, 19). On 27 December Major Taylor officially wrote accused requesting an explanation of his apparent failure to comply with restriction. Accused replied by indorsement that on 26 December he had no knowledge of the order extending the restriction and that he had reason to believe the restriction no longer existed. By second indorsement, Major Taylor expressed his intention to impose punishment under Article of War 104, and requested accused to indicate whether he preferred such punishment or trial by court-martial. On 31 December 1944 accused replied by fourth indorsement addressed to his battalion commanding officer, through channels, as follows:

> "The undersigned declines to accept punishment under the 104th AW because it is the opinion of the undersigned that the Commanding Officer 501st Port Battalion is not competent to render a just and adequate decision in this case or any other case affecting the undersigned" (R12-15; Pros.Ex.4).

4. For the defense, First Lieutenant Cleo E. Hancock, a member of accused's company, testified that he returned to the camp from Mantes about 24 or 26 December, but that the company commander had left accused in charge of the rear detachment, and that until the order was changed the witness did not consider himself in charge (R35-36). The company commander testified that, on or prior to 24 December, all officers of the company had been instructed that they would be responsible for official orders and memoranda left in the basket on his desk (R41). A written company order directed all officers to review the company files from time to time and to read the bulletin board daily (R39-40; Def. Ex.1).

After having his rights explained to him accused elected to testify under oath (R42). He was left with the company while a part of it was at Mantes on guard duty. On the morning of 24 December Lieutenant Hancock returned to duty and remained in charge of the company until 27 December, when the commanding officer returned. Accused continued minor duties and censored mail during the afternoon of 24 December, when he was ordered by battalion headquarters to work the night of 24 December. He worked 12 hours that night and slept the following day, during which he "visited the company" about once and talked with a few persons, but nobody, including the lieutenant then in charge of the company, mentioned any order. He remained in his quarters Christmas night and worked on 26 December from 0800 hours to 2000 hours. That night he went with two officers and a war correspondent for the "Afro-American" to the Red Cross Club in Rouen. There he spoke to Major Taylor, who questioned him about the order continuing the restriction, and told him he should not be there. Accused explained that he had no knowledge of the order and returned to camp immediately. The following morning, 27 December, he checked with the first sergeant who told him "the order had been received and was in the company commander's desk". It was then put on the bulletin board. He had learned of the initial restriction, which terminated at 1200 hours on 24 December from "hearsay", and assumed that it was lifted at that time. He had no previous information that it might be continued, and made no effort to determine whether it had been lifted. As to the Specification of Charge II he felt he was being treated unjustly and was getting a "raw deal" because to the best of his knowledge another company officer who accompanied him to the club was not punished. He "did not mean that statement in an opprobious (sic) way in that it would be understood as disrespect. I merely meant what I stated" (R42-49).

5. a. Specification of Charge I: The evidence is undisputed that accused left camp and went to a Red Cross Club on 26 December at a time when he and all personnel of his company were restricted to their camp and the area of immediate employment by order of competent authority. Accused seeks to excuse himself solely upon the ground that he had no notice of knowledge of the restriction at the time he breached it. The evidence shows that he was acting as company commander on 24 December when an order was received in the company orderly room which extended a previous restriction which would have expired at 1200 hours on 24 December. Upon receiving the information the company clerk made a remark about the continuance of the restriction. He believed accused was present in the orderly room at the time, and knew accused was in and out of the orderly room during the day. Notice of the continuation was put in a basket on the company commander's desk, and it was shown that all company officers customarily read, and were required to read, official papers in the basket. All enlisted men were notified of the continuance of

the restriction. The previous restriction, of which accused had knowledge at least through "hearsay", recited that it was expected that the restriction would be continued at the time of its expiration. Under this evidence the court was clearly warranted in concluding that accused knew of the continuance of the restriction and willfully breached it. Willful or wrongful intent is not a necessary element of the offense charged, and the failure of accused to read an order he was required to read, and which he had an opportunity to read, is no excuse for his failure to observe the terms of the order (see CM 234815, II Bull. JAG 342; CM 248497, III Bull. JAG 233).

b. Specification of Charge II:

The evidence clearly shows that accused used the language set forth in the Specification of Charge II in an indorsement addressed to his battalion commander through official channels. According to Winthrop, the disrespectful behavior contemplated by Article of War 63 (then Article of War 20)

> "is such as 'detracts from the respect due to the authority and person of the commanding officer.' Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language applied to, or in regard to, the commander, by an open declaration of an intention not to obey his orders; by making unwarranted imputations against him or attributing to him improper motives; by misrepresenting or aspersing him in a communication addressed to his superior or other officer in authority, or in a circular, newspaper, or other form of publications, &c. Disrespect toward a commander by acts may be exhibited in a variety of modes--as by neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence, by a systematic or habitual disregard of, or delay to comply with, his orders or directions or by issuing counter orders, by an assault upon him not amounting to breach of the 21st Article, &c.
>
> * * *
>
> It is also not essential that the disrespect be intentional: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may equally with a deliberate act, constitute an offence under the Article" (Winthrop's Military Law and Precedents (Reprint-1920) p.567).

12428

It is thus seen that Article of War 63 is extremely broad in scope and makes punishable a wide range of conduct. The language here employed by accused implies that the officer to whom the communication was addressed would not judge accused's case fairly but would be swayed by prejudice or other improper motives. As such, it falls within the conduct described by Winthrop as violative of the 63rd Article of War. It follows that the court was warranted in finding accused guilty as charged.

6. The charge sheet shows that accused is 27 years and seven months of age. He enlisted 24 June 1941, and was commissioned a second lieutenant on 21 October 1942. No prior service is shown.

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

8. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96 or Article of War 63.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

12428

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant WILLIAM J. DAVIS (O-1298332), 437th Port Company, 501st Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is also invited to the action of the reviewing authority which remits "forfeitures of pay and confinement at hard labor". It was probably the intention of the reviewing authority to remit also that part of the sentence relating to forfeitures of allowances.

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 12428. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 12428).

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

(Sentence ordered executed. Forfeitures remitted. GCMO 294, ETO, 27 July 1945).

5698-5

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

BOARD OF REVIEW NO. 1

13 JUN 1945

CM ETO 12447

U N I T E D S T A T E S	)	EIGHTH AIR FORCE
	)	
v.	)	Trial by GCM, convened at AAF Station 101, APO 634, U.S. Army, 21 April 1945. Sentence: Dismissal and total forfeitures.
	)	
First Lieutenant CATHERINE H. WILSON (L-200219), Headquarters and Headquarters Squadron, 2nd Air Division	)	

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Catherine H. Wilson, Headquarters and Headquarters Squadron, 2nd Air Division, did, without proper leave, absent herself from her station at AAF Station 147, APO 558, U. S. Army, from about 5 March 1945, to about 30 March 1945.

She pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. She 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 18 months. The reviewing authority, the Commanding General, Eighth Air Force, approved the sentence but remitted

that portion thereof relating to confinement at hard labor, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as modified and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence clearly proved that accused was absent without leave from her station from 5 March 1945 to 30 March 1945, when she was apprehended at a London Hotel by an agent of the 8th Criminal Investigation Detachment. This evidence and her plea fully sustain the findings of the court.

4. The charge sheet shows the accused is 36 years 10 months of age and was enrolled in the Women's Army Auxilliary Corps, 14 September 1942, commissioned second lieutenant, Women's Army Corps (AUS), 31 July 1943, and promoted to first lieutenant 1 February 1945. She had no prior service.

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

6. A sentence of dismissal and total forfeitures is authorized upon conviction of an officer of an offense in violation of Article of War 61.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of First Lieutenant CATHERINE H. WILSON (L-200219), Headquarters and Headquarters Squadron, 2nd Air Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12447. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12447).

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

(sentence ordered executed. GCMO 223, ETO, 24 June 1945).

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

BOARD OF REVIEW NO. 2

11 AUG 1945

CM ETO 12451

U N I T E D S T A T E S	)	3RD AIR DIVISION
	)	
v.	)	Trial by GCM, convened at AAF Station 156, APO 559, U. S. Army, 28 March 1945. Sentence: Dismissal and total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant CARL HARVEY KAPLAN (O-681899), 391st Bombardment Squadron, 34th Bombardment Group (H).	)	

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

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

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

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

Specification: In that Second Lieutenant Carl H. Kaplan, 391st Bombardment Squadron, 34th Bombardment Group (H), did, at AAF Station 112, APO 639, U. S. Army, on or about 13 August 1944, present for payment, a claim against the United States by presenting a voucher to E. E. Jackson, Major, Finance Department, finance officer at AAF Station 112, APO 639, U. S. Army, an officer of the United States Army, duly authorized to pay such claims, in the amount of

$249.70 for services alleged to have been rendered to the United States by said Second Lieutenant Carl H. Kaplan in July 1944, which claim was false and fraudulent in that he had been paid for his services for the month of July 1944, and was then known by the said Second Lieutenant Carl H. Kaplan to be false and fraudulent.

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

Specification: In that * * * did, at AAF Station 112, APO 639, U. S. Army, on or about 13 August 1944, present for payment, a claim against the United States by presenting a voucher to E. E. Jackson, Major, Finance Department, finance officer at AAF Station 112, APO 639, U. S. Army, an officer of the United States Army, duly authorized to pay such claims, in the amount of $249.70, for services alleged to have been rendered to the United States by said Second Lieutenant Carl H. Kaplan in July 1944, which claim was false and fraudulent in that he had been paid for his services for the month of July 1944, and was then known by the said Second Lieutenant Carl H. Kaplan to be false and fraudulent.

He pleaded not guilty to, and was found guilty of, the charges and their respective specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but "owing to special circumstances in this case" reducedthe period of confinement to two years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution:

At Army Air Force Station 594, commonly known as "Stone," on 10 August 1944, the accused presented a pay and allowance voucher to the Finance Office for his pay and allowance from 1 July 1944 to 31 July 1944 in the sum of $249.70 (R8,10;Pros.Ex.1). Staff Sergeant

Frederic J. Boulton, the cashier in that office, who, for 17 years in civilian life had been employed by the Irving Trust Company, New York, as bookkeeper, teller and accountant, testified that the voucher was paid on that date as shown by the Schedule of Disbursements of the Finance Officer (Pros.Ex.3) and by the Cashier's Report which balanced for that day and included this payment (R9,10,Pros.Ex.4). The witness had no personal recollection of having made the payment to the accused (R11). There were approximately 200 vouchers processed that day (R9). The voucher was signed by the accused on line 16 thereof. On line 18 of the same document the accused signed a receipt for the money (Pros.Ex.1). As a rule vouchers of this kind are prepared and signed on line 16 at the time of their original presentation which takes place several days in advance of payment (R12,13). The recipient, however, never signs the receipt (line 18) until the voucher is presented for payment (R12). All vouchers are pre-audited and if line 18 were signed the voucher would not be approved (R12). At the time of payment, he is required to identify himself by presenting his AGO card. If he does not have one he is told to get it or to obtain a temporary one from the Post Adjutant General (R10,11). One could obtain payment by other means of identification if the Finance Officer approved (R10). The practice thus described by Sergeant Boulton was corroborated by the Deputy Finance Officer, First Lieutenant K. S. Kohanski (R13-14).

On 12 August 1944 the accused presented for payment a pay and allowance voucher for his services during July 1944 in the amount of $249.70 to the Finance Officer, Major E. E. Jackson, at AAF Station 112 known as "Bovington." Major Jackson as Finance Officer paid the accused the equivalent of $249.70 in English money (R15,Pros.Ex.2). The voucher was signed by the accused on lines 16 and 18 thereof. Line 16 reads as follows:

> "I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within pay voucher is not prohibited by any provisions of law limiting the availability of the appropriation(s) involved.
>
> Name (s) Carl H. Kaplan
> (t) CARL H. KAPLAN
> Rank 2nd Lt.AC
>
> Date 12 August, 1944."

In a written pre-trial statement voluntarily made to the investigating officer and admitted in evidence without objection the accused stated that he presented his voucher at the Finance Office at "Stone" for the month of July but was told at the pay window that he

would not be paid unless he presented an AGO card. He was told to get one at the Provost Marshal's Office the following day. He was transferred the following day and therefore received no payment at "Stone." Upon his arrival at his new base, (Bovington) he inquired of the Finance Officer as to how he could obtain the return of the voucher. He was told to write a letter to the Finance Office at "Stone," which he did. He received no reply to the letter and considered the matter closed. He did receive his pay for the month of July at Bovington and "that is the only monies that I drew for that period of time" (R16,Pros.Ex.6).

4. Evidence for the defense:

By stipulation of counsel sworn statements of two lieutenants, both members of accused's crew and both dated 31 December 1944, were admitted in evidence (R17;Def.Ex.A and B). They both affirmed that while the crew was at Camp Kilmer, New Jersey, just prior to coming overseas, they were issued new AGO cards, except accused, who was in the hospital until the day of their departure; that on arrival at the 70th AAF Replacement Depot ("Stone") the crew was short of money, and accused was unable to get any of his pay because he had no AGO card, so one of the lieutenants loaned him ten pounds.

By a similar stipulation a certificate of the Assistant Adjutant General at "Stone," dated 3 January 1945, was admitted in evidence (R17;Pros.Ex.C). It certified: "Records this headquarters do not indicate that a Temporary AGO card was issued by this headquarters" to accused "during the month of August 1944."

Accused served under the command of Major Benjamin B. Vickery for a little over a year. The major knew accused's general reputation for truth, veracity, honesty and integrity, and it was "very good"; and he considered accused to be "very intelligent" (R17,18). Major J. Martin Smith, who had known accused for approximately the same length of time, testified that accused's reputation on similar matters was "excellent" (R19). The squadron adjutant, Captain Gene A. Nelson, also testified as to accused's reputation for truth, honesty and integrity, saying it was "very good" (R20).

The rights of the accused were explained to him and he elected to testify under oath (R21). He said that he was 26 years old, married, and had joined the army in August 1941. As an enlisted man he was assigned to the Infantry where he remained until 7 December 1941. He was commissioned as a bombardier on 3 June 1943 after taking training as an aviation cadet. Thereafter he took a navigation course, had three months' duty with a bombardment group in South Carolina, spent

six weeks with the Air Transport Command, and was transferred to Salt Lake City, Utah, and then to Rapid City, South Dakota (R21,22). At Rapid City he was assigned, after a short time, as an instructor with the 398th Bombardment Group, 601st Squadron, where he remained from December 1943 until April 1944. On the latter date he was assigned to a combat crew with whom he departed for foreign duty on 25 July 1944. At the port of embarkation (Camp Kilmer, New Jersey) he was taken ill and hospitalized (R23). While at Camp Kilmer and while he was in the hospital the remainder of accused's crew was processed, issued additional clothing and equipment and given a physical check-up. Their old AGO cards were also picked up and new plastic ones issued. Shortly before departure one of the movement's officers told accused he was to be left behind but he insisted on being taken. He was advised, however, that there would be no time for him to obtain equipment or a new AGO card, but that it would have to be obtained at his next station. By evening he was aboard ship. When he arrived in England at "Stone" he was given a six-hour pass and wanted some money to go to town "with the boys; so I put in for a voucher payment * * * I just signed the voucher and went to the window and the clerk counted out the money and then asked me for my AGO card." The clerk refused to hand over the money because he had no AGO card, explaining that he could get one at the "Provost Marshal's Office." When he got to the Provost Marshal's office it was too late so he borrowed money from his pilot and went to town. He didn't have time to get the cardthe next morning and "didn't think about the voucher," feeling certain that because he had not received the money it would be destroyed. A day or two after putting in the voucher at "Stone", he left for "Bovington" (R24). At the latter place he put in another voucher for his pay for July, giving the required data (Pros.Ex.5), and received his money. In October he first learned that there was some difficulty concerning duplication of the vouchers. When asked "what attempt, if any did you make in order to procure the return of the first voucher," accused replied:

> "For the first time since I was commissioned -- we had a large pay line here at the end of the month and I picked up the form and read it in its entirety, which is something I had never done before -- and at the bottom I noticed the statement "I hereby certify I have not submitted a voucher to another station"; and I immediately thought about this other Stone voucher; and so I went to see Major Fanning who was the finance officer at the station, and explained the situation to him; and he said that I had better write to the station to determine what they had done with it, and if they had not destroyed it, to have them destroy it" (R25).

He received no response to his letter. Since coming overseas he has flown 15 missions as a bombardier with the 18th Bombardment Squadron, but has since been grounded and had some duty as squadron supply officer (R25). In civilian life accused had one and a half years of education at college in banking and finance (R27).

On cross examination, accused stated that he left the voucher at "Stone", signed in two places, on the cashier's window. Later he said he left it in the cashier's hands inside of the cashier's cage. He did not receive any money from the cashier at "Stone" (R28-29). Sergeant Boulton was the cashier to whom he handed the voucher at "Stone" (R33-35). Both he and Lieutenant Kohanski told the accused he could not be paid without an AGO card and to get one at the provost marshal's office (R35). In response to questioning by the court the accused stated that the letter he wrote to the Finance Officer at "Stone" was written in "November or December" (R32). In it he asked that his voucher be destroyed. Receiving no reply he thought that it had been destroyed (R36).

5. In rebuttal Staff Sergeant Boulton was recalled and testified that when an officer lacked proper identification he was sent to the Adjutant General's Office and never to the Provost Marshal's; that he personally was responsible as cashier for all money in his cage and no one else had access to it (R38,40); and that if an officer cannot properly identify himself and has handed over the signed voucher, the voucher is always returned to him. Otherwise, upon inspection, if a signed voucher is found in the cage inconsistent with the money balance, an immediate inquiry would result (R40).

6. The accused was recalled as a witness at his own election and testified that he did not know whether he was told to go to the Adjutant General or the Provost Marshal, but he believed at the time that he was told the Provost Marshal (R42).

7. Discussion. a. Specification of Charge I (Presenting false claim in violation of Article of War 94). The necessary elements of proof to support a conviction of the offense are enumerated in MCM, 1928, par. 150b, p.182, as follows:

> "Proof:--(a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim

or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged."

The accused admitted that he did at the time and place averred in the specification present to Major E. E. Jackson, a Finance Officer authorized to pay such claims, for payment a claim against the United States in the amount of $249.70 for services rendered by him during July 1944. Elements of proof (a) and (d) were therefore admitted. The only issues remaining for discussion are whether the claim was fraudulent in the particulars alleged and whether the accused knew it was fraudulent in those particulars. These issues depend entirely upon the determination of the one issue of fact: Did the accused receive payment at "Stone"? If he received payment at "Stone" it must necessarily follow that when he presented his claim for the same services at "Bovington" two days later it was false and fraudulent and the accused knew it to be false and fraudulent.

The evidence for the prosecution clearly established that the sum of $249.70 was paid out by the cashier for the Finance Officer at Stone on a voucher signed by the accused and that the accused actually receipted in writing for the money. The cashier's account for the day conclusively showed the money to have been paid. The accused denied receiving the money. He admitted that he signed the receipt for it but contended that he did not actually receive the money because of his inability to identify himself in the manner required by the cashier. He identified Sergeant Boulton as the person with whom he left the receipted voucher, without receiving his money. There was therefore a clear, well defined issue of fact for the determination of the court,-- whether the accused received the money or whether Sergeant Boulton kept it; or that it disappeared in some unexplained manner. The evidence warranted the court in finding that the accused received the money. It was within the court's province to determine the factual issue thus raised. We can find no valid reason for disturbing that finding. Sergeant Boulton was shown to be an experienced cashier formerly employed for 17 years in a large financial institution in New York City. He occupied a trustworthy position of cashier in a Finance Office of the Army of the United States handling large sums of money. On the other hand the accused admittedly presented his voucher and unreservedly signed a receipt to the effect that he had actually received the money. While a receipt is not conclusive as to the one who signs, it is very strong evidence and difficult to overcome. It necessarily follows that the court was also justified in finding that his claim presented two days later at Bovington was fraudulent and that the accused knew it to be fraudulent. All of the necessary elements of proof were therefore proved. A fraud of this nature practiced upon the government by one in military service constitutes a violation of Article of War 94 (CM

270462, Ricker; CM 278968, Salyer; CM ETO 2506, Gibney. II Dig Op ETO 556).

b. Specification of Charge II (Presenting false claim in violation of Article of War 95): The discussion contained in the preceding paragraph is pertinent here. Conduct unbecoming an officer and gentleman as contemplated by Article of War 95, so far as applicable here, is defined as "action or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman" (Winthrop's Military Law and Precedents (Reprint 1920) p.714). Included in such conduct is "Duplication of pay accounts" (Winthrop's supra, p.714). It was entirely proper for the court to consider the same acts under this charge as it did under the charge of presenting a false claim under Article of War 94. "This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding (AW 94) article" (MCM, 1928, par.151,p.186). While the offense is ordinarily charged as violative of Article of War 94 (punishable as the court sees fit), it is also violative of Article of War 95 (punishable by dismissal only) since it is a crime involving moral turpitude and amounts to conduct unbecoming an officer and gentleman (CM 258108, Perlman, 37BR313 (1944).

8. The charge sheet shows the accused to be 26 years two months of age. He was inducted into the service 20 August 1941 at Camp Upton, New York, and was commissioned second lieutenant, Air Corps, Army of the United States 3 June 1943. No prior service is shown.

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

10. A sentence of dismissal is mandatory upon a conviction of Article of War 95 and authorized, in addition to such other punishment as a court-martial may adjudge, for a conviction of a violation of Article of War 94. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant CARL HARVEY KAPLAN (O-681899), 391st Bombardment Squadron, 34th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12451. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12451).

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

(Sentence ordered executed. GCMO 354, USFET, 28 Aug 1945).

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

BOARD OF REVIEW NO. 3

13 JUL 1945

CM ETO 12453

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Chaudfontaine, Belgium, 12 March 1945.
Captain ALEXANDER MARSHALL (O-504619), 471st Quartermaster Group	)	Sentence: Dismissal and total forfeitures.

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

---

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

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

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

Specification: In that Captain Alexander Marshall, Dental Corps, Headquarters Four Hundred Seventy-First Quartermaster Group, did, in the vicinity of Eupen, Belgium, on or about 30 September 1944, notwithstanding the provisions of First United States Army Circular Number 92, 13 July 1944, requiring that all commanders exercise special vigilence to prevent the transfer from the continent of funds obtained from unauthorized sources, offer, in the presence of enlisted men, to transmit German money or captured enemy funds to any designated person in the United States for a percentage.

(180)

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

Specification: In that * * * did, in the vicinity of Eupen, Belgium, on or about 30 September 1944, wrongfully charge First Sergeant Gaylord Stanley an unconscionable amount, viz, about ninety-two ($92.00) Dollars for transmitting one hundred and forty ($140.00) Dollars to Mrs. Gaylord Stanley.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, First United States Army, approved the sentence, remitted the confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, as approved and modified, though deeming it wholly inadequate punishment for an officer convicted of such grave misconduct, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

Circular No. 92, Headquarters, First United States Army, dated 13 July 1944, providing substantially as alleged in Specification, Charge I (R36-37; Pros.Ex.2) was posted for at least a week (when does not appear) on the 471st Quartermaster Group's bulletin board which officers were required to read daily (R53). Although accused was a dental officer of this organization (R7), no distribution of the circular was made to him (R53).

In the latter part of September 1944 accused, while performing dental work for Staff Sergeant Melvin I. Darnell, 3707th Quartermaster Truck Company, made inquiry of him whether "any of the men got ahold of any German money". He then said "They can't get that money home and * * * he could get it home for us at a percentage" (R8). He frequently joked with enlisted men (R10). At first Darnell "thought he was joking but when he said he was sending it for a percentage, I did take him seriously" (R12). "He could have been joking" (R10). Afterwards accused spoke to some enlisted men outside. According to Darnell "he asked them if they had any German money, that if they had he could get it home for them at a percentage" (R8). Another enlisted man recalled accused saying "something about German money being sent him, if we had any" (R13). Still another enlisted man recalled accused saying, "if you boys have any money to send home I can take care of it for you" (R14-16).

Sergeant Darnell told his company commander (R9,16) who, in turn, told his battalion commander (R16,34) who, in turn, discussed with the group commander the advisability of setting a "trap" for accused (R34-36). As a result the company commander was instructed to have a dependable man offer accused a sizeable sum purported for transmission to relatives (R17,34). First Sergeant Gaylord Stanley, 3707th Quartermaster Truck Company, was selected and given 10,200 Belgian francs "and some odd francs" (R17,19,34). He went to accused and asked to speak to him privately. They went into a small tent (R19). Stanley spoke of sending money to his wife whereupon accused closed the tent flap. When he had counted up to approximately 10,000 francs, he was stopped by the accused (R20,29) who stepped over to the table, counted the money (R20) and said it came to better than $200 (R28). Stanley gave accused all the money given him by his company commander (R22-23,28-29). Accused took all the money except a few odd francs less than 100 (R22,29). He agreed to send $140 to Stanley's wife, saying he did not do that sort of thing for nothing (R21). He requested Stanley not to write his wife immediately but to give him time to get the money home (R21). In the first part of October, accused, through messenger, informed Stanley everything was all right (R21,31).

During the latter part of November or first part of December 1944, accused was interviewed by the group commander and afterwards seemed nervous to a fellow dental surgeon:

> "He shook his head and said, 'Well, they got me this time.' So I said, 'Well, what do you mean?' And he said, 'Oh, one of my deals back-fired.' So I looked more or less questioningly at him and he said, 'Oh, it is nothing. It doesn't amount to much. It is so petty it is embarrassing. That just shows you can't trust anybody.' And then he asked about one of the enlisted men of the company, a Sergeant Stanley; he asked what company Sergeant Stanley was in" (R51-52).

Sergeant Stanley admitted he had owed the Government $1200 as the result of overpayments of allotments but contended there had been no bad faith and the matter had been settled at the time of his dealings with accused (R24-26).

4. Summary of evidence for defense:

Defense counsel announced that his rights had been explained and accused elected to testify (R39). He testified that he first learned of the charges 8 December 1944 (R45). He had no recollection of offering to send money for Sergeant Darnell or other

enlisted men but if he did make such an offer he was joking (R39-40,42). He had not heard about or read Circular 92 but he did read the bulletin board about twice a week. He did not know enlisted men were "having trouble" sending money home. They would have had difficulty sending German money for it was impossible to get or exchange (R46-47). Stanley explained that he won the money gambling, that in the game were a few privates, and that the colonel would find out about this if he sent the money through the company commander. He said he had $150. Accused counted it to be 6300 francs, a trifle more than $140 (R40,46). He had his brother send Mrs. Stanley $140 (R41-42). He saw no harm in helping the sergeant. His profit was but a trifle - the excess of 6300 francs over $140 (R46). Upon hearing from his brother, he notified Stanley, through messenger, that everything was all right (R44). Accused was worth from $35,000 to $40,000 (R41).

The chaplain of accused's group headquarters testified he was unaware of Circular 92 and would have sent money home for an enlisted man (R49-50).

5. The court sustained many objections interposed by the prosecution and overruled many made by the defense. One ruling requires comment. The law member, on his own motion, cut short defense's cross-examination of First Sergeant Stanley with respect to the amount of money he owed the Government. Obviously, defense was seeking to impeach the witness. Prosecution was then allowed to go into every detail of the transaction (R24-27). Defense was entitled to a greater latitude in its cross-examination than permitted. While it was inconsistent to permit prosecution to do what had been denied defense, the result was to place before the court the very details the defense had not been permitted to adduce. Thus, the error in denying the defense was corrected. While the details as developed by the prosecution tended to exonerate rather than impeach the witness, the defense failed to cross-examine as to the details developed by the prosecution in redirect examination. The substantial rights of accused were not injuriously affected.

6. Charge I and Specification:

a. The Specification is technically and factually sufficient in allegations to aver a misbehavior punishable under Article of War 96. While accused's offer was not specifically alleged to have been made "unlawfully", "illegally" or otherwise "wrongfully", it was alleged to have been made "notwithstanding" the provisions of the circular. As observed by Attorney General Cushing, in 7 Opinions Attorney General 604, a specification "does not need to possess the technical nicety of indictments at common law". Though accused was not a "commander" it was his duty to lend support to the policies required of his commander. The Specification therefore alleged not only a neglect to aid the commander in carrying out his

responsibility but also affirmative conduct prejudicial to the fulfillment of that responsibility; and deleting the words "or captured enemy property" as surplusage because of prosecution's failure to show that accused, in making his offer, said them, the Specification is nonetheless sufficient. There remained the alleged and proved offer to transmit "German money". This offer did not exclude money obtained from unauthorized sources. Rather, it included such money in fact as well as by implication. Nor is the Specification defective in that it merely alleged an offer. True, at common law mere words do not constitute an attempt. On the other hand, the allegation here of an offer to assist, for a consideration, enlisted men in the circumvention of a declared policy, was an allegation of a neglect, repudiation, and perversion of duty cognizable under Article of War 96 (See Winthrop's Military Law and Precedents (Reprint, 1920) p.722).

b. The evidence supports the court's findings as to Charge I and Specification. While accused denied knowledge of the circular there was substantial evidence to support the court's finding that he did have knowledge thereof.

7. Charge II and Specification:

a. The evidence clearly established that the evil design originated in accused's mind, that the offense was not instigated by the Government's agents, and that they merely afforded the opportunity and facilities for its commission in order to detect and apprehend accused. There was no entrapment (CM ETO 8619, Lippie; CM 239845 (1943), 3 Bull. JAG 55; CM 227195 (1942), 1 Bull JAG 360).

b. The evidence supports the findings as to Charge II and Specification. While accused contended the sergeant gave him only 6,300 francs it was within the province of the court to reject his testimony and believe prosecution's evidence that 10,200 Belgian francs were given him (See CM ETO 3147, Gayles; CM ETO 3750, Bell). 10,200 Belgian francs have an exchange value slightly in excess of $232. The exchange rate is 43.7732 francs for $1.00. Of this the court could take judicial notice (see CM ETO 2358, Pheil). Accused admitted to transmitting $140. That $92 was an unconscionable amount to charge for sending $140 is self-evident. "An unconscionable bargain is one which * * * no fair and honest man would accept * * *" (Black's Law Dictionary (3rd Ed.) p.773). The exaction of usury from a soldier is conduct unbecoming an officer and a gentlement (Winthrop's Military Law and Precedents (Reprint, 1920) p.716, fn.45); So also accused's exaction.

8. The sentence to "dishonorable discharge", while inappropriate since accused was a commissioned officer, was legal and prejudiced no substantial rights (CM 249921 (1944), 3 Bull. JAG 281; SPJA 1943/7264, May 26, 1943, 2 Bull. JAG 210).

12455

(184)

9. The charge sheet shows accused is 41 years 11 months of age and "entered on active duty" 16 November 1942. He had no prior service.

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

11. The penalty for conviction of a violation of Article of War 95 is dismissal, and for violation of Article of War 96 by an officer, is such punishment as a court-martial may direct.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B V Levy Jr Judge Advocate

1st Ind.

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

1. In the case of Captain ALEXANDER MARSHALL (0-504619), 471st Quartermaster Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12453. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12453).

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

(Sentence ordered executed. GCMO 276, ETO, 20 July 1945).

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

BOARD OF REVIEW NO. 1 8 SEP 1945

CM ETO 12465

U N I T E D S T A T E S	)	XXIII CORPS
	)	
v.	)	Trial by GCM, convened
	)	at Koblenz, Germany,
Private First Class K. C. STANDBERRY (38482362), 1366th Engineer Dump Truck Company	)	20 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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.

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

CHARGE I: Violation of the 61st Article of War.
(Nolle prosequi)

Specification. (Nolle prosequi)

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

Specification. In that Private First Class K. C. Standberry, 1366th Engineer Dump Truck Company, did, at or near Oberwesel, Germany, on or about 31 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Katrina Mouch.

CHARGE III: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE IV: Violation of the 94th Article of War.
(Nolle prosequi)

Specification: (Nolle prosequi)

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 Charge II and its Specification and not guilty of Charge III and its Specification. Evidence was introduced of two previous convictions by summary court, one for absence without leave for four days in violation of Article of War 61 and one for leaving vehicle unguarded in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Substantial and credible testimony of the prosecutrix, age 41 years, shows that at the place and about 0100 hours on the date alleged, after a half-hour visit some three hours earlier, accused, a colored soldier armed with a carbine, without invitation entered her house and the room where she slept with her parents and son. By threatening her parents with his carbine he forced them into the kitchen and then held the woman by the throat, tore her dress and threw her upon a bed, where after threatening her with his weapon, he engaged in three or four acts of sexual intercourse with her over a period of some two hours. She was terrorized, cried for help and, while she was afraid to strike her assailant, did resist by using her feet. Her testimony was corroborated by that of her father that he witnessed the intercourse and heard his daughter's cries, but was prevented from aiding her because of fear of accused's gun, with which he was threatened. It was further corroborated by testimony of an American military police officer, summoned by the victim's son who escaped, that shortly after the assault she was highly nervous and hysterical, her dress torn, her hair dishevelled, and that she complained to him she had "gone through two hours of hell" with accused, whom she described as a "swine-dog". Witness apprehended and disarmed accused at the

scene and his fly was shortly thereafter found to be open.

4. Accused, in a pre-trial sworn statement, the substance of which he reiterated in an unsworn statement at the trial, admitted only the earlier visit to the house, which he claimed was for the purpose of investigating a radio which he heard and denied having even touched the woman, but admitted his apprehension on the scene. His denial of intercourse created an issue of fact which the court was fully warranted in determining against him in its findings of guilty of rape, which are supported by clear evidence of carnal knowledge of the victim by force and terrorization and without her consent (CM ETO 11376, Longie; CM ETO 11608, Hutchinson; CM ETO 14256, Barkley).

5. The charge sheet shows that accused is 32 years two months of age and was inducted 13 November 1943 at Tyler, Texas, to serve for the duration of the war plus six months. No prior service is shown.

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

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

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Paul R. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 12466

UNITED STATES	XXIII CORPS
v.	Trial by GCM, convened at Idar-Oberstein, Germany, 22 May 1945.
Private RUSSELL J. WALKER (36962557), 209th Field Artillery Battalion (Temporary Duty: Headquarters XXIII Corps	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. 1
BURROW, STEVENS 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.

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

CHARGE: Violation of the 86th Article of War.

Specification 1: In that Private Russell J. Walker, 209th Field Artillery Battalion, being on guard and posted as a sentinel at Idar-Oberstein, Birkenfeld Kreis, Rhein Provinz, Germany, on or about 2000, 27 April 1945, did leave his post before he was regularly relieved.

Specification 2: In that * * * being on guard and posted as a sentinel at Idar-Oberstein, Birkenfeld Kreis, Rhein Provinz, Germany, on or about 2230, 27 April 1945, did leave his post before he was regularly relieved.

He pleaded guilty, with motion to change the plea to not guilty subsequently denied, and all of the members of the court present at the time

the vote was taken concurring, was found guilty of the Charge and both specifications. Evidence was introduced of two previous convictions by special courts-martial for absences without leave for 45 and 40 days, respectively, both in violation of Article of War 61. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, ordered it duly executed, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 45, Headquarters XXIII Corps, APO 103, U. S. Army, 31 May 1945. For reasons appearing below, the Board of Review has treated the record of trial as being forwarded for action pursuant to Article of War 50½.

3. The evidence is clear and convincing beyond reasonable doubt: that accused was posted as a sentinel (R7); that before he was properly relieved he left the limits of his post on two occasions during his tour of duty (R8,9; Pros.Ex.1); and that he was twice found in a place which he was specifically instructed was off that post (R16-18). The elements of each offense charged were therefore fully proven (MCM, 1928, par.146c, p.161; CM ETO 4443, Dick; CM ETO 9144, Warren).

4. The record of trial was not transmitted pursuant to paragraph 3 of Article of War 50½, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater for examination and review by the Board of Review in his office and himself, but without such examination and review the approved sentence was promulgated on 31 May 1945 by General Court-Martial Orders No. 45, Headquarters XXIII Corps. Apparently the reviewing authority acted on the assumption that he was authorized to order execution of the sentence without appellate review by the Board of Review and Assistant Judge Advocate General, and based his action on his authority to execute sentences involving dishonorable discharge

> "based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty" (par.3, AW 50½).

This, however, was error because the accused sought to change his plea of guilty to not guilty by statement to that effect in open court (R21), and the defense counsel moved the court that such be done and that the decision be based on the evidence then before the court (R22). The motion was denied (R23). The Manual provides:

"Whenever an accused, after a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the president or the law member * * * will make such explanation and statement to the accused as the occasion requires. If * * * after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty (AW 21)" (MCM, 1928, par.70, pp.54-55).

In the opinion of the Board of Review, his statement of his desire to change his plea to not guilty was, without question, an inconsistent statement within the meaning of Article of War 21 and the Manual. We hold that the court's denial of his request was ineffectual and that the court will be deemed to have proceeded to trial and judgment as if he had pleaded not guilty. The burden was therefore left upon the prosecution to prove the offenses beyond a reasonable doubt, which, however, as noted hereinabove was fully met and the court's error harmless. The findings nevertheless were not in legal effect based solely upon a plea of guilty. That part of the action ordering the sentence executed and the issue of the General Court-Martial Order were therefore premature and wholly void. The action should be amended and the order should be nullified and recalled (CM ETO 9779, Stanley and Shepherd; CM ETO 11619, Thompson; CM ETO 16240, Christiano).

5. The charge sheet shows accused is 19 years seven months of age. He was inducted 3 April 1944 at Fort Sheridan, Illinois. No prior service is shown.

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

7. The penalty for a violation of Article of War 86 in time of war is death or such other punishment as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Wm. F. Burrow Judge Advocate

Edward C. Stevens, Jr. Judge Advocate

David K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1 — 1 SEP 1945

CM ETO 12470

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Korbach, Germany, 12 April 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 60 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant RAYMOND A. MAYO (O-1314931), Company B, 60th Infantry	

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

1. The record of trial in the case of the officer named above has been examined 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 1: In that 2nd Lt. Raymond A. Mayo, Company "B", 60th Infantry, did, at Camp Elsenborn, Belgium on or about 23 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and shirk important service, and did remain absent in desertion until he surrendered himself in Namur Belgium, on or about 28 December 1944.

Specification 2: (Nolle Prosequi).

12470

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

Specification: (Nolle Prosequi)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and Specification I thereof. No evidence of previous convictions was introduced. Seven-eighths 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 60 years. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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. This is a case of five days' admittedly unauthorized absence from an organization which was close enough to the front line to have artillery fire fall in its vicinity the day the absence began (R24). The time was 23 December to 28 December 1944, and the place between Camp Elsenborn, Belgium, and Kalterherberg, Germany, at the northern hinge of the great German Breakthrough in the Ardennes Battle. For operational reasons, accused, who had that day brought to the battalion part of an order to move into the front lines, was relieved of his duties as liaison officer between battalion and regiment and assigned to an infantry company. His primary duty as liaison officer had been to know the tactical situation. He did not report but journeyed some 60 miles to the rear (R4,5,23). He claimed that the reason for his failure was a letter received from his wife some five to 11 days previously which was introduced in evidence and indicated infidelity, residence at a hotel with another man, abandonment of their child to the custody of a hired nurse, and intent to dissolve the marriage. He testified that he left to get drunk and forget it all, for his mind was in turmoil, and he did not intend to avoid hazardous duty as he knew of no move of his battalion out of regimental reserve (R15-22; Def.Ex.1). For further particulars of the evidence, reference is made to paragraphs five and six of the review by the staff judge advocate of the confirming authority.

4. The question in the case is whether accused intended to avoid hazardous duty. It is at once apparent

that the court need not have accepted the testimony of the accused as to his reasons for departure, for it was within the court's province as a fact-finding body to reject it and the letter as a fabricated defense. The Board of Review will take judicial notice that the battles at this time at the hinge of the northern shoulder of the German Salient were violent and most crucial in the Ardennes campaign and resulted in large part in the inability of the Germans to secure their right flank on the swamps to the north and west (CM ETO 7413, Gogol; CM ETO 8358, Lape and Cordeman). To leave this area under such combat conditions and at the time of change of duty from the relative safety of liaison work to the more hazardous duty with a rifle company, and to journey far to the rear, was conduct which the court could with reason infer was motivated by the intent to avoid hazardous duty (CM ETO 6637, Pittala; CM ETO 9862, Irwin; CM ETO 12951, Quintus). The defense evidence, if believed by the court, though pitiful indeed, could properly be considered by it to be no more than a mitigating circumstance. If a man leaves existing hazardous duty and intends thereby to escape it, the law is not that he will be excused if personal reasons were a contributing cause. The law instead is that a man must subject his person and its desires to the service of his country, and stand and fight for the country's sake until death if necessary, though his whims or tragedies or personality or fears make him wish to be elsewhere. Any less severe rule would subordinate discipline to caprice and cowardice (CM ETO 4382, Long; CM ETO 6842, Clifton; CM ETO 7378, Fisher and Wilhelm; CM ETO 8448, Tracy).

5. The charge sheet shows that accused is 26 years of age. He was commissioned a second lieutenant 19 March 1943 by Special Order No. 67,19 March 1943, Headquarters The Infantry School. He had prior enlisted service from March 1936 to August 1937, from 11 August 1938 to 10 August 1941, and from June 1942 to 18 March 1943.

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.

(198)

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

Wm. F. Swinson Judge Advocate

Edward K. Stevens, Jr. Judge Advocate

David K. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant Raymond A. Mayo (O-1314931), Company B, 60th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12470. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12470).

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

(Sentence ordered executed. GCMO 402, USFET, 11 Sept 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 12471

U N I T E D S T A T E S	) 28TH INFANTRY DIVISION
v.	) Trial by GCM, convened at Langendernbach, Germany, 11 April 1945.
Second Lieutenant JOHN H. PECOR (O-1312043), Headquarters 28th Infantry Division	) Sentence: Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Second Lieutenant John H. Pecor, Headquarters 28th Infantry Division, then 110th Infantry, having received a lawful command from Captain David D. White, Division Classification Officer, his superior officer, to go forward to join the 110th Infantry to which he had been verbally assigned, did at Eupen, Belgium on or about 3 March 1945, wilfully disobey the same.

He pleaded guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote

was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority, the Commanding General, 28th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances in the case, remitted the period of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence established that as of 23 February 1945, accused was assigned to the 28th Infantry Division by Headquarters, Twelfth Army Group (R11; Pros.Ex.1). On reporting to 28th Division Headquarters on 3 March 1945, the Division Classification Officer, Captain David D. White, assigned him to the 110th Infantry (R11). Accused protested on the grounds that because of his nervous condition he was incapable of undergoing combat duty with an infantry regiment. Ultimately, Captain White gave accused a direct order to report for duty to the 110th Infantry and accused categorically refused to obey it (R11-12).

4. Evidence for the defense: Major Arthur L. Burks, Medical Corps, Division Psychiatrist, 28th Infantry Division, testified that he examined accused on 6 March 1945 and found him suffering from an "acute anxiety state. A type of anxiety neurosis". Although not fit for combat duty he was sane and responsible for his actions both at the time of the examination and at the time of the alleged offense (R19-22).

Accused, after being advised of his rights, was sworn and testified. He gave a detailed history of his Army career, including his assignment to an infantry regiment as a battalion communications officer. He participated in the fighting around St. Malo and at Brest. Eventually he became nervous under artillery fire and his efficiency was so reduced because of this that he was relieved and sent to the Ninth Army for reclassification. At Ninth Army Headquarters he was assigned the duty of conducting war correspondents to the various divisions until he was ordered to report to the 28th Infantry Division. He refused to obey Captain White's order because he knew he could not successfully lead a platoon of men into combat (R23-27).

5. Accused's plea of guilty, the prosecution's evidence and accused's testimony show that on 3 March 1945, he received an order to report to the 110th Infantry from Captain David D. White, and that he refused to obey it. The intentional character of his disobedience is thus clearly established

(CM ETO 2469, Tibi). The fact that due to his nervous condition he felt incapable of leading men is no defense (CM ETO 10497, Switzer).

6. The charge sheet shows that accused is 28 years and 11 months of age. He was commissioned a second lieutenant on 23 February 1943. He had prior service as an enlisted man in the National Guard from 25 June 1940 to 22 February 1943.

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

8. A sentence of dismissal and total forfeitures is authorized upon conviction of a violation of Article of War 64.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(204)

1st Ind.

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

1. In the case of Second Lieutenant JOHN H. PECOR (O-1312043), Headquarters, 28th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12471. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12471).

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

(Sentence ordered executed. GCMO 358, USFET, 29 Aug 1945).

12471

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

BOARD OF REVIEW NO. 3 11 AUG 1945

CM ETO 12472

U N I T E D S T A T E S	)	65TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Neunkirchen,
	)	Germany, 27 March 1945. Sentence:
Private MIKE J. SYACSURE	)	Dishonorable discharge, total forfeit-
(35230938), Battery B, 720th	)	ures and confinement at hard labor
Field Artillery Battalion	)	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 upon the following charges and specifications:

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

Specification: In that Private Mike J. Syacsure, Battery "B", 720th Field Artillery Battalion, did, at #1 Schultzenstrasse, Wiebelskirchen, Germany, on or about 23 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Ilsa Hahn.

CHARGE II: Violation of the 61st Article of War. (Nolle prosequi).

Specification: (Nolle prosequi).

CHARGE III: Violation of the 93rd Article of War.
(Finding of not guilty).

Specification 1: (Nolle prosequi).

Specification 2: (Finding of not guilty).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification and not guilty of Charge III and Specification 2 thereof. Evidence was introduced of one previous conviction by special court-martial for absence without leave for six days in violation of Article of War 61. 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, 65th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but 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 on 23 March 1945 accused was present for duty with Battery B, 720th Field Artillery Battalion, located about three-quarters of a mile from the town of Wiebelskirchen, Germany. At about 1630 hours accused and Private First Class Sterling L. Wood left the battery area and went to Wiebelskirchen where they entered two or three houses in search of weapons or "some pretty knives and pistols". They were not authorized to make the trip or the searches. Accused was armed with a pistol and a carbine. After securing a pair of field glasses they went into a fourth house where accused was given some cognac, some of which they drank and some of which accused took with him in his canteen when they left after about an hour.

On the way back to the battery area, at about 1800 or 1830 hours Wood and accused "walked in" another house in which were Herr and Frau Neufang, both old people, a small boy, and two girls - the prosecutrix, Ilsa Hahn, aged 16, and her friend, Elfrieda Habel, aged about 20 (R5-7,9,14,34-35,41). Accused "done a little searching" in another room and Wood started a conversation with the people. Accused returned to the room and "got interested in" Ilsa Hahn, the younger girl, whom he had never seen before (R8,41). Everyone except

the boy drank some of accused's cognac, and Ilsa drank "half a glass". Accused came over to a table where she was sitting and put his arm around her and asked her to write her name on a piece of paper. She got up and moved to another chair. In about half an hour she became sick from the cognac and walked outside. Accused followed her with his revolver in his hand and "held /her/ arms tight". She told him to let her alone, but he refused and followed her back into the house (R8,35-36). Wood testified that accused then said, "Wood, watch for me; I'm going in the bedroom and fuck the girl" (R8-9). Accused then took Ilsa's hand and pulled her up from a chair. When she started to go to Herr Neufang, accused held his pistol against Neufang's chest. She refused to go into the bedroom with accused, and when he entered it with Herr Neufang she ran or "walked very fast" to the Habel house across the street at No. 1, Schultzenstrasse. Accused followed her with his pistol in his hand, went into the Habel house without permission, and grabbed Ilsa and pulled her from a bed where she had hidden from him under the bed covers. He then followed her into the kitchen, thence into a wash kitchen, locked the door and "got" her against the wall where he succeeded in getting his hand up under her dress. When he turned to put out the light, she unlocked the door and went into the kitchen with some other people. He followed with his pistol in his hand and grabbed her and turned her around again. He threatened to shoot anyone in the kitchen who wanted to help her (R37-38). Herr Neufang, Wood and Frieda Habel followed accused to the Habel house and found him in the kitchen "trying to hold /Ilsa/ and she was trying to break away". An old man and old woman, who were in the kitchen, asked Wood to stop the scuffling, whereupon he took the ammunition from accused's carbine and pistol. The old lady then fainted and Wood assisted her to the bedroom. On returning to the kitchen he saw that accused had Ilsa on the floor. She was crying and "kicking and wallowing around" and seemed frightened. Accused had his pistol in his hand. Wood took the carbine from the wall and threatened to get an officer if accused did not leave. Accused paid no attention, so he left the room, but "hollered" back to accused to "come on, I'm going". Frieda, the older girl, accompanied Wood to the battery area, where they stopped and got two lieutenants to return with them to the Habel house (R10-13).

In the meantime, accused pulled Ilsa from the kitchen into the bedroom against her will. She did not try to break away "because I was still afraid, because he had the revolver; and when I did try to get away, he held his hand up in the air as if to strike me". He indicated that he was going to shoot her by saying, "Boom, boom". She knew the pistol was not loaded in the bedroom, but had seen some ammunition in accused's pocket at the Neufang house. Accused closed

the bedroom door, threw her down on a couch, pulled up her dress and tore her pants away. He pulled her from the couch over to the bed. She "pushed him away" and attempted to get up, but he held her down. He removed his trousers and displayed his private parts, got on top of her and had sexual intercourse with her, without her consent, inserting his penis "all the way" into her private parts (R38-42).

After about half an hour, and at about 2130 hours, at the direction of Wood, Lieutenants Fraser and Dugdale entered the kitchen of the Habel house where an old lady was crying, and then went into the bedroom where they found accused on top of Ilsa, lying between her legs. His pants were down and he had no drawers on. Ilsa's dress was up, her stockings were down, and she had no pants on. She was sobbing "very mildly", and her hands were on the front of accused's shoulders. Accused saw the officers but did not get up until Lieutenant Fraser walked over and put his hand on accused's shoulder and said, "Okay, Syacsure, let's go". Ilsa got up and came over to Lieutenant Fraser and put her arms around him, at the same time increasing her crying and repeating "Komrad". In the opinion of Lieutenants Fraser and Dugdale she was very excited and almost hysterical. Accused dressed himself, picked up his pistol from the floor by the side of the bed and put it in its holster. After Lieutenant Fraser left the room accused asked Wood for a cigarette and asked about his carbine. In Lieutenant Dugdale's opinion he was not drunk at the time (R22-34).

Elfreida Habel testified that after accused left her house on the night of 23 March with the officers, Fraulein Hahn told her she had had sexual intercourse with a man, that she had protested, and that she did not want to do it (R43-44).

4. For the defense, Oscar Koch, a resident of Wiebelskirchen and former employee of the police bureau in Saarbrucken during 1943 and 1944, testified that Ilsa Hahn had lived in Saarbrucken during that time, and he had seen her many evenings with different soldiers in a number of public places. With reference to the prosecutrix he also testified:

> "At nine o'clock she was with one, and at ten o'clock with a different one. * * * When a girl goes out with a different soldier every evening, then a girl like that is no good" (R44-46).

The accused, after his rights as a witness were fully explained to him, elected to remain silent (R46-47).

5. The testimony of the prosecutrix shows that accused had carnal knowledge of her at the time and place alleged in the Specification of Charge I. Her testimony further shows that the act was committed by accused by force and without her consent, and in spite of actual physical resistance and protestation on her part. She testified in effect that she did not resist accused's advances to any greater extent because of fear engendered in her by his threatening words and gestures, accompanied by an apparent ability on his part to carry them into effect. Her uncontradicted testimony is in all respects corroborated by the testimony of accused's companion, Private First Class Wood, who vainly sought to stop accused's forcible advances prior to the act of intercourse, and by the testimony of two officers who actually saw accused on top of the prosecutrix while the act of intercourse was apparently still in progress, or immediately after its consummation. Under the circumstances shown by the undisputed evidence, there is no doubt but that the court properly found accused guilty of the Specification of Charge I (CM ETO 3933, Ferguson, et al; CM ETO 3740, Sanders, et al; CM ETO 10841, Utsey; CM 236801, II Bull. JAG 310).

6. The charges were served upon accused 26 March and he was brought to trial the following day at 1400 hours. Both accused and his defense counsel expressly assented in open court to trial despite the fact that less than five days had elapsed since service of the charges (R2,3). In view of such express waiver and the lack of any indication in the record of probable injury to accused, it does not appear that his substantial rights were prejudiced by trial within the five-day period (CM ETO 3475, Blackwell; CM ETO 5255, Duncan; CM ETO 5445, Dann).

7. The charge sheet shows that accused is 20 years and five months of age and was inducted 29 May 1943. No prior service is shown.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon a conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary,

Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private MIKE J. SYACSURE (35230938), Battery B, 720th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 12472. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 12472).

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

(Sentence as commuted ordered executed. GCMO 347, ETO, 26 Aug 1945).

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

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 12480

U N I T E D S T A T E S	13TH AIRBORNE DIVISION
v.	Trial by GCM, convened at Auxerre, France, 28 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant IRVIN E. BUCK (O-1317591), Company C, 517th Parachute Infantry.	

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

---

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

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

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

Specification: In that 2nd Lt Irvin E. Buck, Company C, 517th Parachute Infantry, did, at Joigny, France, on or about 14 March 1945, with intent to do him bodily harm, commit an assault upon Mr Henri Speilmann, by shooting him in the region of the hip, with a dangerous weapon, to wit, a pistol, Caliber .45.

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

Specification: In that * * * was at Joigny, France, on or about 14 March 1945, drunk and disorderly in quarters.

He pleaded not guilty to Charge I and its Specification, guilty to Charge II and its Specification, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 13th Airborne Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that, on 13 March 1945, accused was mess officer of the First and Third Battalion Officers' Mess at the Hotel de la Marine in Joigny, France. At about 1400 hours, upon returning from an appointment with his commanding officer, he informed his interpreter, Corporal Marks, that it was his last day as mess officer and that he was to report to his company for duty the following morning. He seemed to be "quite peeved" at being relieved as mess officer and, after stating that he "anticipated to get drunk", commenced to drink from a bottle of cognac with Henri Spielmann, a French chef from one of the other kitchens who had been there quite often. Around supper time, two other bottles of liquor were brought to accused and his friend. Two girls came by about 2200 hours and remained about fifteen minutes (R7-8,14,18,25). Miss Ramonde Noel, a waitress at a hotel in Joigny, an acquaintance of accused, testified that at about 2215 hours on 13 March she talked to accused for about an hour at the Hotel de la Marine and that he was drunk. He did not act normally and walked like a drunk man (R25-26). At about 2300 hours another bottle of cognac was brought to accused and his friend (R7-8).

Henri Spielmann, a self-styled "general handy-man" for the American army, testified by deposition that he drank probably two glasses of cognac with accused before he left the hotel about 1800 hours. At accused's invitation he returned about 2015 hours and they sat around and drank with some other persons until about 2330 hours when accused said he was hungry, "so we made eggs." Upon accused's suggestion that Spielmann spend the night with him, they proceeded upstairs and went to bed. As to the ensuing happenings, Spielmann testified:

"After a few minutes the Lieutenant got up, smoked a cigarette, drew his pistol and without any further words said "go away". * * * I got up and got

> dressed, * * * and then he told me 'get out' and I left to the corridor. He followed me with his revolver still in his hand. On arriving at the door downstairs he opened the door with his key. I left and after having gone a few steps then I heard a shot fired, I began to run, then I heard the second shot" (R18-19, Pros.Ex.C,p.2).

The second shot went through the witness' left hip, but he continued to walk to the police station. Because of the darkness he did not see accused pointing the gun at him or firing it, but he saw nobody else on the street at the time. Accused was "quite drunk" at the time (R18-20; Pros.Ex.C,p.3). On cross-examination, Spielmann stated that accused had drunk a lot and that he started to prepare the meal but "could not continue so I assisted." Accused had put his trousers on before he got up to smoke, and threatened Spielmann while he was getting dressed and also as he went down the stairs, keeping the revolver pointed at the witness, about chest high (R22-23; Pros.Ex.C,p.5-6).

About 0200 hours on 14 March accused went into Corporal Marks' room, "sweating and red-faced", with a pistol in his right hand, and woke Marks saying, "Marks, I just took a couple of shots at that French cocksucking queer bastard." Marks told accused he was "half drunk" and to go back to bed (R8,12). In Marks' opinion accused was drunk at the time (R10), and the witness did not believe he was responsible for his actions (R13).

Captain William H. Young, Provost Marshal of the 517th Parachute Infantry, interviewed Spielmann in a hospital between 0300 and 0500 hours, after which he went to the Hotel de la Marine. About 0630 hours he was admitted to the hotel and went to accused's room with Corporal Marks and a sergeant. He entered the room quietly and cautiously, without knocking. Accused was sitting "propped up" in bed with a "forty-five" in his hand (R9,16-17), which he pointed at Captain Young (R15). Captain Young took out his pistol and yelled, "Put down that gun, Buck." Corporal Marks then asked to go in, and did enter the room and asked accused to give him the gun. Accused took out the magazine and turned the pistol over to Marks. Captain Young reprimanded accused for "displaying" the weapon at him, whereupon accused explained that he thought it was the Frenchman coming back (R9,17). Captain Young arrested accused and read to him the 24th Article of War. In his opinion accused was not drunk at this time. Accused admitted he had fired two shots at Spielmann, and "laughed" and admitted one of two .45 calibre cartridges found about six feet from the hotel door was from his gun. The pistol and cartridges were introduced in evidence. (R14-15; Pros.Ex.A; Pros.Ex.B).

4. After the defense had stated that accused had been warned of his rights and accused had assured the court that he understood them, he was sworn as a witness (R26). He testified that he had been a platoon

leader in the line with the 517th Parachute Infantry in Germany, and had been on patrol combat missions, before becoming his company mess officer and later mess officer of the First and Third Battalions at Joigny. On 13 March, he was "a little bit irritated" at losing his assignment as mess officer after he had made the mess "the best in the regiment." He began drinking, and that night, he testified,

> "Things were pretty hazy, I was rather drunk. I remember having a gun in my hand, going outside, vaguely remember shooting and returning to bed. * * * I couldn't see my target but I presume it was the Frenchman. * * * I was shooting at the air. * * * I must have wanted to scare him" (R27).

He did not remember any of the happenings too well. After going to bed, the next thing he remembered was the "door squeaking and a forty-five coming around the corner" and a head he could not recognize because of the darkness. He was still under the influence of liquor at the time (R26-29).

In accused's behalf, a captain and three first lieutenants of the 517th Parachute Infantry testified as character witnesses. Their testimony collectively shows that accused was in several combat missions as platoon leader, and had volunteered for the first patrol his company sent out. He performed well under fire, and had the respect and admiration of the older officers and enlisted men in the field. He was a very efficient soldier and had been recommended for promotion. His general reputation and character in his organization were excellent (R30-33).

5. a. Specification of Charge II. The evidence is convincing and undisputed that during the early morning of 14 March 1945 accused was drunk in his quarters in the Hotel de la Marine in Joigny, France. Other evidence shows that after he had invited a Frenchman to spend the night in his quarters, and the two had retired to bed, accused, while still "quite drunk", got out of bed and pointed his pistol at his guest and ordered him from the room, and continued to threaten the Frenchman with the pistol while he dressed and left the room. In the absence of any justification in the evidence for accused's actions, and in view of his plea of guilty to Charge II and its Specification, the court was fully warranted in finding accused guilty of being drunk and disorderly as alleged in the Specification, in violation of Article of War 95 (CM ETO 7585, Manning; CM 221591, I Bull. JAG 164; Winthrop's Military Law and Precedents (Reprint 1920) p. 717).

b. Specification of Charge I. The evidence being undisputed and compelling that accused assaulted Henri Speilmann at the time and place alleged in the Specification by shooting him with a pistol in a manner likely to produce death or great bodily harm, the only question

presented for determination is whether the circumstances are sufficient to warrant the court in finding that accused, concurrently with the firing of the pistol, had the alleged specific intent to do bodily harm to Spielmann (see MCM 1928, par. 149m,n, p.180). The testimony shows that immediately prior to the shooting, accused pointed his pistol at Spielmann and threatened him with it while he dressed and as he proceeded down the stairs pursuant to accused's apparently unjustified orders. Accused admitted in his testimony that he "presumed" his target was the Frenchman and that he must have wanted to scare him. Immediately after the shooting he told Corporal Marks about shooting at the Frenchman. Such circumstances, viewed in the light of the fundamental rules that malice is presumed from the use of a deadly weapon, and that accused is presumed to have intended the natural and probable consequences of his acts, are clearly sufficient to justify the court in finding a specific intent to do bodily harm, unless such finding is precluded by the uncontradicted testimony as to accused's drunkenness at the time of the assault (CM ETO 3812 Harshner; CM ETO 7000, Skinner; MCM 1928, par. 126a, p.135-136). The testimony of accused and three other witnesses leaves no doubt that he was intoxicated at the time of the shooting. However, the evidence shows that at about that time he was able to get out of bed, put on his trousers, smoke, walk, speak in a threatening manner, unlock a door, point and fire a pistol, and to thereafter locate and tell Corporal Marks what he had done. Shortly before the shooting he had assisted in preparing a meal and had eaten. The following morning he was able to recall the happenings of the night before and was apprehensive that the Frenchman might return to his room. Under the circumstances, whether he was too drunk to entertain a specific intent was clearly a question for the court's determination (CM ETO 3812, Harshner; CM ETO 7000, Skinner; CM NATO 774, II Bull. JAG 427).

There was no fatal inconsistency in the court's findings that accused was grossly drunk so as to be guilty of a violation of Article of War 95, and at the same time capable of harboring the specific intent to do bodily harm required to establish the alleged violation of Article of War 93 (CM ETO 7585, Manning).

6. The charge sheet shows that accused is 23 years and six months of age and was commissioned 14 April 1943. He entered the Army as an enlisted man on 7 August 1942 (R36). No other 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 confirmed.

8. A sentence of dismissal is mandatory upon conviction of Article of War 95, and dismissal and confinement at hard labor are

(218)

authorized punishments for violation of Article of War 93. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42 and Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

E R Wicker Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant IRVIN E. BUCK (O-1317591), Company C, 517th Parachute Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 12480. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 12480).

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

6 SEP 1945

CM ETO 12481

U N I T E D S T A T E S	)	9TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Bayreuth, Germany, 21 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN DOMINGOS (13009486), 9th Armored Division Band	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private John Domingos, 9th Armored Division Band, did without proper leave absent himself from his command, Band, 9th Armored Division, at Tidworth Barracks, Wiltshire, England, on or about 30 September 1944 at which time his command was departing to a marshalling area for immediate embarkation to France, and did remain absent without proper leave until he returned to Military control on or about 21 October 1944.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by summary court for behaving himself with disrespect toward a commissioned officer in violation of Article of War 63. 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. At a reveille formation of accused's company on the morning of 30 September 1944 at Tidworth Barracks, England, the first sergeant of the band (to which accused belonged) reported to the company first sergeant that all band men were present. The latter sergeant then told the formation a scheduled move to the marshalling area enroute to France was to begin around noon (R7). Accused was ordered to go with others on a truck to dispose of trash, departed the area at 0900 hours on the truck, and was not present shortly thereafter when its destination was reached (R7-9). Searches for him were made at such place and at the camp area when the truck returned there at 1015 or 1030 hours, without success (R8-11). His absence was unauthorized (R11). He was apprehended 21 October 1944 at an American Red Cross Club in Reading, England (R11). A competent morning report also established the original absence without leave (R12; Pros.Ex.B). Accused, after his rights as a witness were fully explained to him, elected to remain silent, and no evidence was introduced in his behalf. There is clear and uncontroverted proof of an aggravated absence without leave on 30 September, which is presumed to have continued until the proof of return to military control on 21 October (CM ETO 12239, Blackshear; CM ETO 9597, Jusiak). The proof would probably have warranted conviction for desertion if such had been the charge (Cf: CM ETO 9843, McClain).

4. The charge sheet shows that the accused is 23 years two months of age and enlisted 23 July 1940 at Pittsburgh, Pennsylvania, to serve for 3 years. He had no prior service.

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

6. The penalty for absence without leave is such punishment less than death as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Wm. F. Sprouse Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Daniel K. Carnes Judge Advocate

CONFIDENTIAL

12121

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

BOARD OF REVIEW NO. 1

25 JUN 1945

CM ETO 12486

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RAYMOND HERBERT (36958128), 672nd Ordnance Ammunition Company	Trial by GCM, convened at Liege, Belgium, 22 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Raymond Herbert, 672nd Ordnance Ammunition Company, did, at Gingelom, Belgium, on or about 2 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Nathaniel Fuse, 672nd Ordnance Ammunition Company, a human being by shooting him with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for disrespect toward a commissioned officer, willfully disobeying the lawful order of an officer and offering violence against an officer. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dis-

honorably 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 is, briefly summarized, as follows:

Accused and the deceased, Private Nathaniel Fuse, were members of 672nd Ordnance Ammunition Company, which, on 2 May 1945 was billeted in the Chateau de Gingelom, Gingelom, Belgium (R7,13). The organization was under restriction. At the time he was shot, Fuse was standing guard at the main gate of the chateau. About 1545 hours, accused arrived at the gate from outside the chateau. Fuse told him that the company was restricted and asked if he did not know that he was not supposed to go outside. An argument ensued during the course of which accused told Fuse that if the latter would lay down his gun, he (accused) would whip him (R22-23). Fuse put his gun down and he and accused advanced upon each other. Fuse pushed accused, whereupon a knife fell to the ground behind accused. Accused then turned and entered a nearby door, reappeared through the same door, proceeded approximately 15 yards to the shower room and entered it (R23,30).

First Sergeant Benjamin N. Humphries, having been advised that a disorder was in progress, appeared on the scene just as accused entered the shower room. After accused left the gate, Fuse resumed his seat on a bench and threw a cartridge into the chamber of his gun (R27). Sergeant Humphries went to where Fuse was sitting and was told by the latter that he and accused had had an argument. Fuse held in his hand at the time a knife. He delivered this knife to Sergeant Humphries, stating that he had taken it from accused (R11). Sergeant Humphries went to the shower room door, called for accused to come to the orderly room, and himself went on to the orderly room. Accused was then seen standing in the hallway of the shower room with a gun, looking out the door toward where Fuse was sitting. He could have emerged into the yard directly from the hallway but did not do so. Instead he circled through a garage and entered the yard from a door within five to ten feet of deceased. He immediately began to shoot at deceased and fired five or six shots in rapid succession, holding the gun about the level of his hip. Fuse, who was seated facing away from accused or with his side toward him, jumped up when the first shot was fired (R15,26), faced toward accused and then fell to the ground. Four or five minutes had elapsed between the initial quarrel and the shooting (R16,31). At the termination of the shooting, accused said, "I did it", stood and looked at deceased briefly and then started to walk away (R24,32). Sergeant Humphries ordered him to put down the gun, which he did. The gun, a carbine, was introduced in evidence R13; Pros.Ex.B). After conducting accused to the orderly room and placing

him under arrest, Sergeant Humphries went to where Fuse had fallen. He found the latter breathing heavily, with his eyes closed, and with his hands on his abdomen. He saw no blood and no perforations of deceased's clothing. He had deceased placed in a jeep and ordered him taken to the dispensary at the 64th Ordnance Battalion (R13).

About 1820 hours Major John E. C. Durant, Medical Officer of the Day, was called to the emergency ward of the 15th General Hospital to see a newly admitted patient who was suffering from a gunshot wound of the abdomen. The hospital records relative to the patient were presented to Major Durant upon his arrival. He stated at the trial that the name shown on the record was "Nathaniel Fuse" (R17). The patient died at 0135 hours on 3 May 1945. The cause of death was the gunshot wound in his abdomen and resulting shock, the bullet having entered the left upper abdomen one inch lateral to the mid-line, traversed the hematoma of the transverse colon, caused multiple perforations of the ilium and made its exit through the soft tissue overlaying the right ilium. There were also perforating wounds in the patient's left buttock and left thigh (R17,18).

A pre-trial statement, voluntarily made by accused, was introduced in evidence by the prosecution (R29; Pros.Ex.A). In it, accused stated that while he and Fuse were quarreling at the gate, the latter advance upon him and began jabbing at him with a small penknife. Accused thereupon pulled his own knife from a scabbard underneath his field jacket. Fuse then stepped back, picked up his carbine, which was lying on a bench, and pulled back the operating handle. Accused threw his knife on the ground and threw up his hands. He then ran upstairs, got the gun from a room where he remembered having seen it, returned and shot Fuse. He did not know how many times he shot; he "was angry at the time".

4. The defense recalled Sergeant Humphries but elicited nothing additional of consequence from him.

Upon having his rights explained to him, accused elected to remain silent.

5. There is no direct evidence of record identifying as one and the same person the Nathaniel Fuse who was shot by accused and the Nathaniel Fuse who died at the 15th General Hospital at 0135 hours on 3 May 1945. Upon the conclusion that the record otherwise sufficiently establishes this identity depends its legal sufficiency to establish the corpus delicti of the offense charged. The Board of Review is of the opinion that the record does contain substantial evidence from which the court could reasonably infer identity of person. Identity of name raises a presumption of identity of person, a presumption that is strengthened where, as in this instance, the name is not a common one (MCM, 1928, par.112a, p.110). Furthermore, the possibility that two soldiers of the Army of the United

named
States, both/Nathaniel Fuse, were both suffering from gunshot wounds on 2 May 1945 and were both in medical channels at the same time is such remote coincidence as not to constitute a reasonable hypothesis inconsistent with guilt. From the identity of name and the other circumstances proved by competent evidence, the court was justified in inferring the identity of person. The hospital records themselves would have been the best evidence of the name they reflected. No objection was asserted, however, to Major Durant's testifying to the name shown by the records, and the objection was therefore waived (MCM, 1928, par.116a, p.120).

6. The record of trial discloses nothing which, under the law, either justifies or excuses the homicide. The fatal wounds were inflicted deliberately, with a weapon that was per se deadly, and after accused had approached his victim in a manner from which stealth may be inferred. The initial fuss and encounter between accused and deceased had terminated four or five minutes earlier and was not of a nature to, as a matter of law, reduce the homicide from murder to manslaughter. The question of whether the homicide was committed with malice aforethought was, under the circumstances, one for determination by the court, and there was substantial competent evidence to support the court's finding (CM ETO 6682, Frazier, and authorities therein cited).

7. The charge sheet shows that accused is 20 years five months of age and was inducted 23 March 1944 to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for 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 275,330, 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. 5 1 SEP 1945

CM ETO 12488

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private BOSS WILSON (33749733) 4198th Quartermaster Service Company	Trial by GCM, convened at Liege, Belgium, 25 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Boss Wilson, 4198th Quartermaster Service Company, did, at or near Liege, Belgium, on or about 22 April 1945, lift up a weapon, to wit, a Carbine, against Lieutenant Charles E. Conklin, his superior officer, who was then in the execution of his office.

He pleaded not guilty, and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for failure to obey the command of a superior officer and one by special court-martial for disobeying an order given by an officer, both in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority, the Commanding General, Channel Base Section, Communications Zone, European Theater of Operations, approved only that portion of the sentence providing that accused be hanged by the neck until dead, and forwarded the record of trial for action under Articles of War 48 and 50. 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 by the convening authority for clemency, 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. Evidence for the prosecution shows that on 22 April 1945, Lieutenant Charles F. Conklin, commanding officer of the 4198th Quartermaster Service Company, of which organization accused was a member, went to one of the squad rooms and told accused to get his clothes together as he was going to the stockade to be confined. Accused complained in a loud voice that he was being abused and that advantage was being taken of him (R15). Lieutenant Conklin left and accused followed him into the orderly room shaking his finger and saying "You have fucked with Boss Wilson long enough * * * Nobody fucks with Boss Wilson", and other similar statements. He complained about not having the normal amount of clothing issued in the organization (R7-9,15). Accused then left, but returned shortly with his carbine, walked across the room and stood by the lieutenant. He repeated his previous statements and said he wanted his clothes right away. He held his carbine pointed at the officer's midsection (R9,10,15,17). Lieutenant Conklin told him they would go to the supply room and get the clothing, to which accused replied: "I will go to the Supply room, but you will go first" (R9). The officer left with accused following about five feet behind pointing the carbine at the lieutenant's back (R9,13,15). Upon entering the supply room, Lieutenant Conklin directed the clerk to issue certain clothing to accused who remained standing with the carbine in the crouch of his arms, the barrel slanting towards the floor in the direction of the officer. Accused was swearing, talking loudly and using very profane language at this time (R8,12,13,16). He then accepted the clothes, walked over to a table,

took the clip out of his carbine, and extracted a shell from the chamber (R16). During this time Lieutenant Conklin was wearing his insignia of rank. He had been an officer in the same company with accused since June 1944 (R11,13,16).

4. Accused, after being fully advised of his rights as a witness, elected to make a sworn statement (R18). He testified that when told to get his clothes together he asked about some clothes he had paid for but never received, and that the lieutenant replied, "Let me tell you something, you niggers have gotten to the place when you feel like going out you just get ready and go and I'm tired of it", to which he answered, "Lieutenant, sir, you shouldn't call me a nigger, you say that again and I'll knock your teeth out". Shortly after that the lieutenant went with him and he was issued a pair of shoes, an overcoat and other clothing (R19). He stated he never had a carbine on his person on 22 April (R20).

5. On rebuttal, a witness for the prosecution, whom the accused said was present when the lieutenant called him a "nigger", testified that at no time during the conversation did he hear such a remark made.

Article of War 64, the Article under which this charge is laid, condemns the lifting up of a weapon against a superior officer who is in the execution of his office. There is substantial evidence to prove all of the elements of this offense. Accused pointed his carbine at Lieutenant Conklin, his commanding officer, and ordered him to precede him to the supply room. "The raising in a threatening manner of a firearm, (whether or not loaded) * * * would be within the description - 'lifts up'" (Winthrop's Military Law and Precedents (Reprint, 1920), p.570). Lieutenant Conklin was performing company duties and was in the execution of his office at the time the offense was committed. There was ample evidence to sustain the findings of guilty (CM ETO 4238, Flack; CM ETO 10003, Rentzel).

6. The charge sheet shows that accused is 36 years and two months of age and was inducted 26 October 1943 at Fort Myer, Virginia. 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 lifting up a weapon against a superior officer who is in the execution of his office is death or such other punishment

as the court-martial may direct (AW 64). Penitentiary confinement is authorized when imposed by way of commutation of a death sentence (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b,(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(231)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private BOSS WILSON (33749733), 4198th 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 12488. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12488).

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

(Sentence as commuted ordered executed. GCMO 421, USFET, 19 Sept 1945).

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

BOARD OF REVIEW NO. 3

12 JUN 1945

CM ETO 12489

UNITED STATES v. Private First Class JOHN S. ATHERTON (39272005), Company M, 60th Infantry Regiment, Private RICHARD CHEROVSKY (15377140), 9th Reconnaissance Troops, both of the 9th Division	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Brussels, Belgium, 16 May 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. Confinement in a penitentiary is authorized upon conviction of unauthorized use of a United States Government vehicle of a value in excess of $50 by Article of War 42 and section 22-2204 (6:62), District of Columbia Code. In this instance, judicial notice of government price lists precludes the possibility that the value of the vehicle in question was $50 or less (CM ETO 7000, Skinner), and hence by analogy to the offense of misapplication of military property, a maximum punishment of confinement at hard labor for five years is authorized by the Manual for Courts-Martial (MCM 1928, par.104c, pp.96,100). A similar maximum punishment is authorized for the offense by the law of the District of Columbia, penitentiary confinement being provided (secs.22-2204 (6:62), 24-401 (6:401) District of Columbia Code). In view of the length of the sentences (2 years each) and the respective ages of accused (19 years and three months and ~~(SICK IN HOSPITAL)~~ 21 years and five months), the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

28 JUN 1945

CM ETO 12515

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Pilsen,
	)	Czechoslovakia, 19 May, 1945.
Private HAROLD R. FRENYA	)	Sentence: Dishonorable discharge,
(32042835), Company C,	)	total forfeitures, and confinement
38th Infantry	)	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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harold R. Frenya, Company C, 38th Infantry, APO #2, European Theater of Operations, U.S. Army, did, at or near Rocherath, Belgium, on or about 4 February 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit: combat with the enemy, and did remain absent in desertion until he was returned to military control at Liege, Belgium, on or about 29 March, 1945.

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

12515

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. Summary of evidence for the prosecution:

On 4 February 1945 accused's company was in a forward assembly area about 2 miles north of Rocherath, Belgium, preparing to relieve another company that was on the line andin contact with the enemy (R7-8, 13-14,17) some 4 or 5 miles away (R8). This information was passed on to the accused (R18). Bed rolls were ready to turn in, packs were ready to go, ammunition (R14) and rations had been drawn (R17). Accused's platoon guide saw him coming from the platoon. Asked where he was going, accused said he was going to the aid station. The guide replied: -

> "I told him that the Aid Station was packed and ready to move out and that I though (sic) he should wait a while and that we were going to pull out in a minute's notice. He turned and went in the direction of the Company C.P. and I went towards the platoon C.P. I haven't seen him since". (R21)

His absence was discovered when the rolls were ordered to be turned in (R18) and was not authorized (R10,15,18). Later, the orders were changed and the company did not move out until the next morning (R8).

Duly authenticated extract of company morning report of 5 February 1945, showing accused from duty to AWOL as of the fourth, was introduced without objection (R9-10; Pros.Ex.2). Accused was apprehended at Liege, Belgium 29 March 1945 (R12; Pros.Ex.1).

4. No evidence was presented for the defense. Accused, after having been advised of his rights, elected to remain silent (R22).

5. The record supports the findings. The circumstances under which accused absented himself without leave justify the inference that accused did so to avoid hazardous duty and shirk important service as charged (CM ETO 5983, Myhand et al).

6. The charge sheet shows that accused is 23 years five months of age and that he was inducted 19 February 1941 at Albany, New York. He had no prior service.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 3

26 JUN 1945

CM ETO 12551

U N I T E D S T A T E S	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private DAVID L. MALONE (38097360), Company A, 384th Engineer Battalion (Separate)	)	Trial by GCM, convened at Mannheim, Germany, 21 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 DAVID L. MALONE, Company A, 384th Engineer Battalion (Separate), did, at or near Rheingonheim, Germany, on or about 18 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau ELISABETH HOFFMANN.

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 the provisions of Article of War 50½.

3. Summary of evidence for the prosecution:

On the evening of the day and at the place alleged a colored soldier (not the accused) came to the home of the prosecutrix, Elisabeth Hoffmann, 40 years of age, of Rheingonheim, Germany. When he would not leave she sent her 13 year old son for help (R6-7,11). The son went to the motor pool of accused's battalion, and returned soon thereafter with two soldiers who were unsuccessful in persuading the unidentified soldier to leave. Being afraid the prosecutrix with her son and seven year old daughter accompanied the soldiers to the parking lot where they met accused and Private Sylvester Carlton, both of the 384th Engineer Battalion (R7,9,11,14). Within a few minutes shots were heard whereupon the group took cover with accused firing in return. When the firing ceased the group emerged. The prosecutrix and her children got into a nearby truck. They were cold (R7,14). Shortly thereafter accused informed prosecutrix he was going to look for the sergeant of the guard and instructed her to accompany him. The children were left in the truck (R7,14-15). As accused and prosecutrix were leaving, Carlton told him not to "bother that old lady". According to Carlton, accused, holding prosecutrix by the wrist, led her to the brushes. "They talked, she was whining, kind of crying". "She raised her voice loud" - "a little louder than when she first came". He saw them until they were "twenty or thirty good steps" away when "all of a sudden they disappeared". "Four or five minutes later she was walking back". She was crying, but she had been crying since she first arrived. He then, at her request, escorted her home with her children. When Carlton returned accused "said again I didn't bother them". Carlton said "if you did bother them and anything came up I would tell what I saw". Accused then said "don't you tell anybody anything" (R14-17).

Prosecutrix testified that when she left the truck with accused, he told her he was taking her to talk to the "sergeant chef". She went with him to the street but saw no one. When they arrived at the street,

> "he grabbed me by the dress [at the breast] and tried to kiss me. * * * I tried to defend myself. He shoved me and took his rifle under his arm and told me if I would not go with him he would shoot me. * * * He took me by the hand and tried to drag me to the nearest bushes. I begged him to leave me alone. I became louder in my talking, but he kept my nose and mouth shut with his hand. * * * Then he tried to drag me into the bushes and I tried to defend myself

by putting my foot in the opposite direction. But he was stronger than I was and he dragged me into the bushes. When we arrived in the bushes he put one hand on my bust and the other hand on my back. He pushed me down on the ground and so I couldn't get up. He put his knee against me. His knee upon me so that I couldn't get up. * * * I tried to push him away, but I didn't succeed because I had only one hand free. * * * I placed my legs together, but he tried to get them apart with his knee. He succeeded. * * * He did not succeed in putting his penis in all the way; he succeeded in getting his penis in only half. * * * in the vagina. * * * When he had finished he got up right away and I got up too. * * * He said to me in French, 'I love you' and 'I shall bring you some coffee'. * * * I told him I wanted to go home. I started to leave and he accompanied me at a distance of about two yards behind me. * * * I went in the direction of the car in which my children were and I told my children let's go home" (R7-11).

Accused made a voluntary statement after his rights were explained to him on 20 April 1945 by an agent of the Criminal Investigation Division, which reads in part as follows:

"I told her in French to come with me, it was possible that the 'Sgt Chef' might return. She got out of the truck and came with me. When we passed Carlton, I told him that I had told her to come up to the post with me as it was possible the Sgt Chef might return. We stood there for a few minutes, and I asked her for a piece of tail. She bowed her head and I told her I had a rubber, showing her a piece of paper which was not a rubber, nor did it contain any rubber. I caught her by the arm and took her over into the bushes. I put one arm behind her back and the other I had on her arm, and laid her down. I pulled up her dress and pushed her drawers aside. She was snuffling as I took her over to the bushes. She didn't completely agree to go into the bushes but she didn't tell me no. When I put it into her, she opened her legs. She didn't have her legs wide apart, but when I got between them and started to put my penis into her she then opened them. She did not cooperate with me during the time we had intercourse. When I had finished we returned to the place Carlton was standing. When we were returning from the bushes,

she walked about two steps ahead of me and rather fast. Carlton said, 'You didn't bother that old lady did you,' and I said 'No.' * * * Carlton asked me on two occasions after he had returned whether I had had anything to do with the old woman. The first time I told him no, but the second time he asked me I told him yes. I am not sure now whether I told Carlton not to say anything about the affair to anybody or not" (R18; Pros.Ex."1").

Wulfgang Hoffmann, prosecutrix's 13 year old son, was sworn and testified without voir dire. His testimony substantiated the testimony of the other witnesses as to the events proceding the alleged offense. At the time of alleged offense he was in the cab of the truck, could not see his mother or the accused, and heard no outcries. He did testify that when his mother returned she was more nervous (R11-15).

4. No evidence was presented by the defense. After his rights as a witness were explained, accused elected to remain silent (R19).

5. For the purpose of this holding, the testimony of Wulfgang Hoffmann, age 13, is assumed to have been inadmissible. He was sworn and testified without voir dire. His testimony, while clear and intelligent, is devoid of anything, showing whether he possessed an understanding of the moral importance and duty of telling the truth. The question for determination then, as in CM ETO 2195, Shorter and CM ETO 10891, Murphy is "whether the admission of this testimony 'injuriously affected the substantial rights' of the accused within the purview of AW 37". His testimony does no more than corroborate the events, as established by the prosecutrix's and Carlton's testimony and accused's extra-judicial statement, preceding the commission of the offense. At the time of the commission of the offense, he was in the cab of a truck where he heard no outcries and where he was unable to see his mother or the accused. The Board concludes that the admission of his unsworn testimony was not prejudicial.

6. That accused carnally knew prosecutrix was clearly proved by his extra-judicial statement and her testimony. "Any penetration, however slight, of a woman's genitals is sufficient * * *" MCM 1928, par.148b, p.165. And the evidence is likewise substantial and compelling that the carnal knowledge was had by force and against her will. The Board of Review is of the opinion that there is substantial and compelling evidence in support of the findings of guilty (CM ETO 3933, Ferguson and Rorie; CM ETO 4661, Ducote; CM ETO 10079, Martinez).

7. The charge sheet shows that accused is 27 years 7 months of age and was inducted 2 March 1942 at Camp Wolters, Texas. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

J K Lang Jr Judge Advocate

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

BOARD OF REVIEW NO. 2 26 JUN 1945

CM ETO 12552

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ROBERT W. LONG (34861091), 1794th Labor Supervision Company	Trial by GCM, convened at Mannheim, Germany, 22 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert W. Long, 1794th Labor Supervision Company, did, at or near Wilferdingen, (Badon), Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Marga Gohler.

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

service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 3 May 1945, accused was supply sergeant of the 1794th Labor Supervision Company and was in charge of a water detail composed of three German prisoners of war (R20). During a trip to the water depot they passed some German girls, who waved to them. Accused stopped the truck and permitted the German prisoners to talk with the girls and make arrangements to meet them later in the evening (R7,12,20). They kept the appointment, accused accompanying the prisoners, who introduced him to the girls. They remained inside a railroad station for some time talking with the girls until several colored soldiers entered the station, pointed their guns at them, indicated they wanted the girls and ordered accused to take the prisoners away. All the girls escaped from the soldiers except Marga Gohler, who was heard screaming as accused and the prisoners left for camp (R8,21,23).

About an hour later accused returned to the railway station and found Fraulein Gohler alone and crying. He caressed her and she asked him to take her home. He assisted her into a truck drove a short distance and then stopped the vehicle. They talked briefly and smoked a cigarette. He gave her a package of cigarettes and a bar of candy which she accepted, and she cried with her head on his shoulder (R9,13,14). She insisted on returning home but accused told her that he wanted to have sexual intercourse with her before taking her there. After a half hours effort he forced her down on the seat of the truck and engaged in sexual intercourse with her against her will and consent. She testified that she beat and kicked him, screamed and cried and that when she attempted to sit up he put his hand on her throat and pushed her back onto the seat. Upon completion of the act of sexual intercourse he took her home, where she immediately reported the incident to her mother (R10-12).

4. Accused, after his rights as a witness were explained to him, elected to testify in his own behalf (R32). He stated that upon returning to the railway station he found the girl, whom he had previously met, walking out of the building and that she came directly towards him. As she was crying he tried to pacify her and she responded. He kissed her and gave her cigarettes. She thereupon lay down on the seat of the truck and permitted him to engage in sexual intercourse with her. He maintained that she did not fight or make any attempt to resist. Following completion of the sexual intercourse, he took her home and she kissed him good-night and thanked him for his kindness (R33-41).

5. The fact that accused engaged in an act of sexual intercourse with Fraulein Marga Gohler at the time and place alleged in the Specification was proved by the prosecution and admitted by accused. The only question for consideration is whether the German girl consented to the act of sexual intercourse as accused testified or whether she was subjected thereto by force and without her consent. Accused denied that he used force in the accomplishment of his lustful act but stated that he caressed the girl, gave her candy and cigarettes following which she consented to having intercourse with him. The victim testified that accused induced her to get into his truck under a promise to take her home but that instead he drove a short distance, stopped the vehicle and demanded sexual intercourse. She maintained that she resisted by beating and kicking him and that she screamed and cried but that he continued his efforts to penetrate her person. He placed his hand on her throat and pushed her onto the seat of the truck and succeeded in overcoming her resistance and in completing the act of sexual intercourse. The victim was 17 years of age. Accused knew that she had been seized by several colored soldiers a short time before and he had ample reason to suspect that they had mistreated her. He admitted that he heard her outcries and that soon thereafter she came out of the building crying, holding "a piece of her undies in her hand" and appearing very weak (R34-35, 38,39). Upon this evidence the court found the accused guilty of the crime of rape, as charged (CM ETO 6224, Kinney and Smith; CM ETO 9611, Prairiechief; CM ETO 11267, Fedico). Questions regarding the credibility of witnesses and the resolving of conflicts of testimony are issues for the exclusive determination of the court and such findings where supported by substantial evidence will not be disturbed by the Board of Review on appellate review (CM ETO 3937, Bigrow; CM ETO 4194, Scott; CM ETO 5561, Holden and Spencer).

6. The charge sheet shows that accused is 24 years of age and was inducted, without prior service, 3 May 1944.

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

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 12580

15 JUN 1945

U N I T E D S T A T E S	104TH INFANTRY DIVISION
v.	Trial by GCM, convened at Halle, Germany, 25 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MICHAEL GROIN (34888412), Company G, 413th Infantry	

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

---

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael Groin, Company "G", Four Hundred and Thirteenth Infantry, did, at Geish, Germany, on or about 16 February 1945, desert the service of the United States and did remain absent in desertion until on or about 23 April 1945.

He pleaded not guilty to desertion in violation of Article of War 58 but guilty of absence without leave for the alleged

period in violation of Article of War 61. All the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Seven-eighths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, 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. Summary of evidence for the prosecution:

On 16 February 1945 accused's unit was located at Geish, Germany, "sweating it out" preparing to cross the Roer River (R7). Such crossing was eventually made on the 24th (R12). On the 15th or 16th of February accused was permitted to go with other men of his company to the rear to take a shower, but he did not return with the remainder of the group (R8,10-11,13). The company commander ordered a search to be made for him (R10-11), which was made without success (R8,13-14). About a week previously, accused was heard to say "a fellow would be better to take off than to stick around here" and "he would rather take his chances in the rear than to stay where we were" (R8-9). His attitude was "one of wanting to go away" (R9). "He was always griping; he was not cheerful" (R10).

Duplicate original morning report of 20 February 1945 showing accused from duty to AWOL as of 16 February 1945 was introduced in evidence without objection (R11). Duplicate original of the morning report of 2 May 1945 showing accused "to duty 30 Apr 45" was also introduced into evidence without objection (R11-12; Pros.Ex.A,B).

4. Summary of evidence for the defense:

After his rights as a witness were explained, accused elected to remain silent (R14-15).

After the prosecution had presented an oral argument in closing, the defense recalled a witness for the prosecution, accused's company commander. It sought to introduce a clemency data sheet containing remarks concerning accused. These remarks had been made by the witness from personal observation and from reports of subordinates. The prosecution objected on the ground that the document was solely for the reviewing authority. The President ruled that certain parts could be brought out by the witness who then testified that accused seemed not to care to associate with the other men and had few friends in the company (R15-16).

5. Accused's unauthorized absence of 66 days in an enemy country, commencing under the conditions shown, support the court's inference and finding that at some time he intended not to return (CM ETO 1629, O'Donnell, and cases therein cited).

6. Some matters require independent comment.

(a) The charge sheet and accompanying papers reveal that accused was originally charged with desertion to avoid hazardous duty terminated by apprehension. Without reinvestigation and without a re-execution by the accuser, the specification was so deleted as to allege desertion terminated in an undisclosed manner. Insofar as termination was concerned, its manner was immaterial and the change not prejudicial to any substantial rights of the accused (See CM 236914, 2 Bull. JAG 270; CM ETO 5555, Slovik; CM ETO 2473, Cantwell). Insofar as desertion was concerned the effect of the deletion was to enlarge the specification thereby permitting the prosecution to show "straight" desertion, as proved, in addition to desertion to avoid hazardous duty, as originally alleged (See CM 245568, 3 Bull.JAG 142). When arraigned the accused did not object. While the practice here followed was highly irregular and improper (CM ETO 5406, Aldinger), accused's substantial rights were not injuriously effected thereby (CM 229477, Floyd; 17 B.R. 149(1943); CM ETO 5555, Slovik; CM ETO 4570, Hawkins; CM ETO 5155, Carroll).

(b) After the accused had pleaded not guilty to desertion in violating Article of War 58 but guilty of absence without leave in violation of Article of War 61, the President announced: "The court will consider his plea as not guilty" (R6). It is unnecessary to decide

the meaning and effect of the President's ruling. The record of trial supports the findings independent of a plea of guilty to absence without leave.

7. The charge sheet shows that accused is 33 years two months of age and was inducted, without prior service, on 9 November 1943.

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

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

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

23 JUN 1945

CM ETO 12586

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIE E. KINSEY (34794128), 3111th Quartermaster Service Company.	Trial by GCM, convened at Liege, Belgium, 27 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisbugg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie E. Kinsey, 3111 Quartermaster Service Company did, at Liege, Belgium on or about 7 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Charlie Crockett, a human being by shooting him with a carbine.

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

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

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

Shortly before 0100 hours on 7 May 1945, accused and Sergeant Crockett, with other members of the guard relief, were on a weapons carrier ready to go on guard at a railhead at Liege, Belgium. An argument developed between them and accused called Sergeant Crockett a "Mother-Fucker". The latter then "put his carbine to the stomach" of accused and after accused "tried to get to Sergeant Crockett", others intervened and stopped the argument. The group left the area and the guards, including accused, were posted. On his way back the Corporal of the Guard met accused, who was coming from the direction of the guardhouse. Accused said, "I shot Sergeant Crockett". He refused to give up his weapon, stating he was going back to his post and would be there if he was wanted (R7).

About 0100 on 7 May 1945, accused relieved Private First Class Colson from guard. Colson at this time gave him his weapon and one clip of ammunition. The weapon did not have a cartridge in the chamber. It was approximately 400 yards or more from the guard post where accused relieved Colson to the guardhouse. Accused was "kinda angry and he was crying" (R7,9). Sometime between 0100 and 0200 hours that morning, accused entered the guardhouse and said to Sergeant Crockett, "You drew a carbine on me, didn't you?" and when Sergeant Crockett took one step forward towards him, accused fired four shots, Sergeant Crockett falling to the floor. The bullets went by another soldier present in the guardhouse at the time (R10,11).

The Officer of the Day, learning that a shooting had occurred, proceeded to the guardhouse where he found Sergeant Crockett lying on the floor, face down. He felt the sergeant's pulse and then closed his eyes. The accused was relieved from the guard and, after reluctantly turning his weapon over to the Officer of the Day, was placed in confinement (R12).

After the investigating officer testified as to its voluntary nature (R13,14), a sworn statement made by accused was received

in evidence, defense counsel stating that there was no objection (R14; Pros.Ex.1). Accused related therein that about 0100 hours 7 May 1945, he was on a truck with 14 or 15 other men, preparatory to going on guard duty. He had been drinking, but he was not drunk. He argued with Sergeant Crockett and suddenly the latter jumped up and pointed his carbine at him, saying "I'll burn you up". He saw Sergeant Crockett pull the bolt back, throwing a cartridge in the chamber. Corporal Ford, who was present, intervened and stopped the argument. Sergeant Crockett got off at the guardhouse and he was posted on post 93A. The guard he relieved turned a carbine over to him and he left his post immediately, proceeding to the guardhouse to see Sergeant Crockett. This occurred about 0110 hours. Before leaving his post he put a cartridge in the chamber of the carbine. It is about 500 yards to the guardhouse and it took him about five minutes to walk there. When he arrived at the guardhouse, Private Hubbard and Sergeant Crockett were the only ones present and he stood in the doorway, pointing his carbine down the length of the room. He asked Sergeant Crockett, "Why did you point your carbine at me?" Receiving no answer he said, "I got one now and I'm as good as you are". He knew that he had a bullet in the chamber and he was ready for anything. Sergeant Crockett turned around and accused thought he was going for his carbine. At that moment he pulled the trigger on his carbine and he saw Sergeant Crockett fall. He does not know how many times he fired. He left and on his way back to his post he met Corporal Ford and told him what had happened. The corporal asked him why he did it and he replied that he "just couldn't get over someone drawing a carbine on" him. He was not drunk when he shot Sergeant Crockett.

It was stipulated by the accused, defense counsel and the prosecution that if Captain William Fittner, Medical Corps, 15th General Hospital, APO 228, U. S. Army, were present, he would testify as follows:

> "That at 0300 hours, 7 May 1945, I examined the body of Sergeant Charlie Crockett, 3111th Quartermaster Service Company, and found him to be dead. Death was caused as a result of gunshot wound, small bore. The deceased had been dead approximately one and one-half hours" (R15; Pros.Ex.2).

4. Accused, after his rights as a witness were fully explained to him (R15), was sworn and testified in substance as follows:

On 7 May 1945 he had quite a bit to drink and became involved in an argument with Sergeant Crockett while they were on the weapons carrier prior to going on guard. Sergeant Crockett drew his carbine on him and put a round in the chamber. Someone present told

him to sit down or he might be killed. He was taken to his post and after relieving the old guard he went over to the guardhouse - a five-minute walk. He was afraid Sergeant Crockett might come over to his post and do something to him as he knew the sergeant had threatened two other soldiers. He walked into the guardhouse and asked Sergeant Crockett, "Why did you draw your carbine on me?" The sergeant made a break and he (accused) thought the deceased was getting his weapon and he shot him (R16,17).

5. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, par.148a, p.162).

Inasmuch as the uncontradicted evidence of the government and accused's clear admissions establish that accused shot and killed Sergeant Crockett at the time and place alleged, the only issue for the court was whether this homicide was perpetrated with malice aforethought and without legal justification. Accused's contention that he acted in self-defense presented an issue of fact for the exclusive determination of the court. This issue was resolved against him and the record contains abundant evidence to support this conclusion (CM ETO 9410, Loran). From accused's deliberate use of a loaded carbine under the circumstances disclosed by the evidence, the court could infer that he acted with malice aforethought (MCM, 1928, par.112a, p.110; Loran, supra).

6. The charge sheet shows that accused is 24 years, 10 months of age and was inducted 16 November 1943 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). 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. 1 8 SEP 1945

CM ETO 12592

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Darmstadt, Germany, 17 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class FRANK L. KOLANKO (31326562) and Private THOMAS R. SANCHEZ (39695074), both of Company A, 648th Tank Destroyer Battalion (T)	

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

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

2. Accused were charged separately and tried together by direction of the appointing authority and with their consent upon the following charges and specifications:

KOLANKO

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

Specification 1: In that Private First Class Frank L. Kolanko, Company "A" 648th Tank Destroyer Battalion (T), did at or near Horbach, Germany, on or about 25 March 1945, forcibly and feloniously against her will, have carnal knowledge of Veronica Marhofer, a female person.

Specification 2: In that * * * did, at or near Horback, Germany, on or about 25 March 1945, forcibly and

feloniously against her will, have carnal knowledge of Irma Marhofer, a female person.

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

Specification: In that * * * did at or near Horback, Germany, on or about 25 March 1945, wrongfully fraternize with residents of Germany by visiting German families not on official business.

SANCHEZ

(The same, except for appropriate substitutions of the name of accused.)

Each accused pleaded not guilty, and all members of the court present at the times the votes were taken concurring, was found guilty of both charges and all specifications preferred against him. No evidence of previous convictions of either accused was introduced. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence shows that about 1900 hours on the date and at the place alleged, both accused entered the Marhofer home uninvited and conversed with the inmates, who were German civilians. Each accused was armed with a carbine and accused Sanchez had a bayonet. They were not engaged in official business. About 2030 hours they went uninvited into the house of Frau Elise Unnold where they played with her grandchildren.

Accused returned to the Marhofer house about 2100 hours and demanded schnapps. When it was refused, Sanchez threatened the fiance of Elfrida, one of the sisters of the prosecutrices, Veronica and Irma Marhofer, aged 16 and 14 years, respectively, neither of whom was a virgin. Wine was produced. Kolanko endeavored to take Veronica into an adjoining bedroom and when she remonstrated Sanchez fired a shot from his carbine into the floor and stuck his bayonet into the table. The whole family, which included in addition to the prosecutrices, their two sisters, the two children of one of them and the fiance of the other, were terrorized and screamed. Thereupon, Kolanko pulled Irma from her sister, Elfrida, while Sanchez threatened the latter and fiance with his bayonet. Elfrida advised Irma to go with him. Kolanko pulled Irma to the bed while she cried and asked the others to help her. They dared not go for help for fear of being shot by accused and because they were unfamiliar with curfew regulations.

Kolanko placed Irma on the bed, pulled off her pants and engaged in sexual intercourse with her against her will. She dared not scream for fear that Sanchez would shoot again. She and Kolanko then went to the kitchen and Sanchez pulled Veronica to the bedroom, Elfrida advised her to go. Pursuant to his direction and because she was afraid of him, Veronica got into the bed, and after he lifted her skirts, she removed her dress. He then helped her remove her underclothes and engaged in sexual intercourse with her against her will. She did not resist because she was afraid he might harm her or the others. They engaged in a second act of intercourse. Meanwhile, Kolanko again pulled Irma into the bedroom, pulled off her pants and again engaged in intercourse with her, over her resistance. Thereafter, the two accused changed girls and Kolanko copulated with Veronica against her will, causing her pain. She did not resist because of her fear of harm. Although Irma removed Sanchez' penis from her parts and tried to climb out of the bed, he overcame her resistance and copulated with her, causing her pain. Accused continued changing thus until they left the house at 0330 hours 26 March 1945. Veronica testified they copulated with her six or seven times but believed neither had an emission while with her. Irma testified to four or five acts of intercourse with her. For a time, accuseds' guns were left in the kitchen with the other civilians there, but were later taken by accused.

4. Each accused in his testimony admitted the first visit, during which, as they claimed, Sanchez' carbine was accidentally discharged, but asserted that after leaving the Marhofer house they went to other German homes and for a bicycle ride, arriving at their camp, as they estimated, around 0200 hours. Three members of their organization who were on guard at the platoon command post testified that accused reached there about 0215 or 0230 hours. Testimony was introduced that the reputation of the prosecutrices was that they were inclined to sexual relations, and they admitted first engaging therein at the ages of seven and eight or nine respectively.

5. There was substantial competent evidence that accused were each guilty of wrongful fraternization and of carnal knowledge of each of the two girls by terrorization and against their will. The credibility of the witnesses and conflicts in the testimony with regard to the time of accuseds' return to camp presented questions which were exclusively for the court's determination. The Board of Review cannot say that its determination against accused is unsupported by ample evidence, particularly in view of accuseds' admissions. In the Board's opinion the record supports the findings of guilty (Rape: CM ETO 3837, Bernard W. Smith; CM ETO 7078, Arthur L. Jones; CM ETO 11376, Longie; CM ETO 11608, Hutchinson; CM ETO 12180, Everett; CM ETO 14564, Anthony and Arnold; Fraternization: CM ETO 11978, Brownley; CM ETO 12869, DeWar).

6. The charge sheets show that Kolanko is 21 years six months of age and that Sanchez is 21 years of age. Each was inducted 2 March 1943 to serve for the duration of the war plus six months. 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 either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence.

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

Wm. F. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Cavell Judge Advocate

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

BOARD OF REVIEW NO. 1

26 JUN 1945

CM ETO 12594

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Staff Sergeant MORRIS LECHINSKY (32266958), 245th Quartermaster Depot Supply Company	Trial by GCM, convened at Brussels, Belgium, 14 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Staff Sergeant Morris Lechinsky, 245th Quartermaster Depot Supply Company, did at Antwerp, Belgium, between the 10th of October 1944 and the 30th November 1944, wrongfully exchange about 740,000 French francs, lawful currency of the French nation, for 651,512 Belgium francs, lawful currency of the Kingdom of Belgium.

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,

CONF

at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. This is a companion case to that of First Lieutenant David Blacker (CM ETO 10418), wherein the Board of Review held that that officer was properly convicted of wrongfully exchanging a total of 300,000 French francs for Belgian francs on 5 and 22 November 1944 at the United States Army Finance Disbursing Office in Belgium, where the officer was on duty, in violation of Article of War 96.

The evidence herein, including voluntary pretrial statements of accused, one of which was offered by the defense, establishes that at Antwerp, Belgium, between the dates alleged, he exchanged in excess of the amount of French francs alleged (740,000) purchased from French civilians for an undisclosed amount of Belgian francs. Lieutenant Blacker testified that of this amount 400,000 francs, which accused stated he had won gambling, were exchanged at witness' Finance Disbursing Office, that witness directed the cashier to make the exchange, and that accused paid witness 5,000 francs for expediting the exchange and thus eliminating delay which would otherwise have been necessary. There was a conflict in the evidence as to whether accused's detachment commander definitely told certain of his non-commissioned personnel that it was legal to exchange French francs for Belgian francs, or merely told them he did not know but would investigate the matter.

The essence of accused's defense, as indicated in his unsworn statement through counsel, was that at the time in question, the practice of exchanging such francs was prevalent in Antwerp and that when francs were presented at the local Finance Office for exchange, no questions were asked and no indication given that such exchanges were not favored by the Army. Accused was informed that following a discussion at the mentioned meeting of non-commissioned officers, the detachment commander stated that he knew of no restriction on such exchange transactions and that, as far as he knew, they were legal. Accused had no actual notice of any official prohibition of the exchanges in question. Testimony was stipulated that Letter, AG 121 Op GA, 23 September 1944, prohibiting the exchanges in question (see CM ETO 10418, Blacker for text thereof) was not received by accused's company until on or about 8 January 1945.

4. Immediately following the arraignment of accused, the defense made the following motion:

> "At this time we move to strike the specification on the ground that it is not definite. It does not state a crime. It fails to state anything

> contrary to the good order of the United States Army and there is not sufficient allegations set forth in the specification to give the defense counsel anything adequate on which to prepare the defense" (R5).

The law member denied the motion (R5).

> The specification alleged that accused
>
> "did, at Antwerp, Belgium, between the 10th of October 1944 and the 30th November 1944 wrongfully exchange about 740,000 French francs, lawful currency of the French nation, for 651,512 Belgium francs, lawful currency of the Kingdom of Belgium".

The defense motion to quash or to strike out raised all objections to the Specification which in civil criminal practice might be taken to an indictment by general or special demurrer, plea in abatement or motion in arrest of judgment (Winthrop's Military Law and Precedents (Reprint, 1920), p.250). Although, at least in a doubtful case, the granting or denying of the motion is within the sound judicial discretion of the court and denial thereof will not necessarily affect the legality of the proceedings (Ibid., pp.251-252), nevertheless if the Specification does not meet the well established tests which guide the civil courts in their determination of motions attacking indictments, the denial of the motion will injuriously affect the accused's substantial rights and will thus require a conviction upon the Specification to be set aside (Cf: MCM, 1928, par.66, p.52). The test applied in the Federal courts is well defined and illustrated in United States v. Hess, (1888), 124 U.S. 483, 31 L.Ed.516. Following the rule in United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588, (1875), and United States v. Simmons, 96 U.S. 360, 24 L.Ed. 819 (1877), the court wrote as follows:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly,

and not inferentially or by way of recital.

> The statute is directed against 'devising or intending to devise any scheme or artifice to defraud', to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.
>
> The averment here is that the defendant, 'having devised a scheme to defraud divers other persons to the jurors unknown', intended to effect the same by inciting such other persons to communicate with him through the postoffice, and received a letter on the subject. Assuming that this averment of 'having devised' the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken" (31L.Ed., pp.517-518).

The court quoted as follows from its opinion in the Cruikshank case, supra:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars. 1 Arch. Cr.Pr. & Pl. 291. The object of the indictment is: first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of the law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances".

The court thus concluded:

> "Following this rule, it must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute. The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict" (31L.Ed., p.518). (Underscoring supplied).

The rule has consistently and frequently been applied in the federal courts (see annotations to 18 USCA 556, notes 26,29). A modern example of its application appears in Harris v. United States (1939), 104 F (2d) 41. There the indictment failed sufficiently to identify a false statement, of mailing allegedly made by an assistant postmaster, as entered in a record which he was required to keep in connection with his duties, so as to fall within the prohibition of the Act of March 9, 1911, c.270; 18 USCA 189; 36 Stat.1355. The court held:

> "While the strict requirements and the formalities of criminal pleading under the common law rules have been modified by modern practice and statute (Section 556, 18 U.S.C.A.), this does not mean that matters of substance may be omitted from the allegations of an indictment.
>
> The basic principle of American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law. In a criminal proceeding, the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense.
>
> It is fundamental that all the necessary ingredients of the offense must be set out in the indictment, and the omission of any fact or circumstance necessary to constitute the offense will be fatal. United States v. Cruikshank et al., 92 U.S. 542, 23 L.Ed. 588. Any omission of that nature cannot be supplied 'by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital'. United States v. Hess, supra" (104F(2d), p.45, italics supplied; see also Hagner v. United States, 285 U.S. 427,431,433, 76 L.Ed.861,865,866 (1931), and other authorities cited in CM ETO 4235, Bartholomen and Briscoe.

The instant specification fails to identify the alleged exchange or exchanges other than to state that they occurred in Antwerp, Belgium, over a period in excess of seven weeks, were wrongful and involved 740,000 French francs and 651,512 Belgian francs. Innumerable exchanges under myriad types of conditions and involving as many different amounts of French and Belgian francs could have been proved by the prosecution to support the Specification, under the law member's ruling on the motion to strike. Accused was entitled to be informed with greater particularity as to the circumstances under which the alleged exchange or exchanges occurred and wherein they were wrongful. Without such information, he would be obliged to defend against an offense of unknown quantity and quality. It is impossible to determine whether the exchanges intended to be charged were made at the Finance Office or with civilians. Thus in a subsequent prosecution for wrongful exchanges either at that office or with civilians accused could not successfully plead the instant conviction in bar because it cannot be determined upon which exchanges it was based. The Board is therefore of the opinion that, within the meaning of the foregoing authorities, substantial elements of the offense sought to be charged were omitted, the Specification was incomplete and ambiguous, neither the accused nor the court was adequately informed of the nature of the offense sought to be charged, and accused was not enabled to make his defense or to avail himself of his conviction (or acquittal) for protection against a further prosecution for the same offense. The motion of the defense to strike out the Specification should, therefore, have been sustained; its denial was error injuriously affecting accused's substantial rights within the purview of Article of War 37, and the conviction was therefore illegal and must be set aside.

The foregoing is not at variance with the holding of the Board of Review in CM ETO 10418, Blacker, that the specifications therein stated offenses in violation of Article of War 96. Those specifications charged that accused, an officer in an Army Finance Disbursing Section in Belgium, ~~at an Army Finance Disbursing Section~~ on two specific dates wrongfully exchanged large amounts of French francs for large amounts of Belgian francs at his own Disbursing Section. The defense did not object to the specifications, which adequately apprized the accused that he was charged with a violation of the trust imposed in him by misusing the official exchange facilities available to him.

5. The charge sheet shows that accused is 35 years six months of age and was inducted 5 May 1942 at Fort Dix, New Jersey, to serve for the duration of the war plus six months. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offense. Error injuriously affecting the substantial rights of accused was 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 and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 12604

U N I T E D S T A T E S	71st INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Hall, Austria, 21, 22 May 1945. Sentence: as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class RITO MENDEZ (39573076) and Private JOSEPH F. REGO (39043368), both of Company A, 371st Medical Battalion	

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

---

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

2. Accused were tried together by direction of the appointing authority and with their consent on the following charges and specifications.

MENDEZ

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

Specification 1: In that Private First Class Rito Mendez, Company "A", 371st Medical Battalion, did, at Auerbach, Bayern, Germany, on or about 20 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Rogner.

Specification 2: In that * * * did, at Auerbach, Bayern, Germany, on or about 20 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Marga Goldbach.

(270)

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

Specification: In that * * * did, at Auerbach, Bayern, Germany, on or about 20 April 1945, wrongfully fraternize with a resident of Germany, by entering the apartment of a German girl and by visiting with German girls not on official business.

(Same as Mendez save ~~for~~ REGO appropriate substitutions of name of accused).

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, each was found guilty of all charges and specifications preferred against him. Evidence was introduced of one previous conviction against Mendez by special court-martial for being drunk and disorderly in uniform in a public place, violating a curfew and entering an off limits area, all in violation of Article of War 96. No evidence of previous convictions was introduced against Rego. 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 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 undisputed facts show that this case falls into the typical pattern of German rape cases. Two American soldiers entered a German home in a somewhat isolated portion of Auerbach about 9:15 on the night of 20 April 1945. One of the men was armed with a pistol. They proceeded to the second floor of the house where the two prosecutrices were sleeping. The soldier who was armed forced the prosecutrices' step-mother to go downstairs by threatening her with a pistol and he then locked the outside door. The two soldiers then had sexual intercourse with each of the prosecutrices. Neither of the women offered much resistance and neither cried out because they were afraid of the soldier who was armed and who threatened them with the pistol. On this evidence it was a question of fact whether there was consent to the acts of sexual intercourse and the court having found that there was not, we are powerless to disturb their conclusions in view of the substantial evidence supporting the same (CM ETO 14564, Anthony and Arnold; CM ETO 12180, Everett; CM ETO 14040, McCreary).

4. Both accused, in effect, pleaded alibi. They vigorously denied having been in the house in question or having had anything to do with the prosecutrices. The vital question for decision in this case is thus one of identity and the conflicting evidence in that point may be summarized as follows:

Frau Iger, the step-mother, identified accused Rego as one of two soldiers who entered her house on the night in question and as the soldier who threatened her with a pistol. She was unable to identify accused Mendez (R7-12).

Frau Marga Goldbach identified both accused as the soldiers who raped her and her sister (R12,13). She stated that although it was dark, one of the accused lit a candle that was on the table and that accused Rego used a flashlight (R14). Rego, who had a mustache, was wearing a brown belt across his right shoulder and underneath his left armpit, with a holster on his left breast. He carried a black pistol. Around his neck he wore a chain with two white rings on it and one or two "things" in rubber. He also wore a small watch, like a woman's,with a black or brown crown on it and a small leather wrist band (R20,21,61-63).

Fraulein Maria Rogner, the other prosecutrix, identified the two accused as the assailants of herself and her sister (R24,25). Rego carried a pistol in a shoulder-holster, had a mustache, and had a Red Cross on his helmet (R25,57), Mendez had a Red Cross arm band and a Red Cross on his helmet (R57). Both accused also wore insignia similar to the 71st Division insignia (R56). The prosecutrices stated that accused left their house at 10:30 pm (R18,28).

First Sergeant Charles E. Swank testified that there were taken from accused Rego's possession a set of dog tags encased in rubber, a chain with two gold wedding bands, a wrist watch and a gun with a shoulder holster (R46-55). Accused Mendez and a soldier named Gentile, who at that time was a suspect were alone in a room and the prosecutrices were brought in. "The older one" (Frau Goldbach) pointed at Mendez and said something in German (R52). For the identification of Rego Sergeant Swank selected four men who resembled him. Rego was put in a lineup with these four. The prosecutrices walked up and down the line several times and the "older girl" shook her head. Finally, she walked over to Rego (R52,54).

Frau Goldbach testified that she selected Mendez as her assailant the moment she saw him in the room with another soldier. Rego was with six or seven other soldiers and at first she had a little difficulty in recognizing him. When he laughed, however, she identified him positively (R62-65). Fraulein Rogner's version of the extrajudicial identification corresponded to her sister's (R64-66).

There was evidence that the distance between the prosecutrices' house and the billets of accused was 300 yards (R55,56).

5. Evidence for the defense:

Private First Class Marshall R. De Feo testified that about 8 o'clock or a little after on the night in question both accused asked him to play cards with them that evening (R30).

Private First Class Carlos Rodriguez testified that Mendez came into his room about 10 pm on 20 April 1945 and remained there until 10:15 pm. He did not see Rego that evening (R31-33).

Private John T. Marshall testified that he saw Rego in the kitchen of their billet around 10:10 pm or 10:15 pm on 20 April (R34,35).

Private First Class James W. Hacker testified that Mendez came into his room about 10:45 pm that night. Mendez was not excited and the witness noticed nothing unusual about him (R36).

Technician Fifth Grade William A. Garratt testified that he saw Rego in the squad room that night and he and Rego talked for about two hours. Rego seemed perfectly normal. He was carrying a gun in a shoulder holster (R37,38).

Accused Mendez, after being advised of his rights, elected to be sworn and testify. He stated that he arrived in Auerbach on 20 April about 6 pm. Rego saw him about 7:30 pm and suggested a game of cards. He sought out De Feo and asked him to play but De Feo declined. He then went to Rego's room and they played until a little after 10 pm. At that time he (Mendez) went to the latrine. He stopped in Rodriguez'room and asked for a drink. Then he returned and played cards for about an hour more. About 11 pm he quit and went to his room where he saw Hacker who gave him something to eat. Then he went to bed. He denied having seen the prosecutrices on 20 April (R40-43).

Accused Rego, after being advised of his rights, elected to be sworn and testify. He told a story similar to Mendez' regarding the card game and the latter's movements on the night in question. After the game was finished the witness talked with Garrett until about 1 pm. He denied having seen the prosecutrices on the night in question. He denied that he laughed while he was in the identification line-up. He admitted owning a pistol which he carried in a shoulder holster although he was not authorized to carry a weapon. He admitted that his dog tag chain had rings on it and a religious medal. The defense introduced into evidence Rego's watch which is described in the record as having "a square gold case, a wrist band and a tan face which measures one inch square" (R67-74;Def.Ex.A).

6. This conflicting evidence as to identity presented no more than a question of fact for the court and when, as here, there is present substantial evidence in the record to support its conclusions we cannot disturb them (CM ETO 895, Davis et al; CM ETO 3837, Bernard W. Smith; CM ETO 3859, Watson and Wimberley; CM ETO 8451, Skipper). Several times during the trial accused were asked to stand while witnesses referred to them and on one occasion the trial judge advocate pointed to them. This practice was frequently necessitated by the fact that they were two accused being tried together and it was to the interest of all concerned that it be made clear to which of the two a witness was referring. When Frau Goldbach was testifying, however, she was asked if she had seen anyone in the courtroom before. She indicated that she had seen accused and certain court personnel. Accused were then asked to stand and the witness was requested to tell the court where she had seen him. This procedure, while improper, did not violate Article of War 24 or the provision of the 5th Amendment to the Federal Constitution and in view of the other evidence in the record as to identity no prejudice resulted (CM ETO 3859, Watson and Wimberley). The testimony as to the extrajudicial identification of accused was properly admitted in evidence (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams; CM ETO 8270, Cook; CM ETO 12869, DeWar). The record is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I, as to both accused.

7. Both accused were charged with fraternization (the Specification of Charge II). The only transaction which accused had with Germans was a criminal act, the rape. We have repeatedly held that a criminal act of violence is not an act of fraternization (CM ETO 10967, Harris, CM ETO 10501, Liner; CM ETO 11854, Moriorty and Sberna).

8. The record reveals that on one occasion the court was closed and cleared of all persons except the trial judge advocate and defense counsel who were permitted to remain. This was a violation of Article of War 30. The least that is required in such cases is that the accused be permitted to be present. However, we can see no prejudice to the substantial rights of the adcused arising from this incident (Cf: Snyder v. Massachusetts 291 US 97, 78 L.Ed.674 (1934)).

9. The charge sheets show that accused Mendez is 31 years of age and was inducted 12 May 1943 at Los Angeles, California, and that accused Rego is 21 years of age and was inducted 29 March 1943 at Oakland, California. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

10. The court was legally constituted and had jurisdiction of the persons and the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial as to each accused, is legally insufficient

12804

to support the findings of guilty of Charge II and Specification and legally sufficient to support the findings of guilty of Charge I and its specifications and the sentence.

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 AW 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 (Dir.229, WD, 8 June 1944, sec.II, pars.1b (4), 3b).

Wm. J. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 12608

U N I T E D S T A T E S	)	XV CORPS
	)	
v.	)	Trial by GCM, convened at Salzburg,
	)	Austria, 12, 14 May 1945. Sentence
Private First Class JOE D.	)	as to each accused: Dishonorable
HAMMOND (20816983) and	)	discharge, total forfeitures and
Private CHARLES L. STOGSDILL	)	confinement at hard labor for life.
(36303229), both of Battery A,	)	"U.S. Penitentiary, Atlanta, Georgia".
961st Field Artillery Battalion	)	

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Pvt. Charles L. Stogsdill, then Sergeant, Battery A, 961st Field Artillery Battalion, and Private First Class Joe D. Hammond, Battery A, 961st Field Artillery Battalion, acting jointly, and in pursuance of a common intent, did, at Wildflecken, Germany, on or about 10 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Leonhard Kraus, a human being by shooting him with a rifle.

Specification 2: (Finding of not guilty as to each accused).

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 Specification I and of the Charge, and not guilty of Specification 2 of the Charge. 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 were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for "the rest of their natural lives". The reviewing authority approved each of the sentences, designated the "U.S. Penitentiary, Atlanta, Georgia", as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

On 9 April 1945 at about 1300 hours Isabella Hergenrother, age 15, Gisela Crede, age 18, and "Heinz, the little boy", left their homes in Bischofsheim, Germany, with a wagon to obtain groceries in Wildflecken (R11,14,18). At about 1500 hours they approached a camp where there were stores apparently abandoned by the German army. About 50 meters from the camp they met the two accused, Stogsdill being armed with a carbine [.30 caliber] Hammond with an M-3 submachine gun [.45 caliber] (R13-14,89). The girls asked them if they could enter the camp to get some groceries (R8,11,19). Accused offered them schnapps and cigarettes and the girls talked a little in English. They went to the camp where an American officer forbade them to enter. Accused told the girls to leave the camp slowly and they would get them two big bundles of material. Accused left and soon returned with two bundles of material, one of which they gave to Heinz and the other to Gisela (R11,19). A "little boy Wolfgang" came up. Accused told the girls they should send the boys home, stay with them and spend the night there. The girls said they did not want that, left the material and ran to their wagon. Accused followed and put the material on the wagon. Gisela asked one of accused "what he would do when she did go home now". He replied he would shoot at her and raised his rifle (R11-12, 15, 19-20,24). At that moment Herr Leonhard Kraus, age about 73 years (R9), appeared and told the girls they should go home with him. Accused would not let them do so. Gisela, Heinz and Wolfgang ran off (R11-12,19-20,27). Isabella released herself from Stogsdill who was holding her hand and "ran away a piece". She became frightened when he pointed his rifle at her and returned to him. She "came back to Mr. Kraus" and started away again with him. Both accused called after them that they "should stand still" and fired two or three times in the air. Isabella "got around the corner with the old man" and could not see accused any more. She turned around later and saw both accused "laid down up at the corner on the ground" 50 or 60 meters away and immediately heard two or three shots pass over her head.

Herr Kraus fell on his stomach and said he was hit (R11-12,14,17,86-87; Pros.Ex.C).

Meanwhile Gisela and Wolfgang had proceeded ahead of Isabella and Herr Kraus. Gisela observed accused as they lay down and when she

> "saw that, I took Wolfgang and laid down in the forest and then the shots began to crack. We remained laying there and thus were separated from Heinz and Isabella. After a while the shots sounded more distinct and then they stopped completely and we heard somebody yell for help" (R20,28).

It was about a minute after she saw accused lie down before she heard the shots (R37). They were "very close" (R38). She thought that the dark-haired one, whom she identified as Stogsdill, was doing the shooting (R30,38).

After she heard Herr Kraus say he was hit, Isabella joined Heinz, threw the bundles of material off the wagon and returned to Bischofsheim where she went to a doctor, then to the American Red Cross. She returned with two cars to the place where she had last seen Herr Kraus and found that he had dragged himself about ten meters into the forest. He was given a blood transfusion. A stretcher and truck arrived and he was taken to his home (R13,73,80). He died some time the following day (R73).

After Isabella first left the scene of the shooting, Gisela went through the forest with Wolfgang and "ran down the mountain and then we came onto the street at Hasselbach" where she again encountered the two accused. Stogsdill instructed her to tell the boy to go home. Wolfgang became frightened and left. Stogsdill then told her to "lay down". When she refused he threatened to shoot her. She then described the manner in which he had sexual intercourse with her, while Hammond was "walking up and down on the road looking up in the air and laughing". Stogsdill was through in about ten minutes and then Hammond

> "came and put his machine pistol under my nose and said he wanted to come to me also. I resisted and yelled and hit him but it was of no use. I heard then from afar people coming. I took my last strength together and pushed him away and ran to the people and they told me then that Mr. Kraus was laying in the forest wounded. I should run home and should say that a wagon should come. I ran then and on the way I saw two medical cars and in one of them Miss

Isabella was sitting. I told her then what the people had told me and went home" (R20-22).

On 12 April 1945 the body of Herr Leonhard Kraus was examined by Captain Harry T. Rachlin, 650th Medical Clearing Company, stationed in Bad Neustadt, Germany. He observed that a bullet had entered below the right shoulder blade and had come out on the right side of the neck. Another bullet had entered the body through the lower back, pierced both lungs and made exit through the abdomen, making multiple perforations through the bowels. They "looked like .30 caliber wounds, but I couldn't be certain", Captain Rachlin testified (R8-10).

It was stipulated between the prosecution, defense counsel and accused that if Dr. Robert Winkler were present in court he would testify as follows:

"On 10 April 1945 in the evening at about 2100 hours, I was called to the Henrich Brewery. I found in bed a man who was unconscious, about 70 years old, who looked pale. An American aid man was present who told me he had administered morphine and a blood transfusion. On the right side of the neck was a ragged wound which was larger than caliber, bleeding was light. I cleaned out the wound. The heart beat regular and strong. Further operational treatment could not be made.

On 11 April 1945 in the morning at about 0930 hours I visited the patient. He was still unconscious and breathing was heavy. Heart irregular and quick. Death came one-half hour later" (R10; Pros.Ex.A).

Technician Fifth Grade John William Benner, Company C, 136th Armored Ordnance Maintenance Battalion, also examined the body. He testified regarding his experience with gunshot wounds. In his opinion, the wound had been caused by a ".45 bullet" (R77) and cloth which he observed in the wound indicated that the bullet had been fired from a distance of less than 50 yards and not closer than 15 yards (R74-75).

On or about 11 April 1945, First Lieutenant William S. Baxter, Headquarters XV Corps, was investigating "an alleged murder" which occurred in the vicinity of Bischofshein. He interviewed accused Stogsdill and warned him of his rights under Article of War 24. Stogsdill signed a statement which recounts his and Hammond's meeting with two German girls on 10 April 1945 and contains the following:

"As we were walking home with them we met an old man. From this point on I do not remember anything until I met some soldiers from the 14th Armored Division who took me to their headquarters. I do not remember if T/5 Schmidt stayed with me all the time or not. I do not know exactly when he left. I do know that Pfc. Joe Hammond was with me when we started walking home with the girls" (R69; Pros.Ex.B).

Major Ralph E. Vandervort, 961st Field Artillery Battalion, the investigating officer in this case, interviewed accused separately. He warned Stogsdill of his rights, "informed him he did not have to say anything, or if he did have anything to tell me he could do so at that time". Stogsdill said: "Sir, I don't know anything that happened. I do know that we went to Ordnance and the next thing I know is that we were in the custody of the armored division". Hammond, after being similarly warned, said: "I know I didn't shoot anybody * * *". Asked about firing his rifle, he said, "Oh, yes, sir. I fired about six rounds into the trees and at some birds" (R72).

Captain William M. Thompson, 87th Ordnance Company, testified that his organization was stationed about one or two miles from Wildflecken. He showed on a map, which was received in evidence, without objection, the location of certain firing ranges in his vicinity on 9 April 1945. There was test firing of .30 and .45 caliber weapons, but he could not say whether or not there was any about five o'clock the day in question (R77-79; Pros.Ex.C). It was a very safe range since it was in the way of a mountain (R79).

On 10 April after 1850 hours, Technical Sergeant Charles Hanson, Company C, 136th Ordnance Battalion, was sergeant of the guard when "these two ladies", whom he identified as Gisela and Isabella came in (R84). As a result of what they said he "got one of the boys on guard to take another jeep and lead us to this spot where this old man was a mile and a half of two miles out of Bischofsheim on a hillside". On the way he saw accused Stogsdill coming down the road as they were on their way up. They

"rendered first aid to the old man that was shot. He had a wound in his throat. The corporal dressed his wound and I helped him administer plasma. We sat down to wait for another vehicle and a litter and when it came placed the old man on a litter and took him to his home * * *. I went back to look for the other people that had been up there. The sergeant [accused Stogsdill] was still coming down the road no further than he had been the first time carrying a carbine and an M-3 submachine gun. He waved to us and I stopped. He asked if I knew where the 46th

> Ordnance was. I had never heard of the 46th Ordnance. I took the sergeant down to the CP and told the company commander what had happened. He suggested we hold the sergeant and get the MP's. He sent a jeep down to bring the MP's up and Lieutenant Masters and two MP's came and examined the two guns. The MP looked at the submachine gun and said, 'This gun has been fired'" (R80).

The "MP" handed the submachine gun to Sergeant Hanson who examined it and observed it had been fired, but he could not say how recently (R81). Accused Stogsdill said, "Of course, it was fired". Asked where he fired the gun and what he fired at, Stogsdill said he fired it up in the hills. He said he was trying the gun out (R82).

4. For the defense, Captain Melvin T. Coffin, accused's battery commander, testified that he has known both men since 1943. Stogsdill was an excellent soldier and one of the best in his battery. He was a gunner corporal and did an excellent job. Hammond was his driver. He would rate him as an excellent soldier, who took excellent care of his vehicle and was one of the best in the battery (R38-39).

Second Lieutenant John B. Schueckler, Battery C, 961st Field Artillery, testified he has known both accused for two years and substantiated Captain Coffin's description of their excellent qualities. Hammond served as his driver on field artillery forward observer missions "through some hot actions, the roughest barrages we have had" (R40-41).

Technician Fifth Grade Hobart Schmidt, Battery A, 961st Field Artillery Battalion, testified that an M-3 submachine gun shown to him in court belonged to him. He had fired it on the firing range "the day I got there" (R88). Asked if he gave it to Hammond right after dinner on April 10, he answered "Yes, Sir" (R89).

After theirrights were explained (R41-42) each accused testified. Stogsdill described his meeting with the girls. At Gisela's suggestion that he walk home with her he accompanied her about two miles when they met a man who spoke German and "seemed rather harsh" (R42-44). They walked a way to an old well, where Gisela "and the boy left and the other girl and this old man went on". He did not object to their leaving (R45-46). He lay down there to rest (R53). He later had sexual intercourse with Gisela, to which she did not object (R45-46). He had with him his .30 caliber carbine which he did not fire at any time after meeting the girls (R46-47). During the day he heard firing "through the woods and over at the Ordnance testing range" (R47), which was rifle and machine-gun fire and "all different kinds" (R48). He did not know how many rounds he had in his carbine (R49). He did not fire any shots with it that afternoon. He never pointed it at the old man, the boys or the

girls (R50). He might have fired his rifle up on the hill that morning. He was out in the woods and a rabbit went along and he tried to hit him. At the time he was "picked up" he did not know of anyone being shot (R91). He stated he had said he did not remember what happened after the girls left because he was scared. "They asked me so many questions I wanted to get back to my outfit" (R91-92).

Hammond testified, giving substantially the same version as Stogsdill regarding their meeting with the girls and the old man (R55-60). Regarding the distance they walked to the well with the girls, he estimated it at about a half a mile (R58). He heard shooting at that time, but he did not fire any weapon nor had he fired any since then (R59,66). When he lay down at the well they both had their rifles with them (R60).

5. The evidence showed that Herr Leonhard Kraus was shot in the back at the time and place alleged when two .30 or .45 caliber bullets passed through his body, causing his death the day following. The defense sought to show that these bullets came from a firing range and that neither accused fired his weapon after meeting the girls and deceased. However, prosecution's evidence disclosed that both accused upon meeting the two girls acted jointly and in pursuance of a common intent in their efforts to obtain sexual intercourse with one or both of them. To this end, besides offering the girls schnapps, cigarettes and bundles of material, they endeavored to separate the girls from the two boys who were with them. The appearance of deceased and his direction to the girls to accompany him home was an obvious interference withe the plans of accused. When deceased and the girls left, accused warned deceased and Isabella to stand still and fired their weapons in the air. They then placed themselves on the ground and when deceased and Isabella were about 50 or 60 meters away, shots were heard by both of the girls. Deceased fell on his stomach and said he was hit. Thereafter both accused accomplished their previously indicated purpose of having sexual intercourse when they later met Gisela. They made free use of their weapons and took turns having sexual intercourse with her, which conduct, in accordance with the finding of the court of not guilty under Specification 2 of the Charge, was not the offense of rape as alleged.

The testimony of Technician Fifth Grade Benner who examined the wounds sustained by deceased demonstrated that they resulted from bullets that had been fired from a distance of 15 to 50 yards (R74-75) and made it incredible under all the circumstances shown that these bullets could have come from a distant rifle range, as the defense endeavored to indicate.

From the foregoing summary of the evidence it is clear that there was substantial evidence that the bullets which struck Leonard Kraus and caused his death were fired by one or both accused.

Murder is legally defined as follows:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, sec.148a, p.162).

"A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequence of his act" (I Wharton's Criminal Law, 12th Ed., sec.420, p.633).

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

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

"Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.654-655) (Underscoring supplied).

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

The record fails to show which of accused fired the shots which caused their victim's death. However, both accused were armed, one with a rifle and one with an M-3 submachine gun and their conduct before, during and after the shooting, showed that they were acting jointly and in pursuance of a common intent. They were both legally responsible therefore for the individual acts committed by either of them in this illegal and wholly inexcusable firing upon Leonhard Kraus (CM ETO 1922, Forester; Cf: CM ETO 4294, Davis). The evidence supports the court's findings of murder (CM ETO 5169, Lewis and cases therein cited).

6. The charge sheet shows the following concerning the service of accused: STOGSDILL is 26 years one month of age and was inducted 21 October 1941 at Chicago, Illinois; HAMMOND is 34 years nine months of age and enlisted 26 October 1940 at Houston, Texas. Neither had prior service.

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

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

(ON LEAVE) Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

30 JUN 1945

CM ETO 12617

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Mergentheim, Germany, 16 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class CHARLES J. BALIKO (20329306), Company A, 8th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Charles J. Baliko, Company A, 8th Infantry, did, near Eppledorf, Luxembourg, on or about 18 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: an engagement with the forces of the German Army, and did remain absent in desertion until he was apprehended near Maternach, Germany, on or about 25 February 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "Maternach, Germany", substituting therefor the words "Manternach, Luxembourg", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced.

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

3. The evidence for the prosecution shows that on 17 January 1945, accused was a member of Company A, 8th Infantry Regiment, which organization was located near Eppledorf, Luxembourg (R4,5,7,8). His assignment was that of "BAR man" (Browning automatic rifleman), third squad, second platoon. In the late afternoon on this date, accused's platoon leader assembled his men and gave them copies of an order to cross the Sure River and to attack the enemy at 2300 hours that night. Accused was present at the time this order was given. The time of the attack was later changed to 0030 hours but subsequently rescheduled to the original time and the platoon moved out at 2300 hours, making the river crossing and the scheduled attack, fighting continually until 23 January 1945 (R5,7,8,13). During the assault the company was subjected to mortar, rocket, machine gun, and small arms fire and as a result the platoon sustained six casualties (R6).

About an hour before the company moved out the accused left the house where his platoon was quartered for the nearby latrine (R12). He did not return. A search was made for him throughout the company area but he could not be found. His weapon and BAR belt were discovered abandoned in a house where he had been sheltered (R12-13). He was apprehended near Manternach, Luxembourg, 25 February 1945 (R15). An extract copy of the morning report of Company A, 8th Infantry was received in evidence without objection by the defense, showing accused from duty to absent without leave 18 January 1945 and in confinement awaiting trial by court-martial, 2 March 1945 (R14; Pros: Pros.Ex.A).

4. Accused, after his rights as a witness were fully explained to him, elected to make an unsworn statement through counsel. He stated that on 17 January 1945 he received the information that his platoon would move out against the enemy that night at 10:30 pm. He later learned that the time was changed to 12:30 am on the 18th. At about 10:15 he left the building to go and "relieve himself". He then went to a nearby church to say a prayer. When he returned at about 11:30 pm he discovered that his unit had departed. He remained in the house that night where his platoon had been quartered and later searched for his organization in the vicinity of Echternach, Germany. Prior to finding his company he was apprehended and returned to military control on 25

February 1945 at Manternach, Luxembourg (R15).

5. Competent uncontradicted evidence establishes the absence of accused as alleged and he admits his absence and that he knew his unit was to move. The assault was scheduled for 10:30 pm that night and at that time it was discovered that accused was missing and a search for him failed to disclose his presence, although his rifle and belt were found abandoned. His company made the scheduled river crossing, assaulted the enemy and suffered casualties as a result of the attack. Accused was absent and did not participate in this advance and fighting. His absence was unauthorized and was terminated by apprehension. Had he been acting in good faith in searching for his organization he would have moved forward in the direction of the briefed movement, rather than to the rear as he admits he did. Under such circumstances the court was fully justified in finding that accused absented himself with the specific intent to avoid hazards and dangers incident to such combat. The offense of desertion as defined and denounced by Articles of War 58 and 28 was therefore established (CM ETO 4686, Lorek: CM ETO 5293, Killen; CM ETO 5555, Slovik; CM ETO 6177, Transeau).

6. The charge sheet shows that accused is 25 years of age and was inducted 13 September 1940 at Bethlehem, Pennsylvania. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

12617

CONFIDENTIAL

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

BOARD OF REVIEW NO. 4

15 JUN 1945

CM ETO 12618

UNITED STATES	) 4TH INFANTRY DIVISION
v.	)
Private EDWARD H. CZYZEWSKI (36346884), Battery A, 20th Field Artillery Battalion	) Trial by GCM, convened at Ober Kochen, Germany, 28 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and 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 evidence in support of the finding of guilty of fraternization (Specification 2, Charge II), fails to show any contact on the part of accused with German civilians except acts constituting violence, and is therefore legally insufficient to support the findings of guilty of this specification (CM ETO 10967, Harris).

3. 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 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. Daniels, Judge Advocate

Franklin A. Meyer, Judge Advocate

John A. Burns, 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 SEP 1945

CM ETO 12619

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kothen, Germany, 7 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ISAAC R. HATFIELD (39096927), Company K, 60th Infantry	

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

1. The record of trial in the case of the soldier named above has been examined 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 Isaac R. Hatfield, Company "K", 60th Infantry, did, in the vicinity of Hastiere Par Dala, Belgium on or about 6 September 1944, desert the service of the United States by absenting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he was apprehended at Verdun, France, on or about 1 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 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. On the night of 5 September 1944, accused was present with his company during the unit's hike forward to the Meuse River with the purpose of crossing that stream and attacking the enemy (R9). The crossing began about 0200 hours on the morning of 6 September, and was made in assault boats at Hastiere Par Dala (near Dinant), Belgium, by the entire company in about an hour and a half under heavy, close and continuous machine gun fire (R6,7). Accused was not present when the company reached the far side (R9-11). It was stipulated that he was apprehended at Verdun, France, on 1 April 1945.

An extract copy of morning reports of accused's company was introduced in evidence. The entry of 11 September 1944 that accused was missing in action as of 6 September was corrected by the entry of 10 November which showed him absent without leave as of 6 September (R22; Pros.Ex.I).

The extract copy did not set forth any signature or initials on that part of the reports extracted. The certificate to the extract stated in pertinent part:

> "* * * the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report" /relating to accused/.

The personnel officer testified that he signed the extract copy and was the custodian of the original, of which the copy was a true representation; that it was not his duty to know the truth and correctness of the remarks; and that "the field copy" thereof was submitted to the company in the field and was not changed (R20-21). There was no testimony as to who signed the original reports. The defense counsel objected to the introduction of the extract copy on the grounds that it was hearsay (R19,21). His objection was overruled.

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 (R17-18).

5. Strong reason exists for holding in this case that the circumstances of the presence of the accused on the night march, the heavy fire at the river on the unprotected assault boats, his absence across the stream, and apprehension seven months later in a rear area remote from the battle lines, prove the unauthorized absence from 6 September 1944 until 1 April 1945 (CM ETO 527, Astrella; CM ETO 4915, Magee). Be that as it

may, it is the opinion of the Board of Review that the extract copy of the morning report was properly admissible and competent to prove the absence without leave for the period alleged. It is presumed in the absence of evidence to the contrary that the original, of which the extract was but a copy of a part, was regular and signed in another and proper part by an officer competent to sign it, and cognizant of the facts therein contained (CM ETO 5234, Stubinski; CM ETO 12151, Osborne). The finding of the court that accused left his organization with the intent to avoid hazardous duty was amply supported by substantial evidence of specific danger in immediate prospect, which the accused could not reasonably have misinterpreted (CM ETO 12470, Mayo; CM ETO 11503, Trostle; CM ETO 8690, Barbin and Ponsiek; CM ETO 6637, Pittala).

6. The charge sheet shows that accused is 23 years nine months of age and was inducted 24 July 1942 at San Francisco, California, to serve for the duration of the was plus 6 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 desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

Wm. F. Sumner Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1

27 JUL 1945

CM ETO 12621

U N I T E D S T A T E S	66TH INFANTRY DIVISION
v.	Trial by GCM, convened at Nantes, France, 4 April 1945. Sentence: Dismissal and total forfeitures.
First Lieutenant WILLIAM H. NICKERSON (O-1174398), 688th Field Artillery Battalion	

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

---

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

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

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

Specification 1: In that First Lieutenant William H. Nickerson, 688th Field Artillery Battalion, did, at Cannington, England, on or about 1 September 1944, wrongfully borrow the sum of twenty dollars ($20.00), lawful money of the United States of America, from Corporal Constantine M. Vaskevitch, Battery B, 688th Field Artillery Battalion, an Enlisted Man.

(296)

Specification 2: In that * * * did, at Blain, France, on or about 15 November 1944, wrongfully borrow the sum of five hundred (500) francs; lawful money of the Republic of France, and of a value of about ten dollars ($10.00), lawful money of the United States of America, from Master Sergeant Gordon G. Roberts, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 3: In that * * * did, at Blain, France, on or about 1 November 1944, wrongfully borrow the sum of two hundred (200) francs, lawful money of the Republic of France, and of a value of about four dollars ($4.00), lawful money of the United States of America, from Staff Sergeant John H. Flynn, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 4: In that * * * did, at Blain, France, on or about 15 November 1944, wrongfully borrow the sum of one thousand (1000) francs, lawful money of the Republic of France, and of a value of about twenty dollars ($20.00), lawful money of the United States of America, from Sergeant Evan C. Morris, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 5: In that * * * did, at Rebon, France, on or about 10 November 1944, wrongfully borrow the sum of five hundred (500) francs, lawful money of the Republic of France, and of a value of about ten dollars ($10.00), lawful money of the United States of America, from Sergeant Edward E. Rakshys, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 6: In that * * * did, at or near Plesse, France, on or about 22 February 1945, wrongfully borrow the sum of twelve hundred (1200) francs, lawful money of the Republic of France, and of a value of about twenty four dollars ($24.00), lawful money of the United States of America, from Technician 4th Grade John J. Lufrano, Battery A, 688th Field Artillery Battalion, an Enlisted man.

Specification 7: In that * * * did, at Blain, France, on or about 15 January 1945, wrongfully borrow the sum of five hundred (500) francs, lawful money of the Republic of France, and of a value of about ten dollars ($10.00), lawful money of the United States of America, from Technician 4th Grade Basil F. Scalzo, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 8: In that * * * did, at Blain, France, on or about 10 October 1944, wrongfully borrow the sum of two hundred (200) francs, lawful money of the Republic of France, and of a value of about four dollars ($4.00), lawful money of the United States of America, from Technician 4th Grade Howard M. Thomas, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

Specification 9: In that * * * did, near Rennes, France, on or about 15 December 1944, wrongfully borrow the sum of one hundred (100) francs, lawful money of the Republic of France, and of a value of about two dollars ($2.00), lawful money of the United States of America, from Private Leland S. Empson, Service Battery, 688th Field Artillery Battalion, an Enlisted Man.

(298)

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that * * * being lawfully indebted to Corporal Walter Willkomm, Battery B, 688th Field Artillery Battalion, an Enlisted Man, in the sum of five hundred (500) francs, lawful money of the Republic of France, and of a value of about ten dollars ($10.00), lawful money of the United States of America, for a personal loan made at or near Nantes, France, which amount became due and payable within a reasonable time after 26 September 1944, did, from about 26 September 1944 until about 2 April 1945, dishonorably fail and neglect to pay such debt.

Specification 4: (Nolle prosequi)

Specification 5: (Nolle prosequi)

Specification 6: (Finding of not guilty)

Specification 7: (Finding of not guilty)

He pleaded not guilty and was found guilty of all specifications of Charge I, Charge I, Specification 3 of Charge II, and Charge II, and not guilty of the remaining 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 a period of 18 months. The reviewing authority, the Commanding General, 66th Infantry Division, approved the sentence, recommended that all confinement, and forfeiture in excess of $50.00 per month for a period of six months, be remitted and that the dismissal be suspended, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of Specification 3 of Charge II as involved a finding that accused,

after having become indebted to an enlisted man at the time and place alleged, did fail and neglect to pay such debt, during the time alleged, in violation of Article of War 96, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the convening authority, remitted the confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Clear and competent evidence, including accused's admissions in his testimony establishes that he borrowed money from enlisted men of his organization as alleged. Such conduct is a violation of Article of War 96 (CM ETO 2972, Collins; CM ETO 11775, Porter). Such evidence likewise established that accused failed and neglected to repay the sum of 500 francs to Corporal Walter Willkomm, an enlisted man of his organization, until 2 April 1945, although such debt was due and payable within a reasonable time after 26 September 1944. Accused, in permitting this obligation to remain outstanding for such a long period, committed a violation of Article of War 96 (CM 251490, Clift, 33 B.R. 263 (1944); CM ETO 11775, Porter).

4. The charge sheet shows that accused is 29 years of age and was appointed a second lieutenant on 3December 1942. He was promoted to first lieutenant on 21 September 1943. He had prior enlisted service in the 101st Field Artillery Battalion, National Guard, from 10 July 1930 to 29 May 1936 and from 15 September 1936 to 5 April 1938.

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

6. A sentence of dismissal and total forfeitures is authorized upon conviction of an offense in violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(300)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 27 JUL 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant WILLIAM H. NICKERSON (O-1174398), 688th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as modified, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12621. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12621).

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

(Sentence ordered executed. GCMO 332, ETO, 13 Aug 1945).

12621

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

BOARD OF REVIEW NO. 2

23 JUN 1945

CM ETO 12650

U N I T E D S T A T E S	III CORPS
v.	Trial by GCM, convened at Swarzenberg, Bavaria, Germany, 24 May 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class CHARLES H. COMBS (34713872) and Private PAUL G. SHIMMEL (33073462), both of Battery B, 565th Antiaircraft Artillery Automatic Weapons Battalion	

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

1. The record of trial in the case of the 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 Private First Class Charles H Combs, Battery "B" 565th Antiaircraft Artillery Automatic Weapons Battalion, did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany, on or about 4 May 1945, forcibly and feloniously against her will, have carnal knowledge of Elise Neuner.

Specification 2: In that Private Paul G. Shimmel, Battery "B" 565th Antiaircraft Artillery Automatic Weapons Battalion, did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany on or about 4 May 1945, forcibly and feloniously, against her will have carnal knowledge of Elise Neuner.

12550

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Private Paul G. Shimmel * * * did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany, on or about 4 May 1945, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Adam Neuner, a plain gold wedding ring, with "EN 18: 1:20" engraved on the inside, value about $5.00, the property of Adam Neuner.

Specification 4: In that Private First Class Charles H. Combs * * * and Private Paul G. Shimmel * * * acting jointly and in pursuance of a common intent, did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany, on or about 4 May 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of August Dietrich, a brown leather billfold, value about $1.00, and 1,000 Reich Marks (6-100 Mark and 8-50 Mark notes) value about $100.00, lawful money of the United States, and a gold band wedding ring with (KR 4:6:22" engraved in it, value about $5.00, property of August Dietrich.

Specification 5: In that * * * acting jointly and in pursuance of a common intent, did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany, on or about 4 May 1945, by force and violence and by putting her in fear, feloniously take, steal, and carry away from the person of Kathe Dietrich, a ladies white metal open faced wrist watch, value about $5.00, a gold band wedding ring with "AD, 4 :6:22" engraved inside, value about $5.00, and a gold colored signet ring with green setting, value about $3.00, the property of Kathe Dietrich.

Specification 6: In that * * * acting jointly and in pursuance of a common intent, did, at Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany, on or about 4 May 1945, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Mattihas Knahn a brown leather coin purse, value about $1.00, and an open face "Anker" silver pocket watch value about $5.00, property of Mattihas Knahn.

Each accused pleaded not guilty to the charges and specifications. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was found guilty of Charge I; and Combs was found guilty of Specification 1 and accused Shimmel of Specification 2 thereunder; of Specifications 1 and 2 of Charge II, each was found not guilty; of Specification 3 Charge II, accused Shimmel was found guilty with an immaterial substitution of Specification 4 Charge II, each accused was found guilty, except the words, "and 1,000 Reich Marks (6-100 Mark and 8-50 Mark notes) value about $100.00, lawful money of the United States", and also as to accused Combs, "a brown leather billfold, value about $1.00", of the excepted words not guilty; of Specification 5, Charge II, as amended by the court (R8,65) to include Specification 6, each was found guilty, except the words, "a ladies white metal open faced wrist watch, value about $5.00" and "a brown leather coin purse, value about $1.00 and", of the excepted words, not guilty, and both accused were found guilty of Charge II. Evidence was introduced of one previous conviction by summary court as to each accused, for absence without leave for one day, in violation of Article of War 61. All of the members of the court present when 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 each sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 4 May 1945, accused were members of Battery B, 565th Antiaircraft Artillery Automatic Weapons Battalion, which organization was stationed near Klosterdorf, Scheinfeld County, Mittel-Franken Province, Germany (R9,11,16,17). Shortly after 9 o'clock that evening two American soldiers, one armed with a pistol and the other with a rifle, entered the apartment of Herr August Dietrich. In addition to Herr Dietrich and his wife Kathe, other occupants of the house at the time included Herr Mattihas Knahn, Frau Knahn and the latter's young daughter, Annalisa (R18,22,23,33). Both soldiers pointed their weapons at these civilians and made them line up in the hallway, following which they searched them and removed from them watches, rings and other items of personal property. They "took" a wrist watch from August Dietrich and "pulled" two rings from the fingers of his wife, Kathe. One of the rings was described as a signet ring with a green stone and the other one as a wedding ring with the initials "AD" and the dated "4.6.22" engraved therein. Both were identified as the property of Kathe Dietrich (R24, Pros.Exs. 1 and 3). One of the soldiers held a pistol against the chest of Herr Knahn

and made him put his arms up, following which he "jerked" a watch from Knahn and put it in his pocket. This watch was described and identified by Herr Knahn as his property (R31, Pros.Ex.5). Following the taking of these items of property in the hallway, under force of arms, the accused ordered the people into a room and directed that they sit down (R26,31). The "bigger one" (Shimmel) went through the pockets of August Dietrich and removed other articles, including a billfold, a wedding ring and some money. He tore the money up and threw it on the floor, returned the bill fold and placed the ring in his pocket. During this time the "shorter one" (Combs) was "playing" with the little girl, Annalisa, who was shaking and frightened (R26,34). Both accused were identified as the soldiers present in the Dietrich apartment on the evening in question and as the persons committing the acts herein described (R22,23,33,34). Each was under the influence of intoxicants and "acting like a man that is drunk". Shimmel was staggering and appeared "more drunk" than Combs (R28,29,38).

Accompanied by Herr Dietrich, the soldiers left the apartment and went across the street to the home of an "old woman" who lived there. They searched this house for liquor but found none. They then took Herr Dietrich's wallet from him and departed (R36,37). Later they entered the house of Herr Adam Neuner and his wife, Frau Elise. Also present in the house at the time were the latter's three daughters and a Mrs. Amtmann and her two young sons. The latter except the youngest daughter were "upstairs in the attic" (R37,39,51). Combs seized Herr Neumer and dragged him into his wife's bedroom, where he found Elise Neumer and her little girl (R40,51,52). Finding a brassier in the room, Combs, by sign and direction, told the woman to put it on and she obeyed by stretching it across her chest. She was then told to undress (R40). She got completely undressed. The child and father were ordered to leave the room (R41).

While Combs remained in the bedroom with Elise Neumer, Shimmel was in the kitchen with her husband. Shimmel struck him on the face with his fist and removed a ring from his right hand. A wedding ring bearing the initials "EN" and dated "18.1.20" was marked for identification as prosecution's exhibit 4 exhibited to the court but not received in evidence (R11,64).

Frau Neumer testified that after her husband left the room Combs pushed her on the bed, grabbed her hair and pulled her towards him. She resisted but he beat her on her neck with his fist. The victim testified that he had "some sort of a gadget there" which she was unable to describe because she had removed her glasses. She thought it was a revolver and asked him to "keep it away". She did nothing further to prevent his advances except to push him away (R41). He penetrated her person and completed the act of sexual intercourse against her will. He then "pulled" her over on another bed and "misused her * * * in all positions", even to the extent of forcing her to take his penis in her mouth, which latter act

caused her to become ill and to vomit. She then tried to "evade" him but he hit her again with his fist and made her "keep doing it" (R41,42). Shortly thereafter, accused Shimmel entered the bedroom and talked with Combs who left the room but returned and upon seeing that she refused to "do anything" pushed her head down on Shimmel who was at this time lying on the bed with his pants opened. Combs remained in the room and Frau Neuner engaged in sexual intercourse with Shimmel. She submitted to this act after resisting, because the soldier had a revolver and "frightened" her (R43). They remained in the room for sometime but later left taking the forty-nine year old woman and mother of three children with them. She carried only her shoes and apron but was left outside in the rain as they walked off towards the woods together (R44,45).

4. Accused, after their rights as witnesses were fully explained to them, each elected to remain silent and no evidence was introduced on their behalf.

5. a. Rape is the unnlawful carnal knowledge of a woman by force and without her consent. Convictions of the offense requires proof: (a) that the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, par.148b, p.165). The victim testified that both accused assaulted her in her bedroom and while armed forced her to engage in sexual intercourse with them. She maintained that she resisted but that she was frightened and that the sex acts were accomplished by each accused, against her will. Her testimony is uncontradicted. It is corroborated by the testimony of other witnesses concerning accused's actions and conduct on the evening in question. The evidence is substantial and convincing that accused committed the crime of rape, as charged (CM ETO 6224, Kinney and Smith; CM ETO 9611, Prairiechief).

b. Concerning the offenses of robbery, the evidence shows that accused entered the homes of the victims on the evening in question, and by force of arms, made the occupants line up and raise their hands. Thereafter, they searched and stripped them of their rings and watches. These items were adequately described and identified to the court, which found that in the taking thereof there was a sufficient showing of force and violence to sustain the allegation of robbery. Under such circumstances, the findings of the court are final and being supported by substantial evidence, will not be disturbed by the Board of Review on appellate review (CM ETO 5561, Holden and Spencer; CM ETO 11216, Andrews).

c. The record discloses that the law member denied to the defense counsel the right to ask preliminary questions of a civilian German witness concerning the religious belief of the witness and whether he was insensible to the taking of an oath. The basis of counsel's objection was that the witness was a German and that Naziism is a reli-

gion, under which an oath is not considered binding except insofar as it is beneficial to the German State. The better practice dictates that counsel should have been permitted a preliminary questioning of the witness. However, the defense counsel was offered the right to cross-examine the witness along the lines indicated upon completion of his testimony, but he declined to avail himself of the opportunity. Any error committed was thus in effect abated. Furthermore, the testimony of the witness related solely to offenses alleged in Specifications 1 and 2 of Charge II of which the accused were found not guilty. Under the circumstances the ruling of the law member was harmless and did not constitute prejudicial error (CM 202928, Cooley, 6 B.R. 371 (1935); CM ETO 3470, Harris).

6. The charge sheet shows that accused Combs is 20 years and ten months of age and was inducted 23 April 1943 at Camp Forrest, Tennessee; accused Shimmel is 25 years and eight months of age and was inducted 23 August 1941 at Camp Lee, Virginia. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No error injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that, as to each accused, 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, and for the crime of robbery by section 284, Federal Criminal Code (18 USCA 457,567 and 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper as to each accused (Cir.229, WD, 8 June 1944, sec.II, pars.1b (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3 23 JUN 1945

CM ETO 12652

U N I T E D S T A T E S v. Private MELVIN A. FLADGER (32330920), 4406th Quartermaster Service Company	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Brussels, Belgium, 23 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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 Melvin A. Fladger, 4406th Quartermaster Service Company did, at Mons, Belgium, on or about 0100 hours 25 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Leslie E. Haughs, Corporal, 210 Military Police Company, a human being by shooting him with a carbine.

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

Specification 1: In that * * * having been duly placed in confinement in City Jail, Mons, Belgium, in custody of 210th Military Police Company, on or about 25 December, 1944, did, at Mons, Belgium, on or about 27 December, 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * having been duly placed in confinement in the detention room of Company "A" 796th Military Police Battalion, Charleroi, Belgium, on or about 14 January 1945, did, at Charleroi, Belgium, on or about 28 February 1945, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave and breach of restriction in violation of Articles of War 61 and 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

At about 2330 hours on 24 December 1944, a Belgian civilian approached Technician Fourth Grade Kurt O. W. Wahle on the street in Mons, Belgium, and

requested aid in quieting a disturbance which was then taking place in his cafe. Upon accompanying the civilian to the cafe, Wahle saw an Air Corps lieutenant attempting to disarm accused of a carbine. Also in the cafe at the time was another colored soldier, a Private Smith. Wahle separated accused and the lieutenant, and shortly thereafter, after another brief altercation with the accused, the lieutenant left the cafe. Almost immediately thereafter, accused and Smith also left the cafe and started to walk in the direction of "the big square". Wahle accompanied them, urging them "to call it quits because it was Christmas Eve and that I would buy them a drink". After the group had proceeded two or three hundred yards, either accused or Smith said, "Let's turn back and kill the son-of-a-bitch" (R7,11). Smith thereupon gave accused a magazine and both men loaded their weapons (R7,8,10,11). Then, despite Wahle's efforts to dissuade them, they turned back (R7,8). Fearing harm to the lieutenant, Wahle immediately went to the military police station and reported the incident to the desk sergeant on duty, Sergeant Regis M. McGuigan (R8,16). McGuigan summoned a fellow military policeman, Corporal Leslie E. Haughs (the deceased), and the three men then went back toward the cafe in search of the accused and Smith. They proceeded by jeep, with McGuigan driving, Wahle beside him in the front seat, and Haughs in the rear (R8,12,17).

After a short search, they saw two colored soldiers walking toward them on the sidewalk on the opposite side of the street (R8,17). Upon being told by Wahle that these were the two soldiers in question, McGuigan turned the vehicle around at the next intersection and proceeded back on the right side of the street in the same direction as that in which accused and Smith were walking. As he drew near them, he slowed down and stopped, saying "Just a minute there" (R8,12,17,18). Both men, seemingly rather startled, turned slightly toward the jeep - they executed a "half left" (R17,18). Both had their carbines slung at this time (R18,21). Shortly before or simultaneously with the stopping of the vehicle, Wahle jumped from the front seat and started to run toward accused (R8,12,18). With this move, accused unslung his carbine. Smith's carbine, however, remained slung (R21). As Wahle approached accused, the latter pointed his carbine at him and, as Wahle reached for it, he saw Smith also unsling his carbine (R8,9,12,21). He

immediately ducked and started to run in the opposite direction and then to his left, passing in front of the jeep toward the opposite side of the street (R8,12). As he was passing in front of the jeep, approximately three or four seconds after he first took flight, he heard a shot (R14,15). Almost immediately thereafter, accused and Smith turned and ran away. At this time, Haughs was discovered lying in the rear of the jeep with his head lying between "the bars that hold the top of the jeep up" (R10,19). Since his right arm was bleeding, it was decided to seek medical aid for him rather than to attempt to apprehend accused and his companion. He was accordingly taken to a Royal Air Force dispensary where a medical officer was called to examine him (R10,19). When the medical officer appeared to make his examination, Haughs was already dead (R22). The examining officer found two wounds, one just below the tip of the right shoulder and the other on the left side of the chest just below the arm pit. It was his opinion that these were gunshot wounds, that the missile had passed from right to left and that the wounds thus received were the cause of Haughs' death (R23,24). His opinion was confirmed by a later autopsy which showed that a bullet had passed completely through the deceased's body, entering his right arm about two inches below the shoulder tip, proceeding on into the right chest, and emerging from the left chest. These wounds, which had apparently been caused by a bullet of high velocity, produced death (R25,26).

The jeep used on the night in question was not equipped with side curtains, nor was it inclosed in any way. However, the top was up at the time of the incident. While at the dispensary, Wahle examined the jeep but found no bullet holes in it "any where at all" (R13).

Neither Wahle nor McGuigan actually saw the fatal shot fired (R12,13,20). However, McGuigan testified that as there were no other people in the vicinity, the shot, which came from his right, of necessity must have been fired either by accused or Smith (R19). He further testified that when he first pulled up to the curb and stopped, the two men were at the right rear of the vehicle on an approximate forty-five degree angle from the front seat with accused opposite the rear seat and

Smith some two or three feet behind him, nearer to the vehicle, "right at the corner of the jeep" (R18,20,21). Haughs was sitting in the rear seat and, at this time at least, Smith was not standing in such a position that he obstructed accused's view of Haughs (R18,20). Wahle testified that at the time he ducked and ran upon seeing Smith begin to unsling his carbine, Haughs was sitting "in the middle of the /rear/ seat not on the right or left but in the middle of the seat", that accused was standing on the sidewalk opposite the rear seat, and that Smith was standing a little to the left and about a yard or a yard and a half behind accused "at such an angle that he could hardly see the deceased because the top was covering him" (R13,14). When, upon hearing the shot fired, he looked to his rear while passing in front of the vehicle, accused was still standing in the same position, holding his gun "at his belly". Smith was still behind accused, and accused was more or less between Smith and the deceased (R15). When asked whether it would have been possible for Smith to have fired the shot, Wahle testified:

> "The time between the unshouldering of his gun and the firing of the shot * * * was too short. Besides, Smith was so far behind the M.P. that when he fired it he would have had to fire through the top of the jeep. He was standing at such an angle that it would have gone through the top" (R13).

On cross-examination, he stated that it was possible to unsling and fire a carbine in two seconds and that about three seconds elapsed from the time he saw Smith start to unsling his rifle and the time he heard the shot fired (R13).

After it was determined that Haughs was dead, orders were given to arrest and take into custody all colored soldiers in Mons (R27,30). Among the soldiers taken into custody as the result of this order was the accused. He was brought to the military police station at about 0130 hours on 25 December and, when apprehended, had in his possession both a carbine and a magazine partially loaded with carbine ammunition (R29,31). Because

of powder in the barrel and "very strong powder smells", it was the opinion of the military police officer who examined the weapon that it recently had been fired (R30, 31). However, he could not state with exactness the time which had elapsed since the weapon had been fired for the reason that, once a weapon has been fired, it continues to smell of powder until cleaned (R30,34). The military police officer did not remember whether a Private Smith had been among the colored soldiers arrested on the night in question. He examined the weapons of other colored soldiers who were taken into custody and of these "definitely four" had been fired that night (R33). Also, certain of the other soldiers taken into custody were in possession of ammunition (R34).

Accused was placed in confinement in the city jail that same night (R31,35). Although no order for his release was given, he could not be found in his cell or at the jail, despite a search, on 27 December (R31,35, 36). He was returned to military control on about 14 January 1945 at Charleroi, Belgium (R41). On the night of 27 February 1945 he escaped from the detention barracks of Company B, 796th Military Police Battalion, at Charleroi, where he was at that time in confinement (R40,41). No order had been given for his release (R40).

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

5. While there was no direct evidence to show that accused personally perpetrated the murder of which he was found guilty under Charge I, the circumstantial evidence adduced points strongly to him as the man who fired the shot which resulted in Haughs' death. Smith had started to unsling his carbine only three or four seconds before the shot was heard whereas accused's carbine was already unslung and in firing position, Smith was to the rear of the deceased whereas accused was directly opposite him, the missile passed through Haughs' body almost directly from right to left, and, when apprehended a short time after the homicide, accused's carbine appeared recently to have been fired. If Wahle's observations were accurate, the absence of bullet holes in the canvas top of the vehicle almost conclusively shows that, of the two men,

accused must have fired the fatal shot. In any event, in view of the background of the homicide, the actions of the two men at the time the military police vehicle drew to the curb shows a concerted design to avoid arrest. They had earlier been disorderly in a cafe and had not only been heard to say that they were going to return to inflict violence on the lieutenant but had loaded their weapons in preparation therefor. In view of Wahle's persistent efforts to dissuade them, they certainly must have recognized him when he leaped from the vehicle and have realized that their activities had been reported to the military police. Both unslung their carbines and the court was justified in inferring that they then mutually intended to aid each other to escape and to shoot if necessary, as in fact one of them did, in order to avoid apprehension. Under the circumstances shown, even if it was Smith who fired the shot, accused may be held responsible for his act (see 1 Wharton's Criminal Law (12th Ed., 1932, sec.258, p.343); 22 ALR 850; 108 ALR 847). There can be no suggestion that the homicide was either justifiable or excusable, and it was clearly attended by the requisite malice aforethought to constitute it murder (MCM, 1928, par.148a, p.162). It is accordingly concluded that the court was warranted in finding accused guilty as charged.

The record of trial clearly supports the court's findings that accused also was guilty of Specifications 1 and 2 of the Additional Charge.

6. The charge sheet shows that accused is 25 years of age and was inducted on 4 May 1942 at Fort Jay, New York. He had no prior service.

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

8. Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sec.275 and

330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Casey Jr Judge Advocate

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

BOARD OF REVIEW NO. 1

10 NOV 1945

CM ETO 12656

U N I T E D S T A T E S	)	84TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Arendsee, Germany, 23,25 April
Private EUGENE TIBBS	)	1945. Sentence: Dishonorable
(34366449), Company M,	)	discharge, total forfeitures and
334th Infantry	)	confinement at hard labor for
	)	life. United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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 specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private Eugene Tibbs, Company "M", 334th Infantry, did, at Bad Oeynhausen, Westfalen, Germany, on or about 6 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Charles E. Smith, Company "L", 334th Infantry.

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 1, and guilty of Specification 2 and the Charge. Evidence was introduced of one previous conviction by special court-martial for using insulting language to a noncommissioned officer who was then in execution of his office in violation of Article of War 65. Three-fourths of the members of the court present at the time the vote was taken concurring, he

RESTRICTED

12656

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 undisputed evidence in the record established that at about 0330 hours on 7 April 1945 a shot was fired within the storage room of a house in Bad Oeynhausen, Westfalen, Germany, causing the death of Private First Class Charles E. Smith. At the time of the shooting three other persons were in the room: accused, Private First Class Leo Feagin, and a German woman, Frau Erma Ottemyer. The sole question in the case is as to the identity of the killer.

The autopsy showed: that Smith died from a wound, the opening of which was on the upper front left arm; that the wound tract was traced to the left chest and continued through the lower lobe of the left lung, through the body of a vertebra, through the diaphragm and the right lobe of the liver, and again through the diaphragm; and that a .45 caliber slug was recovered in the soft tissue just below the twelfth right rib in the mid-axillary line. The wound track was possible only if the left arm were elevated to "at least a right angle with the body" (R7).

Feagin testified that some time after midnight on 6 April he, accused, and Smith, the deceased, went to the house of Frau Ottemyer, which was about 300 or 400 yards from their company command post (R8). After entering the house, they and the woman drank wine together in the living room. She and Smith, the deceased, then left and entered a storage room. Witness went into that room only once and at that time accused was with him (R9). He saw the woman and Smith sitting together toward the foot of a bed, Smith being at her left. Accused stood in front of them, toward the middle of the bed. Accused said something like "Come on, get the hell off" and Smith replied something like "Get the hell out of here" (R10) and the two then argued. Witness saw no gun in anybody's hand. He said "Cut out the nonsense, its getting late", and then a shot was fired. He saw no flash because his back was turned. Accused with his left hand handed him a little pistol, smaller than a .45, and said "Here's the pistol" (R11). Witness had taken his .45 to the house, but did not bring it back with him. The last time he saw it, accused had it -- they were looking at it around the table in the kitchen, and accused never gave it back. He could not say whether accused was carrying it when they went into the storage room, but did know that accused had the little pistol with him (R12). Except for a carbine, he knew of no other weapon possessed by accused. Smith carried a .45 in his holster, but it had not been passed around. Witness did not know whether there was a bullet in the chamber of his .45, but bullets were in the magazine. Beginning at 2130 or 2200 hours that night he and two or three others drank three bottles of wine, and he felt the effects of the wine a little when he entered the woman's house. He carried his .45 in his jacket pocket (R14). Accused's small pistol was first seen when he took it out of a shoulder holster he was wearing. Witness had a flashlight (R15) which he held in his right hand when he came to the bed. He

flasned it on the bed, turned around and while he was leaving, with his back to the bed, he heard the shot. He did not see a .45 in the room (R16) and was sure that he went in the storage room only once (R17).

Recalled as a witness for the defense, Feagin testified that he could not remember going into the storage room more than once and did not remember taking off his field jacket, but missed it after he was back at the command post. It was later found at the house (R36).

At the end of the trial, at an adjourned session two days later, Feagin was recalled by the court and testified that he went to the house for the purpose of sexual intercourse. In answer to the question "Do you know who fired the shot?" Feagin answered "I don't". After he left the room he went to the command post and reported that Smith had been hit, though he was not positive that Smith had been, as he did not look at him. "I was scared pretty bad in a case like that". He did not know whether or not it was his (Feagin's) gun from which the shot was fired. To the question "How did you know the woman didn't shoot him?", he responded "I don't know that she didn't" (R90-91). He went into the storage room only once, and that was the time the shot was fired. He did not recall flashing his light on the bed until after the shot (R94). Upon leaving the storage room, he went to the living room and out of the door. He had only the small caliber gun accused had given him. He removed his jacket before he went into the room. When he flashed his light on the bed after Smith was shot, he saw the woman scrambling to get off the bed and accused was still standing by the bed. He saw only the little gun, not the .45. Asked whether the little gun was the one that fired the shot, he replied, "No, it wasn't, the Major said it was a .45" (R95). He said in one breath that the accused had the .45 in his hand when he went into the room, and in the next when the question was repeated he said he did not see accused's hand (R96). When he went to the living room, he gave the little pistol back to accused (R98).

Frau Erma Ottemyer testified that at about 2345 hours accused came to her house and stayed for about two hours, after which they engaged in sexual intercourse (accused was acquitted by the court of a charge of rape based upon this act). Her legs were paralyzed. During this first visit he had a pistol a little larger than a .45, "but you could rotate something on it" (R18-19). Accused then left the house and returned about 45 minutes later with two companions (R20). After they all had drunk wine in the living room, they went into the storage room. After she was put on the bed in the room, Smith turned out the light and lay down by her side on the bed. Accused and Feagin left the room (R21). The first time accused came back into the storage room, he was flashing his flashlight and talking with Smith "rather normally". A second time that accused came into the room, they talked more excitedly1 The third time he stood at the head of the bed, but towards the side (R22). She saw that accused held a weapon in his right hand. His hand was sideways at his side. On being shown at the trial a U.S. Army .45 caliber pistol, she testified that the weapon he was holding was different from and smaller than the .45. She was then shown a .32 calibe. pistol, and said that she thought the muzzle of the weapon accused held was a little larger and higher and the whole pistol was a little lower. The

weapon accused held "must have been smaller" than the .45 caliber automatic shown her. She heard a shot fired, though it was not loud. Accused fired the shot (R23) which she knew because the sound came from behind her. He was standing behind her, but more toward the side. She could see him without turning her head. She was always looking toward the pistol, but did not see any fire from the muzzle when it was fired. She did not know that when a pistol is fired in a semi-dark room, there is a flash of light (R24). At the time the shot was fired, the third soldier was standing in front of them towards the door and was not holding a weapon. Accused was the first to leave the room after the shot was fired, and he went into the hallway, which was between the storage room and the living room, and put the pistol on a desk in the hallway (R25). All three soldiers were in the storage room at least three times (R26). At the time of the shooting, Smith had his right arm around her shoulder and was sitting sideways. It was not possible that the third soldier put the gun on the table, and she was positive that accused put it there (R27). She could see accused and the third soldier, and the third soldier had on a jacket (R28).

4. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness (R36-37) and testified that, after being relieved of guard duty at 2300 hours, he investigated a noise he had heard while on guard and went to the house in question. He had at this time a carbine, a .38 on a belt in a holster, and a "320" revolver in a holster under his arm. While in the house, he had intercourse with the woman there, to which she had consented (R38). Later he returned with Feagin and Smith. He was not drunk that night, but "you might say" that Feagin was drunk (R39). The second time he came to the house he had the carbine and the little pistol, but did not have the .38. Feagin had a .45 in his left jacket pocket and Smith had a .45 on his belt in a holster. At no time did accused remove his field jacket, but Feagin removed his. After Smith and the woman had gone into the storage room, accused and Feagin went into the room and found them on the bed having sexual intercourse (R40,52). Feagin flashed his light on them and told Smith "to hurry up and get through, that he wanted some" and Smith said "Get the hell out of here so I can". Accused and Feagin then returned to the living room and drank some wine. Feagin took his gun out, put it in his hip pocket, took off his jacket, and said "I am going in and get him off". Feagin then went into the storage room first, followed by accused, Feagin going to a point about two feet from the bed. Accused was about two and a half or three feet behind Feagin, between him and the door (R40). Feagin flashed his light on Smith and the woman, who were sitting on the side of the bed, then turned his light off and a shot was fired. In answer to the question "Did you see him with a .45 in the store room?", accused replied "Yes, he fired the shot". Accused was sure Feagin fired the shot. He saw the flash. Feagin turned to the right and brushed him with the gun in the stomach. He followed Feagin out of the room. Feagin laid the .45 on the table. Accused started toward the command post, took a wrong turn in the dark, "wound up" at a German hospital about three houses from the command post, then went to the command post and told the guard that he wanted a medic (R41,45,58-59). Accused gave his "320" pistol to Feagin in the house while they were drinking wine because he asked for it, but accused never had the little pistol in the storage room (R44). When Feagin

and he went into the storage room the second time a light was on about 12 to 15 feet from the door (R43). It was back from the bed toward one end of the room near the ceiling. The light was not, however, sufficient to enable him to distinguish Smith and the woman (R57). He could see them when Feagin flashed his light on them (R58). In the living room after the shooting, Feagin, who was accused's acting squad leader, told him that he, Feagin, had shot Smith but not to say anything about it, and then told him to get a medic (R61,63,66-67).

In addition to the above testimony of Feagin, accused, and Frau Ottemyer, the following evidence in the record has pertinency on the question of the identity of the person who shot Smith.

Private First Class Brittain, after the shooting, found two .45's in the house, one on the table in the living room, and the other between Smith's legs in a holster (R34,69). He also found Feagin's field jacket in the house (R35). He gave the .45 he found on the table to Lieutenant Tarkington (R34).

Lieutenant Tarkington testified that he looked at that .45 pistol Brittain turned over to him, took the magazine out, and ejected one round from the chamber (R31). (Apparently this pistol had a round in the chamber long before the shooting (R88-89)). The officer saw Feagin between 0400 and 0430 with a small caliber gun, about a .32 (R30). At that time Feagin was "drunk or dopey" and was "pretty high, pretty drunk". Accused was wearing a jacket (R32). Smith's body lay on the bed with his head near the foot of it, and his feet on the floor (R33).

Private First Class Kingsley testified that he was on guard when, at about 0334 hours, he heard a shot (R76). About five minutes later he saw Feagin near his post "hollering for a medic because he said a G.I. was shot, and a G.I. shot a G.I. and a woman shot a G.I. and kept repeating it" (R77,79).

5. The only serious question presented by the record is whether the record contains legally sufficient evidence that it was accused who fired the shot that killed Smith. Frau Ottemyer, an eye-witness, testified that accused fired the fatal shot. She saw him holding the weapon, at which she was looking continuously, and the sound came from behind her, where accused was located. She stated that Feagin was not holding a weapon and did not fire the shot. In addition, the record is barren of evidence that there was anyone else besides the four already described in the room, or that anyone else could be therein without their knowing it. This direct testimony formed a legally sufficient basis for accused's conviction of murder. The presumption of the requisite malice from his use of a deadly weapon with fatal result (1 Wharton's Criminal Law (12th Ed., 1932), sec. 426, pp. 654-655) stands unrebutted. In view of the woman's direct testimony upon this vital factual issue, we may not concern ourselves with inconsistence and evidentiary gaps in the record, which is far from satisfactory. It was the function of the court and of the court alone, who observed the witnesses and heard them testify, to determine, among other factual issues, that of identity. Their determination that accused was the slayer, based as it is upon competent, substantial evidence, we may not disturb upon appellate

review even if we would, as we have not the power to weigh evidence (CM ETO 1631, Pepper; CM ETO 12331, Johnson; CM ETO 14547, Keech). Thus any doubts caused by Feagin's uncertainity as to the killer's identity, and by the woman's testimony that Feagin was wearing a jacket, that she saw no fire from the muzzle of the gun accused was holding, and that this weapon was smaller than and different from a .45, when there was evidence that a .45 caliber slug was found in deceased's body, as well as doubts as to which gun was used, were for resolution by the trial court, not by the Board of Review. The possibility that, in view of conflicts and gaps in the record, one other than accused might have committed the murder was a matter to be definitively weighed by the court in reaching its findings. In this connection, it should be observed that the only suggestion that Frau Ottemyer did the shooting comes from the minority holding. Accused was sure Feagin fired the fatal shot. While the dissenting holding emphasizes the fact that the woman testified the sound of the shot came from behind her, that is not to say she could not have seen accused with the gun. All she had to do was turn and look at him. This case is to be distinguished from cases wherein the record contains no direct testimony of eyewitnesses and depends for its legal sufficiency solely upon circumstantial evidence, such as CM ETO 7867, Westfield, CM ETO 9306, Tennant; and CM ETO 13416, Wells, in each of which the Board of Review held the evidence legally insufficient to support the conviction because, although wholly circumstantial, it did not exclude all reasonable hypothises but that of the accused's guilt. The very lack of direct evidence, which evidence is present in the instant case, demonstrated the necessity for the high legal standard required of circumstantial evidence which was applied in those cases. In the Wells case, the lack of direct evidence left the crime "shrouded in mystery". The doubts in the instant case arise not alone from the inconclusive nature of the circumstantial evidence but from conflicts and inconsistencies between direct and other evidence. Such conflicts and inconsistencies were weighed and considered by the court, in the proper exercise of its functions, and its findings of guilty under authorities above cited, are binding upon the Board of Review. The Board is of the opinion that the findings of guilty of murder are supported by substantial evidence.

6. The charge sheet shows that accused is 28 years nine months of age and was inducted 8 September 1942 at Fort Oglethorpe, Georgia, to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 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

(DISSENT) Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

10 NOV 1945

CM ETO 12656

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Arendsee, Germany, 23,25 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private EUGENE TIBBS (34366449), Company M, 334th Infantry	

DISSENTING OPINION by CARROLL, Judge Advocate

I am unable to concur in the conclusion of the majority of the Board. The grave question is whether there is sufficient substantial evidence in the record to support the court's finding that accused was the one who shot Smith.

Among the facts relevant to this question that are established and undisputed are these: the bullet that killed Smith came from a .45 caliber gun; the only .45 caliber weapons shown to be in the house at the time of the shooting were the pistol which Feagin brought and the pistol in Smith's holster; Feagin was not wearing a jacket at the time of the shooting.

Is there any testimony of an eyewitness that accused shot Smith? Feagin's back was turned at the time of the shooting, and he admitted on the witness stand that he did not know whether accused fired the shot. This leaves the German woman, Frau Ottemyer, as the only possible eyewitness. Although she said that accused fired the shot, when she stated her reasons for saying this, her conclusion, in my opinion, lost its probative force. She said that she saw accused holding a weapon, but testified that it was smaller than and different from a .45 caliber automatic while the fact is undisputed that a bullet from a .45 caliber weapon killed Smith. She said she knew accused fired the shot because the sound came from behind her and accused was behind her. Although she was "always looking" at the pistol, she did not, despite the condition of

darkness of the room, see any fire from the muzzle of the gun he was holding. She also testified that at the time of the shooting the third soldier was wearing a jacket while it is undisputed that Feagin did not have a jacket on, but that accused did. In addition, her testimony is contradicted in numerous particulars by that of both accused and Feagin.

If, then, there is no direct testimony of probative force that accused shot Smith, reliance must be had upon circumstantial evidence. The most important preliminary question is: From what weapon was the fatal shot fired? There were two weapons of .45 caliber proven to be in the house at the time of the shooting, yet there is not a scintilla of evidence that the bullet striking Smith came from either pistol, or even that a bullet was fired from either pistol that night.

To support a conviction the proof must be such as to exclude any fair and rational hypothesis except that of guilt (MCM, 1928, par. 78a, p. 63; CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 10860, Smith and Toll; CM ETO 13416, Wells).

In my opinion, the evidence in the record is so uncertain, contradictory, and inadequate as to allow the following fair and reasonable hypothesis, other than the guilt of accused:

a. Feagin shot Smith. Frau Ottemyer mistakenly thought accused was Feagin, as she said the third soldier was wearing a jacket. The light was dim and she faced a flashlight. Feagin had brought a .45 pistol to the house and a bullet from a weapon of that caliber killed Smith. Accused's lust had been satisfied and his had not. He was found "pretty drunk" soon after the shooting.

b. Frau Ottemyer killed Smith. She was an enemy citizen. The war with Germany was still in progress on the date of the shooting. It was established that Smith had a .45 caliber pistol in his holster within easy arm's reach of her - and it was a bullet from a .45 caliber weapon that killed Smith - yet there is no evidence that Smith's pistol was checked at any time to determine whether it had been fired. If she had taken Smith's pistol out of the holster during the love-making, she had ample time to restore it to the holster before the investigating soldiers arrived. Feagin, who was in the room at the time of the shooting, testified that he did not know that the woman did not fire the shot. If it be said that it was difficult for her to reach around to his left to shoot him, the answer is that his left arm was raised as if in protection at the time against movement in that direction. She was seen thereafter "scrambling" off the bed.

A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence (People v. Galbo, 218 N.Y. 283,112 N.E. 1041, 2 ALR 1220, and authorities cited

therein; CM ETO 6397, Butler; CM ETO 13416, Wells).

I cannot say that the evidence in this case is inconsistent with accused's innocence. The record reveals three survivors of the incident in the storage room each one naturally suspect and each undoubtedly aware of that fact. All had been drinking. Feagin testified that he did not know whether accused fired the shot, but his testimony indicating that accused had possession of his .45 caliber pistol tends to implicate accused. Feagin admitted on the stand that "the Major" had told him it was a .45 that fired the shot. His testimony that accused handed him the small pistol (which could not have fired the shot that killed Smith) and said "Here's the pistol", deepens the mystery. The German woman testified that she knew that accused (whose conviction would naturally close the case) fired the shot, but when she testified as to why she knew this, she destroyed the probative force of her testimony so far as its effect in identifying accused as the shooter is concerned. But accepting both Feagin and the woman as completely impartial witnesses, the circumstances proven cannot be considered inconsistent with accused's innocence.

It is impossible from the vague references made by the witness as to the positions and objects in the room, meaningless to the reader of the record, to reconstruct the scene of the shooting with such accuracy as to be able to draw fair deductions therefrom as to the identity of the one who shot Smith.

Above all, without any evidence in the record as to whether a shot was fired from either of the two .45 caliber weapons shown to be in the house, the conviction of accused must rest upon speculation or, at most, a conclusion of probability, far short of the requirement of "beyond a reasonable doubt".

> "Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilty; nor is it enough that the hypothesis of guilt will account for all the facts proven. Much less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery." (People v. Razezicz (1912), 206 N.Y. 249,99 N.E. 557, quoted with approval in CM ETO 7867, Westfield and CM ETO 13416, Wells).

I am unable to say, therefore, that there is a moral certainty that accused committed the murder with which he is charged, nor that the evidence is sufficient to exclude every reasonable hypothesis except the one of accused's guilt (Cf: CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 10860, Smith and Toll; CM ETO 13416, Wells).

Donald K. Carroll, Judge Advocate.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 NOV 1945. TO: Commanding General, 84th Infantry Division, APO 84, U. S. Army.

1. In the case of Private EUGENE TIBBS (34366449), Company [illegible], 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. Inasmuch as the papers of a prior investigation were made available for incorporation as a part of the investigating officer's report, by an Inspector General they should be forwarded for attachment to the record of trial.

3. Although I agree with the conclusion of the Board of Review that the record is technically legally sufficient, and that the serious questions were factual and purely for the court's determination, the case is far from satisfactory and the identity of the killer is not as clear as it should be. It appears possible that Irma Ottemyer was confused as to the two soldiers present. The record demonstrates the importance of scientific investigation encompassing matters such as ballistics, finger prints, powder burns and diagrams, all of which were lacking and which would have produced a far more satisfactory picture of what happened. The only exhibit in the case is evidence of a previous conviction of the accused. Because of the lack of evidence as to the gun from which the fatal shot was fired and its whereabouts, and as to the precise positions of the persons involved and furniture at the scene, and because of the conflicts and the inconsistences in the evidence, adverted to by the Board of Review in its holding, I am far from satisfied that the accused is the guilty person, and I believe even the majority of the Board shares my uncertainty. The opinion of the dissenting member of the Board speaks for itself. Had the Board or I the power to weigh evidence and review the court's factual determinations, we should probably disapprove them in this case. I accordingly return the record of trial and recommend that very serious consideration be given to disapproval of the findings of guilty and the sentence and, if deemed appropriate after further investigation along the lines above indicated, at the same time directing a rehearing of the case. The foregoing is intended as suggestion and recommendation rather than as criticism. I fully appreciate the fact that the trial was held in the midst of a campaign against the enemy, and that the standards of procedure in civil courts in orderly communities may not fairly be applied.

4. 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 12656. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12656).

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

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

BOARD OF REVIEW NO. 3 28 JUN 1945

CM ETO 12661

U N I T E D S T A T E S	XXII CORPS
v.	Trial by GCM, convened at Cologne, Germany, 27 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Corporal FREDERICK L. WISE (35571206), 4085th 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Frederick L. Wise, 4085th Quartermaster Service Company, did, at Frechen, County of Cologne, Germany, on or about 19 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Paul B. Curry, a human being by shooting him with a carbine.

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

approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

On the evening of 19 May 1945, Staff Sergeant Evie H. Morrow, Private Roy W. Haithcock and Sergeant Paul B. Curry, the deceased, all of Company A, 283d Engineer Combat Battalion, attended a company party at the Battalion Recreation Hall in Frechen, Germany, where they each were allowed "three drinks per man". They came out from the party together and strolled toward the B Company area where they stopped to talk to a man for ten or fifteen minutes in front of the B Company barracks. They then walked toward their own barracks. None of them were armed. They were not intoxicated. It was about 2150 hours and was getting rather dark. They were 15 to 20 feet from their building when they met an American soldier, who stopped four to six feet away from Sergeant Curry, pointed a carbine at him, spoke eight to ten words, which neither Morrow nor Haithcock understood, and fired. Sergeant Curry fell to the ground. The soldier then pointed the weapon at Haithcock, who jumped over a wall as the soldier turned and ran away. Neither Morrow nor Haithcock could tell whether he was white or colored (R7-12, 25-26; Pros.Ex.A).

Sergeant Curry was wounded by a missile of approximately .30 caliber size which entered his chest and passed through his body, causing hemorrhage and shock of which he died either the same day or the day following (R16).

At about 2200, accused entered the officers' quarters in Frechen and announced in the presence of Major Howard A. Hampton, 262nd Ordnance Battalion, "I have just shot a man and want to find the Adjutant" or words to that effect (R13-14). On 21 May, after his rights under the 24th Article of War were explained, accused made a voluntary statement to an agent of the Criminal Investigation Section, 508th Military Police Battalion, in substance that on the evening in question he was on duty as acting sergeant of the guard and was on his way, unarmed, to check one of his sentinels when he saw three soldiers one of whom was saying he would fight "any son of a bitch". The other two tried to pacify him. As accused passed these men, all of whom had been drinking, one called out "You black son of a bitch, come back here". Someone threw something at accused that landed near him. As he continued down the street, one of the three men shouted that "that yellow chocolate colored son of a bitch ain't coming back here". Accused told one of his men on post of his experience and tried to persuade the sentinel to accompany him. When he refused, accused went to a nearby billet, obtained a carbine and a magazine of ammunition. He loaded the weapon and proceeded to the spot where he again encountered the three soldiers "in front of their billets raising hell". They called to him, so he walked over towards

them and told them he was corporal of the guard. Standing 15 feet away, he asked which of them had called him names and said he "would like to speak to him and straighten out a few things with him". The one in the center said, "It was me and what the hell are you going to do about it?" The three men advanced upon him. He called "Halt!" As they continued toward him he called "Halt!" again, put a round in the chamber of his rifle and held it up. The center man of the three had one hand in his pocket. They were very close. Accused told them not to take another step or "I'd have to let them have it". They still did not stop and "as they were real close to me, I raised the rifle and fired one shot". The soldier who had been shot fell to the sidewalk (R14-15; Pros.Ex.B).

4. For the defense, it was shown that on 19 May 1945, accused was on detached service with the 262d Ordnance Battalion, where he was assigned as sergeant of the guard for battalion headquarters. He was selected for this duty by his company commander because he considered him "one of the finest men * * * in the organization" R16-17). Lieutenant Jack Spector, of accused's company, who has known him for approximately two years and associated closely with him, considered his character excellent (R16-17). The place where deceased was shot was not within the area covered by guards of the 262d Ordnance Battalion and as sergeant of the guard accused had no duties to perform there (R19).

After his rights were explained (R20), accused testified substantially in accordance with the statement made by him on 21 May. He added that the man in the center of the three at the time he fired "was probably out looking for trouble". He did not know whether the men were armed or not (R21). He was positive that when he went over there he was still in his area. The route he was on at the time was the only way he could go back to headquarters (R23). When he fired he "didn't have time to aim or anything" and "fired, with the hopes I would hit him in the shoulder" (R21).

5. The circumstances of this case are similar to those in CM ETO 1941, Battles, to which reference is made for a full discussion of the elements of murder and manslaughter which are particularly applicable to the instant case. In that case, accused was thoroughly angered by contemptuous words addressed to him by deceased and was, as a consequence, "itching for a fight". His killing the deceased with a knife soon thereafter was held murder. The following citations are also pertinent:

> "Where the evidence shows an intent on the part of the defendant to kill, no words of reproach, no matter how grievous, are provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or

gestures expressive of contempt or reproach without an assault upon the person" (1 Wharton's Criminal Law, 12th Ed., sec.584, pp.802-803).

"But if a party, under color of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party, and kill the other party with such weapon; or if at the beginning of the contest he prepare a deadly weapon, so as to have the power of using it in some part of the contest, and use it accordingly in the course of the combat, and kill the other party with the weapon, - killing in both these cases will be murder" (Ibid, sec.603, pp.816-817).

Construing the evidence in a light most favorable to accused and considering the authorities above referred to, the Board of Review is of the opinion that such evidence is legally sufficient to sustain the findings of guilty of murder. The opprobrious words directed toward accused, according to his testimony and pre-trial voluntary statement, clearly did not constitute sufficient provocation to reduce the offense committed from murder to voluntary manslaughter. Nor would mere anger on his part because of such treatment serve to reduce the offense to manslaughter. That accused was motivated by resentment to the words he maintained were spoken to him by one of the three soldiers was indicated in his testimony that thereafter he armed himself with a rifle, loaded it and "went over to them and asked which one it was who had called me names" (R21) and added, according to his pre-trial statement, that he "would like to speak to him and straighten out a few things with him" (Pros.Ex.B). His words and actions did not indicate they were governed by a desire merely to carry out his duties as sergeant of the guard, but showed rather an intention to satisfy his anger and resentment under the excuse of his office. Whether the three soldiers continued to advance upon accused even after he cried "Halt!" three times, placed a cartridge in the chamber of his weapon, pointed it at them and threatened to shoot if they took another step, as claimed by accused, or whether he approached them and fired after speaking eight to ten unintelligible words, as described by prosecution's witnesses, were questions of fact which the court was warranted in resolving against him.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence (CM ETO 1941, Battles and authorities therein cited; CM ETO 2007, Harris).

6. The charge sheet shows that accused is 25 years and seven months of age and that he was inducted 27 November 1942 at Fort Harrison, Indiana to serve for the duration of 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.

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

B R Sleeper Judge Advocate

Marcus C. Sherman Judge Advocate

B. A. Adams Judge Advocate

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

BOARD OF REVIEW NO. 1 19 JUN 1945

CM ETO 12662

U N I T E D S T A T E S	XXII CORPS
v.	Trial by GCM, convened at Cologne, Germany, 26 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private (formerly Technician Fifth Grade) MICHAEL A. McDONALD (31391316), Headquarters and Service Company, 1268th Engineer Combat Battalion)	

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

---

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private (then Technician Fifth Grade) Michael A McDonald, Headquarters and Service Company, 1268th Engineer Combat Battalion, did, at Troisdorf, Germany, on or about 2200 16 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs Marie Bergmann.

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

of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Clear and uncontradicted evidence establishes that accused at the time and place alleged in the Specification had carnal knowledge of Mrs. Marie Bergmann, a German woman 54 years old. Her testimony that the act was done forcibly by terrorization and against her will, by the use of physical force and the brandishing of a gun, was corroborated by the testimony of another German woman and that of two American master sergeants who found accused with his trousers down, leaning over the woman on the bed, with a gun lying on the bed beside him.

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent.

5. The factual issue whether the intercourse was against the victim's will and submitted to under fear of her life or of bodily harm, was for the exclusive determination of the court, whose findings of guilty are supported by competent, substantial evidence and will therefore not be disturbed by the Board of Review upon appellate review (CM ETO 11267, Fedico, and authorities cited therein).

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

The question of intoxication and the effect thereof upon the general criminal intent involved in the offense of rape, were issues of fact for the sole determination of the court (CM ETO 3859, Watson and Wimberly).

6. The charge sheet shows that accused is 19 years 10 months

of age and was inducted 28 October 1943 at Lowell, Massachusetts, to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 12683

U N I T E D S T A T E S	)	XXIII CORPS
	)	
v.	)	Trial by GCM, convened at
	)	Idar-Oberstein, Birkenfeld
Private First Class HORACE	)	Kreis, Rhein Provinz,
McCULLOUGH (34410466),	)	Germany, 18 May 1945.
and Private ROSCOE	)	Sentence as to each: Dis-
WETHERSPOON (34555313),	)	honorable discharge, total
both of 443rd Quarter-	)	forfeitures and confinement
master Truck Company	)	at hard labor for life.
	)	United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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

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

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

McCULLOUGH

CHARGE: Violation of the 92nd Article of War.

Specification: In that Horace McCullough, Private First Class, 443rd Quartermaster Truck Company, did, at Oberhausen, Germany, on or about 18 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Helma Geib, a German civilian.

WETHERSPOON

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Roscoe Wetherspoon, Private, 443rd Quartermaster Truck Company, did, at Oberhausen, Germany, on or about 18 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Erna Abt, a German civilian.

Specification II: In that * * * did, at Oberhausen, Germany, on or about 18 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Helma Geib, a German civilian.

Each accused pleaded not guilty and, three-fourths 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 against McCullough. Evidence was introduced against Wetherspoon of one previous conviction by special court-martial for absence without leave for 15 days in violation of Article of War 61. Three-fourths of the members of the court present when 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 each 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 presented by the prosecution was substantially as follows:

At about 8:45 p.m., 18 March 1945, nearly two hours after curfew, two colored soldiers both armed with rifles and identified as the two accused, knocked on the door of the home of Johann F. Geib, a farmer, in Oberhausen, Germany, and were admitted. They entered a small bedroom in which the eight occupants of the house were present, namely, Geib, his wife, his two daughters, Helma Geib, 23 years of age and single, and Erna Abt, 25 years of age and married, a neighbor with her two sons age 14 and 8 respectively, and another boy age 11 who was related to the Geibs. Since the occupation, these eight persons slept in that one room without undressing (R7,38,48,50, 117,120,126,129). Accompanied by the father, the two accused proceeded to search the house for soldiers and

weapons. They found none. They then returned to the room where the women and children were staying. One of the accused had a bottle of wine and both of them drank from it. McCullough stationed himself at the door while Wetherspoon went to the bed where Helma and Erna were sitting and sat between them. He began to caress Helma's legs and to fondle her breasts. He then motioned to her to go out of the room with him, but she did not want to go. Her father asked accused to leave his daughter alone. McCullough became angry and made it clear that if the girls did not comply he would shoot. The girls began to cry and pleaded not to be taken out of the room. McCullough thereupon pointed his rifle at the father, then raised his arm and deliberately fired a round above the father's head. The firing of the rifle frightened Helma and she thought that accused were going to shoot them all. McCullough "acted like an insane person". The bullet struck the ceiling and some debris fell on the bed. The petroleum lamp that lighted the room fell down and was extinguished. Helma immediately turned on her flashlight and gave it to her father. The latter relit the lamp. Wetherspoon took the flashlight away from the father and played its light on the girls' faces. He then took Helma by the arm and directed her to go with him (R7,8, 17,21,26,27,41,44,45,119,121).

She testified, " I asked my mother to go with me, but my mother told me that in God's name she can't help me". The girl screamed as she was taken out of the room. Wetherspoon was walking close behind her and pushed her out into the hall and then into the kitchen where he told her to lie down. She sat on a wooden box that was there and refused to lie down. He ordered her to stand up and when she did so he pulled down the trousers she was wearing over her dress, and reaching under her dress he removed her pants. He pushed her down on the floor, placed his rifle beside her, laid himself on top of her, thrust her legs apart and had sexual intercourse with her. There was penetration. She did not want him to do it and she did not consent, but she had no way of preventing it. As she was lying on the floor she called out to her father for help. Wetherspoon placed both his hands on her throat and stifled further outcry. The father heard her call and answered that he was unable to help her. While Wetherspoon was in the kitchen with the girl, McCullough was standing at the door of the room where the others were, and was holding his rifle pointed toward the father. After completing the act, Wetherspoon returned with the girl to the room occupied by the others. She made no attempt to run out of the house because she was equally afraid that she might be shot outside since it was after curfew. "I could have been

shot outside, or I could have been shot in the house" (R8,17,25,30-32,35,40,41,51,119,120). When she returned to the room Helma was nervous and excited and her hair was disheveled.

McCullough, who was standing at the door with his gun, told her to go out with him. She objected, but McCullough took her out of the room into another bedroom across the hall. There he pushed her down on the floor, removed her trousers and pants, placed his gun near him, and then had intercourse with her. As soon as he had pushed her on the floor he laid himself on top of her. She had no way of defending herself. She did not consent to the act of intercourse. Her clothing was not torn, however, and she did not scream.

Meanwhile in the other room Wetherspoon sat down on the bed next to the older girl, Erna, and began to play with her legs and breasts. He pushed her down on the bed, raised her skirt, removed her pants and tossed them into a corner. He placed his rifle next to him on the bed and made her understand that he would shoot her if she did not lie down. She held her legs together but he forcibly separated them against her resistance and had sexual intercourse with her. Her mother and the other woman in the room ordered the three boys under a table because they were too young to see what was happening. The oldest boy began to vomit. After completing the act, Wetherspoon took out his handkerchief, wiped his penis and threw the handkerchief on the floor. He offered her money, but she refused to take it. In a few minutes he repeated the act. McCullough re-entered the room with the younger girl while Wetherspoon was engaged in the second act of intercourse with her sister. Both accused left the house after they had demanded and received wine. Wetherspoon's sexual acts with Erna Abt, occured in the presence of her father, mother, the neighbor, and three boys. The father was unable to help his daughters because he was physically incapacitated and the soldiers were armed with rifles (R13,14,22,24,25,26,28,36,37,38,53,55,56,121).

In a statement made before trial and received in evidence (R62; Pros. Ex.I) McCullough admits going to a house in the village with Wetherspoon and knocking on the door. They were admitted and entered a room occupied by three women and an old man. He asked for "schnapps" and they said they had none. Accused then looked around the house and finding nothing returned to the room where the people were. He had his carbine in his hand. He guessed that he must have touched the trigger and it went off.

Wetherspoon caught one of the girls by the hand and led her out of the room. He was not out very long and when he returned with the girl, McCullough took her out to another room and told her to lie down. She took off her "panties" and he had intercourse with her. When they had finished they went back to the other room and then he and Wetherspoon left. They were both still very drunk.

Wetherspoon also made a statement before trial which was received in evidence (R67; Pros.Ex.2). In it he relates that on the night of 18 March, while billeted in Oberhausen, Germany, he and McCullough went to a house and obtained a bottle of wine from an old man. After taking a few drinks he noticed two women and two little boys. He took one of the women by the arm and led her into an adjoining room. He opened her pants "in order to rape her". He decided he could not "rape" her and brought her back into the room. McCullough then took the same girl into the other room, while Wetherspoon sat beside another young woman on the bed and ordered her to lie down. "I raped her twice". After "raping" her he sat around and drank some wine with McCullough and then left the house.

The law member instructed the court to consider each statement solely against the accused who made it (R67).

4. Each accused after his rights as a witness were explained to him, elected to be sworn as a witness in his own behalf.

McCullough testified in substance that at about 5:30 p.m., 18 March, he asked a civilian "if he knew where mademoiselle would zig-zig". The civilian, who spoke in French, pointed out a house where he said there was a girl who had sexual intercourse with many soldiers (R71). McCullough informed Wetherspoon about this and they both went to that house where they found two girls. Wetherspoon offered the smaller girl (Helma) some "K" rations, but she pushed them aside. McCullough gave her some chocolate and asked her if she would have sexual intercourse with him for chocolate. Wetherspoon called her to the door and they went out. Very shortly they returned and Wetherspoon told McCullough that she would do nothing for "K" rations. Then McCullough said he had chocolate and the girl came and stood beside him.

He began playing with her and she sat on his lap. He took his rifle, which was lying across his lap and placed it down between his legs. He fondled her breasts and asked her if she would have sexual intercourse with him for the chocolate he had. She said yes and stood up. As McCullough followed suit his rifle fell and catching it he "must have hit the trigger and the rifle goes off". "The whole house gave a gasp * * * like they were frightened." The old man who was sitting near McCullough patted him on the back and said "'Okay, okay', or something", to let him know that he understood the shooting was unintentional. McCullough then went out into the hall where he started to play with her again. She was laughing and he said to her, "Zig-zig" and she replied, "Ja, ja". She began to unbutton her pants from the side and he said to her, "Not here, nichts here". He opened the door to an unoccupied room and he sat on the floor while she stood removing her pants. He then with her cooperation had sexual intercourse with her on the floor. After completing the act they returned to the other room. He drank some wine with Wetherspoon and together they left the house (R71-74). On cross-examination, the prosecution introduced another statement made by McCullough before trial in which he declared that he did not leave his billet during the evening of 18 March, and that on the following morning at an identification parade two women and a man stated he was not the man they were looking for, but in the afternoon he was called out again and identified by the same three (R76; Ex 3).

Wetherspoon testified in substance that he and McCullough went to a house and knocked on the door. One of the girls opened the door and let them in. Wetherspoon had some rations and showed them to the smaller of the two girls [Helma] saying,

> "Zig-zig for me this monger', just like that, and she said 'Nichts, monger'. She said 'Chocolate, bon-bon'. I didn't understand what she meant, but in other words, I know she didn't want this" (R93).

McCullough showed her the chocolate and she went over and stood beside him. Wetherspoon made another try, took her out into the hall and "started playing with her". She said, "No". They remained out in the hall for a few minutes and then "pushed the door and rushed back in

there again". McCullough gave her chocolate and she sat on his lap. While Wetherspoon was looking at the other girl on the bed, McCullough's rifle went off and Wetherspoon told him to stand the rifle against the wall. Wetherspoon did not have a rifle with him. Shortly thereafter McCullough and the smaller girl left the room together. McCullough did not force her to go. Wetherspoon went to sit on the bed next to the other /Erna/ and showed her the rations he had. "I think I had some soap and chewing gum", and asked her "Zig-zig me for this" and she answered "Ja". He gave her the rations which she placed on a table and then she laid herself down on the bed of her own accord and pulled up her dress. Wetherspoon pulled down his trousers and proceeded to have intercourse with her. There were two little boys in the room before he had intercourse but the girl said something to them and they went out (R93-95, 106,110). He consummated the sexual act with her twice while the old man went out to get wine. She was the only woman he had sexual relations with that night. On cross-examination, the prosecution introduced another statement made by Wetherspoon before trial in which he related what he did on the evening of 18 March but made no mention of having gone to any house or of any of the incidents to which he testified and further stated that he first learned of the rape the following morning at the identification parade (R95; Ex.4).

In her rebuttal testimony Helma Geib testified that she never sat on the lap of accused. Neither of them offered her chocolate and each soldier had a rifle (R128,129).

Erna Abt in her rebuttal testimony stated that she saw neither soldier with chocolate or food. The gun did not go off accidentally. Accused held it with both hands and warned them that he would shoot if they did not stop crying (R130,131).

5. The court was warranted in finding that accused McCullough had carnal knowledge of Helma Geib, and that accused Wetherspoon had carnal knowledge of Helma Geib, and Erna Abt, as alleged, and that in each instance the act was done by force and without the woman's consent (MCM, 1928, par.148 b, p.165). There was substantial evidence that one of accused deliberately fired a bullet over the father's head for the purpose of terrorizing the occupants of the house into a state of submission and that this purpose was achieved. Sexual intercourse effected by terror induced by accused or his accomplice

and without consent, is rape (1 Wharton's Criminal Law, (12th Ed. 1932) sec.701, p.942). Whether resistance ceased because it was useless and dangerous or because the woman ultimately consented was a question for the court. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). In evaluating the testimony of both accused their previous contradictory statements could properly be considered against them. The improbability that a woman would consent to sexual intercourse with a strange soldier in the presence of her father, mother, sister, a neighbor and three young boys, could properly be considered by the court in determining the truth or falsity of the testimony of accused.

6. The charge sheets show that accused McCullough is 26 years of age and was inducted 24 August 1942, and that accused Wetherspoon is 26 years of age and was inducted 14 November 1942. Neither had prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

20 JUN 1945

CM ETO 12691

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Mergentheim, Germany, 15 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private (formerly Technician Fifth Grade) GEORGE J. McARDLE (39606268), 704th Ordnance Light Maintenance Company	

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

---

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private (Then Technician 5th Grade) George J. McArdle, 704th Ordnance Light Maintenance Company, did, at Gammelsbach, Germany, on or about 31 March 1945, draw a weapon, to wit, Pistol, Caliber.45, against Captain Thomas A. Welstead, his commanding officer, who was then in the execution of his office.

Specification 2: In that * * * having received a lawful command from Captain Thomas A. Welstead, his superior officer, 'to go back into the kitchen,' did, at Gammelsbach, Germany, on or about 31 March 1945, willfully disobey the same.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both 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 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. Clear, substantial and uncontradicted testimony established that the accused, piqued because his company commander refused to allow him to take another form of punishment in lieu of kitchen police duty, in the presence of several enlisted men, twice refused his direct order to go to the kitchen. Thereupon being placed in arrest, he drew his pistol, loaded, cocked it, and pointed it at that officer four feet away, saying "In Montana a man with a gun is the boss". He was ordered to put the gun away but refused, and persisted in his refusal until the captain assented to his demands. Accused was sober, but angry, loud and defiant.

4. Armies function and succeed in war only when soldiers obey orders and respect authority. Discipline is the absolute necessity of battle. The accused's offenses were mutinous in the extreme, committed in a combat unit during a hard campaign, and therefore impeded and hindered the effort of the Army and the Country. The evidence clearly established accused's guilt as charged (CM ETO 106, Orbon).

12691

5. The charge sheet shows that accused is 27 years of age and was inducted 7 May 1942 at Missoula, Montana, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Pitts Judge Advocate

Wm. F. Brennan Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2 27 JUN 1945

CM ETO 12696

UNITED STATES	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad
	)	Mergentheim, Germany, 23 April
Technician Fifth Grade	)	1945. Sentence: Dishonorable
GRADY F. PARSONS (6928512),	)	discharge, total forfeitures
Battery A, 20th Field	)	and confinement at hard labor
Artillery Battalion	)	for life. United States Peni-
	)	tentiary, Lewisburg, Pennsylvania.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Grady F. Parsons, Battery "A" 20th Field Artillery, did, at Neiderstetten, Germany, on or about 13 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Corona Goeller.

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

12696

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

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

Frau Corona Goeller resides on the first floor at No. 76, Niederstetten, Germany, with her four year old girl and six year old son. A Mr. Leske also lived on this floor. Frau Siegler and her two children occupied the ground floor of these premises and Mr. Hoffmann and his wife the second floor (R9,19,20). On the night of 13 April 1945 between 1:00 and 2:00 am, someone was heard knocking at the door. Mrs. Siegler opened it and two American soldiers entered the house. Frau Goeller went upstairs and sought help from Mr. Hoffmann, who went downstairs where the soldiers were (R10,20). At first Mr. Hoffmann remained in her room, where she hid behind a door, and when one of the soldiers entered, he saw only the children and Mr. Hoffmann. The soldier left this room and Mr. Hoffmann and Mr. Leske were sent upstairs by the soldiers. One soldier remained downstairs on the first floor in Frau Goeller's quarters. This soldier pointed his rifle at her and the children and she sent the children into another room. The soldier pointed out a place to her on a couch and she thus knew what he wanted (R19). He opened his trousers and exposed his sexual part and she told him she was sick [menstruating], thinking this would dissuade him. The soldier violently pushed her down on the bed and she held her legs together in an attempt to prevent penetration. He removed her panties and the sanitary pad she was wearing. The soldier then violently pulled up her left leg and succeeded in effecting partial penetration, after which he satisfied himself. During the act of intercourse, the soldier's gun was standing against the bed and she was afraid he would shoot her or her children. She did not holler for help because she knew it was worthless to cry as no one could help her. When the act was completed the soldier said "Thank you". At her request, as civilians were not allowed outside at night, he escorted her and the children to a point about 200 feet from the house where an air-raid shelter was located and where she could join people she had stayed with before. She was no longer afraid of him, because she felt, that having satisfied himself, there was no further danger. Although accused was drunk, he had control of his hands and legs and had no difficulty

in walking (R11,12,13,14,16,18,19,21,22).

The following evening Frau Goeller promptly identified accused as her assailant (R5,8,14) from a group of three enlisted men and two officers present when she made this identification. Two of the enlisted men were of approximately the same build as accused (R8). All during the time Frau Goeller was in the court-room at the trial, accused was seated second from the end in a row of five enlisted men of similar general size and appearance and she identified him again without difficulty (R14).

4. Accused after his rights as a witness were fully explained to him (R23), elected to remain silent and no evidence was introduced in his behalf.

5. Accused's conduct in menacing his victim and her children with his rifle causing her resultant fear for her life and the safety of her children together with his later acts of pushing her onto the bed, removing her clothing and forcibly separating her legs, constitutes sufficient force to characterize the intercourse that followed as being against her will and without her consent. The proof discloses that she offered such resistance as the circumstances permitted (CM ETO 3933, Ferguson, et al). The uncontradicted evidence of the prosecution fully establishes all the essential elements of the crime of rape (MCM, 1928, par.148b, p.165).

6. The charge sheet shows that accused is 30 years, 10 months of age and enlisted 7 March 1939 at Montgomery, Alabama. 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

-3-

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

BOARD OF REVIEW NO.1

9 OCT 1945

CM ETO 12726

U N I T E D S T A T E S)	3RD INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Toul, France, 7 March 1945.
)	
Private CHARLES DYE (14081633), Company C, 7th Infantry)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles Dye, Company "C" 7th Infantry did, near Strangalavelli, Italy, on or about 15 October 1943, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at Casablanca, North Africa on or about 19 June 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for seven days in

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

3. The evidence of the prosecution showed substantially the following:

Accused was absent from his organization from 15 October 1943 to 19 June 1944. The commencement of this period was established by an extract copy of the morning report of accused's organization (Pros.Ex.A), showing him "duty to MIA" 15 October 1943; an entry on the morning report of 12 January 1945 (also contained in the extract) corrects this entry to "Dy to AWOL time unkn 15 Oct 43". It was stipulated by the Trial Judge Advocate that the officer who signed the correcting entry had no personal knowledge of the facts contained in the entry (R7). A member of accused's company testified that he had been with the company practically continuously since 15 October 1943, that had accused been present with the unit he would have seen him, and that he had not seen him since that date (R8-9). The termination of the period of absence was established by accused's pretrial statement (Pros.Ex.B), in which he stated that "on the 19th of June 1944, after approximately 8 months absence from my company I turned myself in" to military police at Casablanca. On 13 October accused's organization was making an advance across the Volturno River, near Strangalavelli, Italy. They were in a forward assembly area with "a little enemy action and * * * artillery shells coming over"; accused was with the unit when it left the assembly area, but that was the last that witness saw of him and "he didn't fight any more" after that (R8-9).

4. After having been advised of his rights, accused chose to make an unsworn statement, which was read to the court by defense counsel. The portion of this statement here pertinent relates, after a detailed narration of his participation in the Volturno River crossing, how his company was put in position, regrouped in platoons and told they would move again. Accused, having had no sleep for a few days, lay down to rest, telling a corporal to call him if they moved while he was asleep. He went to sleep, "and that is the last I have seen of my company" (R16-18). No witnesses were called by the defense.

5. Over objection of defense counsel, three morning report entries were received in evidence, all contained in an extract copy of the morning report of accused's company. The first such entry was dated 15 October 1943 and placed the company "near Strangalavelli" (the place named in the Specification) on that date. The second entry, dated 18 October 1943, recorded accused from duty to missing in action as of 15 October. These entries were signed by a first lieutenant who did not indicate the capacity in which he signed, but it may be presumed that he was acting in his capacity as commanding officer, in the absence of contrary evidence (CM ETO 5234, Stubinski). They were clearly admissible.

The third entry was dated 12 January 1945, nearly eighteen months later, and purported to correct the second entry referred to above by changing it from "Duty to Missing in Action" to "Duty to Absent Without Leave". It will be assumed, without deciding, that the stipulation between counsel that the officer who signed this entry had no personal knowledge of the facts contained therein renders it inadmissible. In the opinion of the Board of Review, however, the (assumed) erroneous admission of the entry was immaterial as it was merely confirmatory of an absence without leave clearly proven by the competent evidence.

To establish absence without leave, one vital element of the desertion charged, it was necessary to prove that accused absented himself from his place of duty and that such absence was without authority from anyone competent to give him leave (MCM,1928,par.132,p.146). Both elements of the offense may be proved by circumstantial evidence, but mere conjectures or suspicions do not warrant conviction (CM ETO 527, Astrella, and authorities therein cited). The uncontroverted evidence is that accused became absent from his organization sometime on or after 13 October 1944 when it was in a forward assembly area in the course of making an advance against an active enemy across the Volturno River, near Strangalavelli, Italy. In his unsworn statement at the trial, accused stated he participated in the river crossing but then went to sleep after telling a corporal to call him if the company moved while he was asleep, and never saw his company again. According to his own pre-trial statement, he did not return to military control until he surrendered himself to military police at Casablanca on 19 June 194[illegible]. A member of his company corroborated accused's continuous absence therefrom. This evidence, coupled with the competent morning report entry showing him from duty to missing in action on 15 October, in the Board's opinion, meets the standards required of circumstantial evidence of absence without leave for the period alleged (CM ETO 527, Astrella). The entry itself was evidence that the initial absence was without permission but was excused because the soldier was

(354)

"thought to have been killed in combat, although * * * no positive evidence of his death has been found" (TM 20-205 Dictionary of United States Army Terms, WD, 18 Jan 1944, p.175),

and because his status was otherwise unknown. His subsequent return to military control, after an admitted absence of over eight months, from an active theater of war, in view of the lack of contrary evidence, negatived the possibility of legal excuse for the unauthorized absence and to that extent in effect contradicted the entry of missing in action. So much of that entry, however, as indicated an absence without authority was corroborated rather than contradicted. As stated by the Board of Review in CM ETO 527, Astrella:

"When all the circumstances, proved beyond a reasonable doubt in the instant case, are balanced against each other and are given their legitimate probative weight it is difficult, if not impossible, to draw any inference other than the fact that accused was absent from his command without leave. To infer that accused was lawfully absent from his command for at least five weeks /here over eight months/ in time of war when his command was in a foreign country and had during his absence departed therefrom, taxes credulity beyond its utmost limit. Common sense and common experience dictates an opposite conclusion".

The possibilities that accused was wounded and hospitalized or even captured or that there were other excusing or mitigating factors involved in his absence, were matters of defense, completely lacking from his statements, and the prosecution was not obliged to negative any or all of them in its prima facie proof of guilt. It is difficult to conceive of a case of absence without leave wherein the prosecution's evidence would not be consistent with some exculpating possibility. However, as stated in the Astrella case,

"In any event the circumstances proved by the prosecution in its case in chief are certainly sufficient to establish prima facie guilt of accused * * * the burden of adducing evidence excusatory of his prolonged absence - the "burden of explanation" - was on him and his right to remain silent did not relieve him of

such burden of going forward with the proof (16 C.J., par.998,p.531). He offered no explanation of his conduct. The inferences arising from the proof presented by the prosecution therefore stand unrebutted and unexplained. The facts supporting such inferences cannot be controverted. The inferences from such facts are legitimate and logical and are in harmony with common sense and experience. The Board of Review is of the opinion that the facts proved and the inferences arising therefrom are legally sufficient proof of accused's guilt of being absent without leave at the time and place alleged in the specification" (CM ETO 527, Astrella).

And as stated by the Board in CM ETO 9257, Schewe:

"It may be inferred from the evidence of the tactical situation of accused's unit, the length of his absence and the lack ofevidence of permission, that the absence was without leave".

As to the second element of the offense, it was alleged that accused absented himself without leave "with intent to avoid hazardous duty, to wit: Combat with the enemy". His unauthorized absence commenced at a time when his company, to his knowledge, was actually engaged in intermittent combat with the enemy and when an attack on an enemy position was imminent. The Court could properly reject accused's explanation that he merely went to sleep and never saw his company again or could interpret it as an admission of cowardice, and, in view of the tactical situation and accused's knowledge thereof, was fully warranted in concluding that at the time he absented himself without authority he intended to avoid the hazardous combat duty just ahead, with which he was so familiar (CM ETO 4490. Brothers; CM ETO 12007, Pierce).

6. The charge sheet shows that accused is 23 years four months of age and enlisted 24 April 1942 at Camp Blanding, Florida, 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 comitted 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

(356)

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

Wm. T. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(ON LEAVE) Judge Advocate

RESTRICTED

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

BOARD OF REVIEW NO. 3

25 APR 1945

CM ETO 12729

UNITED STATES	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Toul, France, 4 March 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RAYMOND A. LANOUE (31068238), Company I, 30th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private RAYMOND A. LANOUE, Company "I", 30th Infantry, then Private First Class, Company "I", 30th Infantry, did, at or near Guiellenello, Italy, on or about 1 June 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Via Etruria, Italy, on or about 28 October 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found, of the Specification, guilty, except the words "was apprehended at or near Via Etruria, Italy, on or about 28 October 1944," substituting therefor the words "until he returned to military control at a place and time unknown," and guilty of the Charge. No evidence of previous convictions was submitted. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The morning report of Company I, 30th Infantry, of which organization accused was a member, shows that on 1 June 1944 the company was "attached to 2nd Bn. reached and occupied Co. objective 1800, moved N. toward highway #6" (Pros.Ex.A). The sole witness for the prosecution, the platoon runner and radio operator of accused's platoon, testified that on 1 June the company was near the town of Valmontone, Italy, "engaged with the enemy in trying to take highway 6" (R8,10). "Later in the attack" a check was made for accused by the platoon sergeant. The witness, after he also "checked and found out he was missing," assumed that accused was missing in action (R8). The morning report for 5 June shows accused from duty to absent without leave as of 1 June (Pros.Ex.A). After 1 June, accused was not seen by witness until the day of trial. The unit engaged the enemy subsequent to 1 June but accused was not with the company (R9,11).

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

5. a. The evidence, although somewhat meager, shows that accused absented himself from his unit on 1 June 1944 at a time when his company was actively engaged in combat. This being shown, the court was warranted in inferring that he absented himself with the then existing intent to avoid hazardous duty, as alleged (Cf: CM ETO 6079, Marchetti; CM ETO 6934, Carlson).

b. The Specification alleges that accused absented himself at or near Guillenello, Italy, while the proof shows that at the time he absented himself his unit was near the town of Valmontone, Italy. While these two towns may have been near each other, this fact is not shown by the record. However, there is no variance between the date alleged and the date proved and, since accused was shown to have absented himself on that date and was not thereafter seen with his company, the specific absence to which the Specification relates

is clear and, in the absence of objection, it may be assumed that the Specification adequately apprised accused of the offense with which he was charged. Further, the record as a whole is sufficiently precise to preclude a second trial for the offense involved. Thus, the variance mentioned above is not fatal.

c. The time of the termination of accused's absence was not shown. However, this is immaterial because the offense charged "is complete when the person absents himself without authority from his place of service" with the necessary intent (CM ETO 2473, Cantwell).

6. The charge sheet shows that accused is 21 years of age and was inducted 23 February 1942. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

24 AUG 1945

CM ETO 12749

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private NATALE SCALAMONTI (33073844), 375th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command.	Trial by GCM, convened at Ludgershall, Wiltshire, England, 11 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

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

---

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 1: In that Private Natale Scalamonti, 375th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command, then of Casual Detachment Number 40, 305th Replacement Company, Replacement Depot No. 2, United States Army, did at Marston Bigot, Somerset, England, on or about 26 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Bristol, Gloucestershire, England, on or about 16 September 1944.

12749

CONFIDENTIAL

Specification 2: In that * * * did, at Tidworth, Wiltshire, England, on or about 21 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 21 March 1945.

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

Specification: In that * * * having been duly placed in confinement in the 12th Replacement Depot Guardhouse, Tidworth, Wiltshire, England, on or about 20 October 1944, did, at Tidworth, Wiltshire, England on or about 21 October 1944 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * * did at London, England, on or about 21 March 1945 wrongfully have in his possession a fraudulent pass, this to the prejudice of good order and military discipline.

Specification 2: In that * * * did at London, England, on or about 21 March 1945, wrongfully impersonate a non-commissioned officer by appearing in public wearing the chevrons of a technical sergeant.

He pleaded guilty to each specification of Charge I except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty, not guilty to Charge I but guilty of a violation of the 61st Article of War, and guilty to Charges II and III and their respective specifications. All of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of two previous convictions, one by general court-martial for absence without leave for 63 days, and one by special court-martial for absence without leave for 3 days, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, United Kingdom Base, approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended by clemency letter that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the period of his natural life. The confirming authority, the Commanding General, European Theater of Operations, 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 may be summarized as follows:

a. Specification 1, Charge I: A duly authenticated extract copy of the morning report of Detachment 40, 305th Replacement Company, Replacement Depot No. 2, for 26 March 1944, shows accused "Dy to AWOL 0900 hours" (R7;Pros.Ex.1). A duly authenticated extract copy of the morning report of the 308th Replacement Company, Replacement Depot No. 2, for 30 August 1944, shows that accused was attached unassigned in an absent without leave status to that company from Detachment 40, 305th Replacement Company, and an entry for 19 September 1944 shows him from "AWOL to Arr Bristol MP 16 Sep 1944 to confinement Post GH 1700 hours 18 September 1944" (R7;Pros.Ex.2).

b. Remaining Specifications: A member of a military police detachment testified that on 20 October 1944 accused was confined in the guardhouse of the 12th Replacement Depot, Tidworth, Wilts, England, pursuant to a confinement order, and that on the night of 21 October it was determined by roll call that he was one of seven men who escaped that night from the guardhouse (R7-8). Extract copies of entries in the guard book of the 12th Replacement Depot Guardhouse, received in evidence without objection, showed that accused was confined at 1015 hours, 20 October 1944, and that he escaped between 2030 and 2100 hours, 21 October 1944 (R8;Pros.Exs.3,4).

A written stipulation, agreed to by accused in open court and accepted by the court, recites that if Sergeant Bennie Johnson and Sergeant Warren E. Culbertson, both of a military police battalion, were present, they would testify substantially as follows:

> "On 21 March 45 we were on jeep patrol on Uxbridge Road in London when we asked a soldier for his pass and he showed us a 48-hour pass in the name of T/Sgt Wilmer J Schecher, 36231831, Hq, Hq Sq, ASC, USSTAF 633 (Rear). He was wearing a blouse with T/Sgt chevrons on it. We brought this soldier to the guardhouse and then to the CID office where it was determined that he was Pvt Natale Scalamonti, 33073844, 305th Replacement Company" (R8;Pros.Ex.5).

4. The accused, after his rights as a witness were explained to him, elected to testify (R9). He completed three years of junior high school anddecided to work for his father in a coal mine. Then he did "some sand hog work in tunnels." He also "pedalled beer for a while" before he was inducted at Camp Lee, Virginia. He was satisfied with the infantry but wanted to get into the air corps. He was denied the chance because he "didn't get along with the First Sergeant at the time." He "was over the hill." He trained with the 45th Division and "turned in" from an absence without leave to go overseas with it. In spite of

his pleas to go, he was given a 15-year sentence by general court-martial for desertion. At Camp Pickett he was made a "trustee" and was placed in a rehabilitation ward for a three months course. He was an instructor during his last month, and turned down a sergeant's rating and a chance to remain in the United States because he wanted to go to France and be with his friends (R13-14). He came to the United Kingdom in March 1944 as a replacement. He was with the 305th Replacement Company at Bristol the first time he left military control, and spent his absence from 26 March to 16 September 1944 with another soldier's wife in Bristol, who gave him money from her pay checks (R11). On 16 September he was apprehended by military police in Bristol (R12). He escaped from confinement on 21 October because he wanted to be with four friends with whom he had been "back in the outfit," and who escaped with him. From 21 October 1944 to 21 March 1945, he stayed with his friends in London and was given board by a lady from Brighton whom he met (R12). He never wore civilian clothes, made any effort to get back to the United States or told anyone he did not intend to return to the military service. He identified himself immediately when he was apprehended (R10). Relative to the desertion charges, he testified:

> "I know I have no excuse for staying out so long - all I want to say is I am not a deserter. I have had no intentions of deserting. * * * I had intentions of coming back and I was with - there were four or five of us and we talked it over and said it was a good idea if we went back. * * * I know down deep inside of me I am not a deserter. * * * I just couldn't get enough courage to go back, that is all" (R10,13,14).

5. Competent evidence of the prosecution, together with accused's pleas of guilty and sworn testimony, clearly establish his guilt of absences without leave under both specifications of Charge I, and his guilt of the remaining specifications and charges. His first absence without leave was for a period of 174 days and the second absence was for 151 days. From the respective lengths of such absences alone, the court was clearly warranted in inferring an intent on the part of accused to remain permanently away from and desert the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll). The inferences are further strengthened by the circumstances that both absences were terminated by apprehension, that accused was dissatisfied with the organization to which he had been assigned, that the second absence was initiated by an escape from confinement, and that accused carried a fraudulent pass and wrongfully impersonated a non-commissioned officer at the time of his apprehension on 21 March 1945 (see MCM 1928, par. 130a, p.144).

6. Accused's testimony admitting a prior conviction for desertion for which he received a 15-year sentence was manifestly injurious to his case. However, as it appears that such testimony was not elicited by the court or prosecution, but was spontaneously and voluntarily given by accused, the error was clearly self-invited and not fatal (see CM ETO 9424, Smith Jr.).

7. Although Specification 1 of Charge I alleges desertion at Marston Bigot, Somerset, England, and accused's testimony indicates he first absented himself at Bristol, England, the variance is immaterial because the place of desertion is not of the essence of the offense (CM ETO 5564, Fendorak; CM ETO 9257, Schewe).

8. The charge sheet shows that accused is 25 years and 3 months of age and was inducted 30 August 1941.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Silvey Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 24 [illegible] 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U.S. Army.

1. In the case of Private NATALE SCALALDNTI (33073844), 375th Replacement Company, 101st Replacement Battalion, Ground Forces Reinforcement Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12749. For convenience of reference please place that number in brackets at the end of the order (CM ETO 12749).

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

(Sentence as commuted ordered executed. GCMO 387, USFET, 6 Sept 1945).

12749

CONFIDENTIAL

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

1 AUG 1945

BOARD OF REVIEW NO. 3

CM ETO 12758

U N I T E D S T A T E S v. Major CURRY ST. GEORGE (O-461782), Headquarters XII Tactical Air Command	XII TACTICAL AIR COMMAND Trial by GCM, convened at Headquarters XII Tactical Air Command, APO 374, U. S. Army, 30 and 31 January 1945, 1, 2, and 3 February 1945. Sentence: Dismissal

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review which 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 85th Article of War.
(Finding of not guilty).

Specification 1 to 4 inclusive: (Finding of not guilty).

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

Specification 1 to 7 inclusive: (Finding of not guilty).

Specification 8: In that Major Curry St. George, Headquarters XII Tactical Air Command, then Major Curry St. George, 302nd Airdrom e Squadron (Special) did, at or near Kingsnorth, England, on or about 11 August 1944, in the morning, wrongfully take and use without proper authority, a certain motor vehicle, to wit, a 1/4 ton 4x4 jeep, property of the United States, of a value of more than $50.00 by causing said vehicle to be driven from at or near Kingsnorth, England, the said Major Curry St. George's proper station, to his quarters at

Maidstone, England and from Maidstone, England, to at or near Kingsnorth, England, a total distance of approximately forty-six (46) miles, for the purpose of transporting the said Major Curry St. George from his quarters to his proper station, said use of the vehicle being personal and unofficial on the part of said Major Curry St. George.

Specification 9: (Identical with Specification 8 except as to the date which was alleged as "on or about 12 August 1944).

Specification 10: (Identical with Specification 8 except as to the date which was alleged as "on or about 14 August 1944").

Specification 11: In that * * * did, at or near Dole, France, on about 30 October 1944 wrongfully drink intoxicating liquor in company with Master Sergeant George M. Atwood and Staff Sergeant Glen B. Taylor, enlisted men of the 302nd Airdrom Squadron (Special), to the prejudice of good order and military discipline.

Specification 12: In that * * * did at or near Dole, France, on or about 7 November 1944 wrongfully drink intoxicating liquor in company with First Sergeant William B. Lynch, Master Sergeant George M. Atwood, Master Sergeant Henry C. Royal, Jr., Staff Sergeant Glen B. Taylor, Staff Sergeant William R. Sapp, Staff Sergeant Charles J. Elliott, Staff Sergeant Larry E. Graham, Staff Sergeant Thomas H. Shelton, Staff Sergeant Robert W. Blackwood, Technical Sergeant Charlie Cowart, Staff Sergeant Steve Shondell and Technical Sergeant Grady T. Sandlin enlisted men of the 302nd Airdrome squadron (Special), to the prejudice of good order and military discipline.

Specification 13: In that * * * did, at or near Kingsnorth, England, on or about 25 July 1944 wrongfully and unlawfully order and compel Captain Samuel K. Charness, Captain Roy F. Knapp, Captain Cyril J. Ryan, First Lieutenant Paul I. Niehaus, First Lieutenant Russell R. Angert, Jr., First Lieutenant Richard D. Barkes and Warrant Officer Alfred C. Saxon, all members of the 302nd Airdrome Squadron (Special), each to place five pounds (5£) British currency, value about $20.00, in a poker game, to participate in said game and to gamble for said money.

He pleaded not guilty. He was found guilty of Charge II and Specification 8, 9, 10, and 11 thereof, guilty of Specification 12 thereof except the

words "Staff Sergeant Charles J. Elliott, Staff Sergeant Larry E. Graham", of the excepted words, not guilty, guilty of Specification 13 thereof except the words "Captain F. Knapp, Captain Cyril J. Ryan, 1st Lt. Paul I. Niehaus, 1st Lt. Russell R. Angert, Jr.", of the excepted words, not guilty; and not guilty of Charge I and Specification 1, 2, 3, and 4 thereof and of Specification 1, 2, 3, 4, 5, 6, and 7 of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, XII Tactical Air Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

a. Accused's voluntary statements to an officer of the Inspector General's Department were introduced after certain parts thereof were lined out (R150-152; Pros.Ex.1,2). Portions thereof are hereinafter set forth.

b. Specifications 8, 9, and 10, Charge II.

Accused was commanding officer of the 302nd Airdrome Squadron which was stationed at Kingsnorth, England (R36,153,154,157,160) from 13 July to 14 August 1944 (Pros.Ex.2; see also R153,154,157,165,167). At first, accused shared a tent at Kingsnorth with Captain Samuel K. Charness, then of the same squadron (R160). After two weeks he had quarters, apparently at a hotel (R138-140), in Maidstone (Pros.Ex.1; see also R162-163, 279-281), distant from Kingsnorth some 20 (Pros.Ex.1) or 23 miles (R138). His clothing and equipment remained in Captain Charness' tent (Pros.Ex.1,R160) but his cot was occupied by a warrant officer (R160-161). While it was the duty of accused, as commanding officer, to assign himself quarters (R161,281), so far as was known to the squadron adjutant, no hotel in Maidstone had been designated as government quarters nor was Maidstone within the limits of the squadron area (R279). On several mornings during the first two weeks in August, 1944, and particularly on or about the mornings of the 11th, 12th and 13th, Corporal Robert A. Boklund, of accused's squadron, drove the alleged government owned vehicle, value in excess of $50 (R148), from Kingsnorth to Maidstone, picked up accused in front of a hotel, and returned him to Kingsnorth (R137-140). This was done pursuant to accused's instructions to Boklund. Unsigned trip tickets were issued in accused's name for "official business" without any statement as to destination. On some of the trips accused "stopped occasionally at different places to check up on different things * * * the MPs once, and another time he checked up about bathing for the outfit" (R136-149). The trips were made so that accused might "go from my quarters to Maidstone" (Pros.Ex.1).

The court was asked to take judicial notice of "AR 850-15 and File

AG 451/2 PUBGC, subject 'Maintenance and Operation of Motor Vehicles', Section 37, Pamphlet Headquarters FTOUSA 24 January 1944" (R168).

c. Specification 11, Charge II.

On 30 October 1944 the squadron was stationed at Dole, France. In the morning Staff Sergeant Glen B. Taylor, Jr. of accused's squadron, went to accused's quarters to disassemble a warhead torpedo. In the afternoon they were joined by Master Sergeant George M. Atwood, also of accused's squadron. They, i.e., accused, Taylor and Atwood, worked on the warhead, talked of squadron business, and had some drinks of cognac and scotch (Pros.Ex.1-R59-70).

d. Specification 12, Charge II.

On 7 November the squadron was stationed at Dole, France (R9,93, 96,107,108,112,120,128). Accused called a meeting of the "first three graders". After the meeting, drinks were had by accused, First Sergeant Lynch, Master Sergeants Atwood and Royal, Staff Sergeants Taylor, Sapp, Cowart, and Shondell, and Technical Sergeant Sandlin. There was scotch, cognac, gin and champagne (Pros.Ex.1, R91-135).

e. Specification 13, Charge II:

On 25 July 1944 the squadron of which accused was commanding officer was stationed at Kingsnorth, England, (R10,18,31,45). Late that night accused summoned his officers to his tent. When they had assembled he announced that the meeting was to test their sportsmanship and stamina to the end that he might know what officers to take to France. Each man would put up five pounds and play poker until he had lost his five pounds or won all the money. Should any man not have the money, he (accused) would give it to him. Captain Samuel K. Charness, First Lieutenant Richard D. Barkes and Warrant Officer Alfred C. Saxon protested they neither desired nor knew how to play poker whereupon accused explained and demonstrated the game. Most of the officers, including Captain Charness, Lieutenant Barkes and Mr. Saxon, played. The game concluded when all the participants, save accused and Mr. Saxon, had lost their respective five pounds. Mr. Saxon was the big winner (R10-11,13,16; 18-20,23,30; 32-37; 45-46; 49: Pros.Ex.1). While accused gave no direct order, according to accused's admission and Mr. Saxon's testimony, the officers were told they "had to play" (Pros.Ex.1; R11). Lt. Barkes and Mr. Saxon testified that accused stated that those who did not play would see him the next morning (R11,23). Barkes understood he was being threatened with disciplinary action (R30). Captain Charness was of the opinion accused "would take an unkind view" of anyone not participating (R46). Another officer had the impression accused "wouldn't think too much of us for leaving * * * we would be bad sports" (R36).

4. Summary of evidence for defense.

a. After his rights as a witness were explained, accused testified as to Charge I and specifications and Charge II and Specification 11, 12,13. His testimony and that of other defense witnesses will be summarized under paragraphs relating to the specifications of which he was found guilty.

b. Specifications 8,9, and 10, Charge II.

Accused's driver, Boklund, testified that during the first two weeks in August when he drove accused from Maidstone to "camp" he would always "leave" him at the motor pool and "never" in front of Capt. Charness' tent (R254-255) as testified by Captain Charness for the prosecution.

c. Specification 11, Charge II.

Captain Glenn R. Alexander went to accused's quarters on 30 October 1944 to discuss some squadron business. Sergeant Taylor was there working on a warhead. While there he saw accused, Sergeant Taylor, and Master Sergeant Atwood take a drink of liquor (R221-225). Accused testified that on the occasion Sergeant Taylor had disassembled and polished a warhead which he (accused) was sending home as a war trophy. In appreciation he gave Taylor a drink and he also had a drink. They fell to discussing squadron affairs. "There was a strong undercurrent" in the squadron. It appeared "I might be finding out where maybe the source was. * * * I didn't care to stop this discussion". He had lunch sent for himself and Taylor. After lunch they continued their discussion and work. Sergeant Atwood came in to discuss some squadron business. He too joined in the work on the warhead and in the discussion of squadron affairs. The three had drinks (R261-262, 269-270).

d. Specification 12, Charge II.

When accused learned his authority had been questioned by NCOs, he called a meeting of the "first three graders" on 7 November 1944. He held the men at "attention" and talked to them about 5 minutes. Then he gave them "at ease" and talked for another 40 minutes on various squadron affairs. He was pretty "rough" with the men. Finished, he asked the men to have a drink, thinking it would improve their morale and cooperation. He and several of the men had drinks and continued the discussions. "Occasionally, I more or less called them to order not officially. It was that this meeting was held more like this court-martial" (R264-266, 271-273). Accused's testimony was corroborated by Staff Sergeant Glen B. Taylor and First Sergeant William B. Lynch (R240-254).

e. Specification 13, Charge II.

Accused testified his squadron was about to go to France. He was uncertain which officers to take. He was particularly concerned about Lt. Barkes and Mr. Saxon whom he had discussed with Captain Ryan, the

Medical officer. On 25 July he determined to test their stamina and sportsmanship in a poker game. He assembled the officers, offered to lend the five pounds to any officer, excused any with "moral or religious scruples against gambling", also excused those wanting to leave for other reasons, stating, however, "I would draw my own conclusions as to their sportsmanship and I would like to see them in the morning". He further stated that if anyone lost and felt he had been forced to play he would refund the money. He explained and demonstrated the game. Captain Charness threw his money away; Lt. Barkes played earnestly; Mr. Saxon was an accomplished player and the big winner (R259-261, 269, 274). Captain Cyril J. Ryan and First Lieutenant Robert Angert Jr. and First Lieutenant Glenn R. Alexander testified they did not consider they were ordered to play (R194,199,204,207,209). Failure to play would not be held against them (R199,208).

f. Accused enlisted in December 1932, served in the cavalry for four and one-half years, his highest rating having been that of a sergeant. He then served in the infantry for seventeen months, his highest rating having been private first class, specialist third class. In 1939 he transferred to the Air Corps and attained the rank of master sergeant. Later he was commissioned a second lieutenant. He has been married for five years (R257-258). Accused's qualification card (Form 66-1) shows that he was appointed a second lieutenant on 18 April 1942; promoted first lieutenant, 20 May 1942; captain 27 January 1943; and major 23 September 1943. It further shows three efficiency ratings of superior and seven of excellent (R256; Def.Ex.C).

5. Neither evidence relating to the specifications of which accused was acquitted nor evidence tending to impeach certain prosecution witnesses has been set out herein. It was the province and duty of the court to determine the credibility of the witnesses and the weight, if any, to be given their testimony (CM 158027 (1923), Dig. Ops. JAG 1912-40, Sec.395 (56) p.237; CM ETO 817, Yount). In this connection it is to be noted that the defense asked Captain Charness, a prosecution witness, whether he was under charges for his activities as "PX" officer. Objection was raised by prosecution and sustained by the law member (R53-54). The evidence was properly excluded. While courts are not in agreement (3 Wharton's Criminal Evidence (11th Ed) Sec. 1381 p.2266-2267) the federal circuit courts, at least a majority of them, hold that evidence of an arrest or pending indictment is not admissible to impeach a witness (Coulston v. U.S. (C.C.A.10th 1931), 51 F (2nd) 178; Dawson v. U.S. (C.C.A.9th 1926), 10 F (2nd) 106, cert. denied 271 U.S. 687, 70 L. Ed.1152, 46 S. Ct. 638; Glover v. U.S. (C.C.A. 8th 1906), 147 F 426; Dunham v. U.S. (C.C.A. 5th 1923) 289 F. 376; Simon v. U.S. (C.C.A. 4th 1941), 123 F (2nd) 80; Verro v. U.S. (C.C.A. 3rd 1938), 95 F (2nd) 504). This rule was applied in CM 202770, 6 B.R. 259,285 (1935), Dig. Ops. JAG 1912-40 Sec. 395 (8) p. 204, where it was said, "nothing short of a conviction of a crime is admissible".

6. a. Specifications 8, 9, and 10, Charge II.

From a statement made by accused, the prosecution, over objection by defense, sought to refresh the memory of Corporal Boklund as to the dates of trips made to Maidstone. Apparently defense's objection was overruled whereupon defense asked, but was not permitted, to cross examine the witness prior to his use of the statement. Witness was then given accused's statement and witness' statement of 18 November 1944 (R140-142). Whether it was error to have permitted the witness so to refresh his memory (see 3 Wharton's Criminal Evidence (11th Ed.) sec. 1277, p.2144-2146; U.S. v. Putnam, 162 U.S. 687, 40 L. Ed. 1118, 16 S.C.T. 923; Goodfriend v. U.S, (C.C.A. 9th 1923) 294 F 148; Breese v. U.S. (C.C.A. 4th 1901) 106 F 680; Chase v. U.S., (C.C.A. 6th 1926) 13 F (2nd) 847; Jewett v. U.S. (C.C.A. 9th 1926), 15 F (2nd) 955; Briggs Mfg. Co. v. U.S. (D.C.Connecticut 1929) 30 F (2nd) 962, reversed, on another point, at 40F (2nd) 425 (C.C.A. 2nd 1930); Delaney v. U.S. (C.C.A. 3rd 1935) 77F (2nd) 916) need not be decided; nor must the effect of the error (Supp. I, Dig. Ops. JAG 1912-40, Sec. 395 (62a) p.12) in refusing to permit defense to cross examine the witness before giving him the statements to refresh his memory. Prior to the use of these statements, the witness had testified to trips on dates of 11, 12 and 13 August 1944 - after his memory had been, without objection, refreshed from, presumably, another of his own statements (R137-140). Thus, accused's statement, as to which defense was denied timely cross examination, served to refresh witness' memory only as to date of trips of which accused was acquitted (Specifications 1 to 7, Charge II). Accused was convicted of trips on 11, 12 and 14 August 1944.

As to Specification 10, the proof of a trip made on 13 August 1944 was sufficient proof of the offense alleged to have been made "on or about 14 August 1944". The variance was not fatal.

Clearly, accused's proved use of the vehicle was in violation of paragraph 6, AR 850-15, 28 August 1943, and Section XXXVII, Pamphlet, ETOUSA, 24 January 1944, File AG 451/2, PUBGC Subject: Maintenance and Operation of Motor Vehicles. No purpose would be served in setting out the pertinent provisions herein. They are to be found in the record of trial (R282-285) and the Theater Judge Advocate's Review.

b. Specifications 11 and 12 of Charge II.

Substantial evidence supports the findings. Accused's conduct was of a nature prejudicial to good order and military discipline cognizable under Article of War 96 (CM ETO 6235, Leonard).

c. Specification 13, Charge II.

Clearly, gambling is not normally a duty a superior may require of subordinates. Accused's novel test of the stamina and sportsmanship of his

subordinates, conducted under the shown circumstances, constituted conduct prejudicial to good order and military discipline cognizable under Article of War 96.

7. There remains for consideration the president's remarks made with respect to the matter of accused's discussion of squadron shortcomings with enlisted men. During the court's examination of accused, the president states:

> "I would like to have you speak on the philosophy of that because frankly it affects my mind on the credibility of your testimony? * * * It is foreign to my experience to correct deficiencies in the company by private meetings with assembled non-coms (sic), leaving the officers out of the picture. I want to hear a little bit about your philosophy that led you to that sort of action" (R274).

The president's remarks were improper. It has been held that a remark in open court by a court member that accused's defense was "shaky" was highly improper and the irregularity so grave as to invalidate the findings and sentence "if the record proof of the commission of the act charged were not quite clear" (CM 116012 (1918), Dig. Ops. JAG 1912-40 Sec. 395 (48) p.233). Here the proof was "quite clear". No substantial rights of the accused were injuriously affected by the president's remarks.

8. The charge sheet shows that accused is 33 years of age and that he was appointed a second lieutenant 22 April 1942 after nine years of enlisted service.

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

10. The penalty for violation of Article of War 96 by an officer is such punishment as a court-martial may direct.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Avery Jr Judge Advocate

CONFIDENTIAL

12758

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U.S.Army.

1. In the case of Major CURRY ST. GEORGE (O-461782), Headquarters XII Tactical Air Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12758. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 12758).

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

(Sentence ordered executed. GCMO 333, ETO, 13 Aug 1945).

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

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 12759

U N I T E D S T A T E S	XXIX TACTICAL AIR COMMAND (PROV)
v.	Trial by GCM, convened at Maastricht, Netherlands, 17-21 February 1945.
First Lieutenant JOHN A. TRAYNOR (O-1594533), 161st Tactical Reconnaissance Squadron, 363rd Tactical Reconnaissance Group	Sentence: To be dismissed the service.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. John A. Traynor, 161st Tactical Reconnaissance Squadron, 363rd Tactical Reconnaissance Group, was at Beauvechain, Province of Brabant, Belgium, on or about 21 November 1944, in a public place, to wit: Cafe Louis Havel, drunk while in uniform.

Specification 2: In that * * * was at Beauvechain, Province of Brabant, Belgium, on or about 20 December 1944, drunk in camp.

Specification 3: (Finding of not guilty)

Specification 4: (Finding of guilty disapproved by reviewing authority)

Specification 5: In that * * * did, in a public place, to wit: Cafe Nolet, Nodebais, Province of Brabant, Belgium, on or about 25 December 1944, wilfully and wrongfully push one Alfred Libert, a Belgian Civilian, with a loaded pistol.

Specification 6: In that * * * did, in a public place, to wit: Cafe Nolet, Nodebais, Province of Brabant, Belgium, on or about 25 December 1944, in the presence of several Belgian civilians, whose names are unknown, wilfully, wrongfully and recklessly discharge a pistol, without due regard for the safety of the persons present.

Specification 7: (Finding of guilty disapproved by reviewing authority)

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

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

Specification 2: (Finding of not guilty)

Specification 3: In that * * * did, at Arlon, Province of Luxembourg, Belgium, on or about 21 October 1944, willfully, wrongfully, and without proper authority effect the release of a prisoner, one Jean Heymans, a Belgian Civilian, then under arrest in the custody of Belgian authorities in the Leopold Barracks at said Arlon, Province of Luxembourg, Belgium.

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 3 of the Charge and of Specification 2 of the Additional Charge; guilty of all other specifications, with a

minor substitution being effected in the finding as to Specification 1 and the substitution of "threaten" for "push" in Specification 5 of the Charge, and guilty of the Charge and Additional Charge. 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. The reviewing authority, the Commanding General, XXIX Tactical Air Command, disapproved the findings of guilty of Specifications 4 and 7 of the original Charge and of Specification 1, Additional Charge, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of Specifications 1 and 2 of the Charge as involves findings of guilty in violation of Article of War 96, confirmed the sentence, "the maximum authorized under charges so improperly laid under Article of War 95", "though wholly inadequate punishment for an officer convicted of such gross misconduct" and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 21 November 1944 accused was supply and transportation officer for the 161st Tactical Reconnaissance Group, stationed at Beauvechain, Province of Brabant, Belgium (R11,12,13,21,25). Between 7:30 and 8:30 o'clock on that evening, accused entered the barroom of the cafe Louis Havet and inquired for the first sergeant of his unit, who was billeted with other enlisted men on an upper floor of the building (R18,21,22). The First Sergeant Raymond T. Connors, two other noncommissioned officers and a Belgian civilian and the proprietor of the cafe were present at the time. Accused asked Sergeant Connors what had happened to his jeep which he had parked in front of the orderly room about 100 yards away from the cafe about two hours before (R19,26). The first sergeant suggested that perhaps personnel of the transportation section had "picked up" the jeep and returned it to the motor pool area pursuant to standing orders that no vehicles were to be left on the streets. Accused repeated five or six times that the first sergeant should find out who had taken his jeep and that he was going to press court-martial charges against him. His face was flushed, his eyes were "more or less bloodshot" and his voice was high and loud at this time (R19-23,26-27). One of the enlisted men present testified that accused appeared to have been drinking "very heavy" and that "if he wasn't drunk he was on the verge of being drunk" (R22). The other two soldiers testified unequivocally that accused was drunk (R19,26). He was in uniform at this time and the conversation took place in that part of the cafe open to the public (R21,22,25).

At approximately 1:30 pm, 20 December 1944, accused, accompanied by two enlisted men, drove in a jeep to Jodoigne, Belgium.

They each had two drinks of cognac in a cafe in Beauvechain at the outset of their journey and accused consumed a glass of anice liquor and another drink of cognac on the way (R31,32). They went to a liquor store in Jodigne where accused had three drinks of cognac while "trying" to get some girls to come to a dance, proposed to be held on Christmas Eve at their base (R31,32). He visited another cafe and consumed a "couple of cognacs" and then returned to his base, arriving there about 7:30 pm (R33). He did not go to his billet that night but slept in the supply room on a mattress which belonged to him but which was used generally by the charge of quarters (R43). A noncommissioned officer, who served as supply clerk and who saw accused on the evening in question, stated that "He wasn't drunk" as "he wasn't out on his feet" and was able to carry on an intelligent conversation" (R43). Two other enlisted men stated that in their opinion accused was "sober" and "slightly drunk", upon his return to camp (R33,37).

Shortly after 2:00 o'clock on the afternoon of 25 December 1944 accused visited the Nolet Cafe in Nodebais, Belgium. As he was very friendly with the proprietor of this establishment, he proceeded into the kitchen and consumed a bowl of soup while carrying on a general discussion concerning German parachutists who reportedly had been dropped recently in the vicinity of the village (R44-46). At the request of the owner, accused entered that portion of the cafe open to the public and checked the identification cards of about ten patrons present. Accused asked to see their identity cards "because he thought there would be parachutists" among the number there (R66,67). After checking the cards, accused left the cafe but returned about 8:00 or 8:30 that night at which time there were about 12 or 15 civilians present (R46,60). Accused spoke to some of the people he knew and purchased beer for them (R47). Subsequently, he asked the civilians in the cafe to show their identity cards (R47-60). He had his pistol in his hand at this time and remarked that the card of one of the civilians, Alfred Libert, was not right and told him to put his hands up and "go to the wall" (R47,60,61,70). Libert appeared "scared" and, after a moment, walked to the wall, saying, "He is going to kill me" (R61). Accused "followed him with the pistol" (R55). After remaining standing with his hands up in the air for about two minutes, Libert was released, as the proprietor told accused that this civilian was a friend and all right (R48). Accused next asked to see the identification card of Charles Uytterhoven, who was sitting behind the counter at the bar near the wife of the owner of the establishment. This civilian at first refused or ignored accused's request and he asked him two or three times to produce evidence of his proper identify, stating that he would shoot in "one minute" if such card was not exhibited (R52,57-62). As Uytterhoven put his hand in his pocket, accused fired his pistol (R51-52, 61-62). The bullet hit the bar about 30 to 50 centimeters from where Uytterhoven was sitting and about 30 to 40 centimeters from

the woman behind the counter (R52,62,63). The proprietor asked the customers to leave the cafe and when his wife started to cry accused apologized (R63).

During October 1944, while accused's organization was stationed at Arlon, Belgium, the chief of civilian police of the province of Luxembourg, who was also Chief of the Movement Nationale Belgique, a brigade of the Belgian Resistance Movement, arrested one Jean Heymans, a civilian, who was charged with the unauthorized use of American vehicles and gasoline (R121,127,200,206). He was turned over to the American civil affairs officers and placed in confinement in the Leopold Barracks, Arlon, Belgium (R201). On the 21st of October, the wife of this civilian prisoner contacted accused who then went to the prison and told the Belgian guard in charge that he had come "to liberate Heymans because Heymans was a good Belgian" and not a collaborator (R210,214). He asked the guard to release him to accused, but was informed that it was necessary to have "a paper of liberation to release the prisoner" (R211). Thereupon, accused went into the "Center of Confinement" of the barracks, procured a paper concerning Heymans and wrote on it: "Liberate Prisoner 715: p.m. John A. Traynor, Lieutenant U.S. AAF" (R211,212; Pros.Ex.E). Upon presentation of this paper to the guard, he released Heymans who was taken away from the prison by accused (R213). He was not freed by the civilian authorities but his release was effected by accused's demands and actions (R213,214).

Evidence concerning Specifications 3, 4, and 7 of the original Charge and Specifications 1 and 2 of the Additional Charge is not included herein as the accused has either been acquitted thereof, or, where found guilty of such specifications, the findings have been disapproved by action of the reviewing authority (R272,275).

4. Accused, after his rights were explained to him, elected to be sworn as a witness in his own behalf and testified that on the evening of 21 November 1944, he was not drunk but angry at the time he entered the Havel Cafe. He admitted drinking two "one ounce shots" of scotch whiskey that evening and stated that his anger was based on the fact that someone had taken his jeep which he had parked outside the orderly room. He threatened to reprimand or have court-martialed the person guilty of taking his jeep. At the time a vehicle was placed at his disposal he was drinking beer in the cafe (R220,222). On 20 December 1944 he discussed with his commanding officer the possibility of arranging a Christmas dance for the men in his organization and was told by this officer to "Go ahead and make the arrangements and to count me in. * * * Whatever it takes to get the thing organized, you go ahead and handle" (R222). Together with two enlisted men from his

section, he left camp in a jeep to make the necessary arrangements for the dance and while on the way to and in villages in the vicinity he consumed five and one-half drinks of various kinds of intoxicating beverages (R223). He returned to camp about 7:30 pm and instead of going to his billet, slept on a mattress prepared for the Charge of Quarters in the supply room. His reasons for remaining there overnight were that the supply room was warm, his billet was three-quarters of a mile away, and he did not know the evening password because he was not in camp at the time it was given out that day. He denied being drunk in camp or that he had any duties to perform that night (R224).

Concerning the alleged assault upon Alfred Libert and the reckless discharge of a firearm in a public place, accused admitted drawing his pistol and motioning to Libert to stand by the wall after checking his identification card and finding it, to his mind, irregular. He also admitted firing the pistol after a second civilian had declined to produce his identity card, upon his demand. He denied "pushing" Libert and stated that he fired the pistol not negligently, but in self-defense as the second civilian acted suspiciously and appeared to be drawing some sort of a weapon from his pocket. Prior to these occurrences, he had attended meetings at which his superior officers made known the fact that German parachutists had recently dropped in the area and as a result the men were instructed to check the cards of any individuals whatsoever whom they thought acted suspiciously in any manner (R226). His actions were prompted by security reasons. He recited similar security checks made in the vicinity by other officers of his command (R225-227).

On 22 October 1944, accused went with Mrs. Jean Heymans to the Leopold Barracks where her husband was imprisoned. He admitted talking with the guard concerning the prisoner and asking him if he could be relased. He used no threats in any manner to effect his release and stated he did not know why he was liberated or discharged. However, he admitted writing on the confinement order "Liberate Prisoner" and signing his name thereto (R242,243,259,260,261).

5. Article of War 95 establishes a standard of discipline and behavior required of officers of the American Army and provides that:

> "Any officer * * * who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service" (AW 95).

12759

All of the offenses herein were laid under the foregoing article, many improperly requiring corrective action by the court, the reviewing and the confirming authority. Winthrop states that the act which forms the basis of such misconduct here denounced has a "double significance and effect", which need not amount to a crime. Such misconduct:

> "(1) Must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and * * * (2) must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Winthrop's Military Law and Precedents (Reprint,1920), pp.711,712).

The evidence of accused's drunkenness in uniform on 21 November and his drunkenness in camp on 20 December 1944, although substantial and convincing as to his guilt, fails to show that such intoxication was of a gross character or of such a conspicuously disorderly nature under the circumstances as to bring discredit upon the military service. Measured by these tests, the confirming authority properly approved only so much of the findings of guilty of Specifications 1 and 2 of the Charge as involves findings of guilty of Article of War 96. Accused's drunkenness unquestionably constituted a disorder and neglect to the prejudice of good order and military discipline condemned by the 96th Article of War (CM ETO 5027, Newcombe; CM ETO 5465, McBride; CM ETO 7902, Taylor).

Concerning the offenses alleged by Specifications 5 and 6 herein competent substantial evidence shows that accused committed an assault upon Alfred Libert by pointing a pistol at him during the time that he was checking identification cards of civilians present in the Nolet Cafe and that he also wrongfully and recklessly discharged the pistol in the presence of several Belgian civilians who were present in this cafe on the evening of 25 December 1944. The defense showed, in attempted justification of accused's conduct, that these offenses were committed during the last German counter-offensive and after instructions had been issued regarding the necessity for checking identification cards of persons in the vicinity by reason of the presence of German parachutists nearby. He is shown to have acted at the request of the cafe owner. Under such circumstances, it can hardly be said that accused's conduct was such as offends so seriously against morality or decorum as to expose him to social disgrace or that his actions were of such a nature as to bring dishonor or disrepute upon the military service, as condemned by Article of War 95. The commission

of the assault upon Libert, a Belgian national, and the wrongful and careless discharge of a service pistol in a public place, thereby endangering the lives of civilians, are unquestionably serious offenses, but, under the circumstances shown, these offenses, but, under the circumstances shown, these offenses are not of the nature contemplated by Article of War 95, but they do constitute an offense under Article of War 96 (Winthrop's Military Law and Precedents, (Reprint, 1920), pp.711,712; CM 215754, Rush, Jr.; 11 B.R. 35; Dig. Ops. JAG 1912-1940, sec.451 (8), p.313; CM ETO 439, Nicholson; CM ETO 5420, Smith).

Accused was also found guilty of wrongfully and without proper authority effecting the release of a Belgian civilian, while under arrest and in the custody of Belgian authorities. The record is devoid of evidence that accused had any authority to effect the release of the prisoner. He was supply and transportation officer of his unit not a civil affairs official, and had no duties or authority in connection with such latter services. However, by virtue of his position as an officer in the United States Army, and acting only upon the request of the wife of the prisoner, he exercised an authority which he did not possess and effected the release of the prisoner. Inherent in his conduct was misrepresentation, imposition upon the Belgian prison officials under color of his American uniform which resulted in the unauthorized release of a civilian prisoner. His conduct constitutes an act which seriously compromises his character and standing as an officer as well as a gentleman and his behavior relfects discredit upon the military service which he represents. His conviction of this offense alone is sufficient to support the sentence of dismissal (CM ETO 5609, Blizard; CM ETO 6881, Hege and Parsons; CM ETO 11216, Andrews).

6. The charge sheet shows that accused is 36 years and six months of age, was inducted 28 April 1942, was discharged as corporal 15 July 1943, for the convenience of the Government, to accept appointment as second lieutenant and that he entered on active duty as an officer, 16 July 1943, at Camp Lee, Virginia.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty except as to Specifications 5 and 6 of the Charge which are proved only as violations of Article of War 96 instead of 95, and legally sufficient to support the sentence.

8. A sentence of dismissal is mandatory upon conviction of

Article of War 95, and is authorized for a violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

(385)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant JOHN A.TRAYNOR (O-1594533), 161st Tactical Reconnaissance Squadron, 363rd Tactical Reconnaissance Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty except as to Specifications 5 and 6 of the Charge which are proved as violations of Article of War 96 instead of 95, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 12759. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12759).

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

(Sentence ordered executed. GCMO 415, USFET, 8 Sept 1945).

12759

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

BOARD OF REVIEW NO. 1

29 JUN 1945

CM ETO 12761

U N I T E D S T A T E S	87TH INFANTRY DIVISION
v.	Trial by GCM, convened at Jossnitz, Germany, 20 April 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant ADAM BROCKIE (O-1824583), Company A, 347th Infantry	

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

---

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant Adam Brockie, Company "A", 347th Infantry, APO 448, US Army, was, at Rhens, Germany, on or about 24 March 1945, found drunk while on duty as Commanding Officer, Company "A" 347th Infantry.

12761

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

Specification: In that * * * having received a lawful command from Lieutenant Colonel Robert B. Cobb, his superior officer, to report to Major Albert M. Withers, Jr., Executive Officer, First Battalion, 347th Infantry, did at Rhens, Germany, on or about 25 March 1945, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification, guilty of the Specification of Charge II, except the words "willfully disobey", substituting therefor the words "failed to obey", of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge II but guilty of a violation of the 96th Article of War. 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 10 years. The reviewing authority, the Commanding General, 87th Infantry Division, approved the findings and sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. Charge I, Specification:

Prosecution's evidence showed that accused drank wine for at least an hour and a half on the night of 24-25 March 1945 at a time when he was in command of the support company of his battalion which was engaged in crossing the Rhine from west to east at Rhens, Germany. Despite the warning from his company executive officer that his company was soon to follow the other two companies in the assault crossing, he continued to drink. His intoxication, testified to by five officers of his regiment, was physically manifested by his abnormal speech and

12761

manner and his unsteadiness. That it was sufficient also sensibly to impair the rational and full exercise of his mental faculties (MCM, 1928, par.145, p.160) was manifested by his failure to comprehend an order by the executive officer of his battalion to direct his men to unload supporting assault boats from trucks, by his direction to discontinue carrying the boats to the river shore, by his failure to obey his battalion commander's order, after the crossing, to reorganize his company and remove it from the river bank, other than by relaying the order to his platoon leaders, and also by his failure to obey that officer's order to report to the battalion executive officer, which was the subject of Charge II and Specification, infra. Of his guilt of being found drunk on duty in violation of Article of War 85, which he did not seek to explain or deny, there can be no doubt (CM ETO 6684, Murtagh, and authorities therein cited).

b. Charge II, Specification:

Because of accused's condition, as manifested by his uncomprehending response to the order of his battalion commander, Lieutenant Colonel Robert B. Cobb, to reorganize and remove his company, above adverted to, that officer, at about 0200 hours on 25 March, placed him under arrest, relieved him from command and ordered him to report back across the river to Major Albert M. Withers, Jr., Battalion Executive Officer. Accused failed to report as directed at any time on 25 March. Major Withers testified he did not direct that accused be placed in arrest.

In his sworn testimony accused offered the following explanation of his failure:

> "Sir, as soon as he gave me the orders to report I went immediately. I came to the river's edge from the far side--the east bank of the river. There were no boats available at that time. We were getting shot up pretty well. The Engineers were getting set and no boats were available. I had walked down to where two American soldiers had four prisoners--German prisoners. I had taken the four prisoners and the two American soldiers when I came back in the boat with the four prisoners rowing the boat. We dropped down approximately three hundred

(390)

yards. We were getting shot and fired at and it took us until 4:30 or 5:00 o'clock to get back up to our original starting off point. I had asked there of the Engineers whether Major Withers was available. They said no, he wasn't around. So then I went and saw the two men to the stockade with the prisoners and then went to the CP and went to sleep.

Q. Did you know where the Battalion CP was?
A. I did.

Q. Why didn't you report then?
A. At that hour, Colonel, it was between 4:30 and 5:00 o'clock by the time we got up there and Major Withers wasn't available at the time on the shore and I went up past the CP with the two guards and the prisoners and went in the company CP with the intention of reporting to Major Withers in the morning.

Q. Whey didn't you report in the morning?
A. Sir, Lieutenant Triplett came back--he was executive officer--he came back and told me I was in arrest in quarters and to stay with the company organic" (R25).

The court was fully justified in believing that there was no exculpating excuse for accused's failure to obey his superior officer's order. The Board of Review is of the opinion that the findings of guilty of the lesser included offense within that alleged were fully supported by the evidence (CM ETO 5607, Baskin). The question whether accused's intoxication was such as to preclude his ability to understand the order was for the court's determination. It's findings of guilty are supported by substantial evidence, including accused's own testimony (Cf: CM ETO 4184, Heil).

4. The record, before authentication, was examined, found to be correct and signed by a member of the court in lieu of special defense counsel who was absent. Such practice, while irregular, was hot prejudicial to any of accused's substantial rights (CM ETO 2205, Fountain; CM ETO 3644, Nelson).

12761

5. The charge sheet shows that accused is 32 years of age, was inducted 1 April 1942 at Munhall, Pennsylvania, and was commissioned a second lieutenant 1 April 1943. He had no prior service.

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

7. A sentence of dismissal is mandatory upon conviction of an offense in violation of Article of War 85 committed in time of war and, with total forfeitures and confinement at hard labor, which are also appropriate punishment under that article, is authorized upon conviction of an offense in 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

12761

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant ADAM BROCKIE (O-1824583), Company A, 347th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12761. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12761).

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

(Sentence ordered executed. GCMO 251, ETO, 9 July 1945).

12761

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

BOARD OF REVIEW NO. 3

31 AUG 1945

CM ETO 12770

U N I T E D S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER
v.	)	
Private EDWARD WILLIAMS (15040906), Service Battery 203rd Field Artillery Battalion	)	Trial by GCM, convened at Cherbourg, France, 22 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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 Edward Williams, Service Battery, 203rd Field Artillery Battalion, did, in the vicinity of St. Sever-Calvados, France, on or about 9 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Denise Soul.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction for absence without leave for about twenty-five days and escape from confinement in violation of Articles of War 61 and 69, respectively. 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,

12770

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 shows that on the evening of 9 August 1944, accused and two companions were present at a French farmhouse near St. Sever, Calvados, France (R7,17). Also present at the time were the prosecutrix, Denise Soul, a girl in her "early twenties", and her brother, Jules Soul, about twenty years of age (R16,17). Although more or less friendly during the early part of the evening (R16,20,22), the men became progressively more drunk and boisterous as the evening progressed (R10,17, 20,21,36) and, at about 2200 hours, accused's two companions seized the prosecutrix and threw her on a bed (R18,24,25,32,40). When her brother attempted to come to her aid, accused struck him, knocking him to the floor (R18,24,28). While accused stood guard over her brother, one of the other soldiers held her while the third soldier had intercourse with her. This process was repeated until all three men had intercourse with her, each alternately playing the roles described above — "There was always one near my brother /and/ one was holding me all the time " (R27,29,30,36). The prosecutrix was struck on the face and one of the soldiers also threatened her with a knife. She resisted by shouting and by trying to push the men away with her hands and feet but, because of her fear and their superior strength, she was unable to prevent them from having intercourse with her (R20,29,30,41). She testified that accused again had intercourse with her under somewhat similar circumstances at about 0300 hours the following morning (R32,33,35,36). Her testimony that both she and her brother had been roughly treated on the night in question was corroborated both by their appearance the following day and by a medical examination given them on 11 August (R9,11-14). This medical examination also revealed that Denise Soul's hymen recently had been ruptured by the entrance of some firm object into her vaginal tract (R12-14).

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

5. The proof showed that accused aided and abetted his two companions in having intercourse with the prosecutrix, thereafter had intercourse with the prosecutrix himself and again engaged in sexual intercourse with her some five hours later. When one act is alleged by the specification and the evidence discloses two or more, it will be assumed that the prosecution elected to stand on the first act shown by the evidence (CM ETO 7098, Jones; CM ETO 8542, Myles). The evidence summarized above clearly shows that all of the acts of intercourse which took place at or about 2200 hours constituted rape. If the act of the first of accused's companions who had intercourse with the prosecutrix is regarded as "the first act shown by the evidence", accused clearly aided and abetted the individual who performed that act and was properly charged and found guilty as a principal (CM ETO 8542, Myles). If his own act in having intercourse with her at about 2200 hours is regarded,

12770

as to him, as the first act shown by the evidence, he is equally guilty (Cf. CM ETO 6545, Jett). Thus, under either interpretation of the evidence, the record is legally sufficient to support the findings.

6. The charge sheet shows that accused is 22 years, eleven months of age and enlisted on 10 July 1940. He had no prior service.

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

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

B R S Cooper Judge Advocate

Thaddeus C Sherman Judge Advocate

B L Levy Jr Judge Advocate

12770

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

BOARD OF REVIEW NO. 5

30 AUG 1945

CM ETO 12784

U N I T E D S T A T E S	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Schinveld, Holland, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private RALPH C. BROWN (42048105), Company H, 313th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ralph C. Brown, Company "H", 313th Infantry, did, near Rosiers Aux Salines, Meurthe et Moselle, France, on or about 12 November, 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until his return to military control at Epinal, France on or about 20 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The review-

ing authority, the Commanding General 79th Infantry Division, approved the sentence but recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of the soldier's natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed, but owing to special circumstances in the case and the recommendation of the convening authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution shows that on the night of 11 November 1944 accused reported to Company H, 313th Infantry, which organization was located near Rosiers, Meurthe et Moselle, France (R5-8). He joined this organization, together with a group of other men, after having been transferred from another company. At a meeting held that night, the Company Commander told these newly arrived men, including accused, that they were going back into combat, although he did not disclose to them the exact date of the anticipated action (R7,8). On the 12th of November the company was busy, "working at all possible speed", outfitting the men for moving forward to an assembly area, preparatory for engaging the enemy in combat (R7,11). At three-thirty that afternoon a company formation was held for the purpose of assigning these men to their platoons but accused was missing at this time. He had no permission or authority to be absent and the Company Commander accordingly ordered the First Sergeant to make a thorough search for him (R6,7,10,11). A search was made for accused throughout the company area and in a nearby town but he could not be found (R10,11). He was not present with his organization from 12 November to 20 December 1944. His absence was unauthorized (R6,7,11). It was stipulated between counsel for the prosecution and defense, the accused expressly consenting thereto, that accused returned to military control on 20 December 1944, at Epinal, France (R12).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R12,13).

5. Competent, uncontradicted evidence establishes that accused absented himself without leave from his organization on or about 12 November 1944 and that he remained in unauthorized absence until returned to military control on 20 December 1944. On the night of the 11th of November he was informed that he was going back into combat and on the morning of the 12th the men of his platoon were being outfitted, preparatory to moving forward to engage the enemy. On the afternoon of the latter date accused was missing and could not be found. These facts,

coupled with accused's departure shortly after being informed of planned action against the enemy, support the inference that he entertained a specific intent to avoid the hazards and perils of combat, which the circumstances indicated were imminent and of which accused had knowledge. The findings of the court under these circumstances, being supported by substantial evidence, may not be disturbed by the Board of Review. The offense of desertion, as defined and denounced by Articles of War 58 and 28 is therefore established (CM ETO 6177, Transeau; CM ETO 7230, Magnanti; CM ETO 8452, Kaufman).

6. The charge sheet shows that accused is 19 years and four months of age and was inducted 19 October 1943 at New York City, New York. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No error 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, par.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

(400)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 30 AUG 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private Ralph C. Brown (42048105), Company H, 313th 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 12784. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12784).

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

(Sentence as commuted ordered executed. GCMO 423, USFET, 19 Sept 1945).

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.,
JAGC, EXEC. ON 26 FEB 52