E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 5420

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VOLS. 15-16

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 16 B.R. (ETO)

CM ETO 5803 - CM ETO 6333

OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 16 B.R. (ETO)

including

CM ETO 5803 - CM ETO 6333

(1945)

Office of The Judge Advocate General

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

26 JAN 1945

CM ETO 5803

UNITED STATES	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 95, United States Army, 24 December 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class WAYMOND ALEXANDER (38222631), 84th Chemical Smoke Generator Company.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Waymond Alexander, 84th Chemical Smoke Generator Company, did, on or about 19 November 1944, desert the service of the United States by quitting his organization at or near Peltrie, France, with intent to avoid hazardous duty, to wit: operating a smoke generator in an area under enemy observation and fire, and did remain absent in desertion until he surrendered himself at or near Metz, France, on or about 25 November 1944.

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

3. The evidence for the prosectuion showed that accused was a member of an operations section of the 84th Chemical Smoke Generator Company where his duty was that of smoke generator operator (R6, 7,13). On the morning of 19 November 1944, upon returning from the performance of a mission under enemy fire, Sergeant Albert N. Wallace, the non-commissioned officer in charge of accused's section, received orders that the section would move out on another mission at 1800 hours that evening (R6,7,16,17). On this mission, the section was to proceed to an area occupied by the 10th Infantry near Peltrie,France, some 22 kilometers distant, for the purpose of laying a smoke screen before Fort Chesny, then occupied by the enemy (R7,12,14). After having been briefed for the mission by Lieutenant Charles S. Levy, the officer who was to be in charge of this operation, Sergeant Wallace went to his section and oriented his men (R7,8,16). Accused was not present at the orientation and accordingly, shortly before the time for departure, Wallace went to accused's quarters, told him "to get ready, the whole section was going out and I explained to him what was what", i.e., that "we could probably expect artillery fire and this time we would be exposed to 20mm fire and small arms fire" (R7). Accused, who was sitting on his bed partially clothed, replied either "Not me Sarge, I can't make it" or "Sarge, I'm sorry, I can't make it" (R8). Accused had not been excused from the mission by his commanding officer nor had he made any complaints to his company commander regarding his health (R7,20). Wallace then returned to his section. When the trucks were ready to move accused was not there and Wallace reported his absence to Lieutenant Levy (R8). The two then went to accused's quarters and found him there, still only partially clothed. Lieutenant Levy told him "you will go on the mission and get your clothes on on the double" (R13). Accused began to comply with the order, and after directing him to report as soon as he was dressed, Lieutenant Levy and Sergeant Wallace returned to make final preparations for the forthcoming operation. At about 1930, immediately before the section entrucked for departure, a roll call was had and accused answered when his name was called. After Lieutenant Levy had satisfied himself that all the men were on the trucks, the section moved out (R9,13,14). Upon reaching Peltrie at approximately 2200 hours, roll was again called and this time accused failed to respond (R10,15). Following this, a search was made of the area where the men had been quartered for the night but

accused could not be found. The following morning, 20 November 1944, search was again made and again accused could not be found (R15). The section performed its mission without him (R10,14). Lieutenant Levy testified that, at the location where the "smoking" was done,

> "On two points to the west [the enemy] had a machine gun set up at about 400 yards. To the north at Ft. Chesny the position was about 800 yards away. To the northwest we were under direct observation from 20mm fire" (R14).

However, the section was not subjected to enemy fire during the operation (R10,14). The mission was completed on the evening of 20 November after which the section returned to Peltrie and then proceeded back to the company area at Lesmenils. Search was made for the accused prior to departure from Peltrie and upon reaching Lesmenils but he could not be found at either place (R11,16). Search had also been made for the accused at Lesmenils that morning as the result of a report of one of the truck drivers who returned from Peltrie to Lesmenils at approximately 1000 hours and this search proved equally fruitless (R18,19).

On 25 November 1944 accused voluntarily returned to his company, then located at Metz, France. When summoned to the orderly room and asked by his company commander where he had been he replied, "Oh, just walking around Toul and Nancy". He was then asked why he hadn't gone with his section on 19 November and "he said he was scared and he 'couldn't take it' or 'he couldn't make it'" (R19,20). Additional evidence that accused was absent without leave from 19 November until 25 November 1944, was supplied by duly authenticated extract copies of the company morning reports containing entries to this effect and admitted into evidence without objection by the defense (R21,22, Pros.Ex.A,B).

4. After having been advised of his rights as a witness, accused elected to remain silent. No evidence was introduced on behalf of the defense.

5. Article of War 58 provides, in part, as follows:

> "Any person subject to military law who deserts * * * the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court martial may direct * * *".

Article of War 28 provides as follows:

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"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".

In order to make out an offense under the Articles of War quoted above the following must be shown:

"(1) That accused absented himself or remained absent without leave from his place of service, as alleged;

(2) That his unit 'was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service' (MCM, 1921, par.409, p.344);

(3) That notice of such orders and of imminent hazardous duty or important service was actually brought home to him; and

(4) That at the time he absented himself he entertained the specific intent to avoid hazardous duty or shirk important service (CM ETO 5555, Slovik; CM ETO 2368, Lybrand and authorities therein cited; CM ETO 3234, Gray)."

(1) It was here shown both by competent testimony and by the introduction of extract copies of the company morning report that accused absented himself without leave from his organization and place of duty from 19 November 1944 to 25 November 1944. (2) It was further shown that on 19 November accused's section was under orders to perform a mission which involved the laying of a smoke screen before a fort occupied by the enemy and it is clear that these orders involved "hazardous duty", as alleged. The section had only that morning returned to the company area after performing a similar mission during which it had been subjected to enemy fire. The mission scheduled to begin on the evening of 19 November 1944 was to be performed in close proximity to the enemy and it was anticipated that the section would again be fired upon. The mission was actually performed within the range of enemy weapons and the exposure to danger was obvious. The mere fact that the danger did not materialize on this particular occasion does not mean that the operation was not hazardous in nature (Cf: CM ETO 2368, Lybrand, supra). (3) It was further clearly shown that notice of the order to go on the mission and of the hazardous

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nature thereof was brought home to the accused. (4) In view of the circumstances under which accused absented himself, together with his statements prior to his departure and his admissions at the time of his return, the court was warranted in finding that at the time he absented himself he entertained the specific intent to avoid hazardous duty. All elements of the offense having been made out, the evidence is legally sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 24 years of age and was inducted at Camp Walters, Texas, on 10 September 1942. No prior service is shown.

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

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

_____ Judge Advocate

(SICK IN QUARTERS) Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

30 MAR 1945

CM ETO 5805

U N I T E D S T A T E S	UNITED KINGDOM BASE COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	
Privates ALFONSO JOSIE LEWIS (34780813) and FREDDIE MOSES SEXTON (34647819), both of 4197th Quartermaster Service Company	Trial by GCM, convened at Ashchurch, Gloucestershire, England, 19 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused were arraigned separately and tried in common trial without objection on their part on the following charges and specifications:

LEWIS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Alfonso Josie Lewis, 4197th Quartermaster Service Company, did, near Tetbury, Gloucestershire, England, on or about 2 July 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Mable Clarice Mitchell.

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SEXTON

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Freddie Moses Sexton, 4197th Quartermaster Service Company, did, near Tetbury, Gloucestershire, England, on or about 2 July 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Mable Clarice Mitchell.

Each accused pleaded not guilty and, all members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction against Lewis by summary court for absence without leave for two days in violation of Article of War 61, and of one previous conviction against Sexton by summary court for gambling with privates as a noncommissioned officer in violation of Article of War 96. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority, 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. The evidence for the prosecution was substantially as follows:

At approximately 1900 hours, 2 July 1944, Miss Mabel Clarice Mitchell, a 31 year old school teacher, left the home of her sister, Mrs. Edith Enid Earley, to visit friends in the town of Tetbury, Gloucestershire, England, some five miles away. She was expected back by 2300 hours. About midnight, Mrs. Earley, finding she had not yet returned, telephoned her friends and learned that Miss Mitchell had left an hour before. Suspecting that something was wrong, Mrs. Earley went out on the road to see if she could find her. In the course of her search, she was apparently joined by the friend whom Miss Mitchell had been visiting in Tetbury (R7).

A camp of colored American soldiers was located approximately three miles from Tetbury. Mrs. Earley stopped there to inquire whether they had seen her sister. They had not, but reported that there had been "some trouble along the road". Mrs. Earley then telephoned the police and continued on toward Tetbury, still in search of Miss Mitchell. At a cross-road a quarter of a mile beyond, she finally found her walking down the road. She was crying, one of her shoes was missing, and her clothes were dirty. She said "Don't be cross with me, I've been

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set upon by two black Americans and they have broken me". Seeing that Mrs. Earley was angry, she added "Don't go back", By this time, it was 0120 hours. Miss Mitchell then proceeded to her home while Mrs. Earley continued her investigation. She next saw prosecutrix at home an hour later and observed that she was badly cut and bruised about the face, with swollen lips and bleeding eyes. Her legs were likewise scratched and her skirt, mackintosh and hat were covered with mud. Her hair, too, was thick with mud and some of her clothes, including her knickers and one sock and shoe, were missing (R7,8). At noon, she was examined by her physician who found her in an excitable, nervous state and suffering from shock. Her face was swollen, bruised and scratched. Both eyes were blackened and closed, and her neck was tender to the touch and stiff. She was stiff and sore over the lumbar region in the area of the sacro-iliac joints. Her arms and hands were scratched and bruised and her thighs were sore and tender. Vaginal examination revealed a newly ruptured hymen, some bloodstained discharge and soreness to the touch. It was the opinion of the doctor that Miss Mitchell had previously been a virgo intacta and that the rupture of the hymen had been caused by penetration of the vagina by the male organ.The condition of her face indicated that she had been severely punched (R10-13). Her mental condition at the time of trial was such that she was unable to appear in court as a witness (R18-20).

As the result of Mrs. Earley's telephone call to the police a sergeant of the local constabulary set out at about 0045 hours to search for Miss Mitchell. He went first to the home of her friends and from there down the Tetbury Road. At a milestone located about three-quarters of a mile from the cross-road where Mrs. Earley had met Miss Mitchell, he found a bicycle in the ditch. Near the bicycle, the grass in the ditch had been flattened and the earth recently disturbed for a space of six by two feet. While the sergeant was examining this, Mrs. Earley approached and identified the bicycle as belonging to her sister. Nothing else was found in the area and Mrs. Earley took the bicycle home (R8,13,14,16-18). Later in the day the sergeant returned. At a point on the road 45 yards from the milestone, there was a gate leading into a clover field. He found an area about three feet square in the field where the clover had recently been flattened down and the earth showed marks indicating a struggle not long before. Nearby, he found a knife, a galosh with a sandal inside, a bicycle seat cover and two diapers. Further in the field he found another such area and near it a pair of badly torn knickers. It had rained the greater part of the morning and the previous day and the ground and the articles found by the sergeant were wet. Mrs. Earley later identified the shoe and knickers as the property of her sister (R9, 13-18).

James R. Thompson, Criminal Investigation Division Agent, testified that on 4 July 1944, in the course of his investigation of the matter, he obtained signed and sworn statements from each accused.

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These statements were given voluntarily and without threat, force or promise of reward. Before signing them, accused were given an opportunity to read them over and their rights under Article of War 24 were explained. They were also asked whether they wished to make any changes in them. Defense counsel was given opportunity to cross-examine Thompson and was advised by the court, in response to his request that accused be permitted to testify for the limited purpose of contesting the voluntary character of their statements, that accused could testify at the appropriate time if they so desired. The statements were thereafter received in evidence without objection by defense (R14,21-24; Pros.Exs.A,B). The court was cautioned to consider each statement only against the accused who made it (R25).

Lewis', statement (Pros.Ex.A) shows that during the evening of 2 July 1944, he and Sexton had several drinks of beer and whiskey in the pub near camp and also in various public places in Tetbury.While he and "a friend" were walking back to camp from Tetbury, they were overtaken by a girl on a bicycle coming from the direction of the town. Lewis was "high" at the time and did not at first see her coming. His friend grabbed her, and tried to drag her by the arm into the field. Together they lifted her over the gate while she struggled and screamed. Lewis showed her his ten inch knife to stop her from screaming. His friend then got her down, pulled off her pants and started to have intercourse with her. When he finished Lewis took his place. By then she was no longer struggling, but toldthem to let her go. She said she would tell no one for she was a school teacher and did not want anyone to know about it. Since he was already beginning "to realize the seriousness of what we were doing", Lewis was scared and had difficulty effecting satisfactory intercourse. Penetration, however, was accomplished, "but it always kept coming out". His friend then attempted intercourse again. When he finished, he left and Lewis had another try, encountering the same difficulty as before. This time the girl did not resist or scream and said she would let him do it if he would promise to go when he finished. He didn't know, however, whether she liked it. He "messed" around for a time and when he saw he couldn't finish, got up and returned to camp. When he arrived, he found blood on his shorts and shirt and mud on his trousers. He washed the shorts, but later tore them up and burned them. In an oral statement to the Criminal Investigation Division Agent, he admitted that the knife found at the scene of the affair was his (R16, 25,Ex.C).

Sexton's statement (Ex.B) was essentially to the same effect as Lewis'. He admitted he was the "friend" referred to by Lewis, stating however, that it was Lewis who first seized the girl. Sexton put her bicycle to the side of the road while Lewis placed his knife against the back of her neck, presumably to quiet her screams and discourage her efforts to get away. They took her to the field together, one of her shoes being lost in the process. Lewis tore off her underpants,

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struggling with her while he tried to have intercourse. When he got up, Sexton got on her and succeeded in effecting penetration. Lewis then tried again, taking such a long time that Sexton left. The girl did not offer "too much of a struggle" while Sexton was having intercourse with her, merely moving her hips from side to side while he was trying to accomplish penetration. While the act was in progress, she "put her left hand affectionately around my neck, just as though someone was kissing you a welcome home".

4. Accused after their rights as witnesses were fully explained to them, elected to remain silent (R31).

Evidence for the defense included medical testimony to the effect that an intact hymen is rarely found in a woman 31 years of age and that a recently ruptured hymen is not necessarily probative of rape, there being many possible causes for such condition (R26-28).

The remaining evidence for the defense consisted of testimony by a Royal Air Force Aircraftsman who on the night of 2 July 1944 was cycling on the Tetbury road. He saw a colored soldier jump over a small gate and then heard screams. Upon investigation, he found four colored soldiers and a woman in the field. The woman was lying on the ground, one of the men being in the act of raping her. The men appeared to be drunk and one had a knife. The woman said "You are killing me, let me go" and, when she saw the witness, "Thank God you've come". The witness, seeing he was unable to help the woman, went to summon aid. He was unable to identify any of the men. The place where he said he saw them was some 200 yards from the spot described by prosecution's witnesses as the probable scene of the alleged rape (R29-31).

5. The statements of accused in this case assume unusual probative importance, not only because the establishment of accuseds' identity as the criminals depends entirely upon them, but also because the failure of the victim to testify at the trial results in an absence of any independent direct evidence to prove the penetration and lack of consent essential to a conviction of rape. On this point, it may be said at the outset that the victim's failure to testify does not in itself operate to invalidate the proceedings so long as the case is proved by other competent evidence. It is sometimes impossible, because of death or other reasons, for the victim to testify and this of course does not mean that the trial may not proceed (see CM ETO 5747, Harrison, Jr.). The trial judge advocate may prove his case through such witnesses as he desires to use (See 3 Wharton's Criminal Evidence (11th Ed., 1935), sec.1102, p.1933). Assuming that accused would have ground for complaint had Miss Mitchell's absence resulted from bad faith on the part of the prosecution, there is no showing that such was the case here. Defense counsel made what appears to be an informal request that the trial be "held up" until she could appear, but there is no indication that he desired her as a witness for the defense and

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his request appears to be more or less in the nature of a protest against her non-appearance as a witness for the prosecution. Under the circumstances, it is not considered that any prejudice resulted to accused.

With respect to the admissibility of the statements, it is obvious that they amount in legal effect to confessions of guilt. Accordingly, the usual rules relative to the reception in evidence of confessions must be shown to have been complied with. These require that there be independent evidence of the corpus delicti, that the confession be voluntary, and, if the trial is a joint or common one, that the confession be used as evidence only against the particular accused who made it (MCM, 1928, par.114a,c, pp.115,116,117). Examination of the record in the present case reveals that all three requirements have been met.

As to the corpus delicti, the circumstances under which Miss Mitchell was found, the state of her clothing, her physical condition as shown by the medical testimony and that of her sister, and her own statement that she was set upon by two black Americans, taken together, certainly constitute sufficient independent proof that the "offense charged has probably been committed" to justify the admission of the confessions on this score (see CM ETO 2007, Harris; CM ETO 559, Monsalve). In this connection, Miss Mitchell's statement may, in view of her condition and the fact that she made it so shortly after the attack, be properly considered as part of the res gestae (CM ETO 3141, Whitfield; CM ETO 3375, Tarpley). As such, it is admissible irrespective of her failure to testify at the trial (44 Am. Jur. sec.85, pp.955-956).

Similarly, no objection exists from the point of view of the voluntary character of the confessions. Defense counsel, after cross-examination on the issue, expressly stated that he had no objection to their admission and it may be assumed, therefore, that he decided against the advisability of having accused testify for the limited purpose of showing them to be involuntary as he had originally requested. The court extended to accused the right to testify "at the proper time", and hence, in the absence of a renewal by defense counsel of his request, it cannot be said that they were denied opportunity to offer evidence on the matter. There is ample competent evidence in the record to justify the law member's conclusion that the statements were voluntary and his determination will therefore not be disturbed (CM ETO 4055, Ackerman).

Since each accused fully admits all the elements of rape, the question whether the confessions were limited in application to the accused making them is of no great importance. They are essentially recapitulations of each other and there is no need to look to the confession of either accused for evidence against the other (see CM ETO 2901, Childrey and Cuddy). In any event, the court was properly warned

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on the point and may be assumed to have considered the statements in a properly limited manner.

There remains the question whether the evidence, including the confessions, is legally sufficient to support the findings of guilty as to each accused. As previously indicated, there is no reasonable doubt that the testimony, apart from the confessions, proved that Miss Mitchell was brutally attacked and raped by two unknown colored assailants. Nor is there any doubt, in view of their confessions, that each of the accused raped the woman they apprehended on the Tetbury road. True, there is some intimation in their statements that Miss Mitchell did not forcibly resist during the actual commission of the sexual acts, but even assuming this to be capable of belief, it would be impossible under the circumstances to regard it as consent (CM ETO 3933, Ferguson and Rorie). The question, therefore, is whether Miss Mitchell is shown to be the woman raped by accused. On this point, we have accuseds' statements to show that their victim was a school teacher, that she was riding a bicycle when attacked, that her clothes were torn off and that she lost a shoe. All of this fits in perfectly with the testimony of the prosecution's witnesses. Miss Mitchell was found near the place and at about the time of accuseds' activities. She showed visible signs of a severe struggle and her bicycle, shoe and knickers were missing. All three of these articles were found near the place where the attacks by accused obviously occurred. There is no doubt therefore that the court's conclusion that Miss Mitchell was the victim of the rapes perpetrated by accused is supported by substantial competent evidence, and accordingly the record of trial is legally sufficient to support the findings of guilty.

6. At the request of defense counsel, a letter addressed to the Judge Advocate, Southern Base Section, by a psychiatrist who examined Miss Mitchell was read to the court. The letter was neither offered nor received in evidence as an exhibit. It contained considerable hearsay relative to the attack on Miss Mitchell. Presumably, defense counsel requested the reading of the letter for the purpose of showing that Miss Mitchell did not wish to see accused hanged. No prejudice to the substantial rights of accused resulted from the hearsay involved inasmuch as other competent and compelling evidence of guilt was presented (see CM ETO 1201, Pheil, and cases cited therein).

7. The charge sheets show the following as to accused: Both are 21 years and five months of age; Lewis was inducted 6 April 1943 at Camp Blanding, Florida; Sexton was inducted 9 March 1943 at Fort Bragg, North Carolina; neither had prior service.

8. The court was legally constituted and had jurisdiction of each accused and of the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the

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

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

Benjamin R. Sleeper Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

B. H. Dewey Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 5848

U N I T E D S T A T E S	2ND BOMBARDMENT DIVISION
v.	Trial by GCM, convened at Shipdham Air Base, AAF 115, (England), 4 December 1944.
Private WILLIAM C. KAY (11114492), 576th Bombardment Squadron (H), 392nd Bombardment Group (H)	Sentence: Dishonorable discharge (suspended) total forfeitures and confinement at hard labor for two years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its 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 86th Article of War.

Specification: In that Private William C Kay, 576th Bombardment Squadron (H), 392nd Bombardment Group (H), being on guard and posted as a sentinel, at AAF 118, APO 558, on or about 1 November 1944 was found sleeping on his post.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved only so much of the findings of guilty of the Specification and of the Charge as involved finding of guilty of being found asleep while on duty as a sentinel in violation of Article of War 96, approved the sentence, ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset (England), as the place of confinement. The proceedings were published by General Court-Martial Orders No. 98, Headquarters 2nd Bombardment Division, AAF 147, APO 558, 29 December 1944.

3. The evidence for the prosecution was as follows:

Sergeant E. W. Hobbs, Detachment A, 1287th Military Police Company, testified that he was "sergeant of the plane guards" at AAF Station 118, on 1 November 1944. Accused was present at guard mount at 1930 hours. Hobbs posted him on post number 3 at 2000 hours and he was required to remain on his post until 0100 hours (2 November) (R8-9). At approximately midnight while checking the guards with the officer of the day, Hobbs entered "a line shack" where he saw accused lying on the top of a double bunk. He motioned to the officer of the day, who came in and aroused accused. Accused's carbine was on a box in the middle of the shack (R9-10). The "line shack" was "a crew chief's hut off the dispersal area", a distance of 20 to 25 yards from post number 3 and a place "definitely not on post number 3" (R11,12,13). Accused had his head down on his arms, "was lying down in the crew chief's hut, off the post, and he didn't move when I walked in". "His condition appeared to be that of being asleep" (R12). The hut was within sight of the normal limits of the post, but not close enough to be included within them "unless there is some disorder" (R13), and there was no disorder there when they found accused in the hut (R14). Sergeant Hobbs had been in charge of the plane guards for seven or eight months (R12).

Captain Peter A. Zahn, 579th Bomb Squadron, 392nd Bombardment Group, was officer of the day from 1130 hours 31 October to 1130 hours 1 November 1944 (R14-15). He was with the sergeant of the guard making a tour of the "plane guard" at about midnight 31 October. They found no guard at post number 3. After a brief search, the sergeant found accused in a crew chief's hut and signalled to

the captain with a flashlight. Captain Zahn entered the hut and saw

> "There was a guard lying on the top of a double deck bunk. His gun was lying to the side, lying against a box. He was lying on his stomach, his head in his arms. He made no move, so I touched him on the shoulder and he raised his head up and that was all".

Captain Zahn said to him "you ought to know better than to sit down or go to sleep" or words to that effect and instructed him to stay on post until he was relieved (R15). Asked on cross examination if the hut was on post number 3, he replied "I couldn't say that it was" (R16).

A motion of the defense for a finding of not guilty because of lack of proof that accused was found sleeping on his post was denied by the court (R17-18).

4. For the defense, Major Edmund R. Dilworth, 576th Bombardment Squadron, 392nd Bombardment Group, testified with reference to the excellent performance by accused as a sheet metal worker while with "operations" after joining the squadron in June 1943. He also performed very well as a crew chief to help the airplane mechanics, "considering his knowledge of this work was very limited", he was a good soldier and "a willing sort of fellow" (R18). Major Dilworth described the administration of the "plane guards" as follows:

> "There was a distinction made between the plane guard and the guard duty performed by the Military Police Detachment. There has been certain violations and delinquency among plane guards which in some cases were overlooked in our squadron. In one case, a man was given a Summary Court Martial for sitting down on his post, perhaps he was even asleep on post. It was the policy of the group that these men were inexperienced and that we should be a little tolerant with them" (R19).

5. The record of trial recites that "The rights of accused having been explained by the court, he desired to remain silent" (R19).

6. The court found accused guilty as charged. However, since, it was clearly shown by the testimony of Sergeant Hobbs, who had been in charge of the plane guards for seven or eight months, that at the time he was found asleep by the officer of the day, he was 20 or 25 yards off his post, the reviewing authority approved

"only so much of the findings of guilty of the specification and the charge as involves a finding of guilty of being found asleep while on duty as a sentinel, in violation of Article of War 96".

Accused's offense was leaving his post and he should have been so charged. Having abandoned his post, he was no longer on duty as a sentinel. The offense attempted to be carved out and approved was not a lesser included offense. Even if the precedent CM 236351, Ambutivicz, is sound law, it is not analogous to the instant case, for it is an offense for any member of the guard to become drunk, but it is not for a sentinel to sleep except when he is on post or other specific duty. (See Dig.Op. JAG, 1912-40, p.308-9).

7. In view of the foregoing, the Board of Review is of the opinion that the evidence is legally insufficient to sustain the findings of guilt, as modified, of only so much of the findings of guilty of the Specification and of the Charge as involves a finding of guilty of being found asleep while on duty as a sentinel in violation of Article of War 96. It follows that the findings of guilty and the sentence are invalid and should be vacated.

8. The charge sheet shows that accused is 22 years three months of age and that he enlisted 28 October 1942 at Boston, Massachusetts, in the Regular Army to serve for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. Errors affecting the substantial rights of accused were committed as above set forth. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as modified and the sentence.

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private WILLIAM C. KAY (11114492), 576th Bombardment Squadron (H), 392nd Bombardment Group (H).

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

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

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

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

BOARD OF REVIEW NO. 2

12 FEB 1945

CM ETO 5855

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters, IX Air Force Service Command, 14 December 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. Loire Disciplinary Training Center, "Lepmany", (Le Mans), France.
Private (then Technical Sergeant) ALBERT J. HERHOLTZ (33165651), 1922nd Ordnance Ammunition Company (Aviation), 2108th Ordnance Ammunition Battalion Aviation (Sp), (1st Intransit Depot Group).	

OPINION by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SIEEPER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt. Albert J. Herholtz, 1922nd Ord Am Co (Avn), 2108th Ord Am Bn Avn (Sp), (Attached 2109th Ord Am Bn Avn (Sp), then T/Sgt, 1922nd Ord Am Co (Avn), 2109th Ord Am Bn Avn (Sp), did at AAF Station 592, APO 149, on or about 2 February

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1944, feloniously embezzle by fraudulently converting to his own use money of the value of $200 the property of Pfc. Mitchell H. Plumley, entrusted to him by the said Pfc. Mitchell H. Plumley, for safe-keeping or for the purpose of sending to the home of the said Pfc. Mitchell H. Plumley.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, ordered its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Loire Disciplinary Training Center, "Lepmany", (Le Mans), France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 173, Headquarters IX Air Force Service Command, APO 149, U. S. Army, 30 December 1944.

3. From the record in this case it appears that under date of 2 December 1944, the advice of the staff judge advocate to the appointing authority, submitted pursuant to Article of War 70, was prepared and signed by an assistant staff judge advocate(who later prosecuted the case as the trial judge advocate).

In this instrument of advice, the assistant staff judge advocate said, over his signature:

> "In my opinion, the charges are [sic] appropriate to the evidence, are sustained thereby and trial thereon by court-martial is warranted".

Below the signature of the assistant staff judge advocate, appears the following:

> "I concur:
> Starbuck Smith, Jr., [Signature]
> Starbuck Smith, Jr.,
> Lt. Colonel, A.C.
> Actg. Staff Judge Advocate".

This document of advice was then submitted to the appointing authority who thereafter referred the case for trial. This same Lieutenant Colonel Smith subsequently sat as law member of the court which tried accused. On page 3 of the record of trial, the following colloquy is shown to have occurred during the organization of the court:

"TJA: The charges were forwarded to the Commanding General, IX Air Force Service Command by Frank P. McCue, Colonel, Air Corps, Commanding First Intransit Depot Group. If any member of the court is aware of any facts which he believes to be a ground for challenge by either side against any member of the court it is requested that he state such facts.

L M: I know of no such facts, but I would like to state that I believe the present trial judge advocate wrote the advice in the case and while acting as Acting Staff Judge Advocate I concurred in the advice. So far as I know, I have not expressed an opinion as to the guilt or innocence of the accused, and I have no such opinion now.

TJA: The prosecution has no comment on this. Does the defense wish to say something on this matter.

D C: Nothing further on this matter.

TJA: Is it agreeable with the defense to proceed.

D C: It is agreeable.

TJA: The prosecution has no challenges for cause and has no peremptory challenge. Does the accused wish to challenge any member of the court for cause.

D C: He does not.

TJA: Does the accused have any peremptory challenge.

D C: He does not.

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TJA: Does the accused now object to any member of the court now present.

D C: He does not.

The members of the court and the trial judge advocate were then sworn".

The defense counsel, Captain Harry M. Schuck, A.C., was also an assistant in the office of the staff judge advocate.

4. In CM ETO 5458, Bennett, the same assistant staff judge advocate (Lt. Colonel Starbuck Smith) prepared and signed a similar instrument of advice for the appointing authority. The opinion expressed therein employed the same language as that found in a similar opinion in the case now under consideration. There, the assistant staff judge advocate who expressed and transmitted such opinion, later sat as law member of the court which tried that case. When his relationship to the case in its pre-trial phase was stated at the time the court was organizing, he announced that he had not formed or expressed an opinion as to the guilt or innocence of accused. In that case, after such statement by the law member, defense counsel stated:

"We will accept the law member's statement".

In that case, the Board of Review held the record of trial legally insufficient because the law member "was disqualified from sitting as a member of the court within the letter and certainly within the spirit" of the Manual for Courts-Martial, 1928 (par.58e, pp.45,46). The Board concluded its opinion by saying:

"Under CM 261181 (supra) this law member * * * should have been excused without the necessity of a challenge by the defense".

The only point of difference between CM ETO 5458, Bennett, and the instant case is that here the acting staff judge advocate who sat as law member on the court did not initially prepare the instrument in question but rather concurred in the opinion therein expressed.

5. The Board of Review is unable to find any real difference in these two situations from the standpoint of the substantial rights of an accused. No staff judge advocate will "concur" with, and accept, the opinion of an assistant in a

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matter as important as that involved here without reading the very record and the exhibits of the investigating officer which were before his assistant, and without forming his own independent opinion. A judge on the bench who concurs in the opinion of his brethren considers the entire evidence and the law most carefully before he concurs. His opinion is independent, even though concurring.

The staff judge advocate who concurs and adopts is different from a mere forwarding officer whose concurrence in the investigating officer's report is "a routine expression of an opinion" and is not "an opinion as to the guilt of accused" (CM Z19582, Braden, 12 B.R. 305, p.307 (1942)). The Articles of War never intended that the function of the staff judge advocate in advising the appointing authority in matters of military justice should be of a ministerial character. Otherwise, the appointing authority could accept the opinion of the investigating officer. Article of War 70 intended that in between the investigating officer and the appointing authority the question of reference for trial should have the benefit of a trained legal mind.

In CM ETO 5458, Bennett, the Board of Review pointed out the danger to a fair and impartial trial for an accused involved where a member of his court has had pre-trial access to the investigating officer's report and where such member, possessed of legal training, has formed and expressed an official opinion that accused be tried.

The reasons which lead the Board of Review to hold that the assistant staff judge advocate was disqualified to sit in that case and that the failure of the court to excuse such member on its own motion constituted error prejudicial to the substantial rights of accused, all exist with respect to the propriety of the acting staff judge advocate having sat on the court in the present case.

6. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private (then Technical Sergeant) ALBERT J. HERHOLTZ (33165651), 1922nd Ordnance Ammunition Company (Aviation), 2108th Ordnance Ammunition Battalion Aviation (Sp), (1st Intransit Depot Group).

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

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

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

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

BOARD OF REVIEW NO. 2

20 JAN 1945

CM ETO 5869

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FRANK WILLIAMS (38277147), 587th Ordnance Ammunition Company, 100th Ordnance Battalion	Trial by GCM, convened at St. Laurent-sur-Mer, Calvados, France, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Frank Williams, Five Hundred Eighty-Seventh Ordnance Ammunition Company, One Hundredth Ordnance Battalion, did, at Neuilly La Foret, France, on or about 29 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Madeleine Lurienne.

He pleaded not guilty to and, all members 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 present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the ser-

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

3. The evidence for the prosecution shows by the testimony of the 15-year old prosecutrix that at about 0930 hours accused, helmeted and armed, arrived at the house where prosecutrix lived with her foster mother (R9-10,12). The latter was not at home. With prosecutrix were Odette Leplatais, a 9-year old girl, and Odette's little brother. Accused - who could speak no French - asked for cider. Madeleine poured him a glass. Accused put his gun down near the clock but did not drink his cider. After looking at the picture on the chimney, while Madeleine stood at the corner of the bed nearby, accused grasped her about the waist. She screamed. Then

> "He put me on the bed, took a hold of my throat and threatened to give me a kick or with his fist. * * * He lifted up my skirt . * * * He put my left leg aside with one of his hands * * * Then he hurt me".

Asked if he put something into her body she replied that he did (R10). What it was, she did not know. Thereupon the following testimony was elicited in response to the following questions addressed to the prosecutrix by the trial judge advocate, aided and abetted by the president and law member:

> "Q. Did he have sexual intercourse with you?
> A. No, never.
>
> Q. I'm directing this question: Did he at that time have intercourse, sexual intercourse with you when he had you on the bed?
>
> President: The question is not understood.
> Law Member: You have to express it in words she can understand.
>
> (Continuing)
>
> Q. Did the part of the soldier's body come in contact with yours?
>
> * * *
>
> A. Not all, part of it.

Q. Did part of his body have contact with your sexual organs?
A. I don't understand.

Q. Did something go into your sexual organ?
A. Yes.

Q. What part of his body went into your sexual organ?
A. I don't understand.

Q. Did it hurt you?
A. Yes, he did.

Q. How long did he remain on you?
A. Ten minutes.

Q. Did you cry?
A. Yes.

Q. What was he doing with his hands?
A. He held me by the throat.

Q. When the act was completed what did you do?
A. I ran into the yard" (R11).

When she reached the gate she saw him coming out of the front door. Then he "took to the back" and walked rather fast to a field in the rear of the house (R11). When accused put prosecutrix on the bed, Odette went to the neighbors. At some time subsequent, prosecutrix attended an identification parade where all the soldiers passed in front of her and she recognized accused as the soldier who assaulted her in her home (R12).

On cross-examination she testified that she had seen accused on one occasion prior to the assault (R13). "I was with my neighbor milking cows. He was looking at us but he didn't say anything and he returned where he was before". On the occasion in question, she felt a part of accused's body go into her body. It was not his finger. She did not assist him in making penetration but objected to it and tried to hit him with her feet. What accused did to her, during the ten minutes he remained on top of her, did not hurt all the time (R14).

A neighbor testified as to prosecutrix' prompt complaint and obvious distress within a few minutes after the commission of the alleged offense, at which time her nose was bleeding and her lips were swollen (R15-17). The testimony of her foster mother, who was promptly summoned, corroborates the neighbor's testimony with reference to the complaint and physical condition of the girl (R19-20). Captain John E. Darling, of accused's organization,

testified that on 30 June 1944 prosecutrix identified accused as her assailant at a company line-up of "all those men that had been on any duty, that were in the area, and the company headquarters personnel". After the identification

> "I proceeded with the show down. I figured I might as well go through the whole company and the little girl was quite positive after we got through that was the man. She saw all the men in the company" (R22).

An American Army doctor, who examined the child's sex organs the following day under conditions unfavorable for a thorough examination, discovered no signs of violence or of forcible penetration. He observed no hymen, no tears, and no evidence of recent sexual intercourse. He could not say, as the result of his examination, whether or not penetration had occurred. He testified that his examination was very inadequate and a closer examination might have shown differently (R27,28).

4. The defense presented no evidence and accused, after his rights were explained to him, elected to remain silent.

5. The testimony of the prosecutrix, despite the latitude permitted in the matter of leading questions, is not as clear as it might be and presents disconcerting contradictions. Considered as a whole, however, in the light of her immaturity and the clear corroboration of significant attendant circumstances, it cannot be fairly regarded as other than competent, substantial evidence of the guilt of the accused. While the medical testimony, elicited by the prosecution, is wholly inconclusive, tending to raise rather than dispel doubts as to the fact of penetration, it is not of a character to preclude the court from lawfully giving full credence to the prosecutrix' testimony, which obviously the court did.

> "The weighing of the evidence and the determining of its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence" (CM ETO 895 Fred Davis, et al).

6. The charge sheet shows that accused is 31 years seven months of age and that, with no prior service, he was inducted at Oklahoma City, Oklahoma, 1 December 1942.

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

8. Penitentiary confinement is authorized (AW 42; 18 USC 457). 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. 2

25 JAN 1945

CM ETO 5870

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class WILFERD SCHEXNYDER (38421565), 858th Fumigation Bath Company.	Trial by GCM, convened at St. Laurent-sur-Mer, Calvados, France, 4, 5, December 1944: Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Wilferd Schexnyder, 858th Fumigation Bath Company, did, at or near Feugeres, France, on or about 5 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Simonne LeGrand, a French woman.

He pleaded not guilty and, three-fourths of the members of the court

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present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The evidence of the prosectuion shows that Madam Simone LeGrand, 30 years of age and whose husband has been a prisoner in Germany since 1940, was at her home in Mesnil-Vigot, France, on the afternoon of 4 August 1944. Her young cousin, Julienne Leroyscel, was staying with her to keep her company. Two colored soldiers, one big and one small came in the house about six o'clock in the evening (R7,8). She identified accused in court (R8) as the little soldier (R16) whose name was Alfred (R8). They followed her around, drank some cider (R8) and left about 7:30 p.m. promising to return with laundry (R8). They returned around six o'clock in the evening of the next day bringing several articles (R23) and food which she put in the kitchen (R31), but they brought no laundry. Julienne was still there. The soldiers asked for and she gave them some cider which they drank with some cognac the small soldier had in his canteen: Both were armed and both followed her around and helped with the work hauling wood (R8,9) and milking. Supper was ready at dark and the soldiers did not leave although she had asked them to do so. As it worried her, she called two of her neighbors, Joseph Robin and Lepoett Uven to eat supper. The two soldiers also sat down to the table and the smallest soldier asked for soup and both drank cider. After supper, they made ready to leave as she customarily slept over at her neighbor's and she showed the soldiers the door. The neighbors, her cousin and the big soldier went out but the little soldier stayed in the doorway. As Madam LeGrand was waiting inside till everybody was out to close the door (R10-11,18) when the small soldier stopped her from going out. He grabbed her "heavy" and pushed her into the kitchen while she called for help. The big soldier stopped the neighbors from coming back in and forced Robin to leave, fired one shot (R10-11,19) and then came inside the room closing the door. The little soldier in the meantime threw Madame LeGrand on the floor despite her resistance and had intercourse with her, his private parts penetrating hers. She was frightened and in her struggles her glasses were broken and her dress (R12-13) and her underwear were torn (R16,19,27-28). During this time the big soldier was sitting on a table (R14-15). The small soldier was not in a good situation on the floor (R20) so he then

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pushed her into another room and threw her on a mattress where "he continued to satisfy his pleasure" but didn't quite finish as the police arrived. She was scared and did not resist very much. Again there was penetration (R14-15) and because he caused her so much pain she assisted him in making penetration. He kissed her (R22). The door to the room was open and it was just starting to get dark. Two police and one of the neighbors came in and the two soldiers got up. She received bruises on the arms and legs (R14-15,26).

Julienne Leroyscel testified to substantially the same story covering the time she was present in the house. Neither of the soldiers made any advances toward them until the second evening (R23) when the smaller soldier (accused) began to speak to Madame LeGrand about the bed but she refused and went for the neighbors to come to supper with them because the soldiers wouldn't leave. "The soldiers were sad when the neighbors came" and ate their soup without speaking (R24). After supper the soldiers were asked again to leave as the women were going to the neighbors to sleep. The neighbors went out but the small soldier put his rifle across the door to stop them but Julienne pushed the rifle and went out, leaving the neighbors and Julienne and the big soldier outside, the small soldier in the door and Madame LeGrand inside. When the big soldier saw Julienne going away he shot his rifle (R25,27,28) at which time she was under the hedgerow with Mr. Robin, the neighbor. The last she saw of Madame LeGrand, the small soldier had seized her (R25). They heard Madame scream (R26,28) and she and the two neighbors ran for the police. When they returned with the police and entered the house, Madame LeGrand was standing with a handkerchief in her hand (R26), her eyes were wet (R28) her skirt torn and her hair in disorder. The big soldier was sitting at a table and the little soldier came from the fire and sat down. Both had rifles (R26).

Joseph Robin, a farmer and close neighbor of Madame LeGrand, testified that she had slept at the home of himself and wife since the beginning of the war. A refugee friend, Edward Leburva, was at his home on 5 August 1944, when they were called by Madame LeGrand to come and eat because there were two soldiers there. He identified accused as one of them. They went to her house (R29) and ate supper. She asked the soldiers to leave and thinking "it was dangerous for Madame LeGrand to stay there" he invited her to come with him to his house. She took a blanket but could not get by the door as the big soldier was there. The small one pushed her in the house and she screamed. He called his friend and "tried to push the colored boy away from Madame LeGrand" when the big one, who had his rifle in his hand, took him by the shoulders and pushed him away. "When I was away he shot"(30) but Robin didn't know in what direction. He, his friend and the cousin then ran to get the police (R31).

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Sergeant Grant Bialicki, 518th Military Police Battalion, was on traffic duty at Mesnil-Vigot the night of 5 August 1944, when about 10:45 (R33), three civilians came running, hollering for the police. One of them spoke a little English and said "There is a colored soldier zig-zig in the house". With two soldiers and the civilians he returned by jeep to the house and he and Private Thomas walked in. Johnson was seated near a table with an empty bottle in front of him. Accused(R34), with the fly of his trousers unbuttoned (R38), and a woman came through (R34) the bedroom (R37) door.

> "I told Johnson what he was doing and he started to, I don't know if it was mad or something, he just said; 'Now you went and did it. Here is the MP's. You're in a lot of trouble.' In the meantime Shellsnyder was going near the window, lifting up his foot and I told him if he wanted to stop a 30-30 to go ahead and do it. Johnson told him he better do what I say because I mean it, He sat down. Private Thomas took out his notebook, took Johnson's and Shellsnyder's dogtags. We made out the report of name, rank. We disarmed them, we took their carbines and tried to get some information from the woman but she didn't understand ".

Four French persons were present besides the woman; there were two Frenchmen about 35 years old and a blond 14 year old girl, all excited. Johnson was the other soldier with the accused. He figured he was in a lot of trouble but accused told him not to worry, he had nothing to do with it and it was not his fault. Accused stated he had intercourse with the woman (R34). The woman was wiping her eyes with her handkerchief, was trembling and was very excited when Bialicki first observed her (R35). She was not wearing glasses (R36). It was dark except for their flashlights. They identified the soldiers by their dogtags (R35). Private Earl H. Thomas, Military Police, who accompanied Bialicki testified similarly of the occurrence (R36-39).

4. As the first defense witness, Second Lieutenant James R. Allen the officer appointed to investigate the charges herein, testified that Madame LeGrand, in answering his questions, stated that "there was not intercourse in front of the fireplace"(R39,40,43) but she may have meant that the act was not completed there (R44). "She held the soldier's arm and shoulders apparently trying to shove him away", this apparently being the extent of her resistance while before the fireplace

(41) and after this she was forced into the bedroom where the intercourse took place. She did not state there was any physical violence. "It was against her wishes but she yielded to the wishes of the soldier because she was afraid of him ". Madame LeGrand's signed statement was admitted in evidence as Prosecution Exhibit C (42).

Robert Lefinnatare, a high school student and interpreter for Lieutenant Allen during the interview with Madame Legrand (44-45), and who wrote Prosecution Exhibit C (R46) testified to substantially the same story as did Allen (R44-46).

Private Andrew Johnson of accused's organization, who was with accused on the night in question, after being first advised of his rights as a witness, testified that after supper that night, he went outside the house when accused said he was ready to go back to his organization, and sat down to wait for him. One man and one lady had come out and after about five minutes, witness started in the house passing the other man in the door (R49). He called accused again but it was dark and he couldn't see him. It sounded as if he was on the floor and a woman grunting (R50,53). "It seems as if she was saying no". She was not screaming (R50,54) but he did hear scuffling. He then started back to his company (R50) waiting for accused about two blocks from the house. As accused didn't arrive he returned and entered the house just as the "MP's" arrived. He further testified that while walking down from camp that night (R51), accused had said "we were going to get it that night because we didn't know when we were going to move out", and when witness came back in the kitchen and asked him what he was doing, accused answered, "I'm getting this pussy" (R52).

Accused after being first advised of his rights as a witness, testified that on the evening of 4 August they (he and Johnson) had arranged to return to Madame LeGrand's the next day with some laundry. They returned the next day with some "rations and things". They helped with the work and were there when the two neighbor men came in to eat supper. They (the neighbor men) left after supper and the young lady started to go while Johnson went about a quarter of a block away to a latrine. Accused started talking to the lady about going to bed with her and the girl and Johnson both came back. Johnson stayed outside and accused "approached her about the bed again" and she gave him "a little grin, a little laugh" but not"much answer".

> "She started to leave, I started talking, she didn't know what I was talking about. So she decided to go in the bedroom. It was on a mattress right in the other room, the door was open already and she went in this room

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> and I gave her some candy, so she put this candy in the closet in the kitchen, and one piece of gum I gave her, I had one piece of gum. I laid down, I mean she laid down across the mattress and raised up her dress halfway. There wasn't no way for to get in. The hair was packed. She took her hand and put my privates in her. I had it until about three minutes before the MP's came in. When they came in I was standing right at the bed there pulling the rubber off. I start using a handkerchief. I put it in my pocket. I was standing in the door of the two rooms. The MP said; 'What is the matter, what's going on here?' Johnson said; 'I don't know', he said; 'Where is your rifle at?' he said; 'There it is on the table there', in the meantime he took my name and rank. He took us to headquarters".

He told the Lieutenant we were there for "rape or something". "The MP wrote the statement up", and told us to sign it and "I just signed this thing". "She didn't resist at all. * * * It was agreeable to her, she didn't resist on the bed". At the "MP" headquarters they started to type before they were told anything. "He wrote his own thoughts and asked me why did I do it * * * and he told me to sign. * * * he didn't explain any rights * * * he was just trying to scare, he told us he'd shoot us before sundown if we said anything" (R57-60). Accused denied ever telling Johnson he was getting some pussy (R63-64) or than any incident took place between accused and Madame LeGrand at the fireplace (R 63) or that she ever screamed (R63,65). He did not tear her clothes or break her glasses. She didn't have them on at that particular time (R63). He definitely heard no shot when the cousin and neighbors left and he did not bruise or mark Madame LeGrand's arms or legs. He denied he tried to get to a window when the "MP's" walked in. There was no scuffling before the fireplace and he didn't open his fly until he went in the bedroom (R64).

5. For the prosecution in rebuttal, First Lieutenant Dean W. Nelson, Military Police, testified he talked to Private Johnson a little past midnight on or about 5 August 1944 at which time Johnson stated that he heard a woman refusing, then call for help and scream several times. He didn't name the lady but he mentioned it was the lady in the house (R56).

6. The evidence establishes the commission of the crime of rape as found by the court. Accused admitted the act of intercourse but claimed consent was given by the victim and denies that she resisted or screamed. However her story is strongly supported by the marks left on her body, her torn clothes and broken glasses and her appearance when the police arrived. She says she called for help and resisted him before the fireplace. His companion, Johnson fired his

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rifle and kept the Frenchmen away. He also admits he heard scuffling on the floor of the kitchen. Screams were heard by Julienne and Robin. The evidence strongly justifies the court's conclusion that accused had carnal knowledge of Madame LeGrand by force and without her consent (CM 227909, Scarborough). The victim of the rape did not expressly testify that she continued to resist accused to the extent of her ability. She was in the power and under the physical control of two armed men. The circumstances to which she testified, however, fully justify the conclusion that she did not in fact consent but that accused had carnal knowledge of her by force and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts, rape was committed (1928 MCM, par.148b, p.165; Wharton's Criminal Law, 12th Ed, par.701, pp.942-944).

7. The charge sheet shows accused is 21 years of age. He was inducted in April 1943 at Fort Sam Houston, Texas, without 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 is of the opinion that the record is legally sufficient to support the findings of guilty and the sentence.

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

_____ Judge Advocate

(SICK IN QUARTERS) Judge Advocate

_____ Judge Advocate

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

CM ETO 5879

U N I T E D S T A T E S	94TH INFANTRY DIVISION
v.	Trial by GCM, convened at Chateaubriant, France, 22 December 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSE MARTINEZ (38121920), Company I, 376th Infantry	

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

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

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

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

Specification: In that Jose Martinez, Private, Company "I", 376th Infantry, did, without proper leave, absent himself from his organization at the bivouac area near Le Temple de Bretagne, France, from about 1 November 1944 to about 2 November 1944.

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

Specification 1: In that * * *, did, at Le Temple de Bretagne, France, on or about 2 November 1944 unlawfully enter the dwelling of Andre Brisson and Clementine

Pele Brisson, with intent to commit a criminal offense, to wit, rape therein.

Specification 2: In that * * *, did, at Le Temple de Bretagne, France, on or about 2 November 1944 with intent to do him bodily harm, commit an assault upon Andre Brisson, by threatening him and aiming at him with a dangerous weapon, to wit, a service rifle.

Specification 3: In that * * *, did, at Le Temple de Bretagne, France, on or about 2 November 1944 commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with the mouth of Clementine Brisson, a human being.

Specification 4: In that * * *, did, at Le Temple de Bretagne, France, on or about 2 November 1944 with intent to do him bodily harm, commit an assault upon Pierre David, Sergeant, 5th Battalion, 1st Company, French Forces of the Interior, by threatening him and aiming at him with a dangerous weapon, to wit, a service rifle.

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

Specification: In that * * *, did, at Le Temple de Bretagne, France, on or about 2 November 1944 forcibly and feloniously against her will, have carnal knowledge of Clementine Pele Brisson.

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

Specification: In that * * *, did, at Rohanne, Brittany, France, on or about 23 November 1944, with intent to commit a felony, viz murder, commit an assault upon Martin Maisonneuve, by willfully and feloniously shooting the said Martin Maisonneuve in the hand with a pistol.

He pleaded not guilty and all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 is clear and convincing beyond reasonable doubt that accused was absent without leave from his organization at its bivouac area near Le Temple, France from 1 November 1944 to 2 November 1944 (Charge I and Specification); and that he committed the following crimes: Charge II, Specification 1: house-breaking (CM ETO 4589, Powell, et al; CM ETO 6193, Parrott, et al); Charge II, Specification 2: Assault with intent to do bodily harm with a dangerous weapon (Brisson) (CM ETO 5584, Yancy; CM ETO 6229, Creech); Charge II, Specification 4: assault with intent to do bodily harm with a dangerous weapon (David) (see authorities last above cited); Charge III and Specification: rape of Madame Clementine Pele Brisson (CM ETO 3933, Ferguson, et al; CM ETO 7518, Bailey, et al; CM ETO 8451, Skipper); Additional Charge and Specification: assault with intent to commit murder (Maisonneuve) (CM ETO 78, Watts; CM ETO 3858, Jordan, et al). The crime of sodomy per os committed on the person of Madame Clementine Pele Brisson (Charge II, Specification 3) was also proved by substantial evidence. It was properly chargeable as an offense under the 93rd Article of War (CM ETO 339 Gage; CM ETO 3778, Darcy).

4. The charge sheet shows that accused is 32 years of age. He was inducted into the military service on 30 June 1942 to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were com-

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

6. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330 Federal Criminal Code (18 USCA 457, 567). The entire period of confinement may be served in a penitentiary (MCM, 1928, par.90, pp.80-81). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is proper (Cir.229, WD, 8 June 1944, Sec.IV, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

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

26 JAN 1945

CM ETO 5901

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Luxembourg, Luxembourg, 17 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class THEER TAYLOR (34606105), Company A, 8th Infantry	

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

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

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

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

Specification: In that Private First Class Theer Taylor, Company "A", 8th Infantry, having received a lawful command from Captain Gilbert P. Gammill, 8th Infantry, his superior officer, to report to his organization, Company "A", 8th Infantry, for duty, did near Bend, Germany, on or about 22 November 1944, willfully disobey the same.

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

Specification: In that * * * did, near Bend, Germany, on or about 22 November 1944, misbehave himself before the enemy, by refusing to report to his organization for duty, which organization had

been ordered foward by the commanding officer to engage the forces of the German army, which forces, the said command was then opposing.

He pleaded not guilty and, seven-eighths of the members of the court present when the vote was taken concurring in each finding of guilty, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 22 November 1944 accused's battalion was engaged in attacking enemy infantry positions in the Hurtgen Forest (R5). The attack "jumped off" 18 November and close contact with the enemy, established on the 19th, was continuous to the 22nd. The battalion advanced very slowly but each day took new enemy positions. Not until three or four days after the 22nd was it relieved and sent back into the reserve (R7).

On 22 November accused "came to the battalion aid station and said he couldn't take it any more" (R8). Captain Nick J. Accardo, battalion surgeon, had seen accused several days before, when accused was returned to him through medical channels as a combat exhaustion case (R9). On the 22nd, Accardo did not examine accused at any length; he did not think it necessary (R8). He told him he thought he could take it, ordered him to return to duty and sent a report to the battalion S-2 that accused "was to return to duty, as far as medical channels were concerned" (R8-9). Accused appeared to Accardo to be "physically * * * in perfect shape. He was scared" (R8). On cross examination, the battalion surgeon testified:

"It must be remembered that at that time we were * * * receiving a lot of casualties, and we are not allowed to spend too much time with a person who does not need so much care when there are men seriously wounded. When * * * a man comes in and calmly tells you he can't take it any more because of combat exaustion - when he can walk in and calmly tell you he is not physically fit, we know that he is fit for duty. When a man has combat exaustion he is not aware of it himself and does not have to tell you so" (R9).

Captain Gilbert P. Gammill, adjutant of accused's battalion, testified that, on 22 November 1944, accused

> "came to my attention in the battalion CP. He was sent there from the OP to be returned to his company. It is my job as adjutant to return men to the company when they come from the aid station * * * I asked him if he was ready to go back to his company and he said no, he couldn't stand it any longer. * * * I gave the soldier a direct order to return to Company A, 8th Infantry, and he said, 'I can't do it - I won't go'".

Gammill then placed accused under arrest and sent him to the service company for confinement (R5,6).

After due warning accused made a statement to the investigating officer to the effect that he had been a rifleman in Company A since 8 July 1944 (R10; Pros.Ex.A).

> "On the morning of 21 Nov. 1944 I was on the front line and I told my Squad Leader I could not stand it any longer and then left the Co. and caught a jeep and rode it to our Co. kitchen. I arrived at the kitchen in the afternoon and spent the night there. On the morning of 22 November 1944 I rode a Co. jeep to the 1st Bn. OP and without asking anyone I walked back to the aid station. I spoke to the Medical Officer and said to him, 'I can't stand it any longer up there.' The Medical Officer wrote something on a piece of paper and gave it to one of the aid men who took me to the 1st Bn OP and gave the note to Lt. Wittenberger who then said, 'You have refused to go back to your unit!' Lt Wittenberger then left for a few minutes and when he returned he called me and in the presence of a jeep dirver, instructed the driver to take me to Captain Gammill. I rode the jeep to the Bn. CP and there I saw Capt. Gammill who said, 'I am giving you a direct order to go back to your Co.' I replied, 'I can't stand it any longer!' Then Capt Gammill told Lt. Lozaw to take me to Service Co. and when we arrived there I was placed under guard".

The company was not attacking when accused left and he did not know whether they were planning to attack that morning. A few shells were

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falling on the company's left but "I don't think they were coming into the Co. area". He left "not exactely" because of the shelling but "because I had been there so long and had seen so many killed and wounded I just couldn't stand it any longer" (Pros.Ex.A).

4. No evidence was introduced by the defense and accused, after being advised of his rights, elected to remain silent (R11).

5. The evidence shows that accused, at the time and place alleged, willfully disobeyed the lawful order of his superior officer, set forth in the Specification, Charge I. It also shows that, in so doing, he refused to report to his organization for duty when his organization was definitely before the enemy. Clearly the record of trial sustains the findings of guilty of both charges and both specifications.

6. The charge sheet shows that accused is 20 years of age and that, with no prior service, he was inducted at Camp Croft, South Carolina, 11 February 1943.

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

_____ Judge Advocate

(SICK IN QUARTERS)
_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 8 MAY 1945

CM ETO 5942

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class ROBERT T. WILLIAMS (38278802) and Private CALVIN PERRY(38280457) both of 3512th Quartermaster Truck Company	Trial by GCM, convened at Paris, France, 18 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor; WILLIAMS - 10 years; PERRY - 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review. This is a companion case to CM ETO 5659, Maze.

2. Each accused was charged separately with absence without leave from his organization (Perry 22 days; Williams 21 days) in violation of 61st Article of War (Charges I and specifications). Accused each pleaded guilty to this offense and evidence offered by the prosecution fully sustained the plea.

3. Separate charges and specifications (Charges II and specifications) allege that each accused did

> "knowingly, wrongfully and unlawfully possess (a quantity of cigarettes, matches, smoking tobacco and chewing tobacco) property of the Army Exchange Service of the United States" (Underscoring supplied).

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Each accused pleaded guilty to the charge preferred against him. The evidence submitted by the prosecution proved the offenses alleged. The error of the Maze case is not present in the instant case inasmuch as the property was alleged and proved to be owned by the Army Exchange Service.

The Specification charged a military offense prejudicial to good order and military discipline under the 96th Article of War. The evidence fully sustains the allegations that accused knowingly, wrongfully and unlawfully possessed Army Exchange Service property and is legally sufficient to support the findings of guilty (CM 199672, Southern (1932), 4 B.R. 153).

With respect to the punishment which may be imposed upon conviction of such offense the comments of the Board of Review (sitting in Washington) in the Southern case are appropriate:

> "The Executive order limiting punishments does not list the offense involved herein nor any clearly analogous offense. However, the offense is closely related to those denounced in section 288 of the Federal Penal Code of 1910 (USC 18:467), that is, the buying, receiving or concealing, in the places described in section 272 of the Penal Code (USC 18:451), stolen property known to have been stolen. That statute authorizes confinement for three years for the acts thereby made criminal"(4 B.R. p.154,155).

4. The charge sheets show accused Perry is 23 years three months of age and was inducted 14 October 1942 at Camp Walters, Texas and that accused Williams is 36 years 11 months of age and was inducted 14 August 1942 at Camp Walters, Texas. The period of service for each accused is the duration of the war plus six months. No prior service as to either accused is shown.

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

6. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York was properly designated as the place of confinement of each accused (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2 20 JAN 1945

CM ETO 5952

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 29 December 1944.
Sergeant CARL R. GOLDSMITH (35630089), Company C, 121st Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Sergeant Carl R. Goldsmith, Company "C", One Hundred and Twenty First Infantry, did, at or near Hurtgen, Germany, on or about 23 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to Wit engage in combat with the enemy, and did remain absent in desertion until he was apprehended at or near Vielsalm, Belgium, on or about 1410 hours, 28 November 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the 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. The evidence for the prosecution shows that on or about 23 November 1944, accused's company was tactically deployed about 300 yards from the German line in the Hurtgen forest, subject to artillery, extremely heavy mortar and some small arms fire, and committed into action attacking the enemy (R5). Accused was a squad leader in the third platoon (R6). By stipulation the prosecution showed that if Private First Class Harry E. Boyd were present he would testify that when accused's company arrived in Hurtgen forest, accused was Boyd's squad leader. At about 1400 hours, 23 November, Boyd met accused going to the aid station where both were given medicine and sent to the drying tent to dry out and rest up. The drying tent was the last place Boyd saw accused. He joined his company the next day and had been in the platoon since then. He had not seen accused since 23 November (R11). Accused had no permission to leave his company and a search conducted by the first sergeant on 27 November, after his absence was reported, disclosed that he was not in the area (R4-5). A military police corporal apprehended accused at a rest camp at Vielsalm, Belgium, (about 50 miles from his unit), 28 November 1944 (R9-10). Accused stated he was with the 2nd Division. Asked in what organization, he said he was in a replacement pool about 20 miles away. After further questioning he admitted he was absent without leave from the 8th Division (R10). The morning report of accused's organization for 9 December 1944, shows his change of status from duty to AWOL as of 25 November, and the morning report for 17 December shows change from AWOL to confinement as of 28 November 1944 (R8-9; Exs.2,3). During his absence his unit was subjected to counter-attacks from the enemy and was shelled by extremely heavy mortar and artillery fire (R5,7). He was squad leader of the third platoon (R6).

4. After being advised of his rights as a witness, accused elected to make an unsworn statement wherein he gave as a reason for his absence the fact that he was sick on the morning of 23 November 1944. He went to the battalion aid station and upon returning the following morning on the supply truck, shelling

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started, he jumped off the truck to get cover and stayed there that night and the next morning there was no one there and he was unable to find his company. The defense introduced no additional evidence on behalf of accused (R11).

5. Competent substantial evidence establishes the fact that accused, a squad leader, absented himself without authority from his company, while it was engaged in combat with the enemy, and that he remained absent therefrom until apprehended on 28 November 1944 at Vielsalm, Belgium. The stipulation as to what Boyd would testify supports the court's finding that accused went absent without leave on the 23rd as alleged rather than on the 25th as shown on the morning report. 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" (AW 28, MCM, 1928, par.130a, p.142). Herein the evidence fully supports the inference that accused left his company, which was then engaged in combat, with the specific intent to avoid the hazardous duty alleged (CM ETO 5293, Killen and authorities cited therein). The court was justified in finding the accused guilty of desertion as charged.

6. The accused is 21 years of age. He was inducted, without prior military service, at Columbus, Ohio, on 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. The offense of desertion, in time of war, is punishable by death or such other punishment as a court-martial may direct (AW 58). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

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BOARD OF REVIEW NO. 2 20 JAN 1945

CM ETO 5953

U N I T E D S T A T E S	8TH INFANTRY DIVISION.
v.	Trial by GCM, convened at APO 8, United States Army, 29 December 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Staff Sergeant GILFORD MYERS (20466497), Company C, 121st Infantry.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Staff Sergeant Gilford Myers, Company "C", One Hundred and Twenty First Infantry, did, at or near Hurtgen, German, on or about 23 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at or near Vielsalm, Belgium, on or about 1410 hours, 28 November 1944.

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He pleaded not guilty and three-fourths of the members of the court present when the vote was taken concurring in each finding of guilty was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members 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. Accused, a staff sergeant in the United States Army, is alleged to have deserted the service by absenting himself without leave from his organization on or about 23 November 1944, with intent to avoid hazardous duty, and with having remained absent in desertion until his apprehension on 28 November 1944. The prosecution showed the accused's organization was at Lammersdorf, Germany, on or about 23 and 25 November 1944 within 250 to 300 yards of the enemy. On the night of 22 November and early morning of the 23rd, this command was committed and was attacking west into the Hurtgen Forest. It was receiving "heavy 88 fire and extremely heavy mortar fire", was being counter-attacked, and was under small arms fire (R5,6). At that time accused was serving as squad leader in the third platoon and was supposed to be with his men (R6). On 25 November accused's first sergeant was told that accused was not at his accustomed place of duty (R4). The next day the first sergeant sent a runner up to see if accused was present with his platoon. The runner reported that accused was not present. The first sergeant testified that he personally looked for accused on 27 November and could not find him, and also that accused had received no permission to be absent (R4,5). As a result accused was carried on his company morning report, prepared under this witness' supervision, as absent without leave as of 25 November (R6,8; Pros.Ex.1). Accused was apprehended by the military police at Vielsalm, Belgium, (some 50 miles to the rear of his unit) on 28 November 1944, at which time he said he had been absent without leave from his division for two or three days (R8,9).

4. The accused, advised of his rights, remained silent. He interposed no defense.

5. The absence of accused from his organization without proper leave between 25 and 28 November 1944 was proved by competent evidence which included the admission of accused himself. In addition, the prosecution showed conditions of active combat, including attack and counter-attack accompanied by heavy enemy fire, for the night of 22 and 23 November. The record is silent as to specific combat conditions

on 25 November, except for evidence that accused's command was still in the same general territory on 25 November and was separated from the enemy by only 250 to 300 yards. The language of the Specification: "on or about 23 November" was sufficiently broad to include the commission of this offense on 25 November (Dig. Op. JAG, sec.451(39) p. 325, CM 173620 (1926). It is the opinion of the Board of Review that the general situation on 25 November, the date on which accused was proved to have been absent from his command, was shown to have been fraught with potential hazard so as to support the finding of the court that "on or about 23 November" accused absented himself from his command to avoid hazardous duty:- combat with the enemy. The conduct thus proved by the prosectuion constituted a violation of Article of War 58, (CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt; CM ETO 5287, Pemberton).

6. Accused is 23 years of age. He enlisted at Lake Charles, Louisiana, 19 November 1940. His term of service 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 offense of desertion, in violation of Article of War 58, is punishable as a court-martial may direct, including death if committed in time of war. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (AW 42, Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

5 FEB 1945

CM ETO 5958

U N I T E D S T A T E S	6TH ARMORED DIVISION
v.	Trial by GCM, convened at Lixing Les St. Avold, Moselle, France, 13 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. United States Penitentiary, Lewisburg, Pennsylvania.
Privates WILLIAM O. PERRY (14082411) and ROBERT ALIEN (18043470), both of Company A, 603d Tank Destroyer Battalion (Special)	

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

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

2. Accused were charged separately and tried together with their consent.

Accused Perry was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that William O. Perry, Company A, 603d Tank Destroyer Battalion (SP), did, at Lorris, Loiret, France, on or about 16 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: active combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Nancy, Meurthe et Moselle, France, on or about 29 October 1944.

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CONFIDENTIAL

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Accused Allen was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert Allen, Company A, 603d Tank Destroyer Battalion (SP), did, at Lorris, Loiret, France, on or about 16 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: active combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Nancy, Meurthe et Moselle, France, on or about 29 October 1944.

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 the Charge and Specification preferred against him. Evidence was introduced of one previous conviction of accused Perry by special court-martial for disobedience of a noncommissioned officer and willfully destroying three window panes of the value of $2.25 in violation of Articles of War 65 and 96, respectively. No evidence of previous convictions of accused Allen was introduced. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

About 13 or 14 September 1944, Company A, 603d Tank Destroyer Battalion, arrived in the vicinity of Lorris, Department of Loiret, France, from Brest (R9,15,19). In the Lorris area, according to the testimony of First Lieutenant Clayton M. Taylor, platoon leader of the first platoon, "we were more or less reorganizing and waiting for the rest of the Division

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before moving to the Nancy area" (R9)) and the platoon's activities consisted principally of "maintenance and getting equipment together, cleaning clothes, cleaning up personnel, and so forth" (R9-10). Sergeant Ralph B. Utz, security sergeant of the first platoon, testified that both accused came to his security section "the day [15 September] before they left"; Allen was in the platoon prior to that time, was wounded and hospitalized and Perry was transferred from Headquarters Company (R12,15-16). Witness did not assign them any duties but members of his section were cleaning their equipment "to get ready in case we would move out. It was a rest period" (R15). According to the testimony of the first sergeant of Company A, the men were lying around the camp "waiting to move up front" (R11).

With respect to contemplated future action and knowledge thereof by accused, Taylor testified

> "We all knew at that time and [sic] as soon as the Battalion and the rest of the Division arrived we were going to move up into the Nancy area for future operations. * * * Every member knew that when we left Brest that our future operations would be towards Nancy with the Third Army".

The usual procedure in the company was that the platoon leader would give information as to contemplated action to noncommissioned officers who in turn would pass it on to members of their units. Taylor did not personally ask the men whether or not they knew where they were going

> "because we did not have too much information ourselves. We knew that after reorganizing that we were going to move into this general Nancy area with the Third Army but as far as to what we were going to do after hitting there, we did not know" (R9).

The first sergeant testified that the men "knew they were going up to the front and were just waiting for orders to move up to the front"; they did not know, however, the exact area to which they were to move, "but the company commander knew in what direction". He did not believe that the company commander informed him where he thought they were going (R11). Utz testified that neither on the 16th nor the 17th of September did he know where they were going to move. They were there "just on a rest period to reorganize" (R14). "They never told us any length of time that we would

be there" (R15), but "We knew that we would move some time or other", and he "presumed" that all members of his section knew this before accuseds' departure on the 16th. "We all knew that we wouldn't stay there all the time". They all knew they were "either in there for that /reorganizing to prepare for another attack/ or for a rest" (R14). Around 16 September, witness did not know what was going to happen next (R15). The platoon sergeant of accuseds' platoon testified that about that time he did not know even approximately in what direction or at what time they were going to move (R18-19). On the day after arrival in the area (14 or 15 September) instructions were passed down from the company commander through platoon leaders and noncommissioned officers to the men, including both accused, that they were to work on maintenance of vehicles and on trucks - "More or less re-equip for another drive" (R19).

Utz testified that when the unit moved into the Lorris area he was instructed that when men wished to go "any place" they were required to advise witness or request permission from the platoon sergeant, first sergeant or platoon leader (R13). Witness did not know the reason for this - "They were my orders" (R15). The first sergeant testified that passes were not issued at that time, but that men were absenting themselves from the area for the purpose of visiting friends in other companies "around there" (R11).

On the afternoon of 16 September Utz, according to his testimony, was in charge of a truck which took men to the shower point. When they returned to the area both accused were missing. Utz searched for them and reported their absence to the platoon sergeant (R12,17), who also searched for them without success and passed the report on to the platoon leader (R9) and first sergeant (R17). The latter with Utz made a further unsuccessful search of the area for accused and reported their absence to the company commander (R10). Neither Utz nor the platoon sergeant gave accused permission to leave (R13,17). Neither accused took his bedroll or musette bag with him (R13,14,17). The other equipment in possession of members of the unit consisted of guns, clips, belts, canteens and first aid packs (R14). They were also required to wear leggings and helmets and to carry arms (R19). The hair of each accused was brown when they left but during their absence was dyed and was black when they returned (R13,16,18). Utz testified that accused were never present with their section between 16 September and 29 October and that he never knew where they were or received any information concerning them during that period (R16).

The first instructions with respect to further movement of the unit were received about 1930 hours 19 September (R12,13-14,17,18). In accordance with usual procedure the noncommissioned officers and gun commanders were called together and instructed to "load up" in order to move at midnight, at which time the battalion did in fact leave the area (R13-14,18). According to Utz' testimony, when they moved out they knew they were going into battle, but he was not instructed as to their destination (R13).

4. After accuseds' rights were explained to them, defense counsel announced their election that accused Perry should testify on behalf of both accused and that accused Allen should remain silent (R21). Perry testified that the reasnn they left the company area on 16 September was as follows:

> "Allen and I were confined in the Replacement Depot Hospital and we wanted to have a little fun. We had some money and we went into Montargis /ten or 11 miles away (R27)/ to have a good time" (R22).

They took helmet liners and leggings but not a razor. During the time they were in Montargis they were drinking but always conscious that they were absent without leave. They left Montargis the 18th, spent the night with girls, returned to the bivouac area the morning of the 19th and discovered that their battalion had departed. They thereupon returned to Montargis where they remained two days "trying to locate ourselves and see what to do. We figured if we could catch the Unit and rejoin it it would be so much better for us".

Witness recounted their efforts to rejoin their unit, during the course of which they made numerous inquiries as to its location. They went to Sens where they stayed for nine days, Fontainebleau (Perry only (R30)), Troyes (three days) (R22,27), Chaumont (three days), St. Dizier, Reims, Chalons, Dijon, Troyes again, and Chaumont again (three days). "About this time we were getting pretty worried as the time was running up". Accordingly they proceeded to Reims where a lieutenant who arranged to take them to their unit failed to appear at the agreed time. Thence they journeyed to Verdun (two or three days) and Nancy where they arrived about 1230 or 1300 (29 October) and surrendered to the military police who turned them over to their (accuseds') battalion (R23). They intended to join their unit (R24). They did not tell the military police in Montargis or Troyes that they were absent without leave because "we wanted to rejoin the unit on our own accord" and "just had it in our minds that we could catch the outfit" (R26,27).

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The Articles of War were last read to accused Perry before he left the United States and he did not know the punishment for absence without leave (R26). En route they obtained no evidence from anyone to support their story (R28). When they first left they had about 50 or 60 dollars in francs and when they surrendered they had about 30 francs. They occasionally visited cafes and visited girls during the evenings (R29). They did not visit Paris (R30).

Without objection by the prosecution, the defense introduced in evidence a letter dated 5 October 1944, from Headquarters 603rd Tank Destroyer Battalion (SP) signed by the adjutant for the commanding officer, to The Adjutant General, subject: "Action Against Enemy, Reports After", reading in part as follows (R31; Ex.1):

> "12 - 14 September. Unit moved to Lorris, France (15 miles E of Orleans) via Kerroual and La Fleche. No contact with enemy.
>
> 14 September. Company 'A' reverted to Battalion Control at Lorris.
>
> 15 - 18 September. Remained in vicinity at Lorris. No contact with enemy.
>
> 19 September. Entire unit moved to Colombey-les-Belles (10 miles NE of Neufchateau.) No contact with the enemy.
>
> 20 - 21 September. Remained in vicinity of Colomby. No contact with the enemy".

5. The question presented is whether the evidence in the record is legally sufficient to establish each of the four elements of the offense charged against each accused, namely:

(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
(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).

(a) That accused absented themselves without authority from their organization at the time and place alleged in the specifications and that their absence continued until terminated at the time and place and in the manner therein alleged was amply proved by the testimony of the sergeant in charge of their section, their platoon sergeant, the first sergeant of Company A and the testimony of accused Perry on behalf of both accused. The fact that Perry testified at his own request made him a competent witness for and against both himself and accused Allen, even apart from defense counsel's statement (R21) to the effect that both accused elected to have Perry testify on their behalf (CM ETO 2297, Johnson and Loper, and authorities therein cited).

(b) Several days before accused absented themselves, their tank destroyer unit, in the course of its movement towards the enemy, arrived from Brest at the Lorris area where it reorganized, repaired and cleaned its equipment and awaited the arrival of the remainder of the division. Although this was a rest period, the platoon leader of accuseds' platoon testified that their "future operations would be towards Nancy with the Third Army", the first sergeant of accuseds' company testified that they were awaiting orders to move up to the front, and their section sergeant testified that "another drive" was contemplated. The battalion did in fact leave the area on 19 September, three days after accused left, and moved to Colombey-les-Belles, about 20 miles southwest of Nancy. It may reasonably be inferred from this evidence that the unit was under anticipated orders involving active combat duty against the enemy.

(c) There was testimony of a general character that every member of the unit knew that "future operations would be towards Nancy with the Third Army" and that they "were going to the front" at some time in the future. There was not the slightest evidence, however, that any officer or enlisted man in the unit knew when or exactly where the unit was to move. In fact, the platoon leader testified "we did not have too much information ourselves" and the first sergeant testified he did not know where the unit was going to move. The section sergeant's testimony is eloquent on the lack of knowledge of the enlisted personnel: On 16 and 17 September he did not know when the move was coming; the men were not told how long they would remain in the area, but knew that they would move "some time or other"; on 16 September he did not know what was going to happen next. The platoon sergeant was ignorant as to even the approximate time or direction of the future movement. During the rest period men were permitted to absent themselves from the area for the purpose of visiting friends in neighboring units.

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The foregoing evidence demonstrates that the prosecution failed in the proof of the vital element of its case that notice of the anticipated orders involving the hazardous duty of active combat with the enemy was brought home to accused. It also failed to prove that such duty was imminent at the time accused departed without authority. Even proof that their unit had been notified of imminent prospective movement does not suffice as to this element in the absence of proof that accused were actually notified thereof (CM ETO 455, Nigg; CM ETO 1921, King, and authorities therein cited); but the instant case also lacks the element of imminence. It is clear that proof or inference of accuseds' knowledge that their unit would eventually move forward in hazardous operations is insufficient (Ibid.).

(d) On the question of accuseds' intent, the following language of the Board of Review in CM ETO 2481, Newton, is significant:

> "The record does not indicate any preparation for forward movements which put the accused on notice that it was imminent and the time of such movements remained indefinite and uncertain. The relevancy of these facts cannot be ignored in searching for accused's intent".

The lack of proof that the accused knew when his unit would leave, even though he knew that he was absent without authority, was one of the elements which led the Board both in CM ETO 564, Neville, and in CM ETO 2432, Durie, to conclude that there was a failure of proof that the accused in those cases intended to avoid hazardous duty (See also CM ETO 2481, Newton). As the Board said in CM ETO 1921, King,

> "the record lacks competent substantial evidence that accused when he absented himself had reason to believe his organization was about to engage in hazardous duty and could therefore have intended to avoid such duty" (Underscoring supplied).

The Board particularly notes its recent holdings in "battle line" and similar cases: CM ETO 5565, Fendorak; CM ETO 5555 Slovik; CM ETO 5393, Leach; CM ETO 5293, Killen; CM ETO 5291, Piantedosi; CM ETO 5287, Pemberton; CM ETO 5117, DeFrank; CM ETO 4988, Fulton; CM ETO 4987, Brucker;

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CM ETO 4743, Gotschall; CM ETO 4490, Brothers; CM ETO 4165, Fecica; CM ETO 3641, Roth; CM ETO 3473, Ayllon; and CM ETO 3380, Silberschmidt. (See also earlier cases cited in CM ETO 2481, Newton, p.9). In those cases the units of the accused involved were actually engaged in combat or in highly important tactical missions either at or shortly after the commencement of his unauthorized absence. The Board of Review is unwilling to hold that there is enough similarity between the facts of such cases and those of the present case to warrant the conclusion that the former are here controlling. There is no evidence as to how long after accuseds' departure, Company A came into contact with the enemy. Evidence that their unit landed on the continent of Europe, proceeded inland some 400 miles, and was expected at some indefinite future time to move forward to a place where it would eventually engage in tactical operations against the enemy is not, in the Board's opinion, per se probative of an intent on their part, concurrent with their absenting themselves without authority, to avoid the hazardous duty of active combat duty against the enemy.

As indicated, however, the evidence clearly establishes accuseds' absence without leave for the period and under the circumstances alleged, but without the alleged intent to avoid hazardous duty.

The staff judge advocate in his review states:

> "It is assumed * * * that at the * * * beginning of the period of absence without leave of these accused, they may not have entertained any intent other than to seek a period of unauthorized recreation for a few days and then to rejoin the unit. * * *. In my opinion the evidence is sufficient to prove beyond a reasonable doubt that, during the course of the period of absence, these accused conceived, entertained and acted upon the positive mental intent to continue the period of their absence without leave for the specific purpose of avoiding combat duty" (p.4,5).

Article of War 58 provides punishment for desertion generally whereas Article of War 28 merely provides in effect that when the offender does certain acts he will be deemed, a deserter (CM ETO 3118, Prophet). The last paragraph of the latter article provides:

> "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" (Underscoring supplied).

The Manual for Courts-Martial, 1921, recognizing the possibility that an absentee might for the first time entertain the intent not to return to the military service after the inception of his unauthorized absence, provided that such a state of facts would constitute desertion (MCM, 1921, par.409, p.344), but did not apply the principle to the quoted portion of Article of War 28, whose provisions were unambiguous to the effect that the intent to avoid hazardous duty or shirk important service must concur in point of time with the quitting of accused's organization or place of duty. Nevertheless, the following provision appears in Manual for Courts-Martial, 1928, as one of the elements of proof of desertion:

> "that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged" (MCM, 1928, par. 130a, p.143) (Underscoring supplied).

To the extent that this provision attempts to extend or amplify the unambiguous provisions of Article of War 28 it is unauthorized administrative legislation. It is hardly necessary to rely upon the principle of strict construction of penal statutes to reach this conclusion. Well established principles governing the elements of the offense of desertion under Article of War 28 indicate that the requisite intent must be entertained by the absentee at the time he quits his organization or place of duty in order to be guilty of a violation of that Article (MCM, 1921, par.409, pp.343-345; CM 223300, Manashian, 13 BR 363; CM 227459, Wicklund, 15 BR 299; CM 230826, McGrath, 18 BR 53; CM 231163, Sinclair, 18 BR 153; CM ETO 2368, Lybrand; and authorities cited in those cases). It is noted further that the Specification alleges the intent to avoid hazardous duty as concurring with accuseds' absenting themselves without leave from their organization.

6. Accuseds' unauthorized absence continued for almost a month and a half, during which time they failed to surrender to military police, dyed their hair black, travelled extensively for the alleged purpose of finding their unit, visited cafes and enjoyed the company of young women. Such evidence would have supported the inference that, when they absented themselves without authority or at some time during their unauthorized absence,

they entertained the specific intent not to return to the military service. If the Specification had charged desertion generally without alleging any specific intent whatever, following the model specification appearing on page 238, MCM, 1928, App.4, the evidence would have supported the findings of guilty, the prosecution being free, in the absence of a direct attack upon the Specification because of its vagueness or indefiniteness, to prove absence without leave accompanied by any or all of the specific intents (1) not to return, (2) to avoid hazardous duty or (3) to shirk important service (CM 245568 (1943), Clancy, Bull.JAG, April 1944, Vol.III, No. 4, sec.416(14), p.142, 29 B.R. 215; CM ETO 5117, DeFrank). The evidence in the instant case shows the existence of the first intent but, as above shown, not of the other two. Although desertion may properly be charged without an allegation of specific intent, nevertheless when a certain specific intent is alleged it must be proved (CM 224765, Butler, Bull. JAG, Nov. 1942, Vol.I, No.6, sec.385, pp.322-323, 14 B.R. 179; CM 231163, Sinclair, Bull. JAG, April 1943, Vol.II, No.4, sec. 385, pp.139-140, 18 B.R. 153). The following language from the Butler case is peculiarly applicable here:

> "When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '* * * in order to avoid hazardous duty * * *', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved".

The necessity for holding the record of trial herein legally insufficient to support the findings of guilty of desertion would have been avoided had the Specification charged desertion generally without alleging any specific intent. Where the expected evidence indicates the likelihood that accused entertained more than one of the mentioned intents or raises doubt as to which of them he entertained, the specification should allege desertion generally without limitation to only one specific intent, particularly when the absence is prolonged.

7. (a) The record shows (R3) that the trial took place only three days after the charges were served on accused. Defense counsel, after consulting both accused, announced that

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they consented to trial at that time. In the absence of indication of prejudice to any of accuseds' substantial rights, the irregularity may be regarded as harmless (CM ETO 4443, Dick; and cases cited in CM ETO 4564, Woods, Jr.).

(b) At the conclusion of Perry's testimony on behalf of both accused, the law member advised Allen that he could still make a sworn statement in his behalf. The following colloquy ensued:

> "Defense (After consulting with Private Allen): Private Allen elects to make a sworn statement in one connection that has not been brought out in Perry's statement.
>
> Law Member: If Private Allen takes the witness stand and makes a sworn statement he can be questioned on anything that is in the Specification.
>
> Defense (after consulting with Private Allen): The accused elects to remain silent" (R30).

The Manual for Courts-Martial, 1928, provides as follows:

> "An accused person taking the stand as a witness becomes subject to cross-examination like any other witness. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination" (par.121b, p.127).

The foregoing language is unambiguous and the ruling of the law member in accordance therewith was proper.

8. The charge sheets show that accused Perry is 22 years nine months of age and enlisted 2 July 1942, at Camp Blanding, Florida. Accused Allen is 21 years ten months of

age and enlisted 25 July 1941, at Houston, Texas, to serve for three years. Allen's service period is governed by the Service Extension Act of 1941. Neither accused had prior service.

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

10. Penitentiary confinement is not authorized by Article of War 42 for the offense of absence without leave (CM ETO 2432, Durie; CM ETO 2481, Newton; CM ETO 3234, Gray). Confinement should accordingly be in a place other than a penitentiary, Federal correctional institution or reformatory (Ibid.).

_____ Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 FEB 1945 TO: Commanding General, 6th Armored Division, APO 256, U.S. Army.

1. In the case of Privates WILLIAM O. PERRY (14082411) and ROBERT ALLEN (18043470), both of Company A, 603rd Tank Destroyer Battalion (Special), attention is invited to the foregoing holding by the Board of Review that as to each accused the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that he did at the time and place alleged absent himself without leave from his organization and remained absent without leave until he surrendered himself at the time and place alleged, in violation of Article of War 61, 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. For the reasons stated in the holding, the designated place of confinement of each accused should be changed to a place other than a penitentiary, Federal correctional institution or reformatory.

3. In view of the reduction of the grade of the offense of each accused, I believe there should be a substantial reduction in the period of confinement. The average period of confinement imposed for absence from actual combat on conviction under the 75th or 58-28th Article of War is considerably less. Accuseds' offense is less serious. There is evidence of only one previous conviction of accused Perry and none as to accused Allen. I do not believe that these accused should be separated from military service and freed from the hazards and dangers of combat by incarceration until all possibilities of salvaging their value as soldiers have been exhaused. The government should preserve its right to use their services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend in the case of each accused the designation of an appropriate disciplinary training center as the place of confinement for the reduced period with suspension of the execution of the dishonorable discharge until the soldiers' releases from confinement. In the event that you are in accord with this recommendation, supplemental actions should be forwarded to this office for attachment to the record of trial.

4. Attention is invited to paragraph 6 of the Board's holding, in which I concur. In cases where the expected evidence indicates absence without leave accompanied by several specific intents or raises doubt as to which specific intent was entertained by the absentee, the specification should allege desertion generally without being limited to only one specific intent, particularly when

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the absence is prolonged as in this case. Absence without leave, always the most common military offense, still exists even in a combat area. In order to convict of desertion, the specific intent required must be proved. It is not enough to prove only that accused was absent and that his organization participated in battle while he was gone, although in this case the latter fact was not shown by the evidence.

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 5958. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5958).

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. 2

30 JAN 1945

CM ETO 5966

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private GEORGE WHIDBEE (33053125), Company C, 95th Engineer General Service Regiment	Trial by GCM, convened at Vottem, Belgium, 29 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SIEEPER, 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 George Whidbee, attached-unassigned, 447th Replacement Company, 85th Replacement Battalion, then Private, Company C, 95th Engineer General Service Regiment, did, at or near Builth Wells, Wales, on or about 13 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Cardiff, Wales, on or about 29 August 1944.

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

Specification: In that * * * having received a lawful command from First Lieutenant, then Second Lieutenant, Charles T. Mitchell, his

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superior officer, to pick up his barracks bag, did, at or near Builth Wells, Wales, on or about 7 June 1944, willfully disobey the same.

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

Specification: In that * * * having been placed in confinement in the Regimental Stockade of 95th Engineer General Service Regiment, on or about 7 June 1944, did, at or near Builth Wells, Wales, on or about 13 June 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and, all the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for a period less than one day and for unlawfully assisting a soldier to escape from arrest by the military police, in violation of Articles of War 61 and 96 respectively. 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 the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 6 June 1944, accused was a member of Company C, 95th Engineer General Service Regiment, which organization was then stationed near Builth Wells, Wales. On this date, accused, together with a group of four or five other soldiers, appeared before their commanding officer, Colonel Edward J. Finnell, who read and explained to them the provisions and meaning of Article of War 28. They were advised that their regiment was alerted for movement to the continent and that anyone absenting himself without authority would be considered a deserter inasmuch as "shirking hazardous duty meant desertion" under the 28th Article of War (R6,9,10,11). Following this, accused's organization moved to "the concentration area" on 21 June 1944 and proceeded to "the marshalling area" on 3 July 1944. Accused was not present with his unit during these movements but was absent without authority from 13 June until 29 August 1944, when he was returned to military control by apprehension at Cardiff, Wales (R9,10,12,14; Pros.Ex.B,D). On 7 June 1944, while being taken to the guardhouse by Second Lieutenant Charles T. Mitchell, the regimental officer of the day, accused dropped his barracks bag, and was told to pick it up; after waiting for a few

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minutes, the lieutenant gave accused a direct order "to pick the bag up", which accused refused to do. In answer to the order he said, "I'll be damned if I'll carry this bag any farther" (R6). Another soldier carried the bag to the supply room while the lieutenant proceeded with accused to the regimental stockade where he was placed in confinement (R6,7). On 13 June 1944 accused escaped from confinement before he was set at liberty by proper authority (R8,9,14;Pros.Ex.D).

5. After his rights as a witness were explained by the court accused elected to remain silent and no evidence was introduced on his behalf.

6. Concerning Charge I, the evidence shows that on 13 June 1944 accused absented himself without authority from his organization, which was then located at Builth Wells, Wales, and remained absent therefrom until apprehended at Cardiff, Wales, on 29 August 1944. It is thus apparent that he remained absent for a period of 77 days. Although accused was not charged with an intent to avoid hazardous duty or to shirk important service, the commanding officer of accused's regiment had read and explained to him the provisions of Article of War 28 immediately prior to his absence. He was also advised that his unit was alerted for overseas movement and warned that anyone absenting himself during this period would be considered a deserter, within the meaning of the article above indicated. His absence was prolonged and terminated by apprehension. In view of the foregoing, the Board of Review is of the opinion that the court was fully justified in inferring that accused intended permanently to absent himself from the military service as charged (CM ETO 1249, Marchetti; CM ETO 1629, O'Donnell; CM ETO 3963, Nelson).

Concerning Charge II, the evidence shows that accused was given a direct order by his superior officer to pick up his barracks bag and that he refused to obey the same. Such order related to a military duty, as the accused was being taken to the guardhouse, and was one which the officer was authorized to give under the circumstances. The fact that accused used profane language and stated "I'll be damned if I'll carry this bag any farther", justified the findings of the court that the refusal to obey constituted a willful and intentional defiance of authority as contemplated by Article of War 64 (MCM, 1928, par.134b, p.148).

Competent evidence further establishes that the accused had been duly placed in confinement and that he escaped from such restraint before he was set at liberty by proper authority, as alleged in Charge III and its Specification.

6. The charge sheet shows that accused is 22 years of age and that he enlisted in the army, without prior service, 15 May 1941.

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(80)

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the 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. Confinement in a penitentiary is authorized for desertion in time of war (AW 42), and willful disobedience of the lawful command of a superior officer is punishable as a court-martial may direct (AW 64). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42, Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

26 JAN 1945

CM ETO 5983

U N I T E D S T A T E S	) 4TH INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Luxembourg,
	) Luxembourg, 16 December 1944, Sentence
Staff Sergeant PETER P. MYHAND,	) as to each accused: Dishonorable dis-
JR., (19144301), Privates First	) charge, total forfeitures, and confine-
Class FRANK E. BIGDEN (36776216),	) ment at hard labor for life. Eastern
and ABE EDELSTEIN (32901720), all	) Branch, United States Disciplinary
of Company L, 8th Infantry.	) Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Staff Sergeant Peter P. Myhand, Jr., Company L, 8th Infantry, did, near Hunningen, Belgium, on or about 22 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: an engagement with the enemy, and did remain absent in desertion until he surrendered himself near Paris, France, on or about 6 November 1944.

(Accused Privates First Class Bigden and Edelstein were tried upon identical Charges and Specifications)

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Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the respective Charge and Specification against him. No evidence was introduced of previous convictions of any of the accused. 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, although characterizing the sentences as inadequate, approved each sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution showed that the accused Myhand, Bigden, and Edelstein were respectively squad leader, Browning Automatic Rifleman and "rifleman and bazooka man" of the first squad, first platoon, Company L, 8th Infantry (R7,9,11). On 21 October 1944 the company was "relieved from the line" and came back to the town of Hunningen, Belgium, which was at that time "more or less of a rest area" (R8,9,10). This movement was in accordance with a previously established regimental policy

> "to keep one battalion on the line four days and bring them back for two days, so that each battalion in the regiment actually had front line duty for four days straight and were back for two days rest" (R10).

The front line was at that time approximately three or three and a half miles from the town of Hunningen and the position which the first platoon occupied when on the line was separated from the enemy line by a distance of approximately eight or nine hundred yards. The general tactical situation at the front at the time was "one which you might call 'static'".

> "We were in a defensive position and maintained that position in holes with the exception of patrols which we sent out from time to time".

However, enemy activity was visible from the position occupied by the first platoon when on the line; the enemy was engaging in patrol activity and, during the three week period from about 1 October 1944 to 22 October 1944, the company had suffered approximately twenty casualties, chiefly from artillery and mortar fire (R8,10).

First Lieutenant Wayne A. Forcade, platoon leader of the first platoon, testified that when the platoon was relieved from the line on 21 October it expected to remain in Hunningen for at least two days. He further testified that this was common knowledge within

the platoon since he personally had informed each of his men of the regimental policy whereby "we would be back from the line for two days and back on the line for four". Further, the platoon had been in and out of the line in accordance with this policy at least once prior to the date of the offenses here alleged (R9,10,12). However, at approximately 2000 hours on 21 October Lieutenant Forcade received an alert order and accordingly, on that same night, he notified his platoon sergeant and his platoon guide "to tell the boys we would have to move sometime the following day". In so doing, Lieutenant Forcade followed the method usually employed by him to disseminate information to his men and which normally was sufficient to convey to his men all necessary information. At 1330 hours on 22 October he called his squad leaders together to give them further information concerning the move. Accused Myhand, squad leader of the first squad, did not report to receive these further instructions. Lieutenant Forcade then caused a search to be made. This search failed to reveal the presence not only of accused Myhand but also of accused Bigden and Edelstein. Permission to be absent had not been granted to any of them. Later in the day on 22 October 1944 the platoon returned to a reserve position just in back of the front line. The accused were not with the platoon when it returned to this position (R11,12).

The remainder of the company did not move to the front line until 23 October 1944. At about 1800 hours on 22 October 1944, the first sergeant of the company, who had remained in Hunningen, made a thorough search of the building in which Myhand and the members of his squad were billeted as well as other buildings in the area, the aid station and all the downtown streets. However, he was unable to find any of accused. Search was also made on the following morning with the same result. Subsequent searches proved equally fruitless. None of the accused ever returned to the organization (R14,15).

The prosecution also called as a witness Private Bethel Gann, first squad, first platoon, Company L, 8th Infantry (R15,16). He testified concerning the move back to Hunningen on or about 21 October 1944 and corroborated Lieutenant Forcade's testimony to the effect that the unit had had at least one previous rest period in accordance with the policy whereby

> "We would go up and stay two or three days and then come back and stay a day and a half or two days, and go back up" (R16).

He further stated that at the noon meal on or about 22 October 1944, he received orders from his squad leader, accused Myhand, to prepare his equipment for return to the line. Myhand did not appear to be drunk or in any way abnormal at this time. On the same day, the platoon moved up

"but we didn't go on the front line—we stayed in a sort of rest area for the night and the next day we moved right up on the front line".

None of the accused were present when the platoon moved up on 22 October. His squad had not suffered any casualties when in the front lines near Hunningen prior to 21 October and witness himself had not seen the enemy in that vicinity. However, he knew they were there because "they did throw a mortar shell over once in a while" (R16,17,18,19).

Duly authenticated extract copies of the company morning reports contained entries to the effect that each accused absented himself without leave on 22 October 1944, were admitted into evidence without objection by the defense (R7,8; Pros.Ex.A, B and C). It was stipulated that each accused surrendered himself to the military authorities at Paris, France, on or about 6 November 1944 (R20).

4. The court explained to each accused his rights as a witness and each elected to remain silent. No evidence was introduced on behalf of the defense.

5. Article of War 58 provides that any person subject to military law who deserts the service of the United States in time of war shall suffer death or such other punishment as a court-martial may direct and Article of War 28 provides that any person subject to military law who quits his organization or place of duty with intent to avoid hazardous duty shall be deemed a deserter. In the instant case it was shown both by competent testimony and by the introduction of extract copies of the company morning report that each accused absented himself without leave from his organization at the time and place alleged. This having been shown, it remains to consider whether the record contains substantial evidence of each of the three remaining elements of the offense charged, namely:

"(1) That accused's unit 'was under orders or anticipated orders involving * * * hazardous duty' (MCM, 1921, par.409, p.344);

(2) that notice of such orders and of the imminent hazardous duty was actually brought home to the accused; and

(3) that at the time he absented himself from his command he entertained the specific intent to avoid hazardous duty" (CM ETO 5555, Slovik; CM ETO 2368, Lybrand, and authorities therein cited).

(1) In the instant case it was shown that the unit of

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which accused were members had been fighting near Hunningen, Belgium, for approximately three weeks. It was the regimental policy to rotate the units so that each battalion spent four days in the line followed by two days in the rest area after which it again returned to the line. Also, although the tactical situation at the front was static at the time and the platoon was occupying a defensive position, some twenty casualties had been suffered in the company from mortar and artillery fire during the preceeding three weeks and it is thus evident that the orders or anticipated orders to return to the line involved hazardous duty.

(2) Lieutenant Forcade also testified that on the night of 21 October he directed his platoon sergeant and platoon guide to inform the men of the impending movement on 22 October. There is testimony that on 22 October accused Myhand directed one of the members of his squad to prepare his equipment for return to the line and it may therefore be inferred that Myhand knew of the impending move. Lieutenant Forcade also testified that, in directing the platoon sergeant and platoon guide to inform the men of the order, he followed the method usually employed by him to get information to his platoon and which was normally sufficient to accomplish the purpose intended. This being true, and in view of the smallness of the unit, the physical proximity of the members thereof to one another, and the fact that at least two of the members of the squad (Myhand and Gann) knew of the order, the court might well have been justified in inferring that Bigden and Edelstein also had knowledge thereof. There was thus sufficient evidence in the record to show not only that the accuseds' unit was under orders or anticipated orders involving hazardous duty but also to show that notice thereof and of the imminent hazardous duty was actually brought home to the accused.

(3) There is no direct evidence in the record showing the final element of the offense charged, i.e., that at the time the accused absented themselves from their unit they entertained the specific intent to avoid hazardous duty. However, since they absented themselves under the above circumstances, the court was justified in inferring that their departure was prompted by a desire to avoid the hazards attendant upon their imminent return to the front line (Cf: CM ETO 5293, Killen). Accordingly, the Board of Review is of the opinion that there was sufficient evidence in the record to prove each element of the offense charged and that the record of trial is legally sufficient to support the findings of guilty.

6. The charge sheets show that accused Myhand is 19 years of age and enlisted at Spokane, Washington, on 4 February 1943, that accused Bigden is 23 years of age and was inducted at Chicago, Illinois,

on 29 November 1943, and that accused Edelstein is 28 years of age and was inducted at New York, New York, on 3 May 1943. No prior service by any of the accused is shown.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 committed in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

Benjamin R. Sleeper Judge Advocate

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

BOARD OF REVIEW NO. 1

2 APR 1945

CM ETO 6015

U N I T E D S T A T E S v. Private ALBERT C. McDOWELL (37527495), Attached 14th Port Staging Area	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Headquarters 14th Port, APO 229, U.S. Army, 5 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. The evidence in the record of trial would have justified a conviction of murder, in violation of Article of War 92 (CM ETO 4042, Rosinski; CM ETO 3937, Bigrow; CM ETO 3362, Shackleford). It is therefore legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (CM ETO 4042, Rosinski and authorities therein cited; CM NATO 581, Grant). There is substantial evidence in the record of trial to support the findings of guilty of an attempt to commit larceny of an Army vehicle (CM 227676, Kline, 15 B.R. 325 (1942)).

3. The maximum punishment imposable for voluntary manslaughter is dishonorable discharge, total forfeitures and confinement at hard labor for ten years (MCM, 1928, par.104c, p.99). Attempt to commit larceny of Government property is not listed in the Table of maximum punishments. An attempt which is not separately listed in the Table is subject only to the same limit on punishment as is the offense attempted if the latter is listed(MCM, 1928, par.104c, p.96; Op. JAG filed with CM 230666 (1943), II Bull. JAG 61; Cf: CM 212056, Smith,

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(88)

10 B.R. 199,209 (1939)). Confinement at hard labor for five years is therefore authorized upon conviction of attempt to commit larceny of Government property.

4. The charge sheet shows that accused is 20 years eight months of age and was inducted 28 May 1943 at Fort Leavenworth, Kansas, 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. As confinement in a United States penitentiary is authorized upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454), the entire sentence/confinement (15 years) may be executed in such penitentiary (AW 42; MCM, 1928, par.90, p.80-81). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

B. Franklin Rite Judge Advocate

Wm. T. Sumner 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

1 MAR 1945

CM ETO 6039

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U.S. Army, 1 January 1945.
Private CLAYTON BROWN (35064015), Company L, 319th Infantry	)	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for ten years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Clayton Brown, Company L, 319th Infantry Regiment, did, in the vicinity of Serrieres, France, on or about 9 October 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he

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surrendered himself in the vicinity of Chicourt, France, on or about 14 November 1944.

He pleaded guilty to the Specification, except the words, "did, in the vicinity of Serrieres, France, on or about 9 October 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself in the vicinity of Chicourt, France, on or about 14 November 1944", substituting therefor the words "did, without proper leave absent himself from his organization and place of duty in the vicinity of Serrieres, France, from about 10 October 1944 to about 4 November 1944", to the excepted words not guilty, to the substituted words guilty, and to the Charge not guilty but guilty of violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring, he was found guilty of the Specification, except the words "9 October 1944", substituting therefor the words "10 October 1944", and except the words "14 November 1944", substituting therefor the words "4 November 1944", of the excepted words not guilty, of the substituted words guilty, and of the Charge guilty. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 13, Headquarters 80th Infantry Division, APO 80, U.S. Army, 8 January 1945.

3. Evidence for the prosecution may be summarized as follows:

On the morning of 8 October 1944 accused was a member of the support squad of the support platoon of Company L, 319th Infantry (R6,7), which was engaged in a regimental mission to secure Mount Toulon, France. After an artillery barrage, the platoon advanced to a point two-thirds of the way up the hill, where it encountered a considerable number (R6,9),

of the enemy, some of whom they killed and others they captured. Orders were received from the front and passed down to the squads to remove accumulated prisoners to the rear (R7,9).

Accused, who was fighting with his unit at this time (R10), and a Private Kirk were detailed from the support squad by to escort to the rear prisoners captured/their platoon (R7,9,11). Accordingly, they left for the rear with four prisoners (R7,9). Private Ernest B. Martin, of another platoon in accused's company, also started back with prisoners and met accused and Kirk en route (R10,12). The three guards escorted the prisoners to the battalion prisoner of war station, which had moved further to the rear, where they left them (R10). As they were unable to obtain a ride back to their organization they remained at a nearby water point on the night of 8-9 October. On the morning of 9 October they discovered that the regiment had moved to Serrieres, France. They walked there. When they arrived there in the evening, they learned the regiment had moved to another town. After spending the night with the 905th Field Artillery, they obtained a ride to regimental headquarters on the morning of 10 October. There the adjutant referred Martin to the message center for transportation to his battalion and Martin informed accused and Kirk of the possibility of a ride. After the three waited for a time, Kirk "found out where the Company was located" and announced to Martin that he and accused "were going to go back to the company that way" (R11).

Martin did not see accused thereafter. After 8 October accused's platoon leader did not see him again until about a month later, and his squad leader did not see him again until 14 November, at Chicourt, France (R7,9).

Upon his return to the company, accused was immediately placed on active combat duty in the line and fought with his squad until shortly before the trial (R8-9,10). The platoon commander testified that accused "was a soldier just like the rest of the boys" and did his share in combat both before and after his absence (R8).

Morning reports of Company L, the latest of which is dated 22 November 1944, showing accused's absence without leave for the period alleged were received in evidence without objection by the defense (R7-8; Pros. Exs.A,B,C).

4. The defense introduced in evidence the morning report of Company L for 4 November 1944 purporting to show accused "From missing (Non-Bat) to absent in hands of military authorities" on that date.

5. After an explanation of his rights, accused made the following unsworn statement through his counsel:

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"At this time the Defense would like to point out that the evidence as brought out is to the effect that the accused was absent without leave after taking the prisoners back to the PW Inclosure on or about the 10th of October 1944 until the 4th of November when he was in the custody of military authorities. Since that time he has been back on the line and doing his share and did not absent himself to avoid hazardous duty because since that time he has been back doing his share of hazardous duty" (R12).

6. The court found accused guilty of desertion on or about 10 October 1944 by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid the hazardous duty of participation in operations against an enemy, and remaining absent in desertion until he surrendered himself on or about 4 November 1944. Accused's pleas, the meaning and effect of which were explained to him by the law member, admitted that he absented himself without proper authority from his organization and place of duty from about 10 October to 4 November. They are corroborated by the morning report introduced by the defense and by the above quoted unsworn statement.

Absence without leave having been established, the only question for determination is whether the record contains substantial evidence of the other essential elements of the offense charged. Just prior to the time accused left his company, on the authorized mission of removing prisoners to the rear and two days before his unauthorized absence commenced, he was participating with his unit in an attack upon an enemy position.

There is no evidence in the record, that at the time accused left the regimental headquarters on 10 October, he intended to avoid hazardous duty (Cf: CM ETO 5958, Perry and Allen). There is no evidence as to the location or activity of his unit at that time or thereafter. His unauthorized absence for 25 days alone is not probative of the intent charged, however it may aggravate the lesser included offense (Ibid; Cf: CM ETO 5234, Stubinski). On the contrary, the record as a whole strongly tends to negative the inference of an intent to avoid hazardous duty. It is uncontroverted that when accused left regimental headquarters he was on his way back, voluntarily, to his unit following the completion of his assigned mission. He had discharged his share of the burden of combat prior to his absence, he voluntarily surrendered at the end thereof and was immediately restored to

his own squad, with which he performed creditably in further extensive combat operations. Accused's denial of an intention to avoid hazardous duty is consistent with the evidence. This case is distinguishable from CM ETO 5437, Rosenberg, and similar cases, wherein following the accused's authorized absence, which commenced when his unit was in combat and was of relatively short duration, he exceeded the scope of his permission and went absent without leave without making any effort to return to his organization. It is also distinguishable from CM ETO 7304, Brogdon, and similar cases, wherein accused absented himself without leave directly from the battle line. The reasonable inference from the evidence in those cases was that accused intended, at the time he absented himself without authority, to avoid hazardous duty.

The Board of Review is of the opinion that the evidence herein fails to show the requisite intent to support the findings of guilty of desertion and that therefore the court was warranted in finding accused guilty only of absence without leave from 10 October to 4 November 1944.

7. The charge sheet shows that accused is 21 years two months of age and was inducted at Cleveland, Ohio, 26 May 1943 to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. Except as indicated herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the place alleged, absent himself without leave from his organization and place of duty from about 10 October 1944 to about 4 November 1944 in violation of Article of War 61, and legally sufficient to support the sentence.

9. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr. Hq. European Theater of Operations, AG 252 Op. TPM, 19 Dec. 1944, par.3).

Judge Advocate

Judge Advocate

Judge Advocate

(94) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private CLAYTON BROWN (35064015), Company L, 319th Infantry.

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

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

4. This soldier's civilian record, and his military record both before and after his absence, are favorable. His pretrial statement, made during the investigation, indicates that while endeavoring to reach his company he became lost and that when he returned to military control he was still continuing his efforts to locate his unit. He was returned to his squad and continued in combat. In view of the reduction in the offense, there should be an appropriate reduction of the confinement portion of the sentence. In the event that you agree with this recommendation, the inclosed forms of action and GCMO should be modified accordingly.

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

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

(Findings and sentence vacated in accordance with recommendation of Assistant Judge Advocate General. Execution suspended. GCMO 82, ETO, 18 Mar 1945)

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

BOARD OF REVIEW NO. 1

15 MAY 1945

CM ETO 6042

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CHARLES E. DALTON (36055382), Company A, 51st Engineer Combat Battalion	Trial by GCM, convened at Granville, Manche, France, 13,14 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Charles E. Dalton, Private, Company "A", 51st Engineer Combat Battalion, did, at Hembye, Manche, Normandy, France, on or about 0030 6 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Vueve Leon Quesnel.

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. The fact that accused engaged in an act of sexual intercourse with Madame Quesnel at the time and place alleged in the Specification was proved by the prosecution beyond all reasonable doubt and is admitted by the accused himself. The only question deserving consideration is whether the woman voluntarily consented to the act or whether she submitted under fear of her own life or bodily harm.

> "There is a difference between consent and submission; every consent involves submission, but it by no means follow that a mere submission involves consent" (52 CJ, sec.26, p. 1017).

> "Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law (12th Ed., 1932), sec. 701, p.942).

The question whether the victim, without intimidation of any kind, fully consented to the act of intercourse or whether it was committed by accused by force, violence, terrorization and against her will, was a question of fact within the exclusive province of the court. In the instant case there is substantial evidence that Madame Quesnel was overcome by fear of death or bodily harm and that the submission of her body tothe lust of accused was not a free, voluntary act. Under such state of evidence the finding of the court, notwithstanding accused's statements to the contrary, will not be disturbed by the Board of Review on appellate review (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson et al; CM ETO 4194, Scott; CM ETO 5363, Skinner).

4. The charge sheet shows that accused is 25 years one month of age and that he was inducted 19 February 1942 at Scott Field, Illinois, 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

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

B. Franklin Rice Judge Advocate

Wm. F. Swanson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

26 JAN 1945

CM ETO 6050

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Luxembourg, Luxembourg, 17 December 1944.
Private NATHAN GUTTMAN (36326252), Medical Detachment, 8th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Nathan Guttman, Medical Detachment, 8th Infantry, having received a lawful command from Captain WALTER A. SALATICH, Medical Detachment, 8th Infantry, his superior officer, to report to Company I, 8th Infantry, for duty, did near Schevenhutte, Germany, on or about 22 November 1944, willfully disobey the same.

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

Specification: In that * * * did, near Schevenhutte, Germany, on or about 22 November 1944, misbehave himself before the enemy by refusing to return from the 3rd Battalion Aid Station,

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(100)

> to his post of duty with Company I, 8th Infantry, and refusing to advance with the said Company I, 8th Infantry, which was then moving up under orders to engage the forces of the German army, which forces the said Company I, 8th Infantry, was then opposing and about to engage.

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

3. The evidence for the prosecution shows that accused was a member of the 3rd Battalion Medical Section, 8th Infantry, and that he was attached to Company I as an aid man (R7). He actually functioned in that capacity under fire from 15 to 22 November 1944 (R8). During this period the company suffered considerable casualties (R9). Commencing at noon, 22 November, it participated as an assault unit in an attack on the enemy in the Hurtgen Forest. The fighting continued for three or four days in difficult terrain against opposing fire from automatic weapons, mortars and artillery (R5,6,7). On the morning of the 22nd, prior to the attack, as I Company was passing through Schevenhutte, Germany, on its approach march to forward positions some three to five hundred yards away, accused reported to the battalion aid station, which was located in the town, and "said he was not reporting back to I Company, because of the fact he was scared and couldn't take it any more" (R7-8). Captain Walter R. Salatich, battalion surgeon, observing that accused appeared to be in good physical condition, "told him to report back as an aid man, which was his position". Accused replied, "I am sorry, but I can't do it" - that he was scared (R8). He kept saying, "I am afraid, I am just afraid to go back" (R10). Captain Salatich noted that, physically, accused

> "showed no signs of being under the influence of shell concussion; there had been shelling in the vicinity, and he showed

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> no signs of tremendous nervousness - there was no stuttering, impairment of speech, nor any signs of combat fatigue" (R9).

He was however "somewhat shaky" and "acted a little scared" (R9,10). It was explained to accused "that everybody else was afraid and how perilous it was at a time like that" (R10). When accused insisted, "I am not going, I can't", Salatich said, "Oh, yes you are" (R11). He informed accused that he was giving him a direct order to go back (R8). He then "asked him, 'Are you going back? "Yes" or "No"?', and [accused] kept stalling, standing there, and finally said, 'I guess it will just have to be "No"!'" (R8,10).

About a week later, accused, having been duly warned, made a statement to the investigating officer (R12-13) in which he recited that:

> "On the 22nd of November 1944 Captain Salatich ordered me to return to my company.
>
> The company was in the town of Schevenhutte, Germany. The aid men were in the aid station.
>
> I told T/4 Dougherty that I was going to see Captain Salatich and tell him I couldn't go back because of the shelling and strain which I was under that morning when I was up on the hill with the 1st platoon of Company 'I'.
>
> Captain Salatich ordered me to go to the company for duty and I told him I couldn't go back up there because I was afraid.
>
> I did not by any means intend to desert but physically and mentally I just can't take it any more".

Although the captain told him he could be hanged if he did not, accused still said he could not go back (Pros.Ex.A).

4. After his rights were explained to him, accused elected to take the stand under oath (R14). He testified that during the week prior to 22 November, he joined I Company as an aid man at the commencement of a major drive whose preliminary advance to the assembly area encountered continuous enemy artillery fire. At the assembly area, on the first day, accused placed his overcoat on a company jeep which had not proceeded more than

20 feet "before a plane dropped some bombs and killed [the driver]. It shook me up terribly". That night he and his comrades slept in holes subject to fire "and shrapnel from a shell came right in the hole and tore the sergeant's helmet". Accused was getting "jumpy" all the time. The next day the drive began and all along the way his organization suffered casualties "from mines and so on". For three solid days he performed his duties as aid man under enemy artillery fire, then carried litters back during the retreat which brought his company back to the starting point of the drive. On the night of the 21st accused got no rest because there were not enough "bunkers" to accomodate the whole platoon. The following morning there was artillery fire and the company withdrew from the bivouac area "on the run". Accused heard a shell coming and sought refuge in a hole. "Another fellow" continued to run and almost got hit. Accused was already nervous and excited from running and the shell and his nerves "started to get the best of me". When he caught up with his platoon they were passing through Schevenhutte where accused stopped in the battalion aid station and

> "told the sergeant I couldn't take it any more * * * and he told Captain Salatich what I said and the captain came out there and said, 'What's this I hear about you not wanting to go back?', so I told him, 'I can't take it any more. I can't stand it,' and he said, 'You are going back', and I said, 'I can't.' Then he became excited and began hollering and said, 'Will you or will you not go back? Give me a direct answer.' I didn't know what to say and he pushed me out the door and said, 'I don't want to see you around here any more. If I see you around here any more I will charge you with desertion. Go to your company.' I said, 'I can't go back - I am afraid.' He said, 'All right, come back in here.'" (R15).

Salatich then "wrote something on a paper and said, 'Sign that,' and I signed that and was placed under arrest. I told him it was not because I didn't want to go, I couldn't take any more of it" (R15 as amended by Certificate of Correction). He heard no information of an attack scheduled for the 22nd (R16).

On cross-examination he testified that he was neither injured nor wounded but nervous, excited and tired; that he had rheumatism, lying on the ground hurt him and he got no rest (R16-17). As a result he was worried both about his health and his work. He joined the 4th Division in August and served with an assault company of the 22nd Infantry until transferred to the 8th as an aid man

"about two weeks after we hit the Siegfried line". He first complained of rheumatism "about five months ago * * * since I have been lying on the ground". The only treatment he received for it was "vitamin pills to take between meals". On the occasion of his alleged offenses, he expected Captain Salatich to relieve him temporarily because, in his condition on the 22nd, he was no longer perfectly capable of doing his job (R17). He had no intention of deserting his post of duty but "merely went in to try to get relieved" (R18).

5. The Specification, Charge I, alleges willful disobedience by accused of Captain Salatich's order to report to Company I for duty. Accused, attached to I Company as aid man, was a member of the medical detachment commanded by Salatich, who was battalion surgeon. While the battalion, which had been under intermittent enemy fire for several days, was approaching front line positions to participate in an impending attack, accused informed Salatich that he was not reporting back to I Company, because he was "scared and couldn't take it". Observing that he appeared physically fit, Salatich ordered him to report to his company for duty. Accused temporized for about five minutes, insisted that he could not report back. Salatich repeated the order and instructed accused to state definitely whether or not he was going to report. Accused replied that he would have to say no, and was placed under arrest. He testified, in explanation of his refusal, that recent hazardous experiences under fire had shattered his nerves; that he was afflicted with rheumatism which prevented him from getting any rest while sleeping on the ground, which he had been obliged to do for several days preceding the offense; that, as a result of weariness, nervousness and worry, he was not perfectly capable of doing his job; and that he was merely seeking temporary relief when he approached the battalion surgeon on the occasion in question.

Salatich was accused's superior officer. The order related to a military duty and was one which Salatich was authorized under the circumstances to give the accused. For accused, under the circumstances established by the record of trial, to permit the personal considerations relied on by him to motivate the disobedience shown involved an intentional defiance of authority within the contemplation of Article of War 64 denouncing the offense charged.

The Specification, Charge II, alleges the identical refusal involved in the willful disobedience which is the basis of Charge I, as misbehavior before the enemy in violation of Article of War 75. Under the circumstances shown, accused's refusal to obey the order cannot be fairly regarded otherwise than as misbehavior in violation of Article of War 75. However

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"One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person" (MCM, 1928, par.27, p.17).

The only exception expressed in the Manual as warranting making one transaction the basis for charging two or more offenses is "when sufficient doubt as to the facts or law exists" (ibid). No doubt as to either appears justified here. Where, in the absence of such doubt, each of the several offenses charged is capital, the practice of unwarranted multiplication is particularly pernicious because of the difficulty in determining the extent of the inevitably potential resulting injury to the substantial rights of the accused. Since it does not actually affirmatively appear, in this instance, that accused's substantial rights were injuriously affected by the unwarranted multiplication of charges, the record of trial must be regarded as legally sufficient to support conviction on both counts.

6. The charge sheet shows that accused is 31 years of age and that, with no prior service, he was inducted at Chicago, Illinois, 23 March 1943.

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

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 1

28 MAY 1945

CM ETO 6074

U N I T E D S T A T E S)	IX AIR FORCE SERVICE COMMAND
)	
v.)	Trial by GCM, convened at Headquarters,
)	IX Air Force Service Command, 16,18
Private LONNIE J. HOWARD)	December 1944. Sentence: Dishonorable
(34099454), 1958th Quarter-)	discharge, total forfeitures and con-
master Truck Company (Avn),)	finement at hard labor for life. United
1587th Quartermaster Bat-)	States Penitentiary, Lewisburg, Penn-
talion Mobile (Avn))	sylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Lonnie J. Howard, 1958th QM Trk Co Avn., 1587th QM Bn Mobile Avn., did, in the Company Area of the 1958th QM Trk Co Avn., at approximately 1810 hours, on or about 22 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Allen W. Jones, a human being, by shooting him with a carbine rifle.

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 "and with premeditation" and substituting the word "and" before the word "unlawfully", of the excepted words not guilty, of the substituted and remaining words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Three-fourths

of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 introduced by the prosecution was in substance as follows:

During the afternoon of 22 September 1944 between the hours 1600 and 1700, an officer heard the deceased, an habitually loud and profane individual, call someone a "Mother-fucking son of a bitch" (R41,45). At about the same time, enlisted men heard the accused tell the deceased "to go about his business" and "to stop messing with him" (R63,65).

At about 1730 hours, as deceased was going through the chow line where accused was serving bread from behind a table, another officer heard deceased talking in a loud voice for several minutes, in the course of which he said twice "I am not afraid of the mother fucking carbine" (R36-38,38,53). Men in the chow line heard an argument between accused and deceased, but due to noise and another discussion, paid little attention to it (R12,48-50,53). One heard accused tell deceased to "stop fooling" with him (R49,51). Accused was seen to step back and fire one shot from port arms (R15,17,51). The prosecution presented no evidence as to deceased's appearance or actions before the shot, other than that he carried a mess kit (R48,57). He was found near the table and died as a result of a gunshot wound in his left shoulder (R8,12,32,39).

Accused was asked five or ten minutes later "what happened and if the gun went off accidentally". His reply was that "He was a fuck up and had it coming to him" (R35,39,44,47). The officers who saw him at that time testified he was bewildered or frightened (R10), high strung (R40), shaken up and not normal (R46).

4. The defense presented the following evidence:

Accused had been a very quiet man, and had caused no trouble during his three years in the company (R69,80,81,87). He did not use profanity, and had not been in difficulties with his fellow soldiers (R76,87). Deceased was considerably heavier than accused and three or four inches taller (R70,74,75,88). He was loud and profane (R74,80,81,87), and was always in trouble with other soldiers because of his cursing them (R71,87-89). His reputation was that of a mean and rowdy man, "young and crazy", and it was common knowledge that he always carried a knife, which he often flourished (R70,71,75,76,88). He had recently been transferred from another company for fighting (R89).

On deceased's body immediately after the shooting, in the inside left pocket of his jacket, there was found a pocket knife with the three and a half inch blade open and pointed upwards (R72,73,85).

Accused, after his rights as a witness were fully explained to him, elected to be sworn and take the stand in his own behalf. He testified as follows: Prior to 22 September 1944, he had never had any trouble with deceased or been threatened by him (R96). That afternoon, deceased became angry with him when told he could not have a truck to take to Paris because it was in use. Accused then asked deceased why he had lied to him about a drink of cognac promised and not given, whereupon deceased cursed him using the word "mother fucker", and told him "to kiss his ass" and that the next time he saw him he would cut his throat. Accused replied that if deceased pulled a knife on him, he would shoot him. Deceased said he wasn't afraid of his "mother fucking" carbine. Accused told him "to go on", that he did not want any trouble with him and then walked away (R93,94,105). He knew that deceased carried a knife all the time, for he had seen it, and he knew deceased had drawn it against others (R96). He was extremely afraid of knives for a girl had once cut him with one, and he had seen knife fights, and seen how people were injured in them (R96-98). Deceased was a much larger man than he (R96). Accused had for several days regularly kept his rifle under the table with his gas mask (R95).

That night at supper, when deceased came to the point in the chow line where accused was serving bread, deceased told him not to speak to him no "mother fucking" more or he would cut his throat. Accused said he did not want any trouble with him, but deceased continued his abuse and kept making remarks that he would cut his "mother fucking" throat. Finally deceased started to reach for his knife, and as he did so accused secured his carbine from under the table and slid a cartridge into the chamber. Deceased had simultaneously rounded the table and was advancing towards him from the end, while going for his knife, and accused retreated two paces and fired at his oncoming assailant while in fear of his life (R94,95,98,99,102,103,105,106). He testified that he believed deceased's statement that he would cut his throat, that he believed he was getting a knife, and that he fired because he was scared (R97,98,100,101,106). Prior to that moment, he had no intention of shooting him (R97). When hit, deceased turned, took several steps and fell. Accused seeing him retreat, fired only once because he did not want to kill deceased (R107). Accused did not see the knife (R107).

5. The court recalled the first sergeant as a witness, who testified that it was customary in the company for the men to carry carbines, and that loaded clips were carried either in the gun or belt according to individual choice (R108,109). He also demonstrated where the body was found, but from the record it is not possible to say definitely whether the table was between that point and the firing position of accused (R109; see also R8,12,39).

6. The findings of the court, which excepted the words "and with premeditation" from the Specification, were still legally sufficient in form to convict accused of murder (MCM, 1928, par.148a, pp.162-164; Cf: CM ETO 6262, Wesley; 29 CJ, sec.62, pp.1087-1089).

7. 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 isused 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 the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec. 79b, pp.943-944). The presumption of malice is not conclusive however, and the evidence rebutting it may be found in the evidence introduced by prosecution or defense (Winthrop's Military Law and Precedent (Reprint, 1920), p.673; 29 C.J. 1103).

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law (12th Ed. 1932), sec.423, p.640; 26 Am. Jur. sec. 44, p.189).

The case in many respects is similar to that of CM ETO 10338, Lamb, to which reference is made for a full discussion on the points herein involved. There is a complete absence of motive in this case. Accused's prior statement that he would defend himself, and his subsequent statement in justification, were not malicious. The prosecution's only evidence of murder is the firing of a shot from a deadly weapon which caused death. Dependent solely on this fact is the essential element of malice. Accused's testimony explaining the shooting is not contradicted in any manner, but on the contrary, is corroborated in the essentials of his remonstrances, his retreat, and the abuse, the threats and the possession of a deadly weapon by his adversary. Much of the corroboration is in the prosecution's testimony. Killing in the heat of passion and commission of the lesser crime of manslaughter are not inconsistent with the theory of self-defense (Stevenson v. United States, 162 U.S. 313, 40 L.Ed. 980 (1896)). Imperfect self-defense, or shooting unnecessarily in danger but without malice, is manslaughter. Imminent danger and resultant fright of an accused are clearly sufficient to reduce murder to manslaughter, in the same manner as is rage or any other violent emotion (29 CJ, sec.114, p.1127). "Apparent imminent danger of personal violence is adequate provocation" (29 CJ, sec. 120, p.1137), although this may be otherwise if the danger ceased before the accused acted (CM ETO 292, Mickles; CM ETO 6682, Frazier). Due to the absence of degrees of murder in military law, and the intensified passions of soldiers at war in an active theater, the Board of Review should in murder cases require strict and full proof of malice. Particularly is this true in this case where all members of the court have recommended reduction of the sentence towithin the maximum limits of voluntary

manslaughter, and the reviewing authority apparently not cognizant of his powers has made the same recommendation. The defense having shown an assault and full proof of adequate provocation and passion, corroborated in important part by prosecution and other evidence, and the prosecution having shown originally only the firing of a shot and not having gone forward with the proof, the Board of Review is of the opinion that as a matter of law there is no substantial proof of malice. The presumption of malice inferred from the use of a deadly weapon is certainly not a conclusive presumption, and is clearly and completely rebutted here. The offense is therefore not murder, but manslaughter (CM ETO 82, McKenzie; CM ETO 3957, Barneclo; CM ETO 10338, Lamb; 17 CJ, sec.3593, pp.254-263; CM 223336 (1942), I Bull. JAG 159-163; Metropolitan Railroad Company v. Moire, 121 U.S. 558, 30 L.Ed. 1022 (1887); Eagan v. State, 128 Pac.(2d)(Wyo) 215).

8. The charge sheet shows that accused is 24 years ten months of age and was inducted 28 November 1941 at Fort Jackson, South Carolina. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Reviewis of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of voluntary manslaughter in violation of Article of War 93 and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

10. Confinement in a penitentiary is authorized for the crime of murder by Article of War 32 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2 — 6 FEB 1945

CM ETO 6079

U N I T E D S T A T E S v. Private FRANK A. MARCHETTI (31384305), Company E, 157th Infantry	45TH INFANTRY DIVISION Trial by GCM, convened at APO 45, U. S. Army (France), 23 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Pvt Frank A. Marchetti, Co E, 157th Inf, did at or near Anzio, Italy, on or about 15 March 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Anzio, Italy, on or about 16 April 1944.

Specification 2: In that * * * did, on or about 28 April 1944, at or near Anzio, Italy, desert the service of the United States by absenting himself without proper leave from his

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organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he surrendered himself at or near Rome, Italy on or about 9 September 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined, at 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 showed that accused was a member of the fourth platoon, Company E, 157th Infantry (R5,10,12). Duly authenticated extract copies of the company morning reports, admitted into evidence without objection by the defense, showed that accused absented himself without leave from his organization from 15 March 1944 to 16 April 1944 and that he again absented himself without leave therefrom on 28 April 1944 and returned to military control on 9 September 1944 (R4; Pros.Ex.A).

Captain Ray B. Vaughters, 157th Infantry, who was the investigating officer in the instant case, testified that he interviewed the accused on or about 14 November 1944 (R5), at which time the accused, after having been advised of his rights, voluntarily made the following statement:

"He said that he first went AWOL about March 15th when the company was on the Anzio Beachhead up around the Mussolini Canal. I asked him why he took off and he said he couldn't take it anymore. He said he went haywire during barrages and was all broken and nervous and was going to pieces. He said that he and another man out of the same company by the name of Russell took off and went back to the town of Anzio. He stayed around there about a month. He said he was picked up just about a month later and was brought back to the company which was then in the 'Pines' down along the coast. He stayed with the company three or four days and then went to the hospital. He was in the hospital about a week and was

sent back to his company to duty. I think he said then that he was there just over-night, I'm not sure, I think he said he he left immediately or something like that. Anyhow, he took off and went back to the town of Anzio again. He stayed there until the outfit pushed out of Anzio and then he went to Rome to the 73rd Station hospital where he surrendered about September the 9th. He was in the hospital there about a month and then was returned to us all the way up here from Rome. He got up here on November the 11th while we were at Martigny Les Bains" (R6,7).

Captain Vaughters further testified that he was with the 157th Infantry during March and April and that on or about 15 April 1944 the regiment was located "around Pediglione". While there it was shelled heavily and continuously and suffered numerous casualties. He also testified that the regiment was in the "Pines", which "was supposed to be a rest area but actually it wasn't", during the month of April. This area was only about a mile and a half from the front lines "at one point and wasn't more than ten miles from any part of the front lines". Several shells came into the area while the 157th Infantry was there, and although that regiment suffered no casualties at this time, casualties occurred in other regiments (R7,8).

Sergeant Albert DeRay, fourth platoon, Company E, 157th Infantry, testified that accused absented himself from the company some time in March when the organization was near the Padiglione Forest "right in front of those 'long toms' there", some 1,000 yards from the front lines (R10,12). At this time the company was in a secondary position and was receiving long range artillery fire. Later in the month the company pulled back to the rest area "in the 'Pines' * * * down at the tail end of the beachhead" and remained there for approximately 12 days. Thereafter the company was in a defensive position for an undisclosed period of time, after which it participated in "the break-out from the beachhead" and ultimately arrived in France on 15 August 1944 where it took part in the campaign in France. The witness remembered seeing the accused while the company was in the "Pines". However, accused was not present with the company after it left the rest area (R11,12).

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

5. Accused was charged with two violations of Article of War 58, each alleging that he absented himself without leave from his organization with intent to avoid hazardous duty. Accused initially absented himself from his organization at a time when it was occupying a secondary position on the Anzio beachhead some 1,000 yards from the front

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lines. Numerous casualites were being suffered at the time as the result of continuous and heavy shelling. He remained absent until he was "picked up" approximately one month later. When questioned as to the reason for his departure he stated that he had left because "he couldn't take it any more". Shortly after he was returned to his company he again absented himself therefrom without authority. Although his unit was in a "rest area" at this time, it appears that such area was a rest area more in name than in fact. The area was on the Anzio beachhead, was subjected to occasional shelling and was separated from the enemy lines by a distance of only a mile and a half at the closest point, and the enemy lines were nowhere more than ten miles distant. He remained absent for approximately three and a half months and surrendered himself to the military authorities only after his unit had broken out of the beachhead and had gone on to participate in the campaign in France. From these facts the court could reasonably conclude that in each instance accused quit his organization with intent to avoid hazardous duty (Cf: CM ETO 4686, Lorek; CM ETO 4138, Urban; CM ETO 5293, Killen). The evidence substantially supports the findings of guilty.

6. Although holding that the evidence adduced is legally sufficient to support the findings of guilty, the Board of Review feels constrained to point out that the record of trial is far from satisfactory in content and completeness. Accused's duty assignment within his company is not shown; testimony as to the various movements of his unit and the time when those movements took place is vague and in some instances completely lacking; no mention is made of the past activities or record of the accused or the exact circumstances existing at the time he absented himself; no evidence as to his mental condition appears in the record proper; there is no indication of the reason why accused was twice hospitalized; and the record generally is deficient in the precise development of relevant facts. An accused is entitled to have all the evidence both for and against him duly presented to the court in order that it may make intelligent findings and so that, if accused is found guilty, a just sentence may be imposed. A full development of the facts is also desirable so that the appropriate authorities will be furnished a basis for the exercise of clemency, if warranted (CM ETO 5004, Scheck).

7. The charge sheet shows that accused is 20 years of age and was inducted at Providence, Rhode Island, on 28 May 1943. No prior service is shown.

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

9. 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 Sep 1943, sec.VI, as amended).

Judge Advocate

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

BOARD OF REVIEW NO. 1 20 JAN 1945

CM ETO 6093

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U.S. Army (France), 30 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private STANLEY F. INGERSOLL (36413029), Company G, 142d Infantry	

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

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

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

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

Specification: In that Private STANLEY F. INGERSOLL, Company "G", 142d Infantry, APO 36, U.S. Army, did, near REMIREMONT, FRANCE on or about 24 September 1944, desert the service of the United States and did remain absent in desertion until on or about 3 December 1944.

CHARGE II: Violation of the 75th Article of War.
(Motion for finding of not guilty granted).

Specification: (Motion for finding of not guilty granted).

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 the Specification thereunder. 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 50 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence with reference to the offense of which accused was found guilty is as follows:

Prior to 24 September 1944, Company G, 142nd Infantry, of which accused was a member, had participated in the liberation of the town of Remiremont, France. The company was there located and on that date under orders to cross the Moselle River "behind the 143rd and push on into Tendon" (R6-7,11). During the course of this day the company marched out of Remiremont in column formation. It was raining, the march was on pavement and gravel road and through woods and from a physical standpoint conditions were difficult. The unit crossed the Moselle River and the next morning engaged the enemy (R7,9-10).

First Sergeant Robert L. Swint testified that accused had been with the company approximately five months, that he did not give him permission to leave nor was he aware that anyone in authority gave him such permission. Sergeant Swint was continuously on duty from 24 September to 3 December 1944 and he did not see accused present for duty during this time (R7). The defense stating it had no objection, an extract copy of the morning report of Company G for 6 December 1944 was introduced in evidence:

"CORRECTION: 4 Oct 44
36143029 Ingersoll, Stanley F. Pfc
(745) Dy to MIA as of 24 Sept 44.
SHOULD BE:
36413029 Ingersoll, Stanley F. Pfc
(745) Dy to AWOL 24 Sept 44 time unknown. Fr AWOL to Conf 36th Div Stockade 1730 hrs 3 Dec 44, awaiting trial for AWOL. Reduced to Pvt per CO #9 on 3 Dec 44" (Pros.Ex.1).

The extract copy also showed that it was signed by "Joseph Bellonte, Capt. Inf.". It was authenticated as a true copy by the personnel officer of the 142nd Infantry.

4. On the proffer of proof by defense counsel, it was stipulated that if Major Walter L. Ford, 36th Infantry Division Psychiatrist

were present in court, he would testify as follows:

> "I am a qualified expert in matters of psychiatry, having been so recognized by the American Medical Association. I have examined the accused, Private Stanley F. Ingersoll, and in my opinion he was suffering at the time of the offense charged from psychoneurosis, anxiety state, mild. This is a condition which renders it more difficult for the accused to control his behavior. A soldier's 'limit of combat tolerance' is due primarily to the individual and his training rather than the length of time in combat" (R11-12).

After an explanation of his rights, accused elected to remain silent. The defense offered no evidence (R12).

5. Accused had been with his company for five months prior to its arrival at Remiremont. The unit had but recently participated in dislodging the enemy from this town. It was then under orders to cross the Moselle River and presumably continue in pursuit of the fleeing enemy. On the day of accused's unauthorized departure, the unit crossed the Moselle River and on the following morning it engaged the enemy. It may be fairly inferred that under these circumstances of continuous combat as a member of the unit, accused was familiar with the tactical situation and aware not only of the hazards and perils of battle just passed but also of those that were yet imminent. Instead of contributing his all to the impending advance accused departed and remained in unauthorized absence for 70 days. With this status of prosecution's evidence it was incumbent on accused to meet "the burden of explanation" and go forward with proof to show that he intended to return. This he failed to do. The duration of accused's unauthorized absence from his place of duty with an organization in a combat zone and engaged in continuous battle, coupled with the complete failure of defense to discharge the burden of explanation which the prosecution's evidence placed upon it, justify the inference that accused went absent without leave accompanied by the intention not to return (CM ETO 1629, O'Donnell; CM ETO 4490, Brothers).

6. The defense attempted to establish the fact that accused was suffering from a mental incapacity referred to as "limit of combat tolerance" or "combat exhaustion". The medical opinion was far short of a defense of insanity. The issue as to accused's legal responsibility for his acts was one of fact for the court. Inasmuch as there is substantial evidence that accused was a legally responsible person at the time of the commission of the offense the Board of Review upon appellate review will not disturb the court's findings (CM ETO 4095, Delre and authorities therein cited; CM NATO 1824, Myers).

7. The charge sheet shows that accused is 22 years of age and that he was inducted at Kalamazoo, Michigan, 3 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

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European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

19 MAY 1945

CM ETO 6107

U N I T E D S T A T E S	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, U. S. Army, 2 January 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor: COTTAM for 25 years; JOHNSON for 30 years. Loire Disciplinary Training Center, Le Mans, France.
Private RICHARD T. COTTAM (39526566) and Private (formerly Staff Sergeant) WALTER G. R. JOHNSON (32278947), both of Company K, 317th Infantry	

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

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

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

COTTAM

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Richard T. Cottam, Company "K", 317th Infantry, did in the vicinity of Arriance, France on or about 20 Novem-

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ber 1944 desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near St Avold, France on or about 8 December 1944.

JOHNSON

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Walter G. R. Johnson, then Staff Sergeant, Company "K", 317th Infantry, did in the vicinity of Arriance, France, on or about 20 November 1944 desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near St Avold, France, on or about 8 December 1944.

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against Cottam. Evidence was introduced of one previous conviction against Johnson by summary court for careless discharge of a fire arm in violation of the 96th Article of War. All 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: Cottam for 25 years, and Johnson for 30 years. The reviewing authority, as to each accused, approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Numbers 17 and 18, Headquarters 80th Infantry Division, APO 80, U. S. Army, 10 January 1945.

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

Various original morning reports of Company K, 315th Infantry, were introduced in evidence, without objection by the defense. That of 20 November 1944, signed by an assistant personnel officer, contained the following entry:

> "Moved from defensive positions in the vicinity of Arriance, France, at approximately 1200. Occupied high ground 1½ miles south of Elvange, France, at 1630. Weather raining and cold" (R8;Pros.Ex.A).

The morning report of 28 November 1944 showed the two accused from duty to missing in action as of 20 November (R8;Pros.Ex.B). This was corrected by the report of 9 December 1944, showing them from duty to absent without leave on 20 November 1944, and from absent without leave to arrest in quarters 8 December 1944 (R9; Pros.Ex.C). The two latter instruments were signed by the regimental personnel officer. With the consent of the court all original morning reports were withdrawn, and duly authenticated extract copies were substituted (R9).

Other evidence was to the effect that the company was in some action on Thanksgiving Day, and shortly before that date (R13). One soldier saw accused Cottam in a foxhole on some date he could not remember, and did not see him again for ten days (R10). Another saw both accused "somewhere around" 20 November and did not see them again until the company was in a rear area for a rest (R13). Both witnesses were members of the same company as the accused.

4. After his rights were fully explained to him, each accused elected to remain silent (R15).

5. It is apparent that the legal sufficiency of the findings and sentences is wholly dependent upon the facts supplied by the entries on the morning reports above set forth. The original morning reports were introduced in evidence and then withdrawn and extract copies substituted. The problems involved are simplified by this approved practice. We deal only with questions pertaining to the original reports. Authenticated extract copies are not involved. Pros.Ex. A was signed by the assistant personnel officer and Pros.Exs. B and C were signed by the regimental personnel officer.

Therefore, none of these morning reports was signed by

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"The commanding officer of the reporting unit, or, in his absence by the officer acting in command".

as required by AR 345-400, 1 May 1944, section VI, paragraph 42. The presumption of regularity, viz that the morning report was signed by the authorized officer, as applied in CM ETO 5234, Stubinski, cannot arise in this case because it affirmatively appears that the morning reports were signed by officers, to wit, the regimental personnel officer and an assistant, not authorized by the Army Regulations to sign the same. The said morning reports were therefore not admissible in evidence.They possessed no efficacy as official writings (MCM, 1928, par.117a, p.121). Attention is particularly invited to the fact that paragraph 43, Army Regulation 345-400, 3 January 1945 was not in effect on the dates of these morning reports. Likewise, the directive of the Commanding General, European Theater of Operations, contained in Circular 119, European Theater of Operations, 12 December 1944, section 4, was not in effect.

In CM ETO 4691, Knorr, the Board of Review held that although the morning report there involved was signed by the assistant personnel officer the original thereof was admissible in evidence as a writing or record made in the regular course of business as provided in the Federal "shop book rule" statute (28 USCA Sup., sec.695) and it was for the court to consider its weight and evidential value. Reference is made to the statements contained in the opinion of the Judge Advocate General, SPJGN 1945/3492 "Documentary Evidence: Morning Reports" set forth in the Memorandum of The Judge Advocate General, 30 March 1945. Resultant upon the comments made therein and in deference to superior authority the Board of Review (sitting in the European Theater of Operations) will not apply the principles of the Knorr case to the instant situation. However, the Knorr case is not overruled as the Board of Review believes that the Federal "shop book rule" statute was correctly applied to the facts involved in said case and that the principles therein announced may be applied in other cases which present similar circumstances and conditions.

Since the morning reports were not admissible in evidence, there is no evidence in this case whereby the accused can be said to have been absent without leave or to have had the requisite intent to avoid existing or imminent hazardous duty (CM ETO 7686, Maggie and Lewandowski).

6. The charge sheets show the following with respect to the service of the accused: Cottam is 37 years five months of age. He was inducted 9 July 1942 at Los Angeles, California. Johnson is 33 years three months of age. He was inducted 27 April 1942 at Newark, New Jersey. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused.

B. Franklin Pritz Judge Advocate

Wm. T. Sprague Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private RICHARD T. COTTAM (39526566) and Private (formerly Staff Sergeant) WALTER G. R. JOHNSON (32278947), both of Company K, 317th Infantry.

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

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

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

3 Incls:
Incl. 1 - Record of Trial
Incl. 2 - Forms of Action
Incl. 3 - Draft GCMO's

(As to accused Cottam findings & sentance vacated. GCMO 242,ETO, 26 June 1945.)
(As to accused Johnson findings & sentence vacated. GCMO 243, ETO, 26 Jine 1945.)

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

CM ETO 6148

8 MAY 1945

U N I T E D S T A T E S v. Private First Class LENON DEAR (34610525) and Private ARCHIE L. DOUGLAS (37507071), both of 222nd Port Company, 485th Port Battalion	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM convened at Kirkby Hostel Number 1, Lancashire, England, 12,13,14 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 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 arraigned separately and tried together on the following charges and specifications:

DEAR

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class

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Lenon (NMI) Dear, 222nd Port Company, 485th Port Battalion Transportation Corps did, at Maghull, Lancashire, England, on or about 10 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Ann Baker.

DOUGLAS

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

Specification: In that Private Archie L. Douglas, 222nd Port Company, 485th Port Battalion Transportation Corps, did, at Maghull, Lancashire, England, on or about 10 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Ann Baker.

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

Specification: In that * * * did, at Maghull, Lancashire, England, on or about 10 June 1944, with intent to do him bodily harm, commit an assault upon Technical Sergeant Curtis W. Burgess, Headquarters Detachment, 483rd Port Battalion Transportation Corps, by striking him on the head with a dangerous thing, to wit, a piece of wood.

Each accused pleaded not guilty to and was found guilty of the charges and specifications brought against him, such findings being reached with the concurrence of the following proportion of the members of the court present at the time the vote was taken: as to Dear, three-fourths; as to Douglas, Charge I and Specification, two-thirds, Charge II and Specification, all. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring in the case of Dear and three-quarters of such members concurring in the case of Douglas, 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. The evidence for the prosecution was substantially as follows:

Ann Baker, her sister, Lilian, and a friend, Ann Hart, journeyed from Liverpool, England, where they all lived, to Maghull, England, at about 2300 hours, 10 June 1944, having obtained a lift by truck. Their purpose in going was to meet three colored soldiers, Burgess, Quander and Anderson, with whom they were acquainted and whose organization was stationed near Maghull. On arriving at Maghull, they inquired for the soldiers, and after about a ten minute wait were joined by them (R10,11,16,31,44,48-49, 56,61,77).

All six walked together down a lane in the direction of the military camp. They left the lane and walked over to a stack composed of bales of hay and covered with a tarpaulin. The stack, because of the arrangement of the bales, apparently contained at least three separate cuts or compartments. Each couple, Ann Baker being with Burgess, was sitting in one of these compartments when accused (Douglas and Dear) and four or five other colored soldiers approached. They turned a flashlight on the couples and ordered them out of the stack. Douglas was armed with a stick and said "We want women". Burgess said there were none there, to which Douglas said "Yes, there is - there's three". Ann Baker was the last to leave the stack. The newly arrived soldiers circled around them and Douglas put his hand on Miss Baker's arm. Burgess said "Take your hands off her". Douglas, without warning, then struck Burgess over the left eye with the stick he was carrying. The stick was heavy and about 24 inches long. Burgess fell to the ground. Someone shouted "run" and everyone ran except Ann Baker. She was prevented from doing so by Douglas and Dear who grabbed her by the arm and kept her at the haystack until some of the others came back. She was crying and, in the interim, Douglas said "I want sugar", but she did not know what he meant (R11,12,16-24,31-33,44-45,49-51, 56-57, 62-66,67-70,72,73,77-80,84-88).

Shortly afterwards, some of the others returned to the haystack and everyone then walked out to the lane. Miss Baker was crying and Douglas asked her why, saying "I'm not going to touch you". When they reached the lane, Miss Baker's sister and Ann Hart started to walk toward the camp. Miss Baker attempted to join them, but Douglas said "You come this way, this is the nearest way to camp". She protested that she wanted to go with her sister and friend, but he took her by the arm, told her to "shut up"

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and raised his stick as if to strike her. She was frightened and tried to get away, but both accused took her by the arm and walked her down the lane. She was crying throughout this period. Some of the other colored boys followed them, but left when they reached a field. Douglas pushed Miss Baker into the field despite her protests that she wanted to go back with her friends, and continued to threaten her with the stick. When they got into the field, he took off his field jacket, laid it on the ground and told Miss Baker to get down. She refused, telling him that she was "courting" Sergeant Burgess, and he then took her by the shoulders and pushed her down. He laid the stick down next to her and proceeded to undo his trousers and take out his "person". Miss Baker was sitting on the coat and when he told her to take down her knickers, she refused and crossed her legs. He took the knickers off forcibly and then got down and had intercourse with her. She tried to push him away, but could not. The stick was lying next to her throughout. When Douglas finished, Dear who had remained in the vicinity approached. Miss Baker said "don't let him touch me or I'll go mad". Dear then took a knife out of his pocket and placed it against her throat, saying "What did you say?" He then pushed her down and had intercourse with her. While the act was in progress, Miss Baker heard a car on the road and tried to shout, but Dear put his hand over her mouth to stop her. When Dear finished, Douglas walked her out to the lane. They came to a wooden hut and he told her to wait for him while he went inside. She took advantage of the opportunity to escape and ran down the lane, screaming for her sister. As she approached a nearby bungalow, the door opened and Quander and Burgess came down the path and took her into the house (R12-14,24-31,46,51-53,54, 58,67,68,70-71,73-74).

Ann Hart and Lilian Baker, after parting with Ann Baker and accused at the lane, went first to the military camp and asked the guards whether they could "see an officer or somebody". They then ran down the road to a bungalow where they knocked on the door. They were screaming and were in a highly agitated condition. While they were at the door, a shot was heard and Miss Hart fainted. They were then taken into the house. Burgess, meanwhile, had been stunned by the blow he had received from Douglas. When he recovered, he slipped away and went for help. He found assistance and reached the bungalow shortly after the arrival of the two girls. Upon learning that Miss Baker was not with them, he went out to the field in search of her. He was unable to find her and returned to the bungalow about

20 or 30 minutes later. Apparently at just about the time he arrived, Miss Baker came down the road. She was screaming and in a most disheveled condition with her coat, skirt and blouse undone and her hair "all tossed". She collapsed as she was brought into the house and fainted away on a settee (R39-42,46-47,53-54,57-60,75,85).

Subsequent examination of her knickers revealed that they were torn in front and that both the waist and leg elastics were broken. There were dirt and bloodstains on the back and human seminal stains in the crotch (R33-34). A medical examination of Miss Baker, made several hours after the incident, showed no bruises or scratches either externally or internally and nothing that suggested that violence had been used. She had not been a virgin and seminal fluid was found in the vagina. She was fairly calm at the time of examination and it was the opinion of the doctor that there had been little resistance to penetration (R35-38).

4. Accused, after their rights as witnesses had been explained by the law member, elected to testify under oath. Their respective stories were virtually identical, and differed from the prosecution's version of the incidents in various important respects. Both testified that at about 2130 hours, 10 June 1944, they left camp in a truck for Liverpool. Several of their friends were with them, and Burgess, Quander and Anderson were also aboard. In Liverpool, Miss Baker, her sister and Miss Hart joined Burgess, Quander and Anderson and they all returned to Camp in the truck. Accused had not previously known the girls. On arrival, accused and their friends got off in their battalion area. Later in the evening, they were out walking and heard voices emanating from the haystack. They went over, and Douglas pulled back the tarpaulin and ordered the occupants out. He told Miss Baker to step around the haystack since he had something to tell her. Burgess objected, and Douglas told him to let her come, if she wanted to. Burgess said she wasn't coming and "reached his hand in his pocket". Douglas thereupon picked up a plank and struck him with it. Burgess fell and then ran away. Douglas then asked Miss Baker to go with him which she voluntarily did, and when they reached the lane he suggested that they walk together into the woods. He said "I want some sugar" to which she replied "OK", and they thereupon had intercourse. She had taken her knickers off for the purpose and put them under her left arm. When they finished, Dear who had remained in the vicinity asked her whether he could "have a date with her". She asked him whether he had any money, saying she wanted two pounds.

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He had only five shillings but she said she would "go with" him if he would give her the five shillings and see her to the station. She then lay down on the ground and they had intercourse. Dear and Douglas then walked her to the road, and while Douglas went over to a nearby barn to see whether his friends were there, she left (R89-95,102,105-106, 109-116,118-124).

5. In rebuttal, the prosecution recalled as a witness one of accuseds' alleged companions on the truck ride to Liverpool. This witness denied having participated in the trip (R125-130). A similar denial was made by Burgess who was also recalled for the purpose of testifying in the matter (R131-132). A civilian detective who interviewed both accused the day after the alleged offenses were committed, testified that neither accused on that occasion mentioned the trip to Liverpool and both stated that they had not seen the girls previously to the time they encountered them at the haystack. Each accused signed a written statement as a result of this interview. Witness testified that the original of Douglas' statement was in his possession, but that he had only a copy of Dear's. Douglas' statement was not offered in evidence, although the witness read excerpts from it. The copy of Dear's was received in evidence over objection by defense that it was not the best evidence (R126-128; Pros.Ex.B). The trial judge advocate stated to the court that he had never received the original of such statement, which was apparently in France (R97,126).

6. As to the rape charged against each accused, there is no doubt of the legal sufficiency of the record of trial to sustain the findings of guilty in each instance. Essentially, the case is reduced to the question of consent on the part of the victim, both the prosecution and defense being in accord as to the identity of accused and the fact that each had intercourse with Miss Baker at the time and place specified. It was the contention of accused that Miss Baker acquiesced freely and willingly in the act of intercourse with each of them and Dear testified that in his case, at least, she did so upon promise of pecuniary compensation. All of this was flatly denied by Miss Baker, and evidence of a circumstantial character was introduced by the prosecution tending to show that her participation in the affair was involuntary and induced by a show of force and violence on the part of accused. An issue of fact was thus presented for determination by the court, whose findings on such an issue, as the Board of Review has frequently held, will not be disturbed if supported by competent substantial

evidence (CM ETO 1621, Leatherberry; CM ETO 4172, Davis et al). In this connection, it is noted that entirely apart from accuseds' story of complete and willing co-operation by Miss Baker, the prosecution's evidence fails to show that she resisted the actual intercourse with any great physical force. However, there is ample evidence that she refused accuseds' proposals, that she was pushed or thrown to the ground and her knickers forcibly removed, and that she was subjected throughout to a show or threat of force by both Douglas and Dear. Moreover it appears that physical violence had been committed upon her escort at the time he attempted to intercede in her behalf, that she had been prevented against her will from joining her companions, and that when she finally reached the bungalow, she was in a dishevelled and more or less hysterical condition. In view of all this evidence, the court was obviously justified in its refusal to regard any failure on her part to resist more forcibly during the actual commission of the sexual acts as amounting to consent thereto (CM ETO 3933, Furgeson and Rorie; CM ETO 5805, Sexton and Lewis).

Accused Douglas was also convicted of assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93. Such finding is supported by substantial, competent evidence. It is shown that this accused without any adequate, legal provocation struck Burgess on the head with a heavy stick approximately 24 inches in length. The assault was obviously committed for the purpose of preventing further interference by Burgess in accused's illegal design and had the effect of nearly rendering Burgess unconscious. Under these circumstances, the court was fully justified in its finding that the weapon was intended to be used and was used in such a manner as to constitute it a dangerous weapon within the meaning of Article of War 93 (MCM, 1928, par.149m, p.180; CM ETO 2569, Davis).

7. Two procedural matters require comment:

(a) The appointing authority directed that accused be tried together inasmuch as "the facts and circumstances and the witnesses are almost identical" in both cases (R4). A motion by the defense for severance was denied by the court (R4,8). We have, therefore, the question whether a so-called "common trial", that is, a trial wherein two or more separately charged accused are tried together, may proceed in the face of objection by one or more of accused.

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Despite the absence of specific provision on the subject in the Manual for Courts-Martial, it has long been held that separately charged offenders, simultaneously and severally committing offenses of the same character in the same place, provable by the same witnesses, may be tried together at one time by the same court-martial where such trial is directed by the appointing authority and no objection is made by any accused (CM 195294, Fernandez et al, 2 B.R.205(1931)). In the instant case, although objection was interposed by accused, the circumstances are such that a common trial was entirely appropriate, the offenses being virtually identical and having been committed at the same time and place and proved by the same witnesses. Hence, if the granting or denial of a motion for severance in this kind of situation is within the court's discretion, there can be no doubt that the motion was properly denied and that no prejudice resulted to either accused, their rights having been fully protected in every way.

With respect to the joint trial of persons jointly charged, the Manual for Courts-Martial specifically provides that the disposition of a motion for severance is within the sound judicial discretion of the court. It has accordingly been held by the Board of Review that accused in such cases have no right to a severance and that the denial of a motion therefor could become prejudicial error only if it was arbitrary and constituted an abuse of the court's discretion, thereby injuriously affecting the substantial rights of accused (MCM, 1928, par.71b, p.55; CM ETO 895, Davis et al; CM ETO 4294, Davis and Potts). No similar provision exists in the Manual with reference to the common trial of persons separately charged, however, and it is therefore necessary to examine the rules applicable thereto generally recognized in the trial of criminal cases in the district court of the United States.

The Federal code contains two statutory provisions pertinent to the question; one, 18 USCA sec.557 (R.S. sec. 1024), dealing with the consolidation of indictments; and the other, 28 USCA sec.734 (R.S. sec.921), dealing with the consolidation of causes for trial. These are quoted as follows:

R.S. sec.1024: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be

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joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated".

R.S. sec.921: "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so".

With respect to the consolidation of indictments under R.S. 1024, it has been repeatedly held that the statute permits such consolidation only in cases where joinder in single indictment would have been proper in the first instance (McElroy v. United States, 164 U.S. 76, 41 L.Ed.355; Zedd et al v. United States, (CCA 4), 11 F (2nd) 96). The question arises, therefore, whether a Federal court has authority under R.S. sec.921 or under any other rule or provision of law to order two indictments involving similar issues and evidence but different defendants to be tried together despite the fact that the indictments could not be consolidated under R.S. sec.1024 and despite the objection of the accused. The United States District Court, Western District of Kentucky, has had occasion to consider this question in United States v. Glass, 30 Fed. Supp.397 (1939), and in an opinion which contains a thorough discussion of the authorities on the subject, has ruled that such power exists. The following quotation from such opinion is pertinent:

"The consolidation of causes for trial before a single jury under this section of the Judicial Code rests in the discretion of the trial court, subject to the restriction that a consolidation for trial should not be ordered where it would result in prejudice to the defendant or prevent him from obtaining a fair trial. This would seem to be the rule irrespective of statutory authority. In Morris v. United States 9 Cir., 12F.2d 727, 729, such a consolidation for trial by a single jury

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> was approved although the defendants were not the same in all indictments. In that case the Circuit Court of Appeals said:
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> 'Irrespective of statutory authority the consolidation of indictments for trial as was done in this case ordinarily rests in the court's sound discretion, a discretion to be exercised with a view to the avoidance of unnecessary delay and expense and in the interest of both parties, except in a case where the charges are of such a nature that consolidation will result in prejudice to the defendant or embarrassment in the presentation of his defense. Logan v. United States, 144 U.S.263, 296, 12 S. Ct. 617, 36 L.Ed. 429; Brown v. United States /8 Cir./143 F. 60, 74 C.C.A.214'".

It is considered by the Board of Review that the rule set forth in the quoted portion of the opinion in United States v. Glass may be applied with equal effect in a court-martial proceeding, such rule, as indicated by the court, existing independently of any specific statutory authority. Indeed, the Board has already so held in cases where accused have been linked together by at least one specification in which they were jointly charged (CM ETO 3147, Gayles et al; CM ETO 3740, Sanders et al), and in view of the federal authorities on the subject, it is not considered necessary to restrict the application of the rule to the particular circumstances involved in those cases. Accordingly, it is held that where, as in the present case, the appointing authority has directed a so-called "common trial" of two or more accused, separately charged with offenses of the same character committed at the same time and place and provable by the same evidence, the denial or granting of a motion for severance by one or more of such accused is within the sound judicial discretion of the court, whose ruling will not be disturbed unless it is shown that it injuriously affected the substantial rights of accused.

As previously stated, the denial of the motion for severance resulted in no prejudice to accused in this case, and hence is regarded by the Board of Review as a proper exercise of the court's discretion.

(b) Attempts were made by the prosecution to impeach both accused upon cross-examination by a showing of previous inconsistent statements made by them on various occasions. In the case of accused Douglas, the previous inconsistent statements were contained in a written statement made by him on 11 June 1944 to a Criminal Investigation Division agent and a civilian police officer. Although the original statement was apparently in the possession of the police officer, it was not offered in evidence and its contents, at least in part, were proved by his oral testimony (R125-128). Presumably this mode of proof was used pursuant to stipulation by defense counsel that "any conversation that he had with Inspector McGeock and Agent Askew, you can challenge him as far as they are concerned" (R117). This is not the proper way to prove the contents of a written document, but in the absence of objection by accused, the requirements of the best evidence rule may be regarded as waived in a Court-Martial proceeding (MCM, 1928, par.116a, p.120; CM 210985, Bonner et al, 9 B.R. 383 (1939)). As to accused Dear, he apparently made three pre-trial statements all of which appear to have been reduced to writing, one being dated 11 June 1944, another 24 August 1944 and the third with date unspecified (R97,101,102,107). Although the record of trial is highly confused in this connection, all three of these were apparently used as the source of the inconsistent statements with which the prosecution sought to impeach this accused on cross-examination, chief reliance, however, being placed on that of 11 June 1944. Defense counsel stated that he had no objection to the introduction in evidence of the statement of 24 August 1944, although it was never actually offered or received, and he himself offered in evidence what is assumed by the Board of Review to be the statement of unspecified date. The court apparently accepted the latter in evidence, although it was not attached to the record. As for the statement of 11 June 1944, the prosecution and defense stipulated that the prosecution could refer on cross-examination to the conversations on which the statement was based and would then call the civilian police officer to verify them. This was done, and the police officer testified as to such conversation and also identified a carbon copy of the statement itself which was offered and received in evidence over objection by the defense (R97,125-128; Pros.Ex.B). It was shown that the original of the statement was not in the possession of either the police officer or the trial judge advocate and was probably in the hands of the CID agent in France (R97). It is difficult to understand why defense counsel should have objected to the introduction of a properly identified copy of

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the statement after having previously expressly consented to proof by oral testimony of the conversations on which the statement was based. Having so consented, however, the latter testimony became admissible evidence (CM 210985, Bonner, supra) and it is impossible to see how the accused could have been prejudiced by the receipt of the copy in evidence, even assuming that no sufficient showing as to the unavailability of the original was made.

8. The charge sheet shows the following as to accused:

Douglas is 20 years and 11 months of age and was inducted 13 February 1943 at Fort Leavenworth, Kansas; Dear is 22 years of age and was inducted 19 December 1942 at Camp Shelby, Mississippi; neither had prior service.

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

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

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Dewey Jr Judge Advocate

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

BOARD OF REVIEW NO. 1

5 FEB 1945

CM ETO 6159

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kerkrade, Holland, 3 November 1944. Sentence: To be shot to death with musketry.
Private JOE LEWIS (39861254), Company L, 117th Infantry	

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

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

Specification: In that Private Joe Lewis, Company L 117th Infantry Regiment, did, at Tessy-sur-Vire, France, on or about 3 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Julius Beringer, Medical Detachment, First Battalion, 120th Infantry Regiment, a human being by shooting him with a rifle.

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

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All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence, but in view of the attending circumstances recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution was as follows:

At about 1930 hours on 3 August 1944, Technician Fifth Grade Joseph White, Company A, 234th Engineers, was with his platoon in Tessy-sur-Vire, France (R9). It was "after the town had been taken and cleared of snipers" (R7) and the men were engaged in "clearing the road and opening the drains - cleaning up after the battle" (R10). He observed a soldier whom he later identified as accused

> "coming down the road swinging his rifle from one side to the other clicking his safety off and on" (R9),

and wearing

> "an OD shirt and pants, his shirt tail was out, there was mud on his back and he had on no leggings".

As accused passed the platoon and continued toward a bend in the road (R11), he "looked dangerous" and was not acting in a normal manner. While not drunk, it was evident that he had been drinking (R12).

At approximately the same time Privates Martin Kauffman and Julius Beringer (the deceased), both of the 1st Battalion Medical Detachment, 120th Infantry, were walking together in Tessy-sur-Vire. Each wore "O.D. pants and shirt". Beringer had just received a letter from his wife which he was reading while Kauffman watched him "because he was so happy over it". They reached a place in the village near the "bend in the road" above referred to "when this man came from no where and brought his gun up and said 'Who are you' and shot Beringer through the head". Kauffman, seeing Beringer "drop about half way" and having no gun to protect himself, "bent down and took off and ran to the C.P. to report what had happened" (R6,7).

White heard the shot after accused passed the bend in the road and "ran around and saw this medic falling" (R10). White was then ten

or 15 yards away and close enough "to get a good look" at accused (R12) who was "in a kneeling position with his gun pointed towards the medic" (R10). Men of his platoon started to approach, but White "motioned them back" and started to go to the injured man. Accused swung his gun towards White but the latter kept on going and "went to the medic to check and see how bad he was hurt". He found him dead and observed that a bullet had entered "the right lower jaw, knocked out two teeth and the bullet went up through his head". There was "a lot of blood" and "there must have been a half a helmet full that had spilled out of him". He examined the identification tags of the deceased and noted that his name was Julius Beringer (R10). In connection with his duties as company aid man, White had "seen a number of casualties" since he arrived in France on 8 June 1944 (R23) and determined Beringer was dead both by feeling his pulse and listening to his heart (R10,24). He moved the body off the road and

> "told my platoon to go out and look for the man who had done the shooting and I went to the medical unit to report the casualty" (R10).

Later he went to a command post of a unit about a mile from the scene of the crime where the Military Police inquired of Captain Edward B. Parrish, Company Commander of Company L, 117th Infantry, if he had "a dark skinned boy" in his organization. Captain Parrish replied that he did have "a boy who answers that description" and sent for accused (R11,17). When accused appeared a few moments later, White immediately said "that was him" (R11). Captain Parrish testified regarding his questioning of accused as follows:

> "I asked him if he had been into Tessy and he mumbled that he had not. I thought he may have been fooling since the rest had gone for showers and he hadn't, so I asked him if it was a large town and torn up. He said it was a small town and very torn up. I asked him if he had seen anyone in Tessy and he said he had not. I asked him if /he/ had shot anyone and he said 'I did only what my little lieutenant told me to do - to shoot anybody in that uniform'. I asked him what uniform that was and he said a 'uniform like that'. Apparently he referred to our American OD field uniform. I asked if that was the instruction the lieutenant gave him and he said 'Yes'. I asked if he shot anybody like that in Tessy and he said 'Yes'. I asked if he killed him and he said he didn't know. I asked why he had shot him and he said that

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> it was what his lieutenant told him to do. Then we had two rifles brought before him - one we knew definitely not to be his and we asked if he could give us the serial number of his rifle. He gave me his army serial number, which we checked with his dog tags. I asked again for his rifle number and again he gave his own serial number, so I asked him to identify his rifle and when we showed him the rifles; I picked up a rifle I knew was his; I covered the number and he looked at it. I asked for the number and he gave me his serial number again. I then handed him his rifle and he looked at it, rubbed his thumb over it and said 'Yes, that is my rifle'. I then opened the bolt of the rifle and took out seven rounds of ammunition and turned them over to the MP Sergeant" (R17-18).

There should have been eight rounds of ammunition in the weapon. Captain Parrish examined the bore of the rifle and noted it "had apparently been recently fired" (R18). He considered that accused "had been drinking but I don't think he was drunk" (R19). White observed that accused

> "was frightened and scared but he answered the questions O.K. He seemed to have control of his mental and physical faculties" (R12).

Sergeant Clarence A. Bandola, 29th Military Police, who was present, also noted that there were seven rounds of ammunition in accused's rifle and at the trial identified seven rounds of M-1 .30 calibre ball ammunition as those referred to. They were received in evidence without objection, to be withdrawn at the close of the trial (R13,14; Pros.Ex.1). Bandola also questioned accused who admitted he had been out of the area, that he had been in the town of "Tessy", that he took his rifle and "kept saying that 'My little lieutenant told me to shoot anybody that was small'" (R15). He said he had been drinking cider. In Bandola's opinion accused "was drinking and I might say he was half-cocked, but otherwise he looked in good condition". Previous to the trial Bandola made a statement describing accused's condition as follows:

> "When I saw him he was bleary-eyed and practically half-shot and his head kept bobbing back and forth and he was staggering" (R15).

Recross examination of Bandola produced these questions and answers:

"Q. In your opinion you think then that a man could be half shot and still have control of his mental faculties.
A. Yes sir.

Q. Didn't you think that it was peculiar when the accused told you that the lieutenant had told him to go around and shoot little people? Did that sound like he had control of his mental faculties?
A. I could not say.

Q. Did you think Pvt Lewis was normal at that time?
A. He answered all my questions.

Q. Was he bleary-eyed and half shot?
A. He is bleary-eyed right now.

Q. Was he half-shot when you saw him?
A. Yes sir" (R16).

Accused changed his clothes upon his return from Tessy-sur-Vire, which he explained by saying that "the other was wet and I changed to dry clothes'" (R18).

Captain Murray F. Pulver, Company B, 120th Infantry, arrived at the scene of the shooting soon after it occurred, saw the body and identified it by the identification tags and wallet therewith as that of Private Julius Beringer of his company (R22). Private Andrew P. Van Herreweghe, 29th Military Police, 29th Division, also came to the place of the shooting and, with First Lieutenant Harrison H. Holland, Assistant Division Provost Marshal, found a spent cartridge shell near a pool of blood in the road. The body of the deceased was off the road nearby and covered with a blanket. The cartridge shell referred to was identified at the trial by Van Herreweghe as the one so found and it was offered and received in evidence without objection (R20-21,26, Pros. Ex.2).

4. For the defense, Major Smith Troy, Division Judge Advocate, 30th Infantry Division, was called as a witness and testified that prior to his entry into the service he was Attorney General of the State of Washington, and that in his state there was a law which made the sale of intoxicants to Indians punishable by imprisonment in the state penitentiary (R24). He dealt with Indians and observed on a few occasions their actions when they were under the influence of liquor. He has noticed that

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"They became very drunk, the ones I have seen, however, I don't know what quantity they had consumed to cause that condition. They were extremely violent. Most of my experience has been as Prosecuting Attorney some seven years ago in a county adjacent to two Indian reservations. While Prosecuting Attorney, I had occasion to deal with many cases involving drunken Indians and the sale of liquor to Indians" (R25).

On cross examination, he agreed that in respect to drunken Indians their condition depended on the amount of intoxicant consumed and the capacity of the individual concerned to consume it (R25-26).

It was stipulated between the defense, accused and the prosecution that if First Lieutenant Harrison H. Holland, 29th Infantry Division, were present in court and sworn as a witness, he would testify as follows:

"My name is Harrison H. Holland, 1st Lt., and assistant provost marshal, 29th Infantry Division. I reiterate the facts as set forth in my report of 3 August 1944. When I first saw Lewis he was sitting in Sgt Bandola's jeep. He was very quiet and made no outcry. He wasn't resisting at all. He seemed on the whole to be very composed. I walked up to him and asked him if he had shot a man that evening, and he stated, 'I guess so'. I asked him why he had and he stated something about a Lieutenant had sent him into town with orders to clear the town out. At least that is what I gathered from it. He didn't speak clearly or coherently, but more or less mumbled. I detected a slight odor of alcohol on his breath. It wasn't overpowering or anything. I have had experience with Indians, having lived in Wyoming nine or ten years and I couldn't say whether or not the manner in which he was talking was attributable to drinking or whether it was his natural manner of speech. He had all the characteristics of an Indian, swarthy complexion, high cheek bones, acqueline nose, black, coarse, straight hair and dark eyes. He impressed me as being very poorly educated. In my opinion, although I could not state positively whether or not he was drunk, his manner of speech and actions indicated there was something wrong with him. He was not fully

normal. I base this on his mannerisms and actions and speech. I did not know Private Lewis previously and could not compare his actions with any previous condition. I can't state whether this was his normal manner of speaking and acting. He was definitely not of an excitable type. He was quiet. It is my further opinion from the way he talked and acted he did not have complete control of his mental faculties. He had some control, however, and attempted to answer questions. While Private Lewis was in the jeep he was identified by Private Kaufman and Sgt Bandola then took Lewis to the division C. P., and I followed in my jeep with Kaufman. While there Captain Brown examined Private Lewis. I went to the scene of the crime and found a pool of blood, two or three feet in diameter, fresh blood mixed with brains, and the body had been moved twenty-five or thirty yards up the road, lying on the side of the road. I found the spent .30 caliber cartridge case about three to four feet south of the pool of blood" (R26).

After being advised of his rights, accused elected to remain silent (R27). The defense neither suggested nor requested that any examination be made of accused to determine his sanity.

5. Soon after the offense was committed, accused was questioned at length by his company commander and by a sergeant of the Military Police concerning his alleged shooting of a soldier in Tessy-sur-Vire earlier in the day. Although it was not shown that either of his questioners informed him of his rights under Article of War 24, both testified without objection regarding his answers in which he indicated that he had shot somebody in "Tessy" and that he was doing "only what my lieutenant told me to do". It did not appear that any promises were made to him or that any threats were used to induce him to answer questions. The Board of Review is of the opinion that the circumstances show the accused's statements were voluntary and that the testimony regarding his answers was properly received in evidence. Even if such statements of accused were held inadmissible, no substantial right of accused could thereby be injuriously affected since his act of shooting the deceased was shown by other convincing, uncontradicted and compelling evidence.

6. The reason for the absence of any action by the defense raising the issue of the sanity of accused at the time the offense was committed may be explained by the fact that the pre-trial papers contain the signed statement of Major Vivion F. Lowell, Medical Corps, Division

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Neuropsychiatrist of the 30th Infantry Division, which indicates affirmatively the sanity of accused at the time of his examination and reads as follows:

"HEADQUARTERS 30TH INFANTRY DIVISION
OFFICE OF THE DIVISION SURGEON
A. P. O. #30

11 October 1944

C E R T I F I C A T E

This is to certify that I examined Pvt. Joe Lewis, NMI, ASN 39861254, Company L, 117th Infantry Regiment, 30th Infantry Division this date.

Pvt. Lewis is a 21 year old, single, Pepejo Indian. He had the usual childhood diseases. There is no history of serious illness or accident. This soldier completed the 7 grade attending school from age 12-17 years. He states that his home is about 30 miles from Ajo, Arizona. He lives with his grandparents and his father on a farm where they raise cattle. The mother died when he was 7 years of age. There are four other children in the family. One brother is in the armed forces. He gives no history of arrest or abnormal behavior in civilian life. This soldier has been in the armed forces approximately 10 months. He states he has been in the 30th Infantry Division approximately three months.

Attitude and General Behavior: Essentially Normal.
Emotional Reaction: Essentially Normal.
Mental Trend: Essentially Normal.
Orientation: Essentially Normal.
Memory, Recent and Remote: Fair.
School and General Knowledge: Poor. He is only able to add simple numbers. Does not know the name of his Division Commanding General or his Commanding Officer. Does not know the name of the boat he sailed in. Does realize he left New York. Does not know where he stayed in England. Remembers the names of a few places he has been through in Europe. He has difficulty with cowboy stories.
Insight and Judgment: Realizes right from wrong but it is believed that he lacks judgment.

There is no evidence of mental or nervous disease. The gait is normal. Speech tends to be muttering and indistinct.

Impression: Normal Adult. (Borderline intelligence)

/signed/ Vivion F Lowell
VIVION F. LOWELL
Major, Medical Corps
Div. Neuropsychiatrist"

7. 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 consequences of his act" (1 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 or 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 a weapon is used in a

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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 evidence discloses a sudden unprovoked attack by accused who appeared suddenly before his victim, cried "Who are you'" and shot him fatally in the head. No logical, reasonable or plausible motive therefor is shown in the record of trial. The only defense indicated was that accused was intoxicated to such an extent that he did not have the requisite intent to constitute murder. According to the testimony of Major Troy, who has had experience with Indians, they are "extremely violent" when they are under the influence of liquor. The stipulated testimony of Lieutenant Holland described accused as having the physical characteristics and mannerisms of members of that race now found in the State of Wyoming. There was evidence that accused was "bleary-eyed and half shot" soon after the offense was committed, but the witness who so described him stated on recross examination that accused was also "bleary-eyed right now" (R16). His condition was variously described by different witnesses as "he had been drinking" (R12,19), "he was drinking and I might say he was half-cocked, but otherwise he looked in good condition" (R15), "I couldn't say whether or not the manner in which he was talking was attributable to drinking or whether it was his natural manner of speech" (R26), and "although I could not state positively whether or not he was drunk, his manner of speech and actions indicated there was something wrong with him. He was not fully normal" (R26). The question of intoxication was a question of fact for the sole determination of the court, and in view of all the evidence its findings will not be disturbed by the Board of Review (CM ETO 1065, Stratton; CM ETO 1901, Miranda; CM ETO 3937, Bigrow, and cases therein cited; CM ETO 5561, Holden and Spencer).

The shooting by accused followed a pattern of conduct noted in the following cases in which a sudden and unexpected shooting was followed by the death of the victim and the act of accused in each instance was held to be murder:

a. An escaped prisoner without warning and at close range shot a guard with an automatic revolver for no better reason upon all the evidence than a desire to try out the

weapon stolen by him a few minutes before he commenced firing (CM ETO 438, Smith);

b. A soldier returned to camp under the influence of liquor, with no reasonable basis for grievance against his first sergeant, shot the sergeant while he slept, saying immediately thereafter, "Your worries are over now, boys. I have shot the 1st Sergeant * * *" (CM ETO 1901, Miranda);

c. An armed guard while checking passes at the entrance of a camp heard a returning soldier, suffering from overindulgence in alcohol, say, "Well, go ahead and shoot, I couldn't feel any worse". The guard promptly obliged by shooting him fatally (CM ETO 422, Green).

In the instant case, a similar cold and deliberate purpose to kill his victim was evidenced in the conduct of accused (for further cases see CM ETO 4149, Lewis; CM ETO 4020, Hernandez, and cases therein cited). In accordance with the foregoing cases, the evidence is legally sufficient to support the findings of guilty of the Charge and Specification.

8. The charge sheet shows that accused is 21 years and one month of age and was inducted at Phoenix, Arizona, 30 June 1943 to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private JOE LEWIS (39861254), Company L, 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The accused is an Indian. Without reason, excuse or explanation, he shot and killed a man he had never seen before. When interviewed shortly afterwards his conduct was equally baffling. There is some evidence that he had been drinking. This office is advised that a mental examination and report has been directed.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 6159. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6159).

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

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

1 Incl.
Record of Trial.

(Sentence commuted to dishonorable discharge, total forfeitures and confinement for life, in view of report of board of medical officers. GCMO 49, ETO, 18 Feb 1945)

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

BOARD OF REVIEW NO. 1

23 JAN 1945

CM ETO 6175

U N I T E D S T A T E S	2D ARMORED DIVISION
v.	Trial by GCM, convened at APO 252, U. S. Army (Germany), 1 January 1945.
Private WALTER S. ENGLER (32055901), Service Company, 41st Armored Infantry Regiment	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. Confinement in a penitentiary for the offense of sodomy is authorized (AW 42; par.5d, AR 600-375, 17 May 1943; District of Columbia Code, secs.24-401 (6:401) and 22-107 (6:7)). The same article of war authorizes penitentiary confinement upon conviction of two or more acts or omissions, any of which is punishable by confinement in a penitentiary. However, prisoners under 31 years of age and under sentence of not more than ten years will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is therefore proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1) and 3a).

_____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

30 JAN 1945

CM ETO 6177

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 30 December 1944.
Private SIMON TRANSEAU (14030702), Company I, 121st Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Simon Transeau, Company "I", One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 0730 hours, 21 November 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at or near Hurtgen, Germany, on or about 30 November 1944.

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

Specification: In that * * * did misbehave himself before the enemy in that having received a lawful command from Captain Jack Melton, his superior officer to get his radio ready and move up, did, at or near Hurtgen, Germany, on or about 4 December 1944 refuse to obey the same.

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

3. The evidence for the prosecution shows that on 21 November 1944 accused was a member of Company I, 121st Infantry, which was located near Hurtgen, Germany. On 20 November, the company moved forward to an assembly area, and accused was with it (R6,7,10). During the night of November 20th the company was shelled by the enemy and the battalion command post damaged by German artillery fire (R10,11); the company commander alerted his platoon leaders and gave an order for his company to advance and attack enemy-held positions at 0900 hours, 21 November 1944. At the designated hour the company "jumped off" and made the attack ordered, moving through two mined fields and advancing to within 300 yards of enemy troop emplacements (R7,10,11). As a result of the attack, the company suffered about 60 casualties during the first hour and a half (R11). The accused did not accompany his unit in the advance or otherwise take part in the attack. He was present with his company on the night of 20 November 1944 but was absent therefrom the following morning. He had no permission or authority to be absent from his organization on the 21st or at any time between this date and 30 November 1944 when he returned to his company (R5-7,9,11-12). An extract copy of the original company morning report was received in evidence, without objection by the defense, showing accused's absence without leave and his return to military control on the dates above indicated (R5; Pros.Ex.3).

The evidence for the prosecution further shows that, on 2 December 1944, accused's organization was preparing for another assault against the enemy when accused was brought in to the command post. His company commander inquired as to where he had been during his absence, and then said to him, "We need you, just hop in here and do your job, these boys have

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been working pretty hard" (R11,12). Although accused "seemed very agreeable" to the suggestion that he return to performing his job as radio operator, two days later he failed to carry out his duty as required (R12). The tactical situation at this time was very acute. Accused's unit "ran into a strong point of about 25 Jerries" and as a result the enemy pushed the advance line back about 30 yards (R12). The following morning several companies of the division passed the position of Company I and made an attack on the enemy (R12). On the afternoon of 4 December 1944, the enemy strong point was "knocked out" and when the second platoon "came up in line" the company commander, Captain Jack R. Melton, ordered accused to "put the radio on his back and get ready to go", as his company was joining the attack (R12). Accused said, "I can't go. * * * My feet hurt me". Captain Melton asked whether his feet hurt him during the 12 days he was absent in the rear area, to which accused replied, "No, sir". He was again ordered and urged to move forward by the captain saying "let's go we got to get out of here" (R12). Accused refused to advance, saying, "I can't go", at the same time indicating that he understood the significance of his failure to go forward (R12). Accused "stayed behind" while the communications sergeant "took the radio" and advanced, performing accused's normal duty during the assault (R13).

Second Lieutenant Paul Berkos, Medical Administrative Corps, 3rd Battalion, 121st Infantry, testified that, from an examination of the records of the battalion aid station, he could state that accused had not been examined or treated for any type of foot ailment or disease between the dates of 17 November and 4 December 1944 (R14,15,16).

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

5. Competent uncontradicted evidence establishes the fact that accused absented himself without proper leave from his place of duty on 21 November 1944 and that he remained absent until returned to military control by apprehension near Hurtgen, Germany, on 30 November 1944. On the date of his initial absence, accused's organization was under orders to advance and attack the enemy which was located approximately 300 yards forward. At the appointed time and date, accused's unit moved across mined fields, advanced in attack against German mortar and artillery fire and engaged the enemy. Accused was present with his company on the day the order to attack was given but missing therefrom when the assault was made. His absence was unauthorized. Under such circumstances the court was fully justified in inferring that accused knew the assault was about to be made and absented himself with the specific intent to avoid such hazardous duty, within the meaning of Article of War 28 (CM ETO 1400, Johnson; CM ETO 1406, Pettapiece; CM ETO 2473, Cantwell, and authorities cited therein).

Concerning Charge II, the evidence conclusively shows that on 4 December 1944, while engaged in combat with the enemy, accused's

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commanding officer ordered him to prepare his equipment and to move up with his unit in an assault, which command accused refused to obey. Instead, he remained behind while another soldier of his unit performed accused's accustomed duties. Although the Specification, as drawn, combines elements of the offense of willful disobedience of a lawful order of a superior officer in violation of Article of War 64, a charge of misbehavior before the enemy is properly alleged and fully sustained by the evidence adduced herein. Failing to advance in attack or to resist the enemy, when ordered or properly called upon to do so, constitutes an act of misbehavior before the enemy of a most grave and serious character (Winthrop's Military Law and Precedents - Reprint, 1920, p.622). The Board of Review is of the opinion that the allegations of the Specification are aided by the evidence presented and that the findings of the court herein are fully sustained by substantial, competent evidence (CM ETO 5114, Acers; CM ETO 5004, Scheck; CM ETO 4820, Skovan).

The record contains considerable hearsay testimony, improperly admitted in evidence, and as a result thereof the reviewing authority returned the record of trial to the court directing a reconsideration of the original findings and sentence with disregard of specific statements erroneously received. Upon reconvening the court adhered to its former findings and sentence (1st Ind, Hq, 8th Inf Div, 8 Jan 1945, attached to R/T). Under the circumstances such error did not injuriously affect the substantial rights of the accused; to the contrary due precaution was taken indicating that accused's rights were fully protected.

6. The charge sheet shows that accused is 22 years of age. He enlisted at Fort Jackson, South Carolina, without prior service, on 15 November 1940.

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

8. The offenses of desertion and misbehavior before the enemy in violation of Articles of War 58 and 75, respectively, are punishable as a court-martial may direct, including death, if committed in time of war (AW 58, 75). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, par.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

9 FEB 1945

CM ETO 6193

U N I T E D S T A T E S v. Privates JAMES R. PARROTT (32483580), GRANT U. SMITH (35688909) and WILLIAM C. DOWNES (33519814), all of 597th Ordnance Ammunition Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, France, 22,23 November 1944. Sentences: PARROT and SMITH, each dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. DOWNES, to be hanged by the neck until dead.

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

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

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

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

Specification 1: In that Private James R. Parrott, 597th Ordnance Ammunition Company, and Private Grant U. Smith, 597th Ordnance Ammunition Company, and Private William C. Downes, 597th Ordnance Ammunition Company, acting jointly and in pursuance of a common intent, did, at Etienville, France, on or about 2400 hours, 12 July 1944, forcibly and feloniously, against her will, have carnal knowledge of Madam Marie Lepoittevin.

(Findings of not guilty as to accused Parrott and Smith)

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Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Etienville, France, on or about 2400 hours, 12 July 1944, forcibly and feloniously against her will, have carnal knowledge of Mademoiselle Louis Lagouche.

(Findings of not guilty as to accused Parrott and Smith)

Specification 3: In that * * * acting jointly and in pursuance of a common intent, did, at Etienville, France, on or about 2400 hours, 26 July 1944, forcibly and feloniously against her will, have carnal knowledge of Madame Louis Leveziel.

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

Specification 1: In that * * * acting jointly and in pursuance of a common intent, did, at Etienville, France, on or about 2400 hours 12 July 1944, wrongfully and unlawfully enter the dwelling of Madame Marie Lepoittevin and Mademoiselle Louis Lagouche, with intent to commit a criminal offense, to wit: rape, therein.

(Findings of not guilty as to accused Parrott and Smith)

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at Etienville, France, 26 July 1944, in the night-time feloniously and burglariously break and enter the dwelling house of Monsieur Just Hebeurt, Etienville, France with intent to commit a felony, to wit: Rape, therein.

Each accused pleaded not guilty. All members of the court present at the time the votes were taken concurring, accused Parrott and Smith were found not guilty of Specifications 1 and 2 of Charge I and of Specification 1, Charge II, and guilty of Specification 3 of Charge I and Charge I, Specification 2 of Charge II and Charge II; and accused Downes was found guilty of both charges and all specifications thereunder. No evidence of previous convictions of accused Parrott was introduced. Evidence was introduced of two previous convictions of accused Smith by special court-martial for absences without leave for 36 days and two days, respectively, in violation of Article of War 61, and of one previous conviction of accused Downes by special court-martial for absence (evidently without leave) for three days in violation of Article of War 61. All members of the court present at the time the votes were taken concurring, each accused was sentenced to

be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, as to each accused, approved only so much of the findings of guilty of Specification 2 of Charge II as involved findings that accused did, at the time and place alleged, unlawfully enter the dwelling house with intent to commit rape therein, 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, as to each of accused Parrott and Smith, confirmed the sentence, but, owing to special circumstances, 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, and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement; as to accused Downes, confirmed the sentence; and withheld the order directing execution of the sentences pursuant to Article of War 50½.

3. Evidence for the prosecution, bearing upon the offenses of which accused were respectively convicted, was substantially as follows:

On the dates involved herein the three accused were members of the 597th Ordnance Ammunition Company (R9) (stationed at Ammunition Depot 801, near Cherbourg, France (R60)). About 2330 hours on 12 July 1944, three colored American soldiers knocked at the door of the house of Paul Jeanne at Etienville, France. Failing to gain prompt entrance, they knocked the door down with their guns, entered and lit matches and a candle on the mantelpiece. At the trial Jeanne identified the largest of the three soldiers as accused Downes but did not identify the other two. (The record states that "Parrot and Smith were apparently the same height and Downes was approximately three or four inches taller than the other two" (R32)). The three soldiers discovered Jeanne's two sons, at whom they pointed their rifles, and informed Jeanne they were "American Police" looking for "Boche" (R43). After about five minutes, they started to leave and asked for cognac which he refused them. The soldiers inquired if there were American soldiers in the neighborhood and Jeanne replied there were some nearby, whereupon they left in the direction of "this American camp". He saw them "turn around" in the direction of the home of Ernest Lepoittevin and his wife Marie, which was about 600 meters distant (R33,38,43-44).

About midnight three colored American soldiers, each armed with a rifle, came to this home, where the occupants, Ernest Lepoittevin, his wife Marie, 62 years of age, and the latter's granddaughter, Mademoiselle Louise Lagouche, 15 years of age, had retired for the night. Lepoittevin's bed was in the kitchen and those of his wife and the girl were in the bedroom. The soldiers called "'American Police'" and "'Boche'" and Lepoittevin, who did not realize they were colored soldiers, opened the door (R33,37,38,41,42). They entered the house, lit matches, looked in his bed and proceeded to the bedroom door. Because Lepoittevin did not

wish to open it, they "put their guns between the door so that it broke down" and all three entered the bedroom, followed by him. Thereupon the largest of the three threw himself upon Louise, who was still in bed, a second seized Madame Lepoittevin, likewise in bed, and the third, after putting one arm around her husband's throat and the other around his body, "mastered" him and held him "back in the kitchen" (R34,38,40, 42).

Madame Lepoittevin testified that all three soldiers entered her room together and the one who seized her "violated" her, meaning that he placed his private part in her private part. After he finished with her, "They took me by the throat so I am not wholly conscious of what happened, so I knew that all three threw himself on me". Asked if all three violated her, she testified "Of the first one I am absolutely sure, of the two others I am not so sure because I was not wholly conscious but I believe they did". She could identify only accused Downes - only "the large one * * * who threw himself on my grand-daughter". There was no light except that afforded by matches (R39-40,41). Following the attacks, she was attended by an American doctor who visited her once and by a French doctor who came for a period of six weeks (R40).

Louise Lagouche confirmed her grandmother's testimony that all three soldiers, none of whom she could identify, entered the bedroom together. She testified that the one who threw himself upon her (Louise) "violated" her - placed his private part in her private part and after he finished the other two soldiers also did the same thing to her. They did not pay her anything (R42). The soldiers remained in the house about 20 minutes and all left together (R34,39,40).

The testimony of the woman and the girl was corroborated by Lepoittevin, who testified that each of the three soldiers took his turn holding witness, while the other two were in the bedroom with the women (R34). He was frightened, and "everybody was crying" (R36). He reported the incident to the mayor of Etienville that night (R37-38). At the trial he identified Parrott and Downes as two of the soldiers in question, one of whom "was much larger than the others" (R34).

On 26 July, Just Hebert, 74 years of age, lived with his widowed daughter, Madame Louis Leveziel, and her two sons, aged six and eight years, in a house consisting of one large room at Renouf, about two miles from Etienville (R13,17,26,27,28). Sometime that day three colored American soldiers again knocked at Paul Jeanne's door and the same voice as on the previous occasion two weeks before said "'American Police'" - "'Boche'". This time Jeanne, who recognized the voice as the same he had heard on 12 July, refused to open the door (R44,45). About 0200 hours 27 July (midnight 26 July, French time) three colored American soldiers came to the Hebert home and entered the house through a window which contained no glass (R26-27,28,32). Madame Leveziel heard them talking, arose from bed and hid behind a closet or bureau

in the corner next to her bed. The soldiers lit matches and looked around the house (R27,28,29). Hebert endeavored to persuade them to leave the house and after looking around further they did so, but returned in about a quarter of an hour and this time entered by the door (R29). Then one of them, identified by Madame Leveziel as Downes, climbed upon the bureau and, with a lighted match in his hand, discovered her. He seized her and dragged her out to the floor. Meanwhile the closet was overturned and fell on her bed and the mirror was broken (R13,22,27,29). Hebert thereupon fled with his younger grandson, but returned later that night (R27).

Madame Leveziel testified that the soldier who dragged her from the closet "violated" her on the floor - inserted his male organ in her female organ - but did not discharge in her. She did not see the other two soldiers during the act of intercourse, but "they were in the room" (R29,31). The only light in this room was that afforded by the matches lighted by accused (R30). She resisted Downes, and in order to overcome her resistance he dealt her blows on the head. Because of "talking on the road", which the soldiers evidently heard, they left the house, whereupon she went to the house of her father-in-law, to which her father and younger son had fled (R29,31). At the trial she positively identified Downes as the soldier who violated her. He was the largest of the three soldiers, had spots on his left cheek and wore a light colored jacket, and she recognized "his looks" (R30,31). Shortly after the incident she "saw somebody in the American hospital about my nose" (R31). Cross-examination failed to weaken her certainty of her identification (R32).

About 1:20 am (evidently French time, or 0320 hours American time), 27 July (R16), First Lieutenant Michael Sorbello, 795th Antiaircraft Artillery Automatic Weapons Battalion, stationed near Pont-Labbe, France, was awakened by two French children who ran to his command post calling for help. After talking with the children, he summoned Staff Sergeant Edward J. Cravens, Battery C of that battalion, and two other enlisted men and with them accompanied the children along the road toward Etienville (R11-12,20-21). When they reached a point near the Hebert house they met the three accused. Lieutenant Sorbello interrogated them, when the three were about one foot apart, without warning them as to their rights under the 24th Article of War. He asked them if they knew the password and they replied in the negative. He then asked them what they were doing there, to which they replied "they were looking for three colored soldiers, three friends of theirs who were somewhere on the road", looking for calvados (R12,18,21). Parrott stated "that they had been in one of the houses looking for the other soldiers who in turn were looking for a drink of calvados" (R18). Although it was "pretty dark", when Lieutenant Sorbello shined his flashlight on their faces, Madame Leveziel identified them as the soldiers who were in her house. She was particularly emphatic in her identification of Downes because he was the largest and was wearing a light colored jacket (R13,16,21,22,30,31). Lieutenant Sorbello

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left Cravens in charge of the three accused and Madame Leveziel led the officer to the house and showed him the room described in his testimony as "pretty well damaged". The large bureau had been pulled away from the wall and the mirror broken. Beside it one or two chairs lay on the floor. The bed clothes were on the floor (R12,13,21-22). The woman, according to Lieutenant Sorbello, "was pretty frightened and her hair was just all askew" (R13). The three accused stated they did not know their way back to their area so he held them at his command post that night (R14,22). The following morning he saw Madame Leveziel and noticed that one side of her face and her eye were bruised (R14).

Captain Vadie P. Pyland, 1293rd Military Police Company, Chievres, Belgium, testified that after the three accused were brought to his command post on the morning of 27 July, he took them to the Hebert house (R23). As they approached the house in a jeep, Lepoittevin, standing in the road with his wife and Louise Lagouche, identified at least two of accused, including Downes, as the soldiers who entered his house on the night of 12 July. Madame Lepoittevin was sure of the identity of only one of the soldiers, Downes (R25,34,36,39,41). All accused denied their identity as the soldiers concerned (R26). At the Hebert home, Madame Leveziel, through an interpreter, identified the three accused as the soldiers who were at the house the preceding night and Parrott as the one who struck her. Captain Pyland confirmed the testimony as to the disorder of the room and testified the woman was "pretty well battered up. She had been struck in the face with something, her nose was swollen and discolored and particularly her eyes" (R24).

On the morning of 28 July, First Lieutenant Richard E. Dielman, 518th Military Police Battalion, to whom Captain Pyland reported and who originally investigated the case, took the three accused to the Lepoittevin home where, evidently through an interpreter, Jeanne identified them as the three who were at his house (on 12 July) and the Lepoittevins both definitely identified accused. The older woman identified Parrott first. The granddaughter, however, was unable to identify them (R46-47). Lieutenant Dielman confirmed the testimony of the other officers as to the condition of the room in the Hebert house (R46).

Second Lieutenant John A. Copple, 624th Ordnance Ammunition Company, who acted as investigating officer (R9), testified that about 20 August, during the course of a voice test, Jeanne identified the voices of accused Downes and Parrott (R48). After they were warned by witness as to their rights under the 24th Article of War, all accused made statements in which they admitted having been together during the entire evening of 26 July (R49).

The following exhibits (as to which permission to withdraw at the close of the trial was granted) and testimony concerning the same were introduced in evidence:

Pros.Ex.A, United States Army Government Issue Olive Drab shirt, was identified as belonging to accused Parrott (R7-9), who admitted ownership thereof (R10). When Lieutenant Sorbello brought accused to his command post in the early morning of 27 July he observed across the back of Parrott's shirt a white streak, which was thicker than at the time of trial. The mark resembled calcimine or whitewash (R14-15). When Lieutenant Sorbello asked Parrott where he got the mark, he said "'What mark?'" (R17). When the officer went to the Hebert house the following morning he discovered that the walls of the room were calcimined. When one of his men rubbed his back against the wall a similar mark was left upon his clothing (R15,22). Captain Pyland (R24-25) and Lieutenant Dielman (R46) confirmed Lieutenant Sorbello's testimony that the walls of the room were calcimined.

Pros.Ex.B, small brown leather coin purse with snap-catch at the top, was identified by Just Hebert as his "old money purse" which was missing from his trousers when he returned to his home for the night on 26-27 July after the departure of the soldiers (R27). Among the contents of the purse was a watch key. At the trial Hebert demonstrated his ownership of the purse and contents by winding his watch with this key (R28). Private Edward J. Kyle, 795th Antiaircraft Artillery, Automatic Weapons Battalion, saw Parrott washing on the morning of 27 July. After drying his face, he dropped something by a tree and walked away. Kyle thereupon walked over and picked up the purse in question, which he handed to Lieutenant Sorbello (R14,19-20). The latter took the purse to the home of Hebert, who identified it as his (R14). He also later identified it in the presence of Captain Pyland (R24).

Pros.Ex.D, black-handled knife with wide-pointed blade, was identified by Captain Pyland as the one taken from Downes on 27 July during a search of the three accused (R23,25).

The defense stated that it had no objection to the admission in evidence of the foregoing exhibits (R10,25).

4. Evidence for the defense, bearing upon the offenses of which accused were respectively convicted, was substantially as follows:

Madame Leveziel, recalled, testified that she did not remember having told accused Downes during the investigation that the first time she saw him was out in the road following the attack upon her and reaffirmed that the first time she saw him was when he lit a match in the house just before he attacked her (R50-51).

After their rights were fully explained to them (R57), each accused elected to testify in his own behalf.

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Downes testified, with respect to Specifications 1 and 2 of Charge I and Specification 1 of Charge II (rapes and housebreaking of 12 July 1944), that he was engaged in loading and unloading ammunition on trucks with his squad at night for a period from before 12 July 1944 to about 26 July, when they changed to day work. His squad was working on the night of 12 July (R77).

With respect to Specification 3, Charge I, and Specification 2, Charge II (rape and housebreaking of 26 July), he testified that one of the truck drivers carrying ammunition to and from his area told him that cognac could be obtained in a certain "little village". When witness changed from night work to day work he had an opportunity to visit the village. He had some money which, with accused Smith's, would be sufficient to buy a bottle of cognac. While he and Smith were talking about the matter on the evening of 26 July 1944, accused Parrott joined them. The three left camp between 2100 and 2200 hours and proceeded to the village about five or six miles distant, where they asked several people the location of the place where they could obtain cognac, but none of them seemed to know, so the three decided to return to their area (R73-74). After apparently riding past their station in one truck, they dismounted and the driver of another truck

> "gave us a ride to the airport and put us off at the fork of a road and we got off and all three started to walk abreast. * * * So we walked along about 250 - 350 yards after we got off this truck and by the time we walked that distance we heard somebody say 'Halt'. We hollered that we was American Soldiers but still another voice say 'halt' again. Then they came up to us and threw a flashlight in our faces and asked for the password. I told him we didn't know any password. * * * and then this Lieutenant asked us had we been in this house or something like that and we told him we didn't know anything about a house, we just got off a truck and walked up there. He said 'A house has been broken in, do you know anything about it?' We told him 'No' and he wanted to know what we were doing out so late at night. He told us it was two o'clock and 'where had we been'. We told him we got lost from our area or we wouldn't been out that late then" (R74).

He had never before been to any of the houses he visited on 27 July nor had he ever before seen any of the people there.

With respect to Madame Leveziel he testified:

> "* * * the first time we was investigated the investigating officer took us around with him to investigate but at the time in this ladies house when we walked in she said she recognized the tallest one. When she said that I asked the investigating officer to ask the interpreter to ask this lady when and where was the first time she ever seen me and she said it was the night we was picked up in the road and I knew that was the only possible chance she had of seeing me. I said 'I don't know how many French people were in the road that night but I do know there were French people there, I heard the voices.' She may have seen me in the road. It's possible she has seen me before" (R75).

On cross-examination he testified that all three of them were together all the time on the evening of 26-27 July until they were picked up about 0200 hours and that all were armed. He did not remember somebody holding a flashlight and a woman yelling "Oui Oui" after they were picked up (R76). Men of his company had orders to carry weapons wherever they went at that time (R77).

Parrott (R61-67) and Smith (R68-73) testified substantially in accord with Downes. Parrott said that after they were picked up a light was shone in their faces and a French woman said "'Oui'", whereupon an officer said "'You must be the boys'" (R62). The "Captain" searched them at a house on 27 July and took witness' knife from him. At another house "an old lady said we were the fellows who had been in her house about two or three weeks ago sometime" (R63). He had never before been in the first house. He did not at any time during the night of 26-27 July or the next day have a purse which did not belong to him, or Pros. Ex.B, in his possession (R64). On cross-examination, he testified that the three were together from the time they left camp until they were picked up, 30 or 40 feet from the house in question. Before this, he did not hear any yelling, screaming or commotion, but heard talking (R65). He saw no other soldiers in the vicinity that night nor did he remember telling the officer he was looking for some other boys (R66). He was in no houses that night. They had no passes when they left camp, but the first sergeant told them if they knew the password he would not bother them. Parrott identified his shirt and testified as to the marks:

> "All I can tell you is I didn't get the white mark at anybody's house. I don't know how it got on there but not in anybody's house because I didn't go in anybody's house. Nobody knows it except me and the Lord but I didn't get it out of anybody's house" (R67).

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Smith in his testimony also denied ever having been to the house in question before 27 July or ever having seen "any of those people" before (R69). When picked up they were about 30 or 40 feet from the house in question (R72). He also denied hearing any screaming or commotion when walking along the road, but testified he heard some talking. He denied telling the officer he was out looking for some friends (R73).

5. a. Immediately following the arraignment the defense moved to strike out Charge II and both specifications thereunder "on the ground that the charges so drawn represent an unnecessary multiplication of charges". (These specifications charged housebreaking and burglary by all accused jointly on the nights of 12 and 26 July 1944 respectively and were companions of the specifications under Charge I, which charged joint rapes on those dates). The defense argued in effect that the provision of Manual for Courts-Martial, 1928, that "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges" (MCM, 1928, par.27, p.17) was applicable and that the two sets of offenses charged were "merely multiplicitous" and parts of the same transactions. The law member overruled the motion "Due to the seriousness of both charges" (R6). The ruling was correct (CM 157982 (1924), Dig.Op.JAG, 1912-1940, sec.451 (32), pp.321,322; CM ETO 4589, Powell et al; CM ETO 5170, Rudesal and Biles).

b. Upon the redirect examination of Lieutenant Sorbello, he testified that when he talked to the three accused after picking them up on the night of 26-27 July, shortly after the commission of the offenses, they were all three together and at the most one foot apart (R17-18). He was asked to state "what Parrott said, where they had been", whereupon the defense objected on the ground that such testimony was not admissible against the other two accused. The law member overruled the objection "With the foundation as laid". Witness thereupon answered "The soldier told me that they had been in one of the houses looking for three other soldiers who in turn were looking for a drink of calvados" (R18). This admission was peculiarly damaging in view of its inconsistency with the testimony of Parrott that he had been in no houses on the night in question (R67).

The general rule is that admissions of a codefendant engaged with others in a joint unlawful enterprise, made after the termination of the enterprise and in the absence of the defendant, are not admissible against the latter as substantive evidence to prove his guilt (CM ETO 1052, Geddies et al, p.15, and authorities there cited). Well recognized exceptions to the rule are, however, that such admissions are admissible (1) where they are so connected with the commission of the crime as to be part of the res gestae of the transaction (2 Wharton's Criminal Evidence, 11th Ed., sec.714, p.1204, sec,720, pp.1210-1212; Cf: CM ETO 3080, Holliday, p.10) and (2) (more in the nature of a non-application than an exception) where they are made in the presence of

the defendant (Ibid., sec.656, pp.1089-1093, sec.710, pp.1195-1197, sec. 723, p.1216). Where the codefendant's admission is, even tacitly, assented to by the defendant, it becomes in reality the admission by silence, assent or adoption of the defendant and assumes a primary character as such (Ibid.). Here both exceptions are applicable: the statement was closely related in time and place to the commission of the crime and was thus part of the res gestae, and it was made in the presence of each of the other two accused without their denial. The law member properly overruled the defense objection.

c. The record contains some hearsay but because of the clear nature of the competent evidence the same could not have injured accused's substantial rights (CM ETO 5179, Hamlin). In view of the strong evidence of identity of accused, the testimony as to the substance of identifying statements made to witnesses through an interpreter, who was not himself called as a witness to prove the statements, while inadmissible hearsay (CM 154245 (1922), Dig.Op.JAG, sec.395(24), p.218; 20 Am. Jur. secs.255,459, pp.248,405-406) could not have injured accuseds' substantial rights (Ibid.).

6. a. Charge I

"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.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par. 148b, p.165).

"Where the act of intercourse is accomplished after the female yields through fear caused by threats of great bodily injury, there is constructive force, and the act is rape, actual

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physical force or actual physical resistance not being required in such cases, even where the female is capable of consenting. It has been held that, where the female yields through fear, the offense is rape, whether or not the apprehension of bodily harm is reasonable, although there is also authority that the threats must create a reasonable apprehension of great bodily harm, and that the threat must be accompanied by a demonstration of brutal force or a dangerous weapon, or by an apparent power of execution" (52 CJ, sec.32, p.1024) (Underscoring supplied).

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.' But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance" (1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943) (Underscoring supplied).

Specifications 1 and 2: Accused Downes alone was convicted of the rapes of Madame Marie Lepoittevin and Mademoiselle Louise Lagouche, committed on 12 July 1944. Both Monsieur and Madame Lepoittevin positively identified Downes as the colored soldier who threw himself upon Louise, who testified that each of the three soldiers engaged in intercourse with her. Madame Lepoittevin testified that Downes threw himself upon her but she was unable to testify positively that he had intercourse with her because, as a result of the brutality of the soldiers, she was not "wholly conscious" after the first soldier (not Downes) had intercourse with her. Both Lepoittevin and Jeanne, voluntarily and without any inducement, identified Downes, two weeks after the incident, as one of the three soldiers in their houses on the night in question. Such identifications were confirmed at the trial by the testimony of Madame Lepoittevin and Jeanne. The evidence of Downes' identity was amply sufficient (CM ETO 3837, Bernard W. Smith; CM ETO 5009, Sledge and Sanders; and authorities there cited).

The Staff Judge Advocate, Normandy Base Section, comments as follows in his review:

"Considerable evidence was introduced by the Prosecution relative to the extra-judicial identification of the accused by various

> French civilians * * * There is considerable doubt as to the admissibility of such evidence at all when the witnesses are available, are produced in Court, and can and do testify on the subject (Sec.439, Wharton's Criminal Evidence, 11th Ed., Vol. I; Sec.353, Evidence, American Jurisprudence)" (p.7).

The question of admissibility of evidence of extra-judicial identification of the accused has recently received exhaustive consideration by the Board of Review in CM ETO 3837, Bernard W. Smith. It is apparent that the Staff Judge Advocate was not familiar with this holding at the time of the writing of the review. In the Smith case, the Board, while recognizing the divergence among authorities on the point, elected to adopt the principle of admissibility of such evidence.

The only direct evidence of penetration of the victims' genitals consists of their own testimony. Under the general rule, a conviction of rape may be sustained on the uncorroborated testimony of the prosecutrix, even though the defendant denies the crime, where her testimony, as here, is clear and convincing. Evidence concerning a physical examination of the victims' genitals was not essential to prove accuseds' guilt (CM ETO 4661, Ducote, and authorities therein cited; CM ETO 5009, Sledge and Sanders). The victims' version of the episode is supported, moreover, by Monsieur Lepoittevin's testimony that each of the three soldiers entered the bedroom and that each took turns guarding witness in the kitchen. All three soldiers were armed. The violence visited upon Madame Lepoittevin necessitated medical treatment for a period of six weeks. That penetration of the person of each of the victims was accomplished by force and without her consent is clearly established by the evidence of the violence of the soldiers' behavior and of their attacks. Lepoittevin testified that he was frightened and "everyone was crying". All occupants of the house were obviously terrorized and the possibility of consent by either of the victims, under the circumstances, is contrary to common experience. The victims' nonresistant submission, obviously through terror, was not consent in law (CM ETO 5584, Yancy, and authorities there cited). The evidence fully supports the findings of Downes' guilt of the rape of Madame Lepoittevin as an aider and abettor of the soldier who without doubt actually raped her (CM ETO 3470, Sanders et al; CM ETO 4234, Lasker and Harrell; CM ETO 4589, Powell et al), and of the rape of Mademoiselle Lagouche through actual unlawful penetration of her person (CM ETO 5584, Yancy; CM ETO 5009, Sledge and Sanders; and authorities therein cited). 3740

Specification 3: All three accused were convicted of the joint rape of Madame Louise Leveziel. Their identity as the three soldiers who came to her home on the night of 26-27 July was established by the testimony of Madame Leveziel positively identifying Downes as her assailant and by that of Lieutenant Sorbello concerning the apprehension of

the three accused near the house in question shortly after the attack. Moreover, the victim identified them, shortly after their apprehension, as the soldiers who were in her home at the time and all accused admitted both to Lieutenant Copple during the investigation and in their testimony that they were together during the evening. Parrott was clearly stamped as an active participant in the events of the evening by the calcimine mark on his shirt (Pros.Ex.A) from the wall of the Hebert house, and by his larceny of Hebert's purse (Pros.Ex.B). Identity of each of the three as the culprits was satisfactorily established (see discussion, supra). Again, the victim's testimony as to penetration by Downes is the only direct evidence thereof. In view of its clear and convincing character, it is sufficient proof, as above indicated. Furthermore it is partially corroborated by the testimony, of Hebert and officers who visited the scene, as to Downes' violence and the results thereof in the room where the offense was committed, and by evidence that the victim was frightened, disheveled and bruised on the face and eye. She categorically negatived consent to the intercourse by her testimony that she resisted and was struck by Downes. The offense charged was clearly proven as to Downes (CM ETO 4444, Hudson et al, and authorities there cited).

Madame Leveziel testified that, although Downes was the only one actually to engage in intercourse with her, the other two soldiers entered the house with Downes, lit matches, searched the house, left and returned in about a quarter of an hour. Although she did not see them during Downes' act of intercourse with her, they were in the room. When the three accused were apprehended shortly after the attack, Parrott stated in the presence of Smith and Downes "that they had been in one of the houses looking for three other soldiers who in turn were looking for a drink of calvados". Such admission, undenied by Smith at the time, significantly corroborates Madame Leveziel's testimony.

The Board of Review held in CM ETO 804, Orletree et al, that proof of mere presence of an accused at the time and scene of a crime is not alone sufficiently inculpatory to support a finding of guilty as to such accused (as an aider and abettor or otherwise). On this principle the record of trial therein was held legally insufficient to support the findings of guilty of accused James H. Wise. There are significant distinctions between the facts with respect to Wise's connection with the crime charged against him and those with respect to Smith's and Parrott's connection with the rape of Madame Leveziel. In the case of Wise there was a total absence of evidence of preconcert, understanding, mutual plan or design having as its purpose the commission of the crimes involved. There was no showing of Wise's knowledge of the criminal intent of the other accused. The contrary is abundantly evident in the case of Smith and Parrott. The three accused, all of whom were armed, and had been together all evening, unlawfully entered the house together about 0200 hours, lit matches and searched the house. These were circumstances from which the court might infer that they were searching for women. Thereafter they left, returned in a quarter of an hour and

again unlawfully entered the house. Downes discovered the hiding place of the victim and raped her without interference from the other two. The court might properly infer that the only reason that Smith and Parrott, who were present in the room with their guns, did not consummate the joint scheme and themselves each rape the victim, was the fact that they heard talking in the road, evidently from Lieutenant Sorbello's party. There was here far more than mere evidence of presence. There was evidence of preconcert, mutual purpose and intent to aid each other in securing sexual intercourse, by whatever means were necessary. The guilt of Parrott and Smith as aiders and abettors of Downes in his rape and thus as principals as charged was established (see authorities supra).

b. Charge II:

Specification 1: The evidence clearly supports the findings of Downes' guilt of the offense of housebreaking on 12 July 1944 as alleged (CM ETO 5170, Rudesal and Biles; CM ETO 4589, Powell et al; and authorities therein cited).

Specification 2: The reviewing authority, as to each accused, approved only so much of the findings of guilty of this burglary specification as involved findings of guilty of the lesser included offense of housebreaking. The evidence supports the findings of guilty of such offense on the part of each accused as alleged (Ibid.; MCM, 1928, pars. 149d,e, pp.168-170). Their intent to commit rape at the time of their joint unlawful entry is inferable from their joint unlawful entry and searching of the house armed with rifles, their presence in the room during Downes' rape of the victim and her testimony that the reason they left the scene was "Because there was talking on the road".

7. The charge sheet shows the following concerning the service of accused:

Parrott is 23 years five months of age and was inducted 5 December 1942 at Riverside, New Jersey.

Smith is 23 years six months of age and was inducted 27 November 1942 at Greensburg, Kentucky.

Downes is 29 years one month of age and was inducted 17 December 1942 at Norfolk, Virginia.

Each was inducted to serve for the duration of the war plus six months. None had prior service.

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

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sufficient as to each accused to support the findings of guilty as approved and the sentence as confirmed.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). As the sentences of accused Parrott and Smith include confinement for more than ten years, i.e., life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates JAMES R. PARROTT (32483580), GRANT U. SMITH (35688909) and WILLIAM C. DOWNES (33519814), all of 597th Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty as approved and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences as confirmed.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 6193. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6193).

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

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

1 Incl.
Record of Trial.

(As to accused Downes, sentence ordered executed. GCMO 50, ETO, 23 Feb 1945. As to accused Smith and Parrott, sentences as commuted ordered executed. GCMO 51, ETO, 23 Feb 1945)

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

BOARD OF REVIEW NO. 2 3 FEB 1945

CM ETO 6194

U N I T E D S T A T E S	3RD INFANTRY DIVISION.
v.	Trial by GCM, convened at Bruyeres, France, 19 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MAURICE A. SULHAM (31340869), Company L, 7th Infantry.	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Maurice A. Sulham, Company "L" 7th Infantry, having received a lawful command from Captain David B. Fleeman, his superior officer, to "return to your company", did, near Mailleufaing, France, on or about 1 November 1944, willfully disobey the same.

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 members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Command-

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ing General, 3rd Infantry Division, approved the sentence, attached a recommendation for commutation of the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 50 years, and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the afternoon of 1 November 1944, accused reported to Captain David B. Fleeman, Headquarters Company, 3rd Battalion, 7th Infantry, at the battalion command post near Mailleufaing, France (R7,8). Captain Stewart, battalion executive officer, was also present. Accused stated to the two officers that he had fallen behind and

> "had not been with the company for approximately 48 hours. He claimed that he suffered some visual deficiency and couldn't see and couldn't keep up with the company. * * * Capt Stewart told him * * * to go up with the supply sergeant, and report to the company. * * * He said he wasn't going to but he eventually did" (R7).

At approximately 10:00 o'clock that night accused returned to the battalion command post and advised Fleeman that he - accused -

> "had trouble with his eyes but the medical officer had ordered him to go to his compahy and he was appealing to Capt Fleeman and Capt Fleeman told him that he was not a medical officer and couldn't tell if there was anything wrong with his eyes" (R10).

On this occasion, Fleeman testified:

> "I told him I was ordering him to report back to his company immediately, to get into a jeep with Sgt Moore and go up to the company and he replied, I don't recall the exact words, 'I will not commit suicide'. I then said, 'Will you or will you not obey that order?' He said, 'I'll take a court-martial'. I said, 'Answer yes or

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no, will you or will you not obey that order?' and he said 'No'" (R8).

Accused made no effort to obey the order (R10).

4. No evidence was presented on behalf of the defense. After his rights were explained to him, accused elected to remain silent (R11).

5. The evidence shows that accused verbally refused to obey Captain Fleeman's order to report to his company and that he made no effort to obey it. Sergeant Moore was ready to take him in a jeep. This testimony supports the inference that actually he did not obey it. The order related to a military duty and was one which Fleeman was, under the circumstances, authorized to give the accused (Vide MCM, 1928, par.134b, p.148). The latter's mere assertion of visual deficiency - which is all that is shown with reference thereto - was inadequate to relieve him of his obligation to obey (Winthrop's Military Law and Precedents, 1920 Reprint, p.572). His open and express refusal sufficiently established the willful and intentional character of his disobedience (Ibid.,p.573). The record of trial sustains the findings of guilty in violation of Article of War 64.

6. The charge sheet shows that accused is 26 years of age and that, with no prior service, he was inducted at Rutland, Vermont, 29 September 1943.

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

8. The penalty for the willful disobedience by one subject to military law of the lawful command of his superior officer, in violation of Article of War 64, is death or such other punishment as a court-martial may direct (AW 64). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

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

1. In the case of Private MAURICE A. SULHAM (31340869), Company L, 7th 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 6194. For convenience of reference, please place that number in brackets at the end of the order : (CM ETO 6194).

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

(Sentence as commuted ordered executed. GCMO 43, ETO, 10 Feb 1945.)

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

BOARD OF REVIEW NO. 2 26 JAN 1945

CM ETO 6195

U N I T E D S T A T E S	9TH BOMBARDMENT DIVISION (MEDIUM)
v.	Trial by GCM, convened at AAF Station 170 (Weathersfield, England), 21 September 1944 and at Paris, France, 10,11 October 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
First Lieutenant LOYAL D. ODHNER (0-580132), Air Corps	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 58th Article of War.

Specification: In that First Lieutenant Loyal D. Odhner, Air Corps, Seventy-ninth Station Complement Squadron, IX Bomber Command did at Army Air Force Station 170, Army Post Office 140, United States Army on or about 11 July 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Glasgow, Scotland on or about 8 August 1944.

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

Specification 1: In that * * * did at or near Glasgow, Scotland on or about 8 August 1944 with intent to defraud willfully, unlawfully, and feloniously pass as true and genuine a certain paper in words and figures as follows: "Special Order Number 7, Detachment Headquarters, Office of Stragetic Services, dated 6 August 1944," directing travel of one First Lieutenant Daniel D. Kettering to North Ireland, a writing of a public nature which might operate to the prejudice of another, which said paper was, as he the said First Lieutenant Loyal D. Odhner, Air Corps then well knew falsely made and forged.

Specification 2: In that * * * did at or near Glasgow, Scotland on or about 8 August 1944 with intent to defraud willfully, unlawfully, and feloniously pass as true and genuine a certain card, War Department Adjutant General's Office Form Number 65-1, in words and figures as follows: "This is to identify Daniel D. Kettering, Jr. 2nd Lt. AC 0580112 whose signature, photograph, and fingerprints appear hereon, in the Army of the United States, (signed) Daniel D. Kettering, Jr.", a writing of a public nature which might operate to the prejudice of another, which said card was, as he the said First Lieutenant Loyal D. Odner, Air Corps then well knew falsely altered and forged.

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

Specification: In that * * * did at Army Air Force Station 170, Army Post Office 140, United States Army on or about 11July 1944 feloniously embezzle by fraudulently converting to his own use funds of the Post Exchange of Army Air Force Station 170, to wit, about one thousand and eighty-three pounds sterling of a value of about four thousand three hundred and sixty nine dollars, the property of the said Post Exchange, entrusted to him as Post Exchange Officer by the Commanding Officer of said Army Air Force Station 170.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when 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 20 years. The reviewing authority, the Commanding General, 9th Bombardment Division, (M) 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. Accused was made post exchange officer at AAF Station 170 (Weathersfield, England) prior to 1 April 1944. Early in June accused showed to Major William D. Barrell, president of the post exchange council, a post exchange form 200 complete for the month of May and gave him to understand that it had been filed by him (accused) personally with the Army Exchange Division and accepted by them (R70-76). In the latter part of June or during the first week in July, while he was writing a money order for him, accused told Sergeant Robert M. Leech, a postal clerk, in substance, that he (accused) had sent home a couple of thousand dollars through a bank (R59,60). He had sent possibly six or eight $20.00 money orders through the post office (R60). Captain Hugh G. Heiland, Station Adjutant at AAF Station 170 from 8 January until the latter part of July 1944, had just signed orders for the inventory of the post exchange and was in the officers' mess the night of 9 July 1944 when accused came to him and wanted to know "when they were going to inventory the PX and why" and when told that it was because of instructions received, walked away (R37-38). He did not see accused again until about five weeks later (R39-40). Accused was in the post exchange about every day previous to 9 July, and kept the books and made the bank deposits but was not seen there after that date (R55-57). The officers' quarters at Station 170 were taken care of by Private Albert Stevens who knew accused and saw him last on Sunday morning 9 July. Accused's bed was not used for several days thereafter (R41) and his personal belongings were checked and removed to the supply room for storage on 11 or 12 July (R45-46).

About quarter to eight on the evening of 8 August 1944, Lieutenant Douglas May, Branch Intelligence Service, British Army, whose duty it was to check people getting on the boat, saw accused in Glasgow, Scotland, in the Burns Laird Belfast Shed, which is the shed for passengers embarking on a ship going to Ireland. Accused was in proper uniform. His identity card had no

proper number, was written in pencil and the typewritten name, Daniel D. Kettering Jr. was dirty and appeared to have been erased and typed in. His movement order indicated he was sent on a special mission to investigate a Master Sergeant. He claimed his name was Daniel D. Kettering. He had no identification discs. Accused was thereupon detained and turned over to the United States Provost Marshall. May identified accused, as the man he detained in Glasgow (R9-13). Accused was returned to Army Air Force Station 170 under guard on 12 August 1944 (R58). No orders authorizing accused to leave his station for the period of his absence were issued and his absence was unauthorized (R19,21,34,37). The movement order apparently authorizing accused as Daniel D. Kettering Jr. to proceed to Belfast, North Ireland, was an altered and fictitiously signed copy of an official order issued some six months previously by another command than that of accused (R14-16; Pros.Ex.3,4).

On 9 July an investigation board was appointed to inventory the station 170 post exchange (R22). The inventory so taken and an examination of what post exchange records they could find showed a shortage (R25). The auditing officer of the Army Exchange Service had found no finicial report to Station 170 for May and requested it. The same thing occurred in June. Reports for these two months were not secured till 25 July (R61) when they were made and submitted by accused's successor (R67). The April report had not been submitted until 26 June (R62-65). He found the total deficit for the period 1 May to 10 July 1944 to be £ 1065 - 17s - 9½d but it was impossible to tell whether the shortage was in merchandise, in cash or partly both (R68,74,87,90). A post exchange employee testified he had never seen any merchandise removed from the exchange without payment and that £1000 value of merchandise would represent nearly half of the post exchange stock of goods. No theft from the exchange was ever reported (R76-77). The accounting records of the exchange were found to be incomplete (R79) and the bank book showed the exchange money was not regularly deposited (R91) and did not show a normal increase in deposits when made for a period of several days instead of daily (Pros.Ex.16,Sub.Ex.C., Schedule 3). The station post exchange council had met in April and not again until 7 July (R72,92).

Accused was identified both as Loyal Daniel Odhner Jr. and as Daniel D. Kettering Jr. by an agent of the Army Counter Intelligence Corps who questioned him on the morning of 10 August (R48-49). After due warning as to his rights in so doing, accused told his story to him in the morning and then repeated substantially the same story to Agent George H. Hill of the Army Criminal Investigation Division in the afternoon of 10 August, stating in substance that he was married, was promoted to First Lieutenant in April 1944

and had been made Post Exchange Officer at Station 170 some five or six months before. In March 1944 he was for a time ill in a hospital and another officer took over the exchange duties temporarily. When he got out he took an inventory of stock and cash but in the following months his accounts became increasingly involved and in May and June 1944, he didn't get his accounts in at all. He had heard things that led him to believe an investigation of the post exchange accounts was forthcoming, "got the jitters", took about £300 from the exchange office safe and on 9 July went absent without leave. He eventually made his way to Glasgow, Scotland, where he was detained by the military police after having tried to secure passage to Northern Ireland. At the time he was apprehended he had roughly £100. He gave the military police an alias of Daniel D. Kettering Jr., and presented his AGO 65-1 card altered by himself to show this identity which he had assumed (R51-54; Pros. Ex.10).

4. After his rights as a witness were explained to him, accused was sworn as the only defense witness. He repeated in much greater detail his previous stories of his difficulties in making his exchange accounts balance, of being at the same time, transportation, supply and censor officer along with his squadron duties, and his lack of experience in any type of financial or post exchange work. He was worrying about his wife who had already lost two children and was about to have another. Then he heard the post exchange was to be inventoried and thought "it would be the I.G.D.". He tried to figure some way "out of these things". He went to the exchange rather late in the evening, took some money that was in the safe "and took off". He traveled to various cities and thinking the situation over, realized he had a pretty serious charge against himself, since he was absent without leave as well as having taken the funds. He went up to Glasgow and got the idea that he had better turn himself in but thought if he turned himself in in Ireland he would be sent to the States and would not be tried by the command in which he was serving. He made up orders while in Scotland which he thought would facilitate getting across but when he tried to get to Ireland, the British authorities apprehended him. The only money he took from the exchange was that taken when he left and he thought he couldn't turn himself in at the base but should "get as far away as possible and I might have a better chance of being tried with less evidence against me there" (R94-95). The money he sent home, close to $1000, came from his pay and from his gambling winnings. He knew it was impossible to escape the consequences of his acts and intended to turn himself in. "I started to go back to my station and then I decided it would be best to go farther away". He knew no one named Daniel D. Kettering (R96) but thought if apprehended under his own name he would be sent back to his command but using this name he might be sent elsewhere. His own command would have more knowledge of the case and in another command he would get off lighter (R97).

He admitted he had no dog tags, that he had been absent without leave approximately 28 days, that he had altered his AGO card by changing the name, and had himself made up the alleged orders he was carrying (R98). He testified that he did the exchange bookkeeping and as far as he can remember he took the May report which he showed the president of the Station Post Exchange council, to London (R99). His considered intention was "to get as far away from my command as possible" (R100). He thought he had taken about £300 pounds but had not counted it and had spent large sums (R100-101). He denied telling the postal clerk he had sent $1000 or $2000 home through a downtown bank (R102).

5. a. Desertion is absence without leave accompanied by the intention not to return to his place of service. If the absence is much prolonged or is not satisfactorily explained, the court is justified in inferring from that alone an intent to remain permanently absent. Such inferences may also be drawn from such circumstances as his arrest at a considerable distance from his station; that he attempted to secure passage on a ship; that while absent he was in the neighborhood of military posts and did not surrender or that just previous to absenting himself he took without authority money or other property that would assist him in getting away (MCM, 1928, par.132a, pp.142-144). All of these circumstances were present in the case of accused together with his admission of such facts and his statement that he was trying to get as far away from his command as he could. The court was justified in finding accused guilty of desertion as alleged in the Specification of Charge I.

b. Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another (MCM, 1928, par.149j, p.175). Accused was charged with uttering two false instruments. The evidence shows that accused was apprehended on presenting an admittedly self-prepared false order for the purpose of assisting himself to secure passage by ship to Belfast, Northern Ireland (Specification I, Charge II, R12) and while at the same time presenting a wrongfully altered AGO card, signed with a fictitious name, all done with the intent to avoid being apprehended and to secure services and travel for himself that would have been denied him under his own name (Specification 2, Charge II).

c. Embezzlement is the fradulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (MCM, 1928, par.149h, p.173). Accused as post exchange officer, had control of the exchange and was responsible for its management and its accounting and custodian of its property and funds (AR 210-65). The evidence clearly shows and accused admits failure to account for the exchange property and funds and he admits wrongfully taking at least £300 from the office safe of the post exchange and appropriating it to his own use. An inventory of the post exchange showed a shortage of 1065 pounds (Specification of Charge III).

6. The charge sheet shows accused is 25 years 11 months of age. He enlisted in the Regular Army 8 August 1940; was honorably discharged 28 May 1943 to accept an appointment as Second Lieutenant 29 May 1943 and immediately entered upon active duty.

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. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42) and for the offense of embezzlement where the sentence is for more than one year (District of Columbia Code, sec.22-1202 (6:76); sec.24-401 (6:401). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

[signature] Judge Advocate

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1st Ind.

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 JAN 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant LOYAL D. ODHNER (O-580132), Air 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. 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 6195. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6195).

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

(Sentence ordered executed. GCMO 34, ETO, 3 Feb 1945.)

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

BOARD OF REVIEW NO. 2

3 FEB 1945

CM ETO 6198

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kerkrade, Holland, 8 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private EDWARD A. BEAN (33590387), Company K, 119th Infantry.	

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

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

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

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

Specification: In that Private Edward A Bean Company K 119th Infantry, did at Merkstein, Germany, on or about 9 October 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until he was apprehended at Merkstein Germany on or about 12 November 1944.

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

Specification 1: In that * * * did at Merkstein, Germany on or about 12 November 1944, wrongfully

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cast away his Military uniform, arms and equipment and wear civilian clothing

Specification 2: (Finding of Not guilty)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification, of Charge II and Specification 1 thereof, and not guilty of Specification 2 of Charge II. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for about ten days, breach of arrest and wrongfully appearing in improper uniform in violation of Articles of War 61 and 69 and one by summary court for absence without leave for one day in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 9 October 1944, Company K, 119th Infantry, of which company accused was a member, was engaged in attacking the town of Merkstein, Germany (R6,7). On that day, during a period when his platoon was engaged with the enemy, accused and another soldier of his command were detailed to take some previously captured German prisoners to a command post some 500 yards distant and thereafter to return to their platoon. The mission was susceptible of completion within fifteen or twenty minutes and the soldier who was detailed to accompany accused did in fact rejoin his platoon within that time, but accused was not with him when he returned. About an hour later, a third soldier of accused's platoon was sent to search for him but such search proved unsuccessful. Accused's acting platoon sergeant testified that accused did not return to the unit on 9 October and that he did not thereafter see accused until the date of trial (R8,9).

With respect to Specification 1, Charge II, First Lieutenant Morris C. Miller, 29th Infantry Division, testified that shortly after dark on 12 November 1944, as he was entering "the battalion C.P." he noticed a person in civilian clothes "scoot down in the cellar". Lieutenant Miller apprehended the person who answered him in German, later identified as the accused, and who was thereupon turned over to

the Battalion S-2. When apprehended, accused was dressed in "civilian trousers and a suit-coat - sandals and a cap". He was wearing no part of his uniform (R10,11). When questioned in German, he said he was working in a mine and that he had left his identification in his house (R10). Corporal Asa Eberly, 29th Military Police Corps, also testified that when accused was surrendered into his custody on 12 November he was dressed in civilian clothes and was wearing no part of his uniform. Accused later was returned to his organization. Shortly before this was done, a military policeman took accused to "a house" where he secured his uniform, shoes and helmet (R11). At the pre-trial investigation accused voluntarily made a statement to the investigating officer. This statement was introduced into evidence by the prosecution and reads as follows:

> "At about nine o'clock in the morning of October 7th, when my company, Company "K", 119th Infantry, was attacking and I was told by Pfc Hornet to take back to Merkstein seven prisoners. I took them with another man in the company to an area where we were holding prisoners. About noon, we turned them over to another company and started back with another man who had been sent from the company to pick us up. On the way, I went in an air raid shelter to tell the civilians that they could come out. It took me about 20 minutes to explain to them that they could come out and when I came out, the other two men from the company had left. I looked for the Command Post and could not find it, so I went to the school and washed and shaved. I lived there alone until about two weeks before I was picked up. As I was hungry, I went to the home of some civilians. They fed me, and I stayed there until picked up. During this time, I hung around town. I was picked up by an artillery officer about six P.M. on November 12, 1944, in civilian clothes. He turned me over to the M.P.'s. It was not my intention to remain in civilian clothes or to appear in public in civilian clothes. I had removed my uniform to have it washed and remained in the house until that evening when I went outside for about 10 minutes. It was then that I was picked up by the M.P.'s. The next day, I went back with a member of the CIC to investigate the civilians and got my rifle and clothing. I left the rifle at an M.P. station before being brought up to the stockade here"(R12;Pros.Ex.1).

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The prosecution also introduced into evidence a duly authenticated copy of the morning report of Company K, 119th Infantry, containing entries showing that accused absented himself without leave from that organization from 9 October 1944 to 13 November 1944 (R13, Pros.Ex.2).

4. Accused, after having been advised of his rights as a witness, elected to remain silent. No evidence was introduced on behalf of the defense.

5. The evidence adduced in support of Charge I and its Specification, shows that on 9 October, at a time when his platoon was engaged with the enemy during an attack, accused was detailed to take some prisoners to a command post some 500 yards distant, a mission requiring only fifteen or twenty minutes to perform, after which he was to return to his unit; that accused failed to return to his platoon and was not found although search for him was made. More than a month later he was apprehended in civilian clothes at which time he tried to pass himself off as a German miner. The evidence supports the conclusion that both accused and his command were before the enemy at the time of accused's dereliction and that his failure to rejoin his unit constitutes running away from his command within the purview of Article of War 75 (CM ETO 1404, Stack; CM ETO 4093, Folse). All elements of the offense alleged were therefore proved by the evidence.

The evidence conclusively supports the finding of guilty of Specification 1, Charge II, and Charge II.

6. The charge sheet shows that accused is 21 years of age and was inducted at Philadelphia, Pennsylvania, on 8 March 1943. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of 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. Misbehavior before the enemy is punishable by death or such other punishment as a court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

2 FEB 1945

CM ETO 6203

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Soumagne, Belgium, 6 November 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant CHARLES H. MISTRETTA (O-1592448), Corps Military Police, 552nd Military Police Escort Guard Company	

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

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

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

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

Specification: In that Second Lieutenant Charles H. Mistretta, Corps of Military Police, Five Hundred Fifty Second Military Police Escort Guard Company, did, without proper leave, absent himself from his command at Charleroi, Belgium, while enroute to Huy, Belgium, from about 19 September 1944 to about 22 September 1944 during which period the said Five

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Hundred Fifty Second Military Police Escort Guard Company was engaged in operating the Army Prisoner of War Enclosure at Huy, Belgium.

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

Specification 1: In that * * * did at Charleroi, Belgium, on or about 19 September 1944 violate First United States Army directive dated 15 September 1944, Subject: Relations of Troops with Civil Populace, by wrongfully fraternizing with civilians after having been duly warned against such fraternizing.

Specification 2: (Finding of not guilty)

He pleaded not guilty, and was found not guilty of Specification 2, Charge II, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, but reduced the period of confinement to two years, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that at the time mentioned in the specifications, accused was a second lieutenant, attached to the 552nd Military Police Escort Guard Company (R7). On 19 September 1944, two sections of this organization moved "from La Capelle (France) to Huy (Belgium)", for duty at the latter place (R7,10). Accused, in command of the second section, left La Capelle about two hours after the departure of the first section which was under the immediate command of Captain Jacob Amacher, Corps of Military Police, the commanding officer of accused's organization (R7,8). The first section arrived in Huy and established a new prisoner of war enclosure, its new post, in accordance with its mission and in advance of the second section which arrived in Huy the evening of 19 September 1944 (R7,8,10,12; Pros.Ex.1). En route to Huy, at about 12:45 pm in Charleroi, Belgium, accused stopped the section which he commanded to allow the men to eat their lunch (R10). The hour appointed for this "convoy" to leave Charleroi was "1330 /hours/ on the 19th" (September) (R14). Accused left his section, after it reached Charleroi and had parked for lunch. He did not return to it by 1330 hours, nor by

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1430 hours, at which last named hour, and in the continued absence of accused, the second section proceeded on its way to Huy, on the instructions of First Sergeant Mark J. Hanley, 552nd Military Police Escort Guard Company. Accused, himself, did not resume his journey to Huy until about 1630 hours or 1700 hours. He was accompanied at that time by Sergeant Hanley who after having dispatched the second section on its way, under the charge of a mess sergeant, had gone to look for accused (R9-11). When accused and Sergeant Hanley arrived at Huy, the latter inquired of an M.P. at the corner for directions to this new prisoner of war enclosure. While the sergeant was making this inquiry, accused got out of the jeep in which they were riding. That was the last Sergeant Hanley saw of accused until "sometime after 1930" hours on 22 September, although he made a search for accused in the company area twice daily thereafter (R12,13). Captain Amacher did not see accused after leaving La Capelle until "approximately 7:30" (pm) on the 22d of September 1944 (R7,8), at which time accused reported to him (R13). This absence of accused from his command was unauthorized (R8). The company morning report showed accused absent without leave from his organization from 1330 hours 19 September 1944 until 1930 hours 22 September (R13; Pros.Ex.1).

After accused halted his section in Charleroi at about 12:45 pm, he had Sergeant Hanley drive him to the home of some civilian "acquaintances" he knew. Accused entered. Hanley remained outside. At about 1:30 pm Hanley entered the home to notify accused it was the time his convoy was scheduled to move. Inside, Hanley found accused with two other officers and two ladies. Accused then prepared to leave but "in saying goodbye he took possibly five or ten minutes longer than he should have, and in that time an MP officer came to the house" (R9,11). This was First Lieutenant Oliver E. Hopkins, Corps of Military Police, who had noticed an army jeep parked outside of a civilian home and, as a result of a conversation with its driver, went in the home and found the group above described. Lieutenant Hopkins said that accused was sitting beside "a young lady at a table, had his coat off, his gun was lying on the floor beside his chair, and there were drinks sitting by the table in front of him and the young lady". Lieutenant Hopkins asked accused and the other officers to come outside and talk to him. After some delay and a second request, accused went out and was told by the Lieutenant that

> "an order came out at least three days ago about fraternizing with civilians and about being in houses and being off-limits".

During the conversation accused expressed his resentment at Hopkins' "coming into a place like that and pushing him out -". As a result, Lieutenant Hopkins asked all the officers including accused, to accompany him to the summary court. Arrived there, Lieutenant Hopkins "got a copy of the order on fraternizing with civilians and

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showed it to [accused], had him read it, and after he read it asked him if he understood the order, what it meant, and so on" (R14-16). The order thus read to accused had been issued by command of the Commanding General, First United States Army, 15 September 1944. It forbade fraternizing by troops with the civilian population, including "visits to civilian homes, dining with civilians" (R16; Pros.Ex.2). Accused, in answer to Lieutenant Hopkins' question as to whether he understood the order, "assured" the latter that he did and asked if he might leave. Told that "it was all right", accused departed. About 45 minutes later, accused was found by Lieutenant Hopkins in the same house from which he had previously taken him (R11,16,17).

4. Accused advised of his rights as a witness elected to remain silent. He called no witnesses. On direct examination, Sergeant Hanley testified that the order of the First Army against fraternization had come in to his organization late the evening before, had not been published on the bulletin board, and that "in the movement the organization was not acquainted with it" (R11).

5. Accused's absence without leave on the days alleged in violation of Article of War 61 (Charge I, Specification) was established by entries in the morning report and by the testimony of First Sergeant Hanley who had personal knowledge of the initial absence and who personally searched for accused in the company area twice daily until accused's return. It is unnecessary to determine at what particular hour on 19 September accused's initial absence commenced. That accused's absence was unauthorized was established by the testimony of his company commander.

The evidence, also showed that accused was in a civilian home visiting there, socially, with two women, in the town of Charleroi, Belgium, on the date and as otherwise alleged in Specification 1, Charge II. This was in violation of a directive of the First United States Army. The court doubtless took judicial notice of the fact that Charleroi, Belgium, was at that time, so far at least as United States Army personnel were concerned, under the jurisdiction of the First Army. Regardless of whether or not accused knew of this order at the time of his first visit to the civilian home, his second visit, made the same day, occurred after he had been fully informed of the provisions of the order. This offense was properly charged under Article of War 96. Instances of disorder and neglect to the prejudice of good order and military discipline, in violation of Article of War 96, as cited by the Manual for Courts-Martial (1928, Ed., par.152a, p.187) include

> "Disobedience of standing orders or of the orders of an officer when the offense is not chargeable under a specific article * * *".

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6. Accused is 32 years of age. The charge sheet shows that he had enlisted service of six years. He was appointed Second Lieutenant, Quartermaster Corps, 28 May 1943 to serve for the duration of the war plus six months.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty and the sentence. The offense of absence without leave by an officer in violation of Article of War 61 is punishable as a court-martial may direct.

Judge Advocate

Judge Advocate

Judge Advocate

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ETO 6203 MISTRETTA, CHARLES H., 2nd Lt.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant CHARLES H. MISTRETTA (O-1592448), Corps Military Police, 552nd Military Police Escort Guard Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6203. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6203).

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

(Sentence ordered executed. GCMO 39, ETO, 7 Feb 1945.)

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

BOARD OF REVIEW NO. 3 8 MAY 1945

CM ETO 6207

U N I T E D S T A T E S	94TH INFANTRY DIVISION
v.	Trial by GCM, convened at Chateaubriant, France, 27 December 1944.
Private LUTHER W. CARTER (33752089), 667th Quartermaster Truck Company	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Luther W. Carter, 667 Quartermaster Truck Company did at Bain de Bretagne, France, on or about 23 November 1944 forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Genevieve Cordier.

He pleaded not guilty and all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence 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.

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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 approximately 1815 hours on 23 November 1944, Mlle. Genevieve Cordier, 27 years of age, was returning on foot to the home of M. and Mme. Paitel in Bain de Bretagne, France, where she was employed as a maid (R9,10,15). As she was proceeding along the road, she noticed a "closed" jeep approaching from the opposite direction. When the jeep drew near her it stopped and its driver, a colored soldier later identified by Mlle. Cordier as the accused, dismounted and approached (R10,11,17). He attempted to enter into a conversation with her but when she indicated that she did not understand him he slapped her with sufficient force that the blow caused her to fall to the ground. He thereupon picked her up and, despite her screams and struggles, carried her to the jeep. He then started the vehicle, "took the road to Noe Blanche and drove for some time", eventually stopping at the side of the road. Thereupon, after certain preliminary advances, he placed Mlle. Cordier in the back of the jeep and "tried to do what he wanted to do". After persisting unsuccessfully for some ten minutes in the face of her struggles, he ceased his activities upon hearing the voice of one Emile Denise, a neighboring farmer who had been attracted to the scene by the sound of screams (R11,21). Upon hearing M. Denise, accused got in the front seat of the jeep and started the motor. Mlle. Cordier took advantage of this diversion to escape through the rear window and together she and M. Denise fled and hid ina nearby hedge (R11,22). Accused pursued them and frightened M. Denise away by firing his rifle. He then dragged Mlle. Cordier back to the vehicle and again drove away, apparently in the direction of Saint Sulfice (R12,13,21). En route to the new destination accused passed through the village of Bain de Bretagne where the local gendarmes, who previously had heard the sound of rifle shots, attempted unsuccessfully to stop the jeep. Mlle. Cordier was screaming at the time and accused began to sing in a loud voice (R13,24,25). Accused continued on, later turned down a lane, stopped the vehicle and began to remove certain of Mlle. Cordier's clothing. She again struggled, screamed, bit accused's finger when he attempted to stifle her screams, and otherwise attempted, by "putting my hand so that he could not do what he wanted", to prevent him from accomplishing his purpose. However, since she "had not much strength left", by this time, he succeeded in having intercourse with her (R13,14). She was positive that accused's penis entered her body (R19). The act caused her to bleed and the flow thus caused stained her pants and slip (R16,17,26,44). After the intercourse was completed, he aided her in finding and putting on the clothing he had previously removed (R14). He then gave to her "a paper" (a 500 franc note) which she retained because she was frightened and feared that if she did not

accept it he might resume his advances (R14,19). Thereafter, he drove her near the home of M. Paitel where he had first picked her up and there permitted her to depart (R15). Upon reaching the house, she reported the incident to M. and Mme. Paitel (R19).

As the result of a report received about 2000 hours on 23 November, a search was made at accused's company area and accused and the closed jeep of which he was the regularly assigned driver were found to be missing (R7). Accused returned to the area at about 2230 hours. As he was under the influence of liquor at the time, his commanding officer questioned him only briefly and ordered him to report to his tent, thinking to question him more fully the following morning. About one hour later, as the result of a further report, accused was again called to the orderly room. It was noted at this time that his fatigues were bloodstained and his rifle smelled as if it recently had been fired (R8,36,44).

At about 0230 hours on 24 November, Mlle. Cordier was examined by Captain William G. Zantiny, Medical Corps. His findings were as follows:

> "Going back in the general inspection of this woman's body, it revealed superficial lacerations or small cuts on the right side of the head in the region above the eye, lacerations on the right side of the right knee and the right side of the left knee as well. Also numerous small lacerations or cuts on both legs. There was also a bruise, a contusion of about two inches by three inches in diameter on the left side of the jaw. There was also a similar bruise on the region of the 11th thoracic vertebrae, which means the bump that sticks up just below the head. There were several small tender black and blue areas which were found on both arms, numerous areas of varying sizes from one to six inches in diameter on both thighs and legs. Examination of the external genitalia, that is the external sexual glands revealed several small clots of blood. On the hair adjacent to the vulvar orfice, vulvar orfice means the opening of the external sexual glands, there was a moderate amount of fresh dark red

> blood which was draining from the opening. A recent laceration of about one half inch was found on the labia minora, labia minor referring to the fold of the external sex organs. The hymen, I believe that is a term which is familiar to all, was found to be torn and bleeding slightly. There was no evidence of laceration of the lower vaginal canal, referring to the internal female organs" (R47).

The prosecution introduced into evidence a statement voluntarily made by accused on 24 November 1944 to an agent of the Criminal Investigation Division. Accused's version of the events which took place on the evening of 23 November does not differ materially from that given by the witnesses whose testimony has been summarized above. He did, however, state that when he first approached the girl near Bain de Bretagne she appeared "to be in a friendly mood". He also stated that although she protested in a loud voice when he first drove away with her in the jeep, she did not employ what "I would call a 'screaming' voice". He realized, however, that he was driving off against her will. He further stated that he gave Mlle. Cordier the 500 franc note at the conclusion of the first leg of the journey, prior to any attempt at intercourse, that she accepted the note, and that he understood her to reply "we"following the tender of the note. He admitted that thereafter the girl attempted to escape from the rear of the vehicle, that he fired his weapon into the air, and that the French civilian who had appeared on the scene then ran away. He also admitted that when he was removing certain of the girl's clothing she attempted to stop him "once or twice". He stated that thereafter, just prior to the intercourse, he removed from the back of the jeep a hoe which he thought might be causing her discomfort after which she remained quiet "until I, myself forced my Penis into her and this time she exclaimed, 'Oh'". He closed his statement by saying,

> "On the evening of 23 November 1944, after I had been drinking most of the day, I 'took off' from my company area in my jeep. I can see now that my drinks 'took' the best of me and I want to make a clean slate of this entire matter, as my conscious will be clear of the entire thing" (R42; Pros.Ex.E).

4. For the defense, the accused's commanding officer testified that accused, while perhaps at times "mentally slow", had at all times made every attempt to perform his duties to the best of his ability, that his character had been regarded as excellent, that he was well-liked by the men, and that, if accused were found not guilty of the offense charged, he would like to have him return to the company (R49).

Accused, whose rights as a witness were explained to him by his counsel, elected to testify on his own behalf. His testimony on the stand was in the main merely repetitive of the recitals contained in his statement and accordingly need not be repeated in detail here. In addition to the facts previously brought out, accused while on the stand denied that he knocked the prosecutrix to the ground when he first approached her but did admit that he "shoved"her into the jeep (R50,54,55). He stated that at the time of the act itself she did not struggle but lay "still as a pin". He could not understand why he pursued the girl except that he "was just out of his head. The drink had the best of me" (R53). He further stated that, although he had been drinking, he was not drunk on the evening in question (R55).

5. All elements of the offense charged are amply shown by the evidence. That accused had carnal knowledge of the prosecutrix does not, under the evidence here presented, admit of doubt. The testimony of the prosecutrix that such carnal knowledge was had by force and without her consent is strongly corroborated by other evidence of record and, in fact, was not strongly contradicted by accused. There is a conflict in the testimony with respect to the time at which he gave Mlle. Cordier the 500 franc note but even if accused's version of this incident be accepted the mere fact that she took money from him prior to the act of intercourse cannot be said to indicate her consent to his later actions in view of her continued resistance and efforts to escape. There was evidence that accused had been drinking and was under the influence of liquor during the occurrence of the evening's events as well as upon his return to his company area. However, he was not too drunk to approach the prosecutrix and to drive away with her, to render her attempt to escape abortive, and to drive his vehicle to a new location upon being interrupted. He also had sufficient presence of mind to begin to sing loudly while passing through Bain de Bretagne in an apparent effort to drown out the prosecutrix' cries during this portion of the journey. Also, after the intercourse was completed, he was able to return the prosecutrix to the place where he first approached her and thereafter to find his way back to his company area. Further, he admitted while on the stand, that although he had been drinking he was not drunk on the evening in question. Whether accused was too drunk to be responsible for his acts was essentially a question of fact for the court and under the evidence of this case the court did not abuse its discretion in resolving this question adversely to the accused (Cf: CM ETO 4303, Houston). The record of trial is accordingly legally sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 27 years of age and was inducted 31 December 1943 at Fort Myer, Virginia. No prior service is shown.

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

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

Benjamin R Sleeper Judge Advocate

Richard C Sherman Judge Advocate

B F Edwards Judge Advocate

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

BOARD OF REVIEW NO. 1 12 MAR 1945

CM ETO 6210

U N I T E D S T A T E S	IX TROOP CARRIER COMMAND
v.	Trial by GCM, convened at USAAF Station 472-S, APO 133 (England), 15,22 November 1944. Sentence: Dismissal.
Second Lieutenant GERARD L. WINANT (O-677206), 80th Troop Carrier Squadron, 436th Troop Carrier Group	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Second Lieutenant Gerard L. Winant, 80th Troop Carrier Squadron, 436th Troop Carrier Group, IX Troop Carrier Command, having received a lawful command from Major (then Captain) Robert E. Stuck, Air Corps, his superior officer, to fly as co-pilot of an aircraft on a scheduled practice mission, did at United States Army Air Force Station 466, on or about 15 May 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority, the Commanding General, IX Troop Carrier Command, approved only so much of the findings of guilty of the Specification of the Charge and the Charge as involved a finding of guilty of failure to obey a lawful command of a superior officer in violation of the 96th Article of War, approved only so much of the sentence as provided for dismissal the service and forwarded the record of trial for action under Article of War 48.

The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, as approved, but declared the same to be wholly inadequate punishment for an officer convicted of so serious an offense in deliberate selfish disregard of his duty, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on or about 14 May 1944 Captain Ralph M. Gignac, Medical Corps, Squadron Surgeon, 80th Troop Carrier Squadron having heard rumors that accused did not care to fly in combat missions (R13,15), examined him "in respect to his statement that he did not desire to fly". After talking with accused for about two hours he found he did not have a "healthy attitude" towards flying in combat or bad weather or under hazardous conditions (R14,18). Captain Gignac had no authority to excuse anybody from the practice missions and he did not on 14 May request his commanding officer to change accused's flying status (R19). On the night of 15 May 1944 a formation was scheduled for practice runs "for D-day, or the hop to Normandy". At a briefing session held that afternoon or evening in the group briefing room, the absence of accused was noted by Major (then Captain) Robert E. Stuck, squadron operations officer (R4-5). When the meeting was over he went to accused's barracks (R5) where he found him with Lieutenants Dale R. Birdseye, Bernard Simon and others of the squadron (R6). Major Stuck asked accused why he "was not down to fly" and accused replied that he was through with flying. The Major said, "Then I will have to give you a direct order to fly" and added "If you don't, you understand you are disobeying a direct order?". Accused said he did understand that (R5,9,10,11,12). The only person who could countermand Major Stuck's flight orders was his commanding officer (R6). Accused did not fly on the mission (R10,29).

4. For the defense, Major Herman Finkelstein, flight surgeon (R22), 436th Troop Carrier Group, testified regarding his talk with accused at about 1000 hours on 15 May 1944. Accused said that he was "scared of formation flying, scared of bad weather", had been

thinking it over for a long time and wanted to quit (R26-27). The flight surgeon informed him that he should see his squadron medical officer, Captain Gignac, and that he, (Major Finkelstein) would suggest to Captain Gignac that accused be grounded (R27). He did make such suggestion to the medical officer that accused "ought to be grounded" and "probably" spoke to the squadron commander in the same respect a few days later (R28).

At noon on 15 May 1944, First Lieutenant Charles E. Hunt, a member of the squadron, and accused entered the officers' mess as Major Stuck departed therefrom. Accused told Major Stuck "he was grounded for three or four days and Major Stuck kind of laughed and went on". Lieutenant Hunt was present with Lieutenants Birdseye, Simon and accused when Major Stuck entered their barracks and told accused "he wanted him to fly and Lieutenant Winant said he was not going to fly" (R29).

Special Orders Number 232, Headquarters IX Troop Carrier Command, 19 August 1944, was received in evidence without objection (R30, Def.Ex.A). Paragraph 2 thereof shows that it confirms and makes of record a verbal order of the commanding general of 15 May 1944 relieving accused from duty requiring regular and frequent participation in aerial flights for a period not to exceed six months.

5. After his rights were explained to him (R20-21), accused testified that on the 13th and 14th of May 1944 he had been having a little trouble, especially with the weather and made up his mind to get a rest. He described in detail his difficulties with flying as he reported them to Major Finkelstein, who said, after listening to his recital, "I guess I will have to ground you" (R21-22,23-24). Thereafter, upon meeting Major Stuck at luncheon on 15 May, he said to him, "I have been grounded for a couple of days". Major Stuck said, "Is that so" and went on (R22). That same evening when Major Stuck ordered him to "Go down and fly", he twice said "I don't have to" and with that the Major just turned around and left (R23).

6. Further evidence presented at the request of the court showed that accused was on flying status on 15 May 1944 (R30,31,32, 34,35-37) and testimony of First Lieutenant John A. Tortorici, Headquarters IX Troop Carrier Command, received in evidence over objection of the defense (R40) indicated that paragraph 2, Special Orders No. 232, Headquarters IX Troop Carrier Command, 19 August 1944 (Def.Ex.A) was made retroactive to 15 May 1944 as the result of action taken by the Command Flying Evaluation Board sometime after 15 May 1944 (R39,41,41-42; Pros.Ex.1).

7. The defense was premised on the contention that accused

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had been relieved from his flying status at the time he was ordered to fly on 15 May 1944 by Major Stuck. Examination of paragraph 2 of Special Order 232, Headquarters IX Troop Carrier Command, dated 19 August 1944, which was made retroactive to the date of 15 May 1944, tends to support such defense. However, the testimony of Lieutenant Tortorici with respect to this order disclosed that the "VOCG, 15 May 1944" which it purported to confirm was not in effect at the time accused was ordered to fly by Major Stuck. The court's action in refusing to strike out such testimony because it had "no materiality" was correct. Such evidence was material since it contradicted the contention of the defense regarding accused's flying status on 15 May 1944.

8. The record of trial is legally sufficient to support the findings, as approved by the reviewing authority, of accused's guilt of the lesser included offense of failing to obey the lawful command of a superior officer in violation of the 96th Article of War (CM 223336, I Bull, JAG, sec.422(5), pp.159-163; CM ETO 1920, Horton; CM ETO 1366, English quoted in CM ETO 1057, Redmond).

9. The charge sheet shows that accused is 25 years of age and that his enlisted service covered the period 14 January 1941 to 22 April 1943. He was "Commissioned 22 April 1943".

10. 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 as modified and the sentence as approved and confirmed.

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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant GERARD L. WINANT (O-677206), 80th Troop Carrier Squadron, 436th Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as modified and the sentence as approved and confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The delay from the date of the offense, May 15, 1944 to October 27, 1944 when the charges were preferred, is not fully explained, but it is indicated that it was caused by the proceedings of the Evaluation Board, as a result of which the order of 19 August was issued and following that, a communication from USSTAF dated 19 October 1944 expressing the view that the facts warranted court-martial.

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 6210. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6210).

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

(Sentence ordered executed. GCMO 74, ETO, 18 Mar 1945.)

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

BOARD OF REVIEW NO. 2

26 JAN 1945

CM ETO 6217

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOSEPH BARKUS (38153613), 537th Port Company, 516th Port Battalion.	Trial by GCM, convened at Cherbourg, Manche, France, 30 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. By its finding of guilty of Specification 2 of the Charge, the court convicted accused of the larceny, from a French civilian, of a radio of the exchange value of about $100.00. The only evidence of value was a stipulation

> "that if a French radio dealer were called to testify as a witness in this case, he would testify that a radio of the type involved in this case costs new in 1939, 1350 francs; that the present price of such a radio involved in this case is 3500 francs" (R33).

No evidence was adduced as to the exchange value of the franc in United States currency. Its value as foreign exchange on the open market - and hence to a French civilian - is, according to common knowledge, only a

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fraction of the arbitrary value employed by the United States Government in computing exchange in connection with the payment in francs of its armed forces serving in France. It would be manifestly inappropriate to apply this rate in the instant case and thereby ascribe to the stolen radio an exchange value of $70.00, thus constituting the theft thereof a felony. Accused's concomitant conviction of burglary renders the error immaterial insofar as the sentence is concerned. The record of trial, however, is legally sufficient to support only so much of the finding of guilty of Specification 2 of the Charge as involves accused's conviction of larceny of a radio of some value not in excess of $50.00.

3. Penitentiary confinement is authorized for burglary (AW 42; 22 District of Columbia Code 1801). Designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 1

14 MAR 1945

CM ETO 6221

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 14 December 1944. Sentence: Dishonorable discharge (Suspended), total forfeitures and confinement at hard labor for ten years. Loire Disciplinary Training Center, Le Mans, France.
Private GILBERT RODRIGUEZ (32861613), Company G, 30th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private GILBERT (NMI) RODRIGUEZ, Company "G", 30th Infantry, did, at or near Remiremont, France, on or about 3 October 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: Combat with

the enemy, and did remain absent in desertion until he was apprehended at Epinal, France, on or about 20 November 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, except the words, "was apprehended", substituting therefor the words "returned to military control", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to ten years, ordered the sentence executed as thus modified but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published by General Court Martial Order No. 200, Headquarters 3rd Infantry Division, APO #3, 31 December 1944.

3. The evidence for the prosecution was as follows:

On 3 October 1944 accused reported to Technician Fifth Grade Leonard Wallace, company clerk attached to the Service Company, 30th Infantry, near Remiremont, France, and asked for his mail. It was given him and Wallace asked where he was going. Accused said he was coming back out of the hospital and returning to the company. Wallace told him the company "was up on the line at the present time" (R7-8).

The testimony of Technical Sergeant Gerald Heckman, Acting First Sergeant of Company G, 30th Infantry, indicated that the company was engaged in combat on 3 and 4 October 1944 and a time after that. He had been with the company since 6 June 1944 and did not know accused. No one bearing the name of accused reported to the company. He sent a message to Wallace stating in answer to a memorandum received from him that accused "was not yet for duty with the company" (R9).

It was stipulated between accused, the defense and the prosecution that if First Lieutenant Louis A. Tritico, 30th Infantry, were present in court and sworn as a witness he would testify that as investigating officer he took a statement from accused on or about 8 December 1944 and that prior to taking the statement he fully warned and apprised accused of his rights under Article of War 104. The

statement included in the stipulation reads as follows:

> "'On or about 1 October 1944, I was at the Division Replacement Depot. That afternoon I was taken up to the Service Company of the 30th Infantry at St. Aimes, France. Shells came into the area. I took my blankets and went to the Service Company of the 15th Infantry at Remiremont,France. On the 3rd of October 1944 I went into Remiremont and turned myself in to the M.P.'s.
>
> I was taken to the Regimental C.P. I didn't want to go back to the lines. I went to the Bn. C.P. Going up to the Company, I went to the Medics because I had a discharge from my penis. The Medics had no pills and told me to come back in the morning. I stayed there that night. The next morning I was given some pills. While there, Jerry threw in some shells. I felt as if anyone of them was coming in on top of me and I had to get away from them. I went to Remiremont. I went to Epinal and on 20 November I turned myself in. I have been wounded once and knocked out from concussion once'" (R11; Pros. Ex. A).

4. a. For the defense, a letter dated 28 November 1944, addressed to the Commanding Officer, 30th Infantry, and signed by John H. West, First Lieutenant, 30th Infantry, received in evidence, recited that accused's character was "good", that "When he was with the company his efficiency was good", that his previous record was "good", that "From his past record he would be desirable in the service" and that "It is believed that a dishonorable discharge is justified and it is recommended that trial be by General Courts-Martial" (R12; Def.Ex.1).

b. After his rights were explained, accused elected to make an unsworn statement through his counsel, as follows:

> "The accused in his unsworn statement wishes to invite the courts attention that he is 21 years of age, that he joined the 3rd Division in October, 1943, at the time that the Division was crossing the Volturno River. He fought with company "G" of the 30th Infantry on the Cassino front. He later made the amphibious landing on the Anzio beachhead

with company "G" of the 30th Infantry in the capacity of a rifleman. He was wounded on the 29th of January, 1944, for which he received a purple heart and was hospitalized. He rejoined company 'G' of the 30th Infantry while it was still on the Anzio beachhead. He participated in the break-out from the Anzio beachhead and was wounded on the 23rd of May 1944 in that breakout. He was hospitalized and received an oak leaf cluster to his purple heart because of this injury. He did not rejoin his company until later in France. The accused has never been AWOL, nor has the accused ever been tried by any military court whatsoever"(R13-14).

5. Apart from accused's statement, received in evidence by stipulation (R11; Pros.Ex.A), the only other evidence as to his alleged absence without leave with intent to avoid hazardous duty was that on 3 October he said to the clerk of the Service Company, 30th Infantry, "he was coming back out of the hospital and returning to the company" (R7), that the clerk told him "the company was up on the line at the present time" (R8), that the acting first sergeant of Company G did not know accused but did send a message to Wallace regarding him and "no one bearing the name of accused reported to the company", which on 3 and 4 October and for a time after that was engaged in combat (R9). The foregoing facts presented sufficient evidence to warrant a finding by the court that accused was absent from his organization or place of duty without leave (CM ETO 527, Astrella).

"An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself" (MCM, 1928, par. 114, p.115).

The full statement of accused to the investigating officer contains his confession to the offense alleged and shows that he did absent himself from his place of duty (then the shortest practicable route to his company which was at the time engaged in combat) with intent to avoid hazardous duty. Since his absence without leave was shown

by evidence outside of his confession and constitutes the corpus delicti of the offense charged (CM ETO 6810, Shambaugh and authorities therein cited), his confession was properly admitted in evidence and all the elements of the offense charged were thus supplied and fully supported the court's findings of guilty (CM ETO 1664, Wilson; CM ETO 4165, Fecica; CM ETO 4743, Gotschall; CM ETO 5293, Killen; CM ETO 5555, Slovik; CM ETO 5565, Fendorak).

6. The charge sheet shows that accused is 21 years of age and was inducted 12 March 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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. European Theater of Operations, AG 252 Op TPM, 19 Dec. 1944, par.3).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

17 FEB 1945

BOARD OF REVIEW NO. 2

CM ETO 6224

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates SAMUEL L. KINNEY (33654061), and JOHN E. SMITH (33744012), both of 599th Quartermaster Laundry Company	Trial by GCM, convened at Granville, Manche, France, 29 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private John E. Smith and Private Samuel L. Kinney, both of 599th Quartermaster Laundry Company, acting jointly, and in pursuance of a common intent, did, at or near Pontfarcy, France, on or about 17 August, 1944, forcibly and feloniously, against her will, have carnal knowledge of Denise Leloutre, a French woman.

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

Specification: In that * * * acting jointly and in

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pursuance of a common intent, did, at or near Pontfarcy, France, on or about 17 August, 1944, with intent to do him bodily harm, commit an assault upon Joseph Lecanu, a French civilian, by wilfully and feloniously pointing a dangerous weapon, to wit, a carbine, at his body. (Kinney: Finding of not guilty of both Charge and Specification)

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

Specification: (Finding of not guilty)

Each accused pleaded not guilty to the charges and specifications. Two-thirds of the members of the court present when the vote was taken concurring, each was found guilty of the Specification of Charge I and Charge I; accused Kinney was found not guilty and accused Smith was found guilty of Charge II and its Specification; and both accused were found not guilty of the Specification of Charge III and Charge III. No evidence of previous convictions was introduced as to either of accused. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved 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 the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 17 August 1944 Privates Samuel L. Kinney and John E. Smith were members of the 599th Quartermaster Laundry Company (R32,44,56). At about eight o'clock on that evening a colored soldier, later identified as accused Kinney, approached Madamoiselle Denise LeLoutre, a French girl who was milking a cow in a meadow near her home at Pontfarcy, France (R15, 16,20). The soldier asked her for some cognac and, upon being informed that she had none, inquired for cider. The girl replied that she would give him some cider and, after picking up her milk pail, started walking out of the meadow. Thereupon accused Kinney whistled and four other colored soldiers appeared and followed the girl to her home where she gave all five of them some cider, which they drank (R16, 20,21). A little later Madame Albertine LeLoutre, the mother of Denise, returned to the house and found her daughter and the soldiers in the yard (R6,11,16). She greeted them and the soldiers asked her for some more cider which she gave them (R6,16). They consumed a total of "four or five pitchers" (R66). The mother, thereupon, told her daughter to get a rope as it was necessary for them to go and search for one of their cows that was lost. The soldiers walked down the road with them for a short distance and, after saying goodbye, departed (R6,11, 16).

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At about nine o'clock that evening, two of the soldiers, one of whom carried a gun, returned and asked for cognac and cider. As it was late, Madam LaLoutre told them that she would not give them anything to drink (R6,9,12,16,20,25). Following her mother's refusal to give them drinks, Denise testified:

> "they started to attack us. I tried to run away * * * but a soldier hold me by my 2 arms. * * * The other one was showing me his gun under my nose. One of the soldiers had put me on the ground, lifting my dress. I succeeded to get away from him. I run along the garden, and I arrived at the small gate. When * * * one of the soldiers arrived on me like a madman. He caught hold of me and squeezed me on the throat, so that I could not speak and he put his hands on my mouth, * * * the other soldier caught hold of her /mother/ and threw her on the ground. When my mother saw that she could not be of any help for me, she run away toward Mr. Lecanu, and one of the soldiers run after her up to the corner of the building" (R16).

When Mr. Lecanu, a priest who resided nearby, arrived at the house, he told the soldiers in English that "the girl is not at your disposal" (R6,17). One of the soldiers thereupon threatened the priest by placing his rifle against his chest two or three times and by working the bolt mechanism (R6,10,17,29,31). When his efforts to cause the soldiers to leave proved futile, the priest went for the military police while Madame LeLoutre ran in search of help from others (R7,17,29). After they left, the soldiers took Denise into a meadow near the house. She testified concerning the occurrences thereafter as follows:

> "They lay me flat on the ground and one of the soldiers got my drawers and cut my diaper. After he threw himself on top of me and raped me. During that time the other soldier was kneeling, holding his rifle in the direction of the house. They spoke between themselves and the other soldier changed place with the first one. The first one did it again. He draw back and the second soldier took his place for the second time. * * * Then they went away across the field" (R17).

She further testified that the soldiers, whom she identified as Kinney and Smith, each had intercourse with her twice, without her consent and against her will (R18,19,26). She tried to shout and call for help but each time she did this one of the soldiers placed his hands over her mouth (R18,26). She returned to Mr. Lecanu's house where later the military police arrived (R17). Her appearance was disheveled, her hair was hanging down her back, her comb was broken, and her clothes full of blood. At this time she was having her menstruation (R8,26,29,30).

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The testimony of Madame LeLoutre (R5-15) and the priest Lecanu (R28-31) corroborates Denise's statement in all essential details. Madame LeLoutre identified accused Smith in court; as to accused Kinney, she said "I'd rather not say because I don't recognize him well" (R9). The priest could not identify the two soldiers (R30).

On 3 September 1944, Captain Ralph A. Newman, investigating officer in the case, went to the LeLoutre home with the accused. Denise was in bed with an abscessed throat and appeared very ill (R14,15). Both she and her mother identified Smith as one of her attackers but neither identified Kinney at this time (R12,13,15,22). After leaving the house on the return to camp, both Smith and Kinney, at different times, talked to Captain Newman. Smith admitted having been at the house with four others on the night of 17 August 1944, and also admitted returning later. He admitted having gone to a field where he had seen the girl (R33,34,36,39). Kinney admitted substantially the same thing and stated he met the girl in the field on his return and went on back to the farmhouse with her (R36,37,38,39).

On 27 November 1944, Denise was asked to identify her assailants from a "line-up" of six soldiers at the prison camp in Granville. She first picked out accused, Smith, and then picked out accused, Kinney (R19,20,22,23,32,41,42).

4. After being fully informed of their rights as witnesses each accused elected to be sworn and to testify in his own behalf (R44).

Accused Kinney admitted meeting Denise LeLoutre in the meadow and asking her for cognac and cider. His testimony concerning the happening of events accords with the prosecution's witnesses up to the time the five soldiers took their leave of the girl and her mother (R45,46). Thereafter, according to Kinney, he and Smith passed a girl on the road who was not the same one they had seen back at the house (R46). They decided they would turn back and try to "screw" the girl. When they walked by the LeLoutre house, Kinney went up to the gate and started talking with Denise. He asked her if she would "zig-zig", to which she replied, after hesitating a moment, "Oui" (R46,47). He then kissed her and took her to a nearby field where, without any assistance from him, she took off her pants, after which he had intercourse with Denise LeLoutre with her consent (R47, 51). He then called accused Smith who also had intercourse with her (R47). Thereafter, according to Kinney, the girl "put her arms around" him and kissed him. He and Smith then walked back to the house with the girl before returning to camp (R47). Kinney admitted making prior inconsistent statements to the CID agent but explained that his reason for doing so was fright occasioned by the methods employed in securing the information (R48,49). He was positive the girl was not having a monthly period during the time of the intercourse with her as he "probably would have noticed it" (R50). At the identification parade, Denise hesitated before identifying him (R55,56).

Accused Smith's testimony agreed with that of Kinney. He added that upon arrival at the house Kinney asked him to hold his rifle and that soon thereafter Denise and Kinney left by way of the gate while he remained in the yard (R56,58). Madame LeLoutre, appearing very excited, arrived and departed, returning shortly with the priest who spoke to him in French. Smith could not understand what he said and denied that he pointed his gun at either the priest or Madame LeLoutre (R58). He then walked over to where Kinney and Denise were sitting on the ground (R59). After learning that Kinney had had intercourse with the girl, he asked her to engage in the same act with him, which he accomplished with her consent (R59). He had Kinney's gun with him at the time but laid it on the ground nearby (R59). When he finished his desires the girl spoke to them in broken English, inviting them to "come back tommorow night" (R59). Smith said he intended to return but was prevented from doing so by reason of his military duties (R59). He, also, admitted making prior inconsistent statements to the CID agent, stating that he was "afraid to talk" and that he did not know that he was swearing to his statements when he signed the papers (R61-64).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Conviction 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 evidence herein shows that each accused had intercourse with the victim, Denise LeLoutre, on 17 August 1944. This fact is testified to by her and admitted by the accused. There is, therefore, no question regarding penetration. Concerning the use of force and lack of consent the evidence is in conflict, as each accused testified that the girl consented to their having intercourse with her, whereas she stated that the soldiers attacked her, held her by the arms and throat, took her into a field and each pursued his desires against her will and consent. She claimed that she tried to scream and call for help but was prevented from doing so by the soldiers placing their hands over her mouth. One of the soldiers had a gun and Smith held the weapon while Kinney attacked the girl. Later Smith placed the gun on the ground nearby when he had intercourse with her. The testimony of the victim's mother and the priest concerning the demeanor and improper conduct of accused prior to their taking the girl into the field, as well as the evidence regarding her appearance and condition following her return to the priest's house shortly thereafter, all corroborate the testimony of the victim that she did not consent but that in the accomplishment of the act by accused force was employed. It appears that she resisted to the best of her ability under the circumstances, being in the company of two soldiers possessed of a weapon. Although accused testified that the girl consented to the acts of intercourse and that she kissed them goodbye thereafter and invited their

later return, the statements made by accused prior to and at the trial, being inconsistent and contradictory in character, discredit their testimony. The record contains substantial evidence that the girl did not consent to the commission of the acts in question but that the accused, in pursuance of a common intent, forced her to engage in intercourse with them. The Board of Review is therefore of the opinion that the court was fully justified in finding each accused guilty of the crime of rape, as charged (CM ETO 3750, Bell; CM ETO 3858, Jordon, et al; CM ETO 4266, Guest).

The evidence further shows that accused Smith committed an assault upon Joseph Lecanu by willfully pointing a dangerous weapon at him in the manner and under the circumstances alleged. The findings of the court, where supported by substantial evidence, will not be disturbed by the Board of Review (CM ETO 1899, Hicks; CM ETO 1953, Lewis).

6. The charge sheet shows that accused Kinney is 19 years and 10 months of age and was inducted 1 July 1943; accused Smith is 23 years and six months of age and was inducted 29 June 1943. No prior service by either accused is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

5 MAY 1945

CM ETO 6226

U N I T E D S T A T E S	OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private LEVEL EALY (38330597), 4255th Quartermaster Truck Company	Trial by GCM, convened at Reims, France, 12 January 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. 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 Private Level Ealy, 4255th Quartermaster Truck Company (Transportation Corps), did, at or near Soissons, France, on or about 16 December 1944, prejudice the success of The United States forces by wrongfully and unlawfully disposing of gasoline, military property of the United States vitally needed for combat operations.

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

at such place as the reviewing authority may direct, for 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 Specification charged that accused did:

> "at or near Soissons, France, on or about 16 December 1944, prejudice the success of The United States forces by wrongfully and unlawfully disposing of gasoline, military property of the United States vitally needed for combat operations".

The Board of Review (sitting in the European Theater of Operations) with the approval of the Assistant Judge Advocate General has heretofore held in CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; and CM ETO 8599, Hart et al, that the wrongful and unauthorized disposition of Government property intended for, adapted to, or suitable for use by the armed forces of the United States under circumstances which constitute an interference with or obstruction of the war effort constitutes an offense of more serious import and consequences than the offenses denounced by the 84th and 94th Article of War. The following quotation from the Young case is relevant:

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

the conclusion that the specifications charged the accused with conduct which interfered with or obstructed the national defense and the prosecution of the war, is both logical and reasonable under the circumstances.

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

* * *

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

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> total lack of patriotism and loyalty which have always been the pride of the soldiers of the Republic. While not traitors they were certainly saboteurs who consciously and deliberately stole property intended for combat and other soldiers in the theater in order that they might profit thereby.
>
> The diversion of war supplies from their intended purpose is a cumulative evil. It was to prevent diversions from reaching a cumulative total whereby they would produce undesirable results that Congress denounced certain conduct as criminal by specific (50 USCA 105, supra) and by general (AW 96) legislation".

However, such offense as above described must be both alleged and proved. In the instant case, it will be assumed (without deciding) that the allegations of the Specification stated facts sufficient to constitute the more serious offense. The evidence in support of the Specification is adequate to prove that accused wrongfully and without authority sold and delivered approximately 20 gallons of Government gasoline to a French civilian. At the conclusion of the prosecution's case, the trial judge advocate stated:

> "The prosecution at this time asks the court to take judicial notice that vast quantities of gasoline are needed for supply for Allied vehicles in the European Theater of Operations " (R26).

The law member responded:

> "Without objection by the defense, the court will take judicial notice of the statement of the prosecution" (R26).

The defense counsel stated:

> "No objection" (R26).

The foregoing constitutes the total proof by the prosecution of those highly necessary and relevant facts and circumstances which would show the accused "prejudiced the success of the United States Forces" by diverting from their established channel of distribution "gasoline, military property * * * vitally needed for combat operations". The suggestion of the trial judge advocate that judicial notice should be taken of the need of vast quantities of gasoline to supply "allied vehicles in the * * * Theater * * *"

does not refer to the time and place of the alleged offense. It refered to conditions at date of trial - "are needed". However, the form of expression used by the trial judge advocate which invited the court's attention to alleged relevant facts of general knowledge is immaterial. If judicial notice of the necessary facts is allowable, such right exists independent of any invitation of the prosecution. Stipulations or admissions of counsel cannot bring facts within the sphere of judicial notice which in law do not belong there (Gottstein v. Lister, 88 Wash. 462, 153 Pac.595). The Board of Review has consistently asserted the right to take judicial notice of permissible pertinent facts independent of any suggestion or invitation either of the court or the parties (CM ETO 7148, Giombetti and authorities therein cited; CM ETO 7413, Gogol).

The principles governing judicial notice are stated thus:

> "It is a well-intrenched part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially. The presumption prevails that when a cause is presented at the bar for trial, the court and jury are uninformed concerning the facts involved, and it is incumbent upon the litigants to the action to establish by evidence the facts upon which they rely. There are, however, many facts which need not be proved, since they are judicially noticed by the court and jury. Judicial notice of such facts takes the place of proof and is of equal force. It displaces evidence, since it stands for the same thing. Judicial knowledge may be defined as the cognizance of certain facts which a judge under rules of legal procedure or otherwise may properly take or act upon without proof because they are already known to him or because of that knowledge which a judge has, or is assumed to have, by virtue of his office. To say that a court will take judicial notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with if the fact is one of public concern or notoriety which is known generally by all well-informed persons. As has been said, judges will not shut their minds to truths that all others can see and understand. The importance of the subject of judicial notice is therefore readily evident, for there is no instance in which some matters do not fall within the judicial cognizance of the tribunal before which it is tried. The law itself is the subject of judicial notice. The doctrine

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of judicial notice is based upon obvious reasons of convenience and expediency and operates to save trouble, expense, and time which would be lost in establishing in the ordinary way facts which do not admit of contradiction" (20 Am.Jur.sec.16, pp.46,47).

"The rule may be stated broadly that generally courts will take notice of whatever matters are known, or ought to be generally known, within the limits of their jurisdiction, upon the theory that justice does not require that courts be more ignorant than the rest of mankind. At the same time, however, the power of judicial notice must be exercised with great caution by the courts. Generally speaking, matters of judicial notice have three material requisites: (1) The matter must be a matter of common and general knowledge; (2) it must be well and authoritatively settled and not doubtful or uncertain; (3) and it must be known to be within the limits of the jurisdiction of the court"(Ibid., sec.17, p.48).

"In order that a matter may properly be a subject of judicial notice, it must be 'known'- that is, well established and authoritatively settled. It is clear that uncertainty or difference of belief in respect to the matter in question, will operate to preclude judicial notice thereof. Matters of which the court will take notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized. The test is whether sufficient notoriety attaches to the fact involved, so as to make it safe and proper to assume its existence without proof" (Ibid., sec.19, pp.50,51).

The foregoing principles authorize both the court and Board of Review to take judicial notice of the fact that the American Forces in the European Theater of Operations possess and have possessed thousands of motor vehicles powered by internal combustion engines; that a continuous supply of tremendous quantities of gasoline has been and is necessary in order to furnish the fuel for said engines and that the ultimate success of the American Arms in the theater has been and is largely dependent upon the movement of said vehicles. But it is manifest that after the court and the Board of Review have judicially noticed said generally

known facts, prosecution's case falls far short of the proof necessary to sustain the highly necessary allegations above indicated. Had there been proof that there were wholesale thefts, wrongful dispositions or misappropriations of Government gasoline at or about the time and at or in the proximity of the place alleged; that these thefts, wrongful dispositions and misappropriations resulted in the diversion of gasoline in more than nominal quantity from the usual and legitimate channels of distribution which would have eventually delivered it to combat and other troops for consumption, and that accused's instant wrongful disposition was part of the mass irregularities, there would exist in the record of trial proof of facts from which the court and Board of Review could legitimately and reasonably infer that at the time and place alleged this particular gasoline was a vitally-needed commodity and that accused, when and at the place he diverted it prejudiced the success of the American Arms. Therein lies the difference between the instant case and the Young case. The record of trial in the latter case carried such evidence.

To allow this conviction to rest upon the general facts above stated which may be judicially noticed, without proof of the specific conditions existing when and at the place of the diversion as hereinabove stated, will introduce an uncertainty into the law which is not only undesirable but also indefensible.

It must be noticed that Congress by enacting the 84th and 94th Articles of War declared specifically the circumstances and conditions under which a member of the military service may be punished for wrongful disposal of Government military property. These Articles establish the general prevailing rules. Departure from the principles therein set forth is justified only under extraordinary and unusual circumstances which lie outside of their ambit and are of such nature as to make it reasonably apparent that Congress did not intend to include the indicted conduct within the denouncements of said Articles. Then and only then can a charge involving wrongful disposal of Government military property be laid under the 96th Article of War, and those extraordinary and unusual facts and circumstances must be alleged and proved. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings that accused did "prejudice the success of The United States forces by wrongfully and unlawfully disposing of gasoline, military property of the United States vitally needed for combat operations".

However, the evidence clearly showed that accused wrongfully and without authority at the time and place alleged disposed of approximately 20 gallons of Government owned gasoline. The unauthorized disposition of property owned by the United States Government not specifically "issued for use in the military service" (AW 84) or "furnished or intended for the military service"

(AW 94) is a disorder to the prejudice of good order and military discipline under the 96th Article of War (CM 235011 Goodman, 21 B.R. 243 (1943)). This conclusion is not in conflict with CM 162158 (1924) (Dig.Op. JAG 1912-1940, sec.452 (20), p.340) because the instant accused did not object to the form of the Specification and request that it be made more definite and certain. The digested holding in the last mentioned case presented a question of pleading and practice under the 94th Article of War not here involved. The Specification in the instant case obviously alleged that accused without authority of law disposed of Government owned property. In the absence of an objection requiring it to be made more definite and certain by stating both the amount of gasoline involved and the method of disposition, it will support a conviction of this offense under the 96th Article of War. The Board of Review may judicially notice the fact that at the time of the wrongful disposal the 20 gallons of gasoline was valued at less than $20.00 (CM ETO 5539, Hufendick). By analogy and as a closely related offense, it may be punished no more severely than an offense under the ninth paragraph of the 94th Article of War. The permissible punishment is dishonorable discharge, total forfeitures and confinement at hard labor for six months (MCM, 1928, par.104c, p.100).

4. The charge sheet shows that accused is 23 years two months of age and was inducted 26 October 1942 at Shreveport, Louisiana, to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves the findings that accused wrongfully and without authority at the time and place alleged disposed of approximately 20 gallons of gasoline owned by the United States of a value less than $20.00 and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for six months.

6. The Loire Disciplinary Training Center, Le Mans, France, should be designated as the place of confinement (Ltr. Hq. European Theater of Operations, AG 252, Op/ TPM, 19 Dec. 1944, par.3).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 MAY 1945 TO: Commanding General, Oise Section, Communications Zone, European Theater of Operations, APO 513, U.S. Army.

1. In the case of Private LEVEL EALY (38330597), 4255th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves the findings that accused wrongfully and without authority at the time and place alleged disposed of approximately 20 gallons of gasoline owned by the United States of a value less than $20.00, and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for six months; which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the reduced sentence.

2. The doctrine of judicial notice is a valuable implement in the administration of justice. However, it is governed by well established and long recognized legal principles. It must be applied with discrimination and discretion. Allowing the Government the benefit of such principle to the utmost extent, it is manifest in the instant case that it does not supply the necessary and crucial evidence which will convert offenses under the 84th and 94th Articles of War into the more serious offense of interfering with or diverting from their intended purpose critical and necessary supplies for the combat forces. Everyone knows that the American Army in Europe requires vast quantities of petroleum products. So it does of everything else. It is necessary to prove that gasoline was short and a critical item of supply and that the operations of the Army were held up or prejudiced by the lack, at the time and place alleged. Convictions cannot be supported by conjectural or speculative surmises and guesses. Facts which remove conduct from the patterns defined by Congress in specific statutes and place the same under the 96th Article of War must not only be alleged but must also be proved.

3. Loire Disciplinary Training Center, Le Mans, France should be designated as the place of confinement of accused. This may be done in the published court-martial order.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6226. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6226).

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

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

BOARD OF REVIEW NO. 2

9 FEB 1945

CM ETO 6227

U N I T E D S T A T E S v. Private JOHN H. WHITE (36565649), 1511th Engineer Water Supply Company	OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Reims, France, 16, 28 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private John H. White, 1511 Engineer Water Supply Company, did, at Palis, France, on or about 1 September 1944, with intent to commit a felony, viz., rape, commit an assault upon Clementine Lartisien by willfully and feloniously striking the said Clementine Lartisien in the face with his fist, cutting her on the hand with a bayonet, and throwing her forcibly upon a bed.

He pleaded not guilty and was found "Of the Specification of the Charge, and the Charge: Guilty, except the words "with in-

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to commit a felony, viz., rape, commit an assault upon Clementine Lartisien by willfully and feloniously striking the said Clementine Lartisien in the face with his fist, cutting her on the hand with a bayonet, and throwing her forcibly upon a bed', and substituting therefor, the words 'did, with intent to do her bodily harm, commit an assault upon Clementine Lartisien by willfully and feloniously striking the said Clementine Lartisien". Evidence was introduced of one previous conviction by special court martial for absence without leave for less than one day, appearing in improper uniform and insubordination toward a noncommissioned officer in violation of Articles of War 61 and 93. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. But two witnesses appeared for the prosecution, Madame Lartisien, the prosecutrix, a refugee from Paris living at Palis, France (R7) with her two daughters aged three and a half and four and a half years respectively (R11,14); and First Lieutenant Edward C. Heyne, 503rd Military Police Battalion, who secured from accused a signed statement (R19).

Madame Lartisien testified that between six and seven o'clock on the evening of 1 September 1944, accused stopped at her house and asked for cognac and eggs and was informed that she had none. Accused then entered her house and said "If you will be my friend, I will give you plenty of money". She informed him she was married and had two children (R7). He then took her in his arms and, despite her struggles, kissed her and when she pushed him away, he struck her on the face and dragged her into a bedroom where after a long struggle she slipped from his grasp (R8). He then drew his bayonet and struck her several times, (R9) it once piercing her cheek (R15). The struggle lasted some 15 to 20 minutes when accused desisted on the approach of some person (R10-11). During this time the children screamed. Finally she escaped to the courtyard where he threw her to ground and she became unconscious (R10,11,15). He"threw her down" in the kitchen and in the bedroom also (R11). Accused had never been to her house nor had she ever seen him before 1 September (R13). Prior to the attack she had given him some eggs which were broken in his pocket

by his leaning against the table and she had assisted in cleaning his pocket (R14,17). Accused gave her 100 francs and offered her 400 more if she would allow him to caress her (R16,17). At first she thought the 100 francs were for the eggs and when she understood what it was for she returned it. She had first placed it on the dresser (R17). Many bruises were sustained by her during the struggle (R18) and a scar remained on her cheek and lip. She testified that she had been treated by an American doctor in a hospital for four days for the injuries sustained (R21).

Lieutenant Heyne testified that on 3 September, after due warning of his rights therein, accused made a sworn statement of the occurrence (R19-20; Pros.Ex.A).

On the court's request and after accused had testified, the prosecution introduced the bayonet and scabbard that accused wore the night in question (R39,41), and a stipulation consented to by accused and admitted as Prosecution Exhibit D, wherein it was agreed that the three persons named therein if present as witnesses would testify: (1) M. La Goguat, that on the night of 1 September in passing Madame Lartisien's house he heard her call "Help" and saw her standing just outside her door with a big negro who had one arm around her neck and one arm around her waist. He saw no struggle and no knife. She was on her feet and when released walked away; (2) Henriette Millet, that between 8:30 and 9:00 p.m., 1 September prosecutrix came to the Millet home with her two small children. She had a wound on her cheek, but not through the cheek, and that about 11:30 an ambulance came and took her away; (3) Captain Melvin F. Fuller, Medical Corps, that when he examined Madame Lartisien on 2 September 1944, he found no bruises on her body, the cheek laceration was minor and did not extend through the cheek and she was retained in the hospital less than 24 hours but he did not know "how long she was in custody of military officers" (R42; Pros.Ex.D). This statement by Captain Fuller was in substance the same as the stipulation (Pros.Ex.B) previously admitted in evidence (R20).

4. Accused as the only defense witness testified in substance that he had seen Madame Lartisien and been in her house at least twice prior to 1 September (R23). He had been to Palis, had drunk some wine and on passing her house on the way back to camp, saw her and started talking when she invited him in (R23,24). She was supposed to "get me some lady for two hundred francs" and she left the house returning in about five minutes alone. He asked for his 200 francs back and she gave him 100 and explained that she didn't have any food. He started getting his other 100 francs out of the drawer where she had put it and had to push her away at which time she fell

over a chair and when she got up her nose was bleeding, she was crying and she went out the door screaming. He followed her leaving his pocketbook and fountain pen on the table. Some man was passing and she went out and spoke to him and then went on across the street into another house and accused "walked on to town" (R24,26). He went on guard duty that night, was arrested the next morning and is still confined. He had drunk some wine but not enough to effect him (R27). It was a friendly visit and he had no intention of having sexual intercourse with Madame Lartisien (R26). He was in her house 45 or 50 minutes during which time he did not remove the bayonet from its scabbard (R36).

5. The stories of the prosecutrix and of accused agree upon the fact that accused laid hands upon her and at least pushed her, causing her to fall according to his story and throwing her down according to her version. An assault and battery admittedly occurred. An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another --- a battery is an assault in which force is applied, by material agencies, to the person of another --- (MCM, 1928, par.149d, pp.177-178; CM ETO 1177, Combess; CM ETO 1690, Armijo).

The original Specification alleges that accused did "with intent to commit a felony, viz., rape, commit an assault upon Clementine Lartisien by willfully and felohiously striking the said Clementine Lartisien in the face with his fist, cutting her on the hand with a bayonet, and throwing her forcibly upon a bed". The court's findings exclude not only the specific intent set forth in the Specification, viz., to rape, but also the evidentiary allegation as to the manner of the commission of the battery involved in the offense charged, and by substitution undertakes to convict the accused of assault and battery with intent to do bodily harm, committed in a different manner by "striking", but at the same time and place and upon the identical person described in the Specification.

The variance between the Specification and finding as to the manner in which the battery was committed is not fatal (MCM, 1928, par.78c, pp.64-65). The facts so found constitute the lesser offense of assault and battery included in the allegations of the Specification (CM 230541, Daniel; CM 220805, Peavy) (CM ETO 764, Copeland et al (1943)), Bull. JAG, Nov.1943, sec.451(12), p.428). The change did not alter the substantive nature or identity of the offense (CM 193292, Olles).

However, the court was not authorized by exception and substitution to find accused guilty of intent to do bodily harm in connection with his commission of the assault and battery in question.

> "As a general rule in all cases of assaults with /felonious/ intent, the intent forming the gist of the offense must be specifically averred and satisfactorily proved. The same rule is applicable to * * * assaults with intent to do great bodily harm. There must in such cases be both attempt and intent. * * * The defendant when the felonious intent is not proved, may be convicted of the assault * * * but he cannot be convicted of another offense of the same grade but based upon a different intent, as the intent to wound" (1 Wharton's Criminal Law, 12th Ed., sec.841-842, pp. 1128-1134).

(31 CJ, sec.522, p.868; State v. McDonough, 104 Iowa 6, 73 NW 357; CM 220396, Shepherd (1942); Bull. JAG, Jan-June 1942, sec. 451(4), p.20).

> "Under charges for assault and battery with intent to commit * * * rape, the accused may be found guilty of assault and battery only" (Winthrop's Military Law and Precedents, Reprint, 1920, p.689).

The record, therefore, fails to support the findings of guilty to the extent that they undertake to ascribe to accused "intent to do her bodily harm" in committing the assault and battery of which he was legally convicted. Assault with intent to do bodily harm is not a lesser offense included in assault with intent to commit rape, a felony. Accused was fully apprised by the original specification that battery as well as assault was a component of the greater dereliction charged and the record affirmatively shows that he was not prejudiced by the court's substitutions in the findings, accomplished without changing the nature or identity of the (lesser included) offense charged (MCM, 1928, par.78c, p.65).

6. The charge sheet shows accused is 21 years of age and was, without prior service, inducted 30 January 1943, at Fort Custer, Michigan.

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7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated however, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of assault and battery in violation of Article of War 96 and only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month for a like period (MCM, 1928, par.104c, p.100).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

14 FEB 1945

CM ETO 6228

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Privates AMOS AGEE (34163762), FRANK WATSON (34793522) and JOHN C. SMITH (33214953), all of 644th Quartermaster Troop Transport Company.	Trial by GCM, convened at Rambouillet, France, 18,19 October 1944. Sentence as to each accused: To be hanged by the neck until dead.

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

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

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

ALL

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

Specification 1: In that Private Amos Agee, Private John C. Smith and Private Frank Watson, all of 644th Quartermaster Troop Transport Company, acting jointly and in pursuance of a common intent, did, at Le Noyer, Commune de Bure, Orne, France, on or about 2 September 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of M. Raoul Vingtier 80 francs lawful money of the Republic of

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France, of an exchange value of about $1.60, the property of M. Raoul Vingtier.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Le Noyer, Commune de Bure, Orne, France, on or about 2 September 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of M. Leon Boet 10 francs lawful money of the Republic of France, of an exchange value of about $0.20, the property of M. Leon Boet.

AGEE

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

Specification: In that Private Amos Agee, 644th Quartermaster Troop Transport Company, did, at Le Noyer, Commune de Bure, Orne, France, on or about 2 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Alexina Vingtier.

SMITH

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

Specification: In that Private John C. Smith, 644th Quartermaster Troop Transport Company, did, at Le Noyer, Commune de Bure, Orne, France, on or about 2 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Alexina Vingtier.

WATSON

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

Specification: In that Private Frank Watson, 644th Quartermaster Troop Transport Company, did, at Le Noyer, Commune de Bure, Orne, France, on or about 2 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Alexina Vingtier.

Each accused pleaded not guilty; and, all members of the court present when the vote was taken concurring, accused Watson was

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found guilty of the charges and specifications against him, and accused Smith and Agee were found not guilty of Charge I and its specifications and guilty of Charge II and the Specification relating to him. No evidence was introduced of any previous convictions of accused Watson or Smith. Evidence was introduced of three previous convictions of accused Agee, two by summary court, one for one day absence without leave and one for absence without leave, duration not shown, in violation of Article of War 61, and one by special court-martial for failure to obey the order of a superior officer, in violation of Article of War 96. All members of the court present when the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Advance Section, Communications Zone, European Theater of Operations, approved each 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 each sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence shows that Madame Alexina Vingtier, the 24 year old wife of Raoul Vingtier, a farmer, lived with her husband (R12-13), their two and a half year old child (R29) and M. Leon Boet, the 47 year old uncle of Raoul Vingtier (R80), at Le Noyer, Commune de Bure, Orne, France, on 2 September 1944. At about three o'clock in the afternoon of that day the three accused came to their home asking for something to drink. She gave them each a glass of cider and while drinking they took out a little book and each one wrote his name in it after which the Vingtiers wrote their names in it (R13,27,36). The accused, each of whom was identified in court by both the Vingtiers, then left (R13) after staying about a half hour (R14). No others were present at this time (R13) except a neighbor (Lorieux) (R37) who just walked in and left again (R13,37).

That night about 11:00 o'clock, after the Vingtiers had gone to bed (R20) all three accused returned (R14,22) and knocked on the door for a long time until Vingtier, who couldn't understand what they were saying and knew the door would eventually give way, got his uncle up, told his wife to dress and then opened the door (R14,21,30). When he opened the door they (Watson) pointed a rifle at him (R21-22,29-30,34,80,82) and motioned him to leave the house. He refused to leave but his wife picked the baby from the cradle and attempted to leave (R14,23,31) when two of accused (R14), Agee and Watson (R36), seized her by the arm (R14,23) and took her out to a building in the yard (R14). Watson took the baby back to the house

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(R14,23,31) and gave it to the uncle at the door (R14,82), and then returned. Although the night was dark she could see them clearly. They laid her on the ground, raised her dress (R15,23) and while one soldier held her down and "blocked" her mouth (R16,23,25), another laid on top of her and made penetration (R25). She had a sore mouth for two days (R26,81). He was on top of her with his penis between her legs in her "vatre" (R17). She testified that the first soldier, either Watson or Agee (R17,24) "entered into my person" for at least 15 minutes (R16,17) and then withdrew himself and the other took his place. Smith was last. The second soldier did like the first for ten or 15 minutes and when he got through, Smith took his place, and did like the others. "He introduced himself into my person also" (R17,24) for about ten minutes. Then they helped her up and left (R18). They were there about an hour and a half and she continued to struggle during the entire time (R21). They hurt her (R25) and one soldier was always holding her in addition to the one having intercourse (R21). They knew what they were doing and she did not smell liquor on their breath (R26).

On 3 September she and her husband were taken to the nearby camp where accused were living and both identified accused Watson from soldiers lined up in two rows (R26,32,41, 45). The other two accused were not present (R45). Watson didn't look toward them when they saw him. On 5 September she, her husband, Lorieux and Mlle. Lupernant went to the camp and she identified all three accused (R26,33,42), Agee in the first rank of soldiers and Smith and Watson in the second rank (R20).

Madame Vingtier's story was corroborated by her husband (R29-37). He testified that when he opened the door Watson stepped inside pointing a rifle at him and working the bolt (R30,34,36). Agee grabbed his wife when she attempted to leave (R34) while Watson passed the rifle to Smith who stayed at the door watching them. Later Watson came back, took the rifle and came into the house. He showed them that they had to lay some money on the table (R31,34). As he was threatening them, Vingtier gave him 80 francs and Watson then turned with his rifle to the uncle and demanded money and the uncle got some from his room and gave him fifteen francs (R13,81,82). Watson was alone at this time (R35). Then Watson demanded more money and Vingtier dumped his wallet on the table and Watson put the money in his pocketbook. A little later Madame Vingtier came in the house and told what had happened (R31). Vingtier had heard his wife's screams (R31,81) but couldn't go to aid her as Smith was holding them with the rifle (R31). He identified

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Watson's pocketbook (R32-33; Pros. Ex.C) which was given by Watson to the officer at the time complaint was made on 3 September when the officer asked Watson for the money (R33). No other soldiers were at the Vingtier home on 2 September (R34).

Edouard Lorieux, a neighbor testified that he went to the Vingtier home on the afternoon of 2 September on an errand and as he was leaving the house three colored soldiers arrived. Shortly after, as he was about to leave his own home, three soldiers came, asked for cognac and without invitation or permission came in and sat down at a table and were each given a glass of cider (R37). Witness could not identify the accused in court (R38).

Mlle. Gisele Lupernant, maid at the Hotel Vassel, Commune de Bure, Orne, France, identified each of accused (R38), who came to the hotel about 3:30 (R40) on 2 September (R38) and drank some cider. She identified Prosecution Exhibit B as a little book in which Watson had them all write their names and in which she saw the names of Raoul Vingtier and his wife already written (R39).

Troop Captain Isidor Lazar, commanding officer of the 644th Quartermaster/Transport Company since 11 September 1943, identified each accused (R40) as members of his organization since the morning of 2 September 1944 (R41). On 3 September he had a line-up of part of his company at which Mr. and Mrs. Vingtier picked out accused Watson (R41,45). Agee and Smith were not present (R45). On 5 September, five French civilians, three men and two women were present at a line-up which included all of accused. Both Vingtier and his wife picked out each accused and after rearranging the line-up, picked them out again (R42). On questioning accused Watson, he produced a notebook with several pages missing, from his tent which witness identified as Prosecution Exhibit B (R42-43). Some original French bank notes, Bank of France, were also taken from Watson on 3 September in the presence of Madame Vingtier.

With the express consent of each accused, a stipulation was admitted in evidence to the effect that if Captain Abraham J. Swiren, who was investigating officer in this case, were present, he would testify that, on 9 September 1944, he explained to each accused his rights in regard to making a statement, and that accused Amos Agee told him the matters as set out in document marked Prosecution Exhibit D; accused John E. Smith told him that set out in Prosecution Exhibit E and accused Frank Watson told him that set out in Prosecution Exhibit F. It was also stipulated that if Captain Regnard Robert, Medical Corps, were present he would testify as set out in Prosecution Exhibit G (R50). All of

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these exhibits were admitted in evidence (R51). Captain Robert stated that on examination of Madame Vingtier on 4 September, he found light abrasions at the nose and left elbow; bruise on lower gums; more important bruises on the loins on a large surface and she was sore in many places (Pros.Ex.G).

Private Tom Bankston, 644th Quartermaster Troop Transport Company, did not know accused but testified that while playing cards with Lucius Scott and William Kelley on the night of 2 September, three strange men came to their tent (R53) between eleven and one o'clock (R55). These men had been drinking (R54) for it could be smelt on their breath (R55). Technician Fifth Grade Lucius Scott testified similarly (R56).

Prosecution Exhibit D, the sworn statement of accused Agee relates in substance that he arrived in France on the 29 or 30 August and at the 644th Transport Company on 2 September; with Smith, Watson and another soldier, he reported at about 11 o'clock in the morning. They had "chow" and he drank some cider and cognac. He then met Smith and Watson and had more to drink and they went for a walk. They stopped at a house and had some cider and he remembered sitting at a table and Watson writing something on a piece of paper. A lady and man were at the house. After some more walking, they returned to camp and had supper. A while after supper, all three again visited some houses and had cider and cognac and then returned to camp together. He went back to the area by himself and laid down when someone said there was gambling at a tent. He went over to the tent Watson and Smith preceding him. It was about 11 or 12 o'clock and he only played a hand or two and then went to bed leaving Smith in the game. He didn't know when Watson left. Neither he nor Smith carried a weapon that night. He admitted he was at the Vingtier house that afternoon but denied being there that night or having anything to do with taking the money or with the rape.

In Prosecution Exhibit E, the sworn statement of accused Smith, he told a similar story. He admitted being at the Vingtier house in the afternoon but denied being there in the evening or having anything to do with the taking of the money or of the rape. He denied that any of them had any weapon that evening.

Prosecution Exhibit F, the sworn statement of accused Watson, is substantially similar. They were in a house and drank cider in the afternoon where there was one man outside cutting the grass and one man, a woman and child inside.

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They sat around a table, were asked their names and they all wrote their names in a book. This was about three o'clock in the afternoon. After supper in camp, they again went out and had more cider at various places before returning to camp. Smith and Agee went on and he went over to the card game and played at least two hours leaving about midnight. Smith and Agee were there when he left. He stated that none of them carried a weapon. He had a notebook but the names written in it he decided were not necessary to keep and he took them out "Saturday afternoon sometime during supper". He did not show the book to Smith or Agee on Sunday. He denied having anything to do with the rape or taking of the money. He was not present at that house that evening or night.

4. Accused Agee was sworn as the first defense witness and told somewhat the same story he told in his statement (Pros. Ex.D), except he testified that he got so far drunk that he "don't remember--can't remember everything that happened" (R61). He remembered being in the tent but didn't know whether he played. He visited some houses and had cognac and cider, but remembers no baby and heard no woman scream (R61,63). He "was about as drunk as I generally get -- and can't remember everything what happened" (R62). When asked if he had anything else to tell the court, he answered, "I beg the court to live; beg mercy from the court to let me live, sir" (R63).

Accused Smith, as a defense witness, related substantially the same story as in his statement (Pros.Ex.E). He visited the Vingtier home in the afternoon (R65-66) and visited more homes in search of drink after having supper in camp. They drank cognac and cider and he became "pretty high" that night (R67). It was dark before they got to the last house. Neither he nor Watson had a rifle. As near as he remembered, he returned to the company and lay down for a time. He remembered something about a gambling game (R66). He was with Watson and Agee all evening and neither heard a woman scream nor has had anything to do with one since "being over here". Was "not so high" but that he knows he had nothing to do with a woman that night. When shown the dress that Madame Vingtier wore that night (Pros.Ex.A) and asked if he had ever seen the dress, he answered, "No sir, I don't -- I didn't pay any -- no attention" (R67).

Accused Watson testified substantially as in his statement (Pros.Ex.F) (R71-76). He also was "pretty high" on his return to the bivouac area that night when he played poker and quit because he lost (R77-78). This is all he remembers of the night's happenings (R71). He did not recall visiting the Vingtier house that night and is "sure -- positive" that he did not (R72). He returned to camp about eleven o'clock (R76). In the afternoon he had his notebook at the Vingtier home and had written in the three names and the one man (uncle)had written his (R72). He

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identified the book (Pros.Ex.B) from which he stated he tore out the names "because they weren't nothing to me" (R73,77). He denied he had anything to do with a woman that night (R73,76) and he wasn't so drunk but that he would know if he had. He denied getting any money that night (R73) or that he had seen the dress (Pros.Ex.A) before the trial (R76). He is positive he had left his carbine in his tent and did not have it that night. When asked if the two French people mentioned his name when he went in the room that night, he answered, "I didn't -- hadn't been in the room that night, sir", and when asked if he had anything else to tell the court, answered, "I want to appeal to them to let me live" (R78).

On request of the court, Leon Boet was called as a witness. He testified that on 2 September 1944 he lived with Raoul Vingtier and he related the same story as did Raoul Vingtier. Nobody came in the house until the one came in for money (R83).

For the defense, accused Agee was recalled and testified that both he and Watson were in the 3 September line-up. Smith was not (R84-85).

Captain Lazar, recalled, was positive that of the three accused, only Watson was in the 3 September line-up (R88-89) and that he found Smith and Agee later coming in from a detail (R88).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.149b, p.165). The evidence convincingly establishes beyond all doubt the commission of every essential element of the offense of rape by each accused. Madame Vingtier was forcibly taken from her home and in turn was held by one accused while being ravished by each of the others, while her husband and uncle were prevented by a third accused, armed with a rifle, from going to her assistance. That she resisted and that her outcries were stifled is clearly shown. There is no question as to the penetration of her person by each accused and of the positive identification of each of them as the perpetrators of the acts.

It is also as convincingly shown that accused Watson alone entered the house and demanded and received money from both Raoul Vingtier and his uncle, Leon Boet, when he threatened them with his gun. This was robbery.

6. The charge sheet shows that accused Watson is 21 years of age and that he was inducted 29 September 1944 (1943), at Camp Blanding, Florida; that accused Smith is 26 years 11 months old and was inducted 14 October 1942 at Fort Meade, Maryland; and that accused Agee is 28 years six months old and was inducted 19 November 1941 at Fort McClellan, Alabama. None had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. A sentence of either death or life imprisonment is mandatory upon a conviction of rape under Article of War 92.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

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

1. In the case of the Privates AMOS AGEE (34163762), FRANK WATSON (34793522) and JOHN C. SMITH (33214953), all of 644th Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 6228. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6228).

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

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

(As to accused Smith, sentence ordered executed. GCMO 52, ETO, 26 Feb 1945.)
As to accused Agee, sentence ordered executed. GCMO 53, ETO, 26 Feb 1945.
As to accused Watson, sentence ordered executed. GCMO 54, ETO, 26 Feb 1945.)

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

BOARD OF REVIEW NO. 1

10 FEB 1945

CM ETO 6229

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class JACK CREECH (35879783), Company B, 36th Signal Heavy Construction Battalion	Trial by GCM, convened at Namur, Belgium, 24 November 1944. Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private First Class Jack Creech, Company B, 36th Signal Heavy Construction Battalion, did, at or near Le Mans, France, on or about 9 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Donald T. Drake, Company B, 36th Signal Heavy Construction Battalion, a human being by shooting him with a rifle.

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

Specification: In that * * * did, at or near Le Mans, France, on or about 9 October 1944, with intent to do him bodily harm, commit an assault upon Technician Fifth Grade Thomas J. Steinbrunn, Company B, 36th Signal Heavy Construction Battalion, by shooting him in the body, with a dangerous weapon, to wit, a rifle.

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

3. Prosecution's evidence proved the following facts:

On 9 October 1944 Company B, 36th Signal Heavy Construction Battalion, was stationed in the environs of Le Mans, France. The accused, deceased and all witnesses at the trial were members of said company (R11-12). The enlisted personnel who were actors in and witnesses of this tragedy were on said date billeted in a structure which is not described in the evidence but it is designated as the "barracks". The room in the barracks where the homicide occurred was longer in one dimension than in the other (R7,9; Pros.Ex.1). Pros.Ex. 1 was introduced in evidence without objection (R7,9) and shows that when a person entered the room there was a line of beds on his right, placed with their heads toward the right wall of the room. They projected into the room and were parallel with each other. There was a space between each of them. The beds of the soldiers concerned in or who witnessed the homicide were arranged in the following order:

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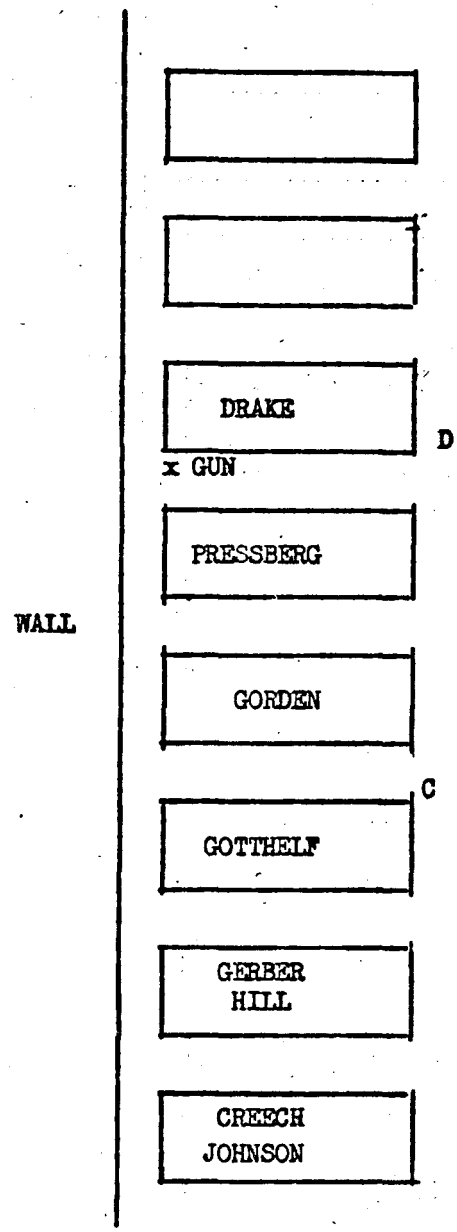

(R7,9,20; Pros.Ex.1)

Opposite the row of beds shown above was a row of single beds. There was an aisle between the feet of the two rows of beds (R14). Donald Drake (deceased), Pressberg, Gordon and Gotthelf slept in single beds. The beds occupied by Gerber and Hill and by Jack Creech (accused) and Johnson were each double tier (R8,9,12,13; Pros.Ex.1). Johnson slept in the upper bed; Creech in the lower (R12). Technician Fifth Grade Thomas J. Steinbrunn (Charge II and Specification) occupied a bed near the entrance and four or five beds removed from that of Drake (R9).

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At about 10 pm 9 October 1944 accused, in the presence of a number of other soldiers, sat upon the floor of the barrack room mixing calvados and cognac. He drank of the mixture (R6,12, 16), and spilled some of it on the floor and ignited it. After consuming more of the liquor he appeared to have "passed out" (R6,12,16,19). Two of his fellow soldiers picked him up and placed him upon his bed. In a few minutes he arose (R6,12,19) and demanded fresh air. Two of the men took him outside. On the way out Creech stuck his right hand through glass in the barrack room door and cut his wrist. A "medic" dressed the cut (R15,16). Thereafter he was returned into the barrack room, and was then placed in bed. Subsequently he was taken outside a second time. A bed was made of blankets for him. He lay on the blankets, but remained only about five minutes when he came back into the barrack room. He went directly to his bed where he secured his carbine and loaded it. He ordered all of the other men to bed (R6,8,12,16) and then commenced to shoot into the ceiling, counting the shots as he fired. The men were afraid because they knew "he could be mean when he was drinking" (R13). He fired five or six shots and had about eight rounds of ammunition unexpended. The men "pampered" him and encouraged him to shoot all of his cartridges into the ceiling. At the same time some of the men tried "to get him to give up the gun". He refused and threatened to shoot anyone who came near him (R8,11,12,16,19). While the soldiers were requesting accused either to surrender possession of his gun or fire all of his ammunition into the ceiling, the deceased, Drake, entered the barrack room. He went to the head of his bed and on the side next to Pressberg's bed hung his gun - a .38 claiber P 38 German gun - and his jacket (see Pros.Ex.1, p.3 hereof). Accused saw Drake and directed abusive language toward him. The remarks were of the nature: "What a tough guy Drake thought he was" and "he [accused] said he was just as tough" (R13). Drake replied in substance that accused "wasn't tough" and "You're not so damn tough" (R13). Drake took his gun from the holster and fired five or six shots into the ceiling (R8,13,20,22). He then replaced his gun in to holster at the head of his bed, and removed his shirt. He walked to a point near the foot of his own bed, marked "D" on Pros.Ex.1 (see page 3 hereof). The accused continued to address insulting remarks to the deceased, who stood facing accused with his hands in his pockets and his feet about 15 inches apart. Creech asserted that he "had killed bigger things than squirrels and he liked to see them squirm" (R9). He stood at this moment at the foot of Gotthelf's bed at the point marked "C" on Pros.Ex.1 (see page 3 hereof) (R8,9, 17,20,22). He was seven to ten feet from deceased (R9,15,17,20,21). He called deceased "a dirty bastard". Deceased requested accused to put his gun away, but accused demanded that Drake "get his gun" (R9, 13,20).

> "Drake told him to put his gun away and go ahead outside and they would settle it. Drake said the only time he would shoot a man was on guard duty. Creech stood there and told him again to get his gun, but Drake refused. Creech then pointed his gun at Drake" (R9),

and called him "a dirty son of a bitch". Drake replied, "You are the same". Accused "swung his gun" away from deceased and said to men standing at his side that he wanted "to shoot him /Drake/ anyway". He then pulled his gun back in a position where it was aimed at Drake and fired. Drake fell. His head struck the corner of his bed and he lay flat on his back. Both of his hands were in his trousers pocket (R9,10,14,17,18,21,23). The bullet struck deceased's forehead above his right eye, passed through his skull and struck Steinbrunn, who was then in his bed. Drake died instantly (R10,17). The bullet lodged in Steinbrunn's right shoulder (R10,17,18,21,23). Accused looked at deceased and said, "Go ahead and yell now you cock sucker". He expressed the desire to shoot him again. Certain of the soldiers protested that deceased was dead, but accused persisted in his desire to shoot deceased again because "he liked to see him wiggle". He then walked to the head of deceased's bed and removed deceased's revolver from its holster. He placed the gun on deceased's stomach, removed his left hand from the trouser pocket and arranged it near his hip (R9,10,14,18,21) (Drake was right handed (R14)).

After accused had arranged deceased's revolver and arm, he went to a bed in the opposite row and sat down. He said, "I done it to him, now I'll do it to myself". He placed the muzzle of his carbine to his head. There were protests from his fellow soldiers: "Don't do it, Jack". At that moment First Lieutenant Walter Brooks appeared with his .45 drawn. (He had been previously summoned by Master Sergeant Dean L. Thompson (R16)). The officer approached accused, who stood erect. Lieutenant Brooks said, "Give me that gun, Creech". Accused turned away from the officer, who then said, "I am going to kill you if you don't give me that gun". Accused delivered his carbine to Lieutenant Brooks (R10,14,15,23, 24), and commenced to talk about the deceased. He asserted he had killed Drake in self defense (R15,18,21).

> "He said Drake was a good boy but he had it coming to him, and he says 'I have killed bigger game than squirrels back home'" (R24).

Lieutenant Brooks felt Drake's wrist and there was no pulse action. Drake was dead. The officer made a motion to pick up the pistol on deceased's stomach. Accused exclaimed, "Don't do that there

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may be fingerprints on it". Deceased lay on his back with his right hand in his pocket and his left hand and arm on the floor parallel with his body (R24).

4. In defense of accused the following evidence was introduced:

Sergeant Bruce Muhlestein, motor sergeant of Company B, testified he had known accused about nine or ten months; that accused was a truck driver and that he had no trouble with accused in connection with the performance of his duties (R25,26).

Sergeant Hyman Spinowitz, supply sergeant of Company B, had known accused about ten months. He had never had any trouble with accused, and accused had never made complaints to him. Accused had never worked for him (R26).

After his rights were explained to him, accused elected to make an unsworn statement through his counsel. Accused was on pass for the afternoon of 9 October 1944 (R28; Pros.Ex.1). The defense counsel stated further:

> "The pass states that he was free for the afternoon. He informs me that during the afternnon he stayed in camp and that he ran into a Frenchman about two o'clock in the afternoon and that he bought five bottles of calvados from him paying 300 francs a bottle for it. He started drinking. He remembers drinking one bottle and starting on the second. He did not go out of camp and was in and out of buildings free to come and go because of his pass. Supper time came and he felt bad. He went through the chow line and took a helping. He sat down to eat but felt so bad he couldn't eat and got up and left, emptied his mess kit, cleaned it and from then on his mind is a total blank. He finished washing his mess kit and then from then on his recollection of what took place during the night is blank. The first he heard of the incident was when Lieutenant Cox woke him up in the guard house the next morning to talk to him. That is all he knows that took place during the time in question" (R28).

5. Rebuttal evidence of the prosecution summarizes as follows:

Technician Fifth Grade Jack Pressberg, a prosecution witness, was recalled. He stated he had seen accused drinking on

the night of the homicide, but it was his opinion that accused "knew what he was doing". During the disorder, accused referred to two of the men by their names (R28) and he recognized deceased by name. Creech and Drake worked on the same team. Witness did not "believe" they had been unfriendly (R29).

Technician Fourth Grade John W. Johnson, also a witness for the prosecution in its case in chief, testified that

> "at the time of the shot he fired he was drinking, but he was not under the influence of liquor to such an extent that he did not know what he was doing. In my estimation he knew what he was doing. * * * Private Creech and I have bunked together in the same tent since we hit France. I have seen him drink before but he has never been so drunk he never knew what he was doing. I have seen him go sleep outside the tent and stay by himself and play drunk and if no one came after him he would come back sober" (R29).

Private Robert Gordon, who had testified for the prosecution in its principal case, testified, "Creech had been drinking but I think he had good command of his faculties at the time" (R29). Creech and Drake worked on the same team.

> "They got along with each other. They never went out together but there was never any signs of animosity between them" (R30).

Technician Fourth Grade Joseph B. Weis stated he was in the barrack room on the night of the homicide for about an hour. He saw Drake killed. Creech "had been drinking, but in my opinion he knew what he was doing". Accused and deceased

> "were friends in the sense of men working in the same outfit. Whether they were good friends or just friendly I couldn't say"(R30).

Private William L. Gerber was also present in the barrack room when Drake was killed.

> "In my opinion he [accused] was not intoxicated. He had been drinking but was not drunk" (R31).

Witness was one of the men who helped accused out of the barracks

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and secured blankets for him. The first time he was taken outside he put his fist through one of the windows. Witness had seen accused under the influence of liquor previously but had never seen him act in a threatening manner toward anyone (R31).

Master Sergeant Dean L. Thompson, who had previously testified for the prosecution, upon being recalled, stated that accused "was under the influence of liquor, but I thought he knew what he was doing". Accused had a small amount of liquor left in his bottle. Witness suggested to him that he drink it and go to bed as the men were trying to go to sleep. He had seen accused under the influence of liquor, but "he was never out of sort" (R31,32).

6. The facts that accused shot deceased at the time and place alleged in the Specification and that deceased died instantly as a result of the gunshot wound thus inflicted were proved beyond contradiction or doubt. The only question for consideration by the Board of Review in connection with the murder charge (Charge I and Specification) is whether accused is guilty of the crime of murder or whether the homicide constituted the lesser included offense of voluntary manslaughter. The constituent elements of murder are stated thus:

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. The death must take place within a year and a day of the act or omission that caused it
> * * *
>
> Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault, and an attempt to commit murder.
> * * *
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before 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,

whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not becaused; intent to commit any felony" (MCM, 1928, par.148a, pp.162-164).

The distinction between murder and voluntary manslaughter is well understood and established:

"Manslaughter is distinguised from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, sec.423, p.640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary" (MCM, 1928, par.148a, p.165).

"At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden fray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment" (29 CJ, sec.115, p.1128).

"The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter"

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(Stevenson v. United States, 162 U.S. 313,320; 40 L.Ed. 980,983) (Cf: Jerry Wallace v. United States, 162 U.S. 466, 40 L. Ed. 1039; John Brown v. United States, 159 U.S. 100, 40 L. Ed. 90).

The following statements of the law are relevant in considering and applying the evidence of accused's intoxication:

"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.

Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence" (MCM, 1928, par.126a, p.136).

"Crime therefore, when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is in the wrong ab initio; hence the established general principle of law that voluntary drunkenness furnishes per se no excuse or palliation for criminal acts committed during its continuance, and no immunity from the penal consequences of such acts"(Winthrop's Military Law and Precedents - Reprint, p.292).

"It is now generally held that intoxication may be considered where murder is divided into degrees, and, in many states, may have the effect of reducing homicide from murder in the first to murder in the second degree. In fact, in most states, the only consideration given to the fact of drunkenness or intoxication at the

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time of the commission of the homicide is to enable the court and jury to determine whether the prisoner may be guilty of murder in the second degree, rather than of murder in the first degree. By the great weight of authority, intoxication will not reduce a homicide from murder to manslaughter. In other words, in most states, as between murder in the second degree and manslaughter, intoxication of the offender is generally not regarded as a legitimate matter of inquiry. In some states, however, either by virute of particular statutes, or according to a general principle of law, intoxication may reduce murder to manslaughter" (26 Am. Jur., sec.119, pp.237-238; Cf: Annotations in 12 ALR 888-894 and 79 ALR 904-905).

Notwithstanding the prevailing rule in the civil courts, in the administration of military justice, evidence of accused's intoxication at the time of commission of the homicide is admitted as bearing upon the question whether accused was motivated by "malice aforethought" when he killed the deceased. Such evidence is relevant and material in determining the subordinate question whether an accused's deliberativefaculties and power of reasoning (e.g.: his ability to premeditate the deceased's death) had been dethroned and replaced by fear, passion or unreasoning hysteria at the time he committed the homicidal act (CM ETO 72, Jacobs and Farley; CM ETO 82, McKenzie; CM ETO 506, Bryson; CM ETO 3639, McAbee; CM ETO 3957, Barneclo).

Eyewitnesses of the homicide testified as to accused's condition as follows:

Pressberg expressed the opinion that accused "knew what he was doing". Johnson stated that, although accused had been drinking, "he was not under the influence of liquor to such an extent he did not know what he was doing. In my estimation he knew what he was doing". Gordon testified: "Creech had been drinking but I think he had good command of his faculties at the time". Weis admitted accused had been drinking, "but in my opinion he knew what he was doing". Gerber: "In my opinion he /accused/ was not intoxicated. He had been drinking but he was not drunk". Thompson: "He was under the influence of liquor, but I thought he knew what he was doing". Lieutenant Brooks: "He had been drinking. I didn't see him drink, but he smelled of drink".

The above forms a body of substantial evidence that supports the findings of the court that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the 6229

requisite element of "malice aforethought" to support the findings of his guilt of murder (CM 237782, Prentiss, 24 BR 111; CM 238389, Kincaid, 24 BR 247; CM 238470, Ledbetter, 24 BR 257; CM ETO 1901, Miranda).

Even though it be assumed that accused's intoxication was of such severity as to destroy his deliberative powers and place passion and hysteria in control of his mental faculties, such fact taken alone would not serve to reduce the homicide from murder to manslaughter.

> "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been adequate provocation" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.655,656).

The record of trial is wholly devoid of any proof of provocation by the deceased. At the time accused delivered the fatal shot, deceased stood at a distance of from seven to ten feet from him. He faced accused with his hands in his pockets. He had previously, in accused's presence, placed his gun in his holster at the head of his bed. He stood before accused unarmed and in a passive, nonresistant attitude. The replies made by him to the epithets and insults hurled at him by accused did not constitute adequate provocation for accused's act of violence. It is well settled

> "at common law mere language, however aggravating, abusive, opprobrious, or indecent, is not regarded as sufficient provocation to arouse ungovernable passion which will reduce a homicide from murder to manslaughter" (26 Am. Jur. sec.29, p.175; Cf: 40 CJS, sec.87, p.950; MCM, 1928, par.149a, p.166; CM ETO 2899, Reeves).

The question of intoxication and its effect upon accused's deliberative faculties was one of fact for the court and, in view of the substantial evidence supporting the court's findings, the same will not be disturbed on appellate review (CM ETO 1065, Stratton; CM ETO 1901, Miranda; CM ETO 3937, Bigrow; CM ETO 3932, Kluxdal; CM ETO 5561, Holden and Spencer; CM ETO 6159, Lewis).

Accused's conduct immediately prior and subsequent to the homicide bespoke deliberation, premeditation and malice. Deceased stood before him unarmed with his hands in his pockets. Accused addressed profane and insulting epithets to deceased and urged him to "get his gun". Drake asked accused to put his gun away and offered to settle their dispute "outside" in a fist fight. Accused refused and repeated his demand that accused "get his gun". Drake informed him that he would only shoot a man when on guard duty. Creech pointed his gun at deceased and called him "a dirty son of a bitch". Drake replied: "You are the same". Accused "swung" his gun to the side and informed bystanders "he wanted to shoot him /deceased/ anyway". Instantaneously he aimed the carbine at deceased, pulled

the trigger and shot deceased through the head. After deceased fell to the floor, accused looked on his prostrate form and exclaimed, "Go ahead and yell now you c--- s-----", and expressed the desire to shoot him again because "he liked to see him wiggle". Only the protest of his fellow soldiers prevented him from shooting into the body of deceased. With the obvious intention of "framing" a plea of self defense, accused placed deceased's gun on his stomach and withdrew deceased's left hand from his pocket and placed the arm and hand at the side of deceased's body. Then as a final gesture he seated himself on an adjoining bed with the remark, "I done it to him, now I'll do it to myself". At the same time he pointed the muzzle of his carbine at his head. Whether it was a mere piece of stage acting or pretense will never be known as Lieutenant Brooks appeared and demanded accused's gun. It is significant also that accused asserted to Lieutenant Brooks that he killed Drake in self defense and that, when the officer was about to remove deceased's gun from his body, accused said, "Don't do that there may be finger-prints on it".

The foregoing evidence is substantial and convincing beyond reasonable doubt that accused killed Drake with malice aforethought. The homicide was brutal and ruthless and without a scintilla of justification or excuse. Accused, in full possession of his senses, apparently was seized with a lust for blood which was only satisfied when his fellow soldier lay dead at his feet. The court's finding that accused murdered Drake is sustained by an abundance of competent evidence (CM ETO 438, Smith; CM ETO 422, Green; CM ETO 1901, Miranda; CM ETO 2007, Harris; CM ETO 3042, Guy, Jr; CM ETO 3585, Pygate; CM ETO 3180, Porter; CM ETO 4020, Hernandez; CM ETO 4149, Lewis; CM ETO 4949, Robbins; CM ETO 5451, Twiggs; CM ETO 6159, Lewis).

7. The Specification of Charge II alleges that accused committed an assault upon Technician Fifth Grade Thomas J. Steinbrunn with intent to do him bodily harm by shooting him in the body, with a dangerous weapon, to wit, a rifle. The evidence shows without contradiction that the bullet from accused's carbine which killed Drake passed through his skull and lodged in the right shoulder of Steinbrunn. The victim of this assault was a bystander or spectator. He was in his bed, which was located a distance from Drake's bed. The bullet was evidently deflected when it passed through deceased's skull in the direction of Steinbrunn. The facts of this assault are almost identical with those in CM ETO 422, Green. In the holding in said case the Board of Review discussed in detail the principles of law applicable and, upon re-examination of same, believes the holding to be correct. The following comment from said holding is pertinent:

> "The intent on accused's part to inflict bodily harm on deceased, exhibited by accused's deliberate, malicious killing of deceased included within its scope the intent to do bodily harm

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to any person who was or came within the range of the bullets fired by accused at deceased. Accused displayed 'a reckless disregard for the safety of others'. Such conduct supplies the proof that accused intended to inflict bodily harm on Brown. The law does not require proof that accused intended that the bullet which killed O'Connell should also have wounded Brown. The requirements are satisfied by the proof that accused intended to inflict bodily harm on deceased and in the execution of such intent Brown was wounded. The specific intent to do bodily harm to O'Connell followed the bullet through his body into Brown's hand. (Cf: CM 221640, Loper)" (CM ETO 422, Green, pp.28-29).

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of guilty of Charge II and its Specification.

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 charge sheet shows that accused is 26 years seven months of age. He was inducted into the military service at Fort Thomas, Kentucky, 12 November 1943 to serve for the duration of the war plus six months. He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

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

1. In the case of Private First Class Jack Creech (35879783), Company B, 36th Signal Heavy Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 6229. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6229).

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

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

(Sentence ordered executed. GCMO 124, ETO, 23 April 1945.)
(Death Sentence stayed. GCMO 127, ETO, 27 April 1945.)
(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life, and as commuted ordered executed. GCMO 272, ETO, 6 July 1945.)

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

BOARD OF REVIEW NO. 2 9 FEB 1945

CM ETO 6231

U N I T E D S T A T E S	THIRD UNITED STATES ARMY.
v.	Trial by GCM, convened at Nancy, France, 9 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JESSE SISTRUNK (12154317) 3199th Quartermaster Service Company.	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Jesse Sistrunk, 3199th QM Service Company, did, at Toul, France, on or about 2 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one David D. Ward, 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 Specification and the Charge. Evidence was introduced of one previous conviction by summary court for disobeying the lawful order of a noncommissioned officer in violation of Article of War 96. Three-fourths of

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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 the provisions of Article of War 50½.

3. The evidence for the prosecution shows that at about 10 o'clock p.m., on the date and at the place alleged, accused entered his barracks and invited several of his comrades, who were on their bunks, to shoot craps with him (R7,21,29). While issuing this invitation accused sat down on his own bunk with his carbine across his knees (R7). There deceased, Private David D. Ward, joined him almost immediately, whereupon the two proceeded to shoot craps (R7, 8,21,29). After a few minutes they engaged in a momentary dispute concerning ten francs or so which accused claimed deceased owed him (R8,9,29). Thereafter deceased requested accused to fade him and accused refused. Deceased told accused to "Give me a fade or I will break up the game" /or "I will break up the house break up the game and turn the lights out"/ Accused replied "Break up the game and turn the lights out", at the same time rising and backing away from deceased until a distance of about nine feet separated them. Then, with his gun pointed in deceased's direction, accused fired from his hip ten or twelve shots in rapid succession (R8-9,12,15,16,18,19, 29, 33). Deceased fell back against a barracks bag (R17). His belt was torn by holes that "looked like bullet holes" (R9,13,30). When a comrade called him, "he didn't say nothing but, 'Oh, Lord'" (R9). It was stipulated that if Captain David W. Robinson, Medical Corps, were present in court he would testify to the facts recited in the death certificate signed by him, viz.

> "that DAVID W. WARD, A.S.N.,34120937, 3199th Quartermaster Service Company was brought to the Receiving Division of the 39th Evacuation Hospital at 0130 hours, 3 November 1944, was examined by me and pronounced dead on arrival, death due to gunshot wounds (Carbine), wounds multiple. There were 3 wounds through and through the chest, two wounds through and through the abdomen, and one wound through and through the left thigh" (R52,53; Pros.Ex."B").

After the shooting, accused left the barracks and walked across a field, without even turning his head when several shots were

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fired in his direction (R 37,40,45). About three-quarters of an hour later, he returned to the barracks, carrying a rifle (R38,39, 45). An officer and some military policemen entered the room. The beam of the officer's flashlight revealed accused on his bunk. When the light struck him, accused said, "Take that god-damned light out of my face" (R38,39,48). An enlisted man shot accused, "/trying/ to see if I could unarm him" (R38,39).

Accused was gay and talkative, apparently from drinking, just prior to the shooting. He did not appear drunk (R24,25,31,68). There had not been any apparent ill feeling between deceased and accused (R26,41,49).

4. The evidence for the defense shows that, at about 10:30 on the night of the shooting, accused entered the company supply room where he asked for his rifle. He came in with a carbine, placed it in the rack and "started fumbling around looking for his rifle". There was a knock at the door at about the same time that accused took an '03 rifle out of the rack and got behind the door with it (R54).

First Lieutenant Delmar G. Fleesner, an officer in accused's company, testified that accused had a good character and performed his job efficiently. Fleesner did not consider accused's temperament pugnacious or quarrelsome (R56).

5. After his rights were explained to him, accused elected to testify under oath substantially as follows:

On the date in question he obtained cognac in the village, returned to camp after imbibing, and issued a general invitation to the men in his barracks to join him in a crap game. Deceased accepted. Accused made two passes with the dice. Deceased requested accused to "Give me a shot". When accused refused, deceased remarked, "I'm going to break the game up". Accused protested and the two started arguing, finally engaging in a tussle over a rifle - not accused's - which was resting at the head of accused's bed. In the tussle the rifle was discharged three or four time. Seeing deceased leaning over on the barracks bag, and knowing deceased carried a pistol, accused went downstairs to the supply room for his gun (R58).

> "So they wouldn't give me my gun so I comes back upstairs and I goes to the bunk and Ward still there at the head of my bunk by the barracks bag. So the rifle is still laying down there and I picks the rifle up, walks out the door and goes downstairs and there's an empty lot out there. So I goes out

> there and stays about 25 or 30 minutes. * * * So I said I know I ain't going to stay here all night and I knows something is wrong, I'm going back upstairs. I goes back upstairs and go to bed, put the rifle down beside me and goes to bed and * * * somebody come up and shined the light in my face. I thought it was some soldier just coming through so I said, 'Take the light out of my face,'" (R58,59).

He remembered being taken to the hospital. There he remained.

> "I don't know why. I know my eye has gone bad and I have been having an awful headache, but what I learned and heard, somebody took a shot at me" (R59).

There had been no hard feelings between deceased and accused (R59). Accused had quite a few drinks of cognac that night. He was feeling good but remembered everything that happened (R60,65).

6. In rebuttal an eyewitness for the prosecution testified that he observed no scuffle between deceased and accused during their conversation which immediately preceded the shooting (R68).

7. The evidence shows that accused terminated a brief and apparently trivial argument, which arose during a crap game, by shooting deceased repeatedly with a carbine. Accused fired from his hip at a distance of about ten feet. Deceased expired within three hours after the shooting, as a result of the wounds so received. Accused had been drinking enough to affect his spirits but not his memory. The sole defensive issue raised by his testimony was whether the shooting was accidental rather than motivated by malice aforethought as indicated by the prosecution's evidence.

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

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> 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,* * * (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation);"(MCM, 1928,par. 148a, p.163).

No adequate provocation is shown. Accused's uncorroborated testimony that the gun was accidentally discharged while he and deceased were tussling for it is flatly contradicted by numerous witnesses for the prosecution. Competent substantial evidence indicates that accused deliberately and maliciously shot deceased through the body six times.

8. The charge sheet shows that accused is 39 years seven months of age and that, with no prior service, he was inducted 16 October 1942.

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

10. Confinement in a United States penitentiary is authorized for the crime of murder (AW 42; sec.275, Federal Criminal Code,18 USC 454). 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

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

31 March 1945

BOARD OF REVIEW NO. I

CM ETO 6232

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Nancy, France, 13 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, LYNCH for six months, BIELASKI, for four years. Seine Base Section Stockade, Paris, France.
Technician Fifth Grade LELAND E. LYNCH (38446969), and Private JOSEPH L. BIELASKI (33451187), both of 485th Quartermaster Refrigerating Company	

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

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

2. Accused were charged separately and, by direction of the appointing authority and with their consent, were tried together upon the following charges and specifications:

LYNCH

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

Specification 1: In that Technician Fifth Grade Leland E. Lynch, 485th Quartermaster Refrigerating Company, did, at Conflans, France, on or about 14 September 1944, wrongfully and knowlingly sell to Monsieur Roger Bugnot fifty cigars of the value of less than twenty dollars ($20.00), property of the United States, intended for the military service thereof.

Specification 2: (Disapproved by reviewing authority).

CHARGE II: Violation of the 96th Article of War.
(Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

BIELASKI

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

Specification 1: In that Private Joseph L. Bielaski, 485th Quartermaster Refrigerating Company, did, at Conflans, France, on or about 14 September 1944, wrongfully and knowingly sell to unknown French civilians ten cartons of cigarettes and five cartons of chocolate bars of the value of more than fifty dollars ($50.00), property of the United States, intended for the military service thereof.

Specification 2: In that * * * did, at Conflans, France, on or about 14 September 1944, wrongfully and knowingly dispose of by giving to Madame Leonie Jullion, one carton of chocolate bars of the value of less than twenty dollars ($20.00), property of the United States intended forthe military service thereof.

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

Specification: In that * * * did, near Braquis, France, on or about 22 September 1944, in his testimony before Major Edward I. Roman, Inspector General's Department, at an investigation then being conducted by said officer, in response to questions whether he had sold cigars or candy or anything to French civilians, make under oath, a statement in substance as follows: "No, sir, I have never sold them anything", which statement he did not then believe to be true.

Each accused pleaded not guilty. Accused Lynch was found guilty of Specification 2, Charge I, except the word "sell", substituting therefor the word "give", of the excepted word not guilty and of the substituted word guilty; and guilty of the remaining charges and specifications. Accused Bielaski was found guilty of Specification 1, Charge 1, except the words "more than fifty dollars ($50.00)" substituting therefor the words "less than twenty dollars ($20.00)",

of the excepted words not guilty and of the substituted words guilty, and guilty of theremaining charges and specifications. No evidence of previous convictions was introduced against either accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, as to accused Lynch, disapproved the findings of guilty of Specification 2, Charge I and of Charge II and the Specification thereof, approved only so much of the sentence as included dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for six months; and as to accused Bielaski, approved only so much of the sentence as included dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four years, designated the Seine Base Section Stockade, Paris, France, as the place of confinement of both accused pending further orders, and forwarded the record of trial for action pursuant to Article of War 50½.

3. With reference to accused Lynch, there is no affirmative evidence that the box of 50 cigars he sold or gave to Monsieur Roger Bugnot was government property. The record is completely devoid of evidence that any cigars were taken from government supplies, that the accused had access to cigars which were the property of the United States or any evidence excluding the possibility that the cigars were the personal property of accused (See R15). In a charge of wrongful sale or other disposition of government porperty under the 94th Article of War, proof ofownership of the property in the United States is one of the vital elements of the offense and failure of proof of the same is fatal to the prosecution's case (MCM, 1928, par. 150i, p. 185; CM 207591, Nash et al, 8 B.R. 359 (1937); CM 208895, Zerkel, 9 B.R. 59 (1938); CM 210763, Pelletier, 9 B.R. 351 (1938)). It is manifest that the prosecution did not prove that the cigars disposed of by accused Lynch were government property. The record is therefore legally insufficient to support the findings of guilty of Specification 1 of Charge I against him.

4. With reference to accused Bielaski, convincing evidence clearly established that shortly after noon on 14 September he sold from six to ten cartons of cigarettes and four or five cartons of Hershey Tropical chocolate to French civilians (R9-10,17,20-22, 27-28). He gave or sold a carton of Hershey Tropical chocolate to Madame Leonie Jullion (R18,21,23,42,44). The cartons of cigarettes and chocolates were the type normally issued gratuitously to U.S. Army troops. Major Louis Hemerda, Jr., Assistant Class I Supply Officer, Headquarters Third United States Army, testified that the average full weekly gratuitous issue of PX items was seven packages of cigarettes and seven ounces of candy and that "the

usual chocolate bar issue is what we know as a small Tropical Hershey chocolate bar" (R30-31).

In the course of conducting an investigation in the vicinity of Conflans, pertaining to an alleged black market operation, Major Edward I. Ronan, Inspector General's Department, Headquarters Third United States Army, interrogated accused Bielaski on 22 September 1944. After accused Bielaski, who was under oath, testified that he had been in the vicinity of Conflans on 14 and 15 September (R38-39), Major Ronan

> "asked Private Joseph L. Bielaski, "Did you sell any cigars or candy to the French civilians.' 'A. No, sir.' Next question, 'Did you sell anything to the French civilians?' 'I have never sold them anything'" (R36).

5. The serious question as to Charge I and the specifications thereunder against accused Bielaski is whether the record sustains the findings that the cigarettes and chocolate involved were government property. The Manual for Courts-Martial, 1928, (par. 150i, p. 185) provides that:

> "circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for or issued for use in the military service might together with other inferring that it was property of the United States, so furnished or intended".

While the necessary element of government ownership may be proved by circumstantial evidence (MCM, 1928, par. 150i, p. 185, supra) mere conjecture or suspicion does not warrant the conclusion that the cigarettes and chocolate were property of the United States (CM 210763, Pelletier, 9 B.R. 351 (1938); CM 197408, McCrimon, 3 B.R. 111 (1932). The following has been quoted with approval by the Board of Review (sitting in Washington) (CM 207591, Nash et al, 8 B.R. 359 (1937); CM 197408, McCrimon, 3 B.R. 111 (1932)) with respect to circumstantial proof:

> "'While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilty. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *.

It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens.' Buntain v. State 15 Tex.App. 490".

In the instant case there is no evidence of a shortage or theft of cigarettes and chocolate from any Army installation nor evidence that Bielaski had access to government supplies of this type. The record does not indicate that the property involved had characteristics peculiar to government ownership (e.g., that the cigarettes had tax-free labels), and the distinct possibility remains that the cigarettes and chocolate were his personal property received in packages from the United States or from other legitimate sources. The Board of Review is of the opinion that the facts are not sufficiently conclusive to exclude all fair and rational inferences except the one that the cigarettes and chocolate were "property of the United States, intended for the military service thereof" (CM 208895, Kerkel, 9 B.R. 59 (1938); CM 207591, Nash et al, 8 B.R. 359 (1937); CM 197408, McCrimon, 3 B.R. 111 (1932); CM 255114, Caracappa, 36 B.R. 35 (1944); Cf: CM 248197, Thompson, 31 B.R. 179 (1944)). Proof of ownership of the property in the United States being a vital element of the offenses of wrongful sale or disposal of government property in violation of the 94th Article of War (MCM, 1928, par. 150i, p. 185), the record is legally insufficient to support the findings of guilty of Charge I and the specifications thereunder against accused Bielaski.

6. In considering Charge II and its Specification against Bielaski, the question of ownership of the property in the United States is immaterial. While under oath, he categorically denied having ever sold anything to French civilians. The evidence adduced by the prosecution shows this statement to be patently false. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Charge II and its Specification against accused Bielaski (CM ETO 1447, Scholbe).

7. The charge sheets show the following with respect to the service of accused: Lynch is 21 years three months of age and was inducted 16 January 1943 at Camp Joseph T. Robinson, Little Rock, Arkansas. Bielaski is 21 years two months of age and was inducted 5 January 1943 at Camp Lee, Virginia. Each was inducted to serve for the duration of the war plus six months. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the persons and offenses. For the reasons stated, the Board of Review is of the opinion that as to accused Lynch, the record

of trial is not legally sufficient to support the findings of guilty and the sentence as approved, and that as to accused Bielaski the record of trial is not legally sufficient to support the findings of guilty of Charge I and the specifications thereunder, but is legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the approved sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for three years (MCM, 1928, sec. 104c, p. 100).

B. FRANKLIN RITER Judge Advocate

William F. Burrow Judge Advocate

EDWARD L. STEVENS, JR. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 Mar. 1945 TO: Commanding General, Third United States Army, APO 403, U.S. Army.

1. In the case of Technician Fifth Grade LELAND E. LYNCH (38446969) and Private JOSEPH L. BIELASKI (33451187) both of 485th Quartermaster Refrigerating Company, attention is invited to the foregoing holding by the Board of Review that as to accused Lynch the record is not legally sufficient to support the findings of guilty and the sentence as approved, and that as to accused Bielaski the record is not legally sufficient to support the findings of guilty of Charge I and the specifications thereunder, but is legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the approved sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for three years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence of accused Bielaski.

2. When copies of the published orders 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 6232. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 6232).

E. C. McNEIL

E. C. McNEIL
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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

3 FEB 1945

CM ETO 6235

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Epinal, France, 24 November 1944. Sentence: To be dismissed the service and to be confined at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant REXFORD L. LEONARD (O-1305943), 77th Ordnance Company (D)	

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

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

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

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

Specification: In that 2nd Lt Rexford L. Leonard, 77th Ordnance Co. (D), did, at Maddaloni, Italy, unlawfully kill Charles E. Taylor, 32378978, Pvt., 77th Ordnance Co. (D) by failing to exercise due caution and circumspection in that he, the said Rexford L. Leonard, did, on or about 21 August 1944, while under the influence of intoxicating liquor operate a motor vehicle in such a dangerous and reckless manner as to cause it to hit an Italian cart, then to hit two trees and finally to turn over twice thereby injuring the said Charles E. Taylor, from which injuries he died on 23 August 1944.

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that * * * did, at Naples, Italy, on or about 21st August 1944, drink intoxicating liquors in the company of three enlisted men.

He pleaded not guilty and was found guilty of Charges I and III and their respective specifications and not guilty of Charge II and its Specification, No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Seventh United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although he declared the punishment wholly inadequate for one guilty of such criminal conduct, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

On the afternoon of 21 August 1944 in the environs of Naples, Italy, the accused in company with four enlisted men, viz, the deceased, Private Charles E. Taylor, Private First Class Shelby V. Moser, Private Andres Torralba and Private Robert L. Phillips, all of the 77th Ordnance Company (D), were in possession of a three-quarter-ton motor vehicle, the property of the United States Government. Accused acted as driver of the truck. After completing sundry errands of a legitimate nature (R6,17), the quartette of soldiers, accompanied by accused, stopped at a sidewalk cafe. The five men seated themselves at a table and a drinking bout commenced which engaged the attention of all of them, except Moser who abstained. In the course of the affair four quart bottles of vermouth and two bottles of cognac brandy were consumed by accused, deceased, Torralba and Phillips. Accused partook of the liquor with the soldiers at a table which was on the sidewalk in plain public view. Other patrons of the cafe sat at nearby tables (R6,7,9,10,14,17,18,19). Pedestrians, who were able to observe the activities of the Ameri-

cans, passed to and fro on the sidewalk (R14). Accused and the soldiers remained at this cafe for two and one-half to three hours consuming intoxicants. They then entered the truck and drove to a second place - "it wasn't quite like a cafe, but it was about the same way" (R7) - where two bottles of wine were purchased and consumed (R7,10). Accused again drank with and in the presence of the soldiers. Moser did not drink. There were civilians present (R14). Thirty or forty minutes were passed at this stop and at its conclusion the group drove to a third place where accused, deceased, Torralba and Phillips in each other's company continued their imbibing of wine. Two bottles of wine were drunk (R7,10,15). There were present three enlisted men from the Air Corps and four or five Italian girls (R15). Thirty or forty minutes were passed at this place. At about 8:30 pm - it was "close to dark or close to dusk" (R7,8) - accused and the soldiers reentered the truck. Accused continued to drive. Moser sat in the front seat with him. Phillips and Torralba sat in the rear seat. The deceased, Taylor, reclined on the floor of the vehicle in the rear (R9,19). The party drove toward Caserta. After leaving the Naples "20-mile-an-hour zone", an American Military Police Lieutenant stopped the truck because it was driven too fast (R8,11). After the halt, with the accused driving the truck, the group proceeded onward in the direction of Caserta. An automobile, driven by an English Army officer preceded the truck on the right hand side of the road. It came to a sudden stop and accused drove the truck into the rear of the automobile (R8,11,18,20). At that point Moser became anxious because he believed accused drove too fast and was reckless. He asked accused that he be permitted to drive the truck, but accused refused the request (R8,12).

The party passed through the village of Maddaloni at approximately 9 pm. About two miles beyond the village an Italian animal-drawn cart was proceeding in the direction of Caserta (R8,12). At this point many pedestrians crossed the road. The cart was on the right hand side of the highway in front of the truck. Accused drove directly toward it (R8,9,14). It was dark and the truck lights threw their beams on the cart, which carried no lights (R12). Moser warned accused and asked that he turn out for the cart. The truck was then 50 to 100 yards from the cart. Accused either did not hear Moser's warning or he paid no heed to same. Moser warned him the second time as the truck approached close to the cart. At that moment Moser looked at the speedometer. It registered a speed of 60 miles per hour (R9,12). Seeing that a collision was inevitable, Moser stood erect. Immediately thereafter the front right half of the truck hit the cart (R9,13). The truck then struck a tree. Moser was thrown free of the vehicle but the truck lights yet operated and he saw the truck ricochet against a second tree.

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It turned over twice on the right hand side of the road facing forward about 40 feet from where he was prone on the ground (R9,14). Accused, deceased, Torralba and Phillips were catapulted to the ground when the truck overturned. All of the men in accused's group including the accused and deceased were taken to a hospital by another passing Army truck. Moser saw deceased, Taylor, in the hospital (R22).

The following colloquy occurred during the presentation of prosecution's evidence:

> "Prosecution: At this time it is stipulated by and between the trial judge advocate, the defense counsel, and the accused that Private Charles E. Taylor, 32378978, 77th Ordnance Company (D), died on 23 August 1944 as the direct result of the injuries he sustained on 21 August 1944 at or near Maddaloni, Italy while a passenger in a motor vehicle operated by the accused, 2nd Lieutenant Rexford L. Leonard. The stipulation is signed by the trial judge advocate, defense counsel, and the accused. Does the accused consent to this stipulation?
>
> Accused: Yes sir. I do.
>
> Prosecution: Will it be accepted by the court?" (R21).

Thereafter the following proceedings are shown:

> "Prosecution: If the court please, we have a true copy of the official report of death and it would be available for the court if it would be accepted in evidence without objection by the defense.
>
> President: At this time, I would like to say something to the accused. There has been no testimony brought out to prove definitely that Taylor received injuries in this accident from which he died. There can be no question about his death, but so far there has been no testimony other than your stipulation which would prove that he died as a result of this accident. I would like to

have you think that over for a few minutes and consult with your defense counsel, and if you still desire to submit this stipulation, the court will consider accepting it or rejecting it. Do you get my point?

Accused: Yes, sir.

(Defense counsel and accused confer).

Defense: The accused would like to submit this stipulation.

The court was closed, and upon being opened, the law member announced that the stipulation would be accepted" (R22-23).

4. The evidence for the defense was as follows:

a. Private First Class Shelby V. Moser, who had previously appeared as a witness for the prosecution and whose testimony represented the substance of prosecution's case, was called as a witness for the defense. He testified that he had known the deceased, Taylor, for about 16 months; that he met him each day in the company and had "gone on pass" with him; that they were "ordinary friends", but there was nothing in their relationship that would influence his testimony. He had known accused about two months prior to the accident and had talked with him twice (R23).

b. After his rights were explained to him, accused at his own request was sworn and testified in his own behalf. His testimony corroborated prosecution's evidence as to his presence at the sidewalk cafe with the four enlisted men and his drinking of intoxicants with them, except he asserted that only two bottles of vermouth and a bottle of wine were consumed (R25-26). There were Italian civilians at the cafe and people passing on the sidewalk could see him sitting at the table drinking with the enlisted men (R32). He admitted that he remained at the cafe for a period of two and one-half to three hours duration, but denied he visited other drinking places and also denied the party drank cognac brandy (R28). He further testified that upon leaving the cafe the party entered the three-quarter-ton truck and proceeded toward Santa Maria. Accused confirmed prosecution's evidence that a Military Police Officer had warned him to drive slower, but with respect to striking the rear of a British Army officer's automobile, he did "not remember running into that car that evening" (R26,29,30). They passed through Bagnoli and entered upon

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a straight section of the highway about two miles in length.

> "It is a good highway and I did romp down the accelerator as we drove along there. I was approaching the curve and I slowed down and took my foot off the accelerator altogether and let her slow down under her own compression and we came around the curve and a little further up ahead was one of these Italian carts. * * * I pulled out; I didn't make any square turn or anything else like that; I just eased out and was going to pass it. As I started to get up real close, the Italian either took a notion to turn off the road or was scared I was going to hit him and wanted to get off the road or something; I don't know. I saw what was happening, that we were liable to hit the cart if the back end swung out, so I took and applied the brakes and threw in the clutch and at the same time pushed down on the wheel so as to make it. I do not remember hitting the cart or anything after that. When I came to in the hospital, I was told it was three days after the accident" (R26).

He further testified that his customary speed in driving a motor vehicle is between 40 and 45 miles per hour;

> "it all depends on the highway. If the highway is open, I go around 40 or 45, I can't swear to the speed; it is just that I put my foot down to a certain depth and drive along" (R27).

He asserted that at the time of the accident he drove at a speed of about 30 miles per hour, but when he first saw the cart he drove "around 40 or 45 miles per hour". He claimed that he was sober, that he knew what was happening at all times and that he was in a condition to drive when he left the cafe (R27), but admitted he "felt some liquor" (R30).

Upon cross-examination he explained his testimony on direct examination in regard to the speed of the truck as follows:

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"What I am getting at is that previous to that, we had this straight stretch of road. They had been arguing as to what the speed of one of those three-quarter tons would do. I pushed down on the accelerator and got it up 60 miles an hour until she got to humming. After a motor starts humming, that is her maximum speed. I took my foot off the accelerator before I got to the curve and slowed down to make the curve. It wasn't a right-angle turn; it was a sweeping curve" (R30).

Accused recalled that Moser desired to drive the truck and asserted that Phillips made a similar request. He could not say whether Phillips was sober or drunk (R30).

5. Accused is charged with the crime of involuntary manslaughter under the 93rd Article of War in that he

"did * * * unlawfully kill * * * Taylor * * * by failing to exercise due caution and circumspection in that he * * * did * * * while under the influence of intoxicating liquor operate a motor vehicle in * * * a dangerous and reckless manner" (Charge I and Specification).

The Specification obviously does not follow Form 88 (Appendix 4, Forms for Charges and Specifications) appearing on page 249, Manual for Courts-Martial, 1928, inasmuch as it omits the words "willfully" and "feloniously". A serious question is thereby presented whether the Specification is fatally defective by reason of the omission from it of these adverbs which by long established precedents and tradition have attained definite and particularized meanings in criminal practice.

As a preliminary matter it must be noted that Form 88, supra, charges both voluntary and involuntary manslaughter. An accused is given notice that the prosecution's proof may take either one direction or the other or possibly both (United States v. Meagher, 37 Fed. 875,880; Roberts v. United States, 126 Fed. (5th Cir.) 897, rehearing denied 127 Fed. 818, certiorari denied 193 U.S. 673, 48 L.Ed. 842; United States v. Boyd 45 Fed. 851,855, 142 U.S. 450, 35 L.Ed. 1077; 1 Wharton's Criminal Law - 12th Ed. sec.427, p.666; CM ETO 1317, Bentley).

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When the specification alleges that accused did "feloniously and unlawfully kill" the deceased as a result of grossly negligent and reckless operation of an automobile which gross negligence and recklessness are specifically described, the omission of the word "willfully" from the specification is immaterial. The specification charges involuntary manslaughter and will support proof of a homicide committed by accused as a result of his gross negligence and recklessness (CM ETO 393, Caton and Fikes; CM ETO 2926, Norman and Greenawalt; CM 202359, Turner, 6 B.R. 87, 106). In the instant case accused's method of operation of the truck while under the influence of intoxicants is described with particularity and is declared to have been unlawful but it is not characterized as being "felonious" and "willful".

Congress has defined the crime of manslaughter thus:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary - Upon a sudden quarrel or heat of passion.
>
> Involuntary - In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (R.S. 5341; sec.274, Federal Criminal Code, 18 USCA, sec.453).

The statutory definition governs courts-martial and is the crime denounced by the 93rd Article of War as manslaughter. It is however declaratory of the common law, to which reference is made for the principles underlying the statutory definition (AW 42; MCM, 1921, pars.442,443, pp.408-415; MCM, 1928, par.149a, pp.165,166; 40 CJS sec.55, pp.918,919).

Manslaughter at common law is a felony (1 Wharton's Criminal Law - 12th Ed, sec.26, p.38; 29 CJ, sec.3, p.1049; 40 CJS, sec.37, p.896).

> "In all cases of felonies at common law, and some, also, by statute, the felonious intent is deemed an essential ingredient in constituting the offense and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness, and

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> properly so, where this intent is a material element of the crime" (United States v. Staats, 8 Howard 41, 12 L. Ed. 979,981).

It is therefore clear that an indictment or information at common law charging the crime of manslaughter which omits the adverb "feloniously" is fatally defective (1 Wharton's Criminal Law - 12th Ed., sec.651, p.883; 16 W and P, Perm. pp.430,431; 31 CJ, sec.248, p.699).

However the foregoing rule is inapplicable where the statute denouncing the crime does not use the word "feloniously". In such instances the indictment or information need not charge that the criminal act was done feloniously (United States v. Staats, supra; Bannon et al v. United States, 156 U.S. 464, 39 L.Ed. 494). In this instance Congress defined the crime of manslaughter without using the adverb "feloniously". Under the above rule the absence from the indictment or specification of the allegation that accused "feloniously" killed the deceased does not affect its validity (Myres v. United States, 256 Fed. (5th Cir) 779, 782; Welch v. Hudspeth, 132 Fed. (2nd) (10th Cir.) 434,436; Wood v. United States, 204 Fed. (4th Cir.) 55,56, certiorari denied 229 U.S. 617, 57 L.Ed. 1353, error dismissed 232 U.S. 731, 58 L.Ed., 818; Bowen v. Johnson, 97 Fed. (2nd) (9th Cir.) 860,961, affirmed on certiorari 306 U.S. 19, 83 L.Ed. 455; United States v. Brookman, 1 Fed. (2nd) 528,539).

Unlike the specifications involved in the Caton and Fikes and the Norman and Greenawalt cases above cited, the Specification in the instant case not only omits the adverb "willfully" but also the adverb "feloniously". However, the particularized allegations of the Specification set forth that accused operated the motor vehicle in a "dangerous and reckless manner".

> "A reckless act, moreover, is always regarded as the equivalent of a willful one" (Lear v. United States 147 Fed. (3rd Cir.) 359).

There are therefore contained within the four corners of the Specification allegations legally equivalent to the statement that accused "willfully" killed the deceased (Walsh v. United States, 174 Fed. (7th Cir.) 615,618; Heller v. New York, N.H. &H. R. Co. 265 Fed. (2nd Cir.) 192,194; Strough v. Central Railroad of New Jersey, 209 Fed. (3rd Cir.) 23,24; Hazle v. Southern Pacific Company 173 Fed. 431; 45 C.J, sec.44, pp. 677,678).

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The modern rule with respect to sufficiency of indictments is stated thus:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Cochran v. United States, 157 U.S. 286,290, 39 L. Ed. 704,705, 15 S. Ct. 628; Rosen v. United States, 161 U.S. 29,34,40 L.Ed. 606,607, 16 S. Ct. 434,480, 10 Am.Crim.Rep.251" (Hagner v. United States 285 U.S. 427,431, 76 L.Ed. 861, 865).

The Board of Review has adopted and applied the foregoing principle to specifications in numerous cases (CM ETO 3740,Sanders et al; CM ETO 3803, Gaddis et al; CM ETO 4235, Bartholomew and Briscoe). The Specification of Charge I in the instant case beyond peradventure meets the test prescribed by the Hagner case, supra. Accused was informed with accuracy and detail as to the nature of the offense for which he would be tried. Also, the resulting findings of guilty and sentence are based upon a pleading which describes the offense with such particularity as would enable accused successfully to plead it as a former conviction.

6. Prosecution's evidence, corroborated in important details by accused's testimony, showed that accused consumed a large amount of intoxicants during a period approximating three to four hours on the afternoon and evening of 21 August 1944. Following this drinking bout and while he was under the influence of the stimulants, he drove the motor vehicle which contained deceased and three other soldiers upon a public highway in the vicinity of Naples, Italy, at a high and dangerous rate

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of speed. Immediately prior to the collision with the cart and after it had come into view of the occupants of the truck and at a point where there were many pedestrians on the road, the speed of the truck registered 60 miles per hour. In the course of the ride and but a few minutes prior to the accident accused had been stopped by a military police officer and requested to lessen the speed at which he was driving. Soon thereafter he struck the rear of a motor vehicle driven by an English Army officer which had stopped suddenly in the road. Moser, the only sober occupant of the truck, believing accused operated the truck in a reckless and dangerous manner, requested that he be allowed to drive it. The request was refused by accused. When the cart came into view, Moser twice warned accused and requested that he "turn out for the cart", without accused attempting to remedy the perilous situation. The inference is clear and positive that the cart was struck with great force and violence as the truck was hurled against one tree and ricocheted against a second one. In the process it turned over twice at a point 40 feet beyond Moser, who was thrown free from the truck on its impact with the cart. While the evidence lacks proof of the specific time the deceased Taylor was thrown from the truck, the established facts show beyond all doubt that he was thrown from the truck simultaneously with accused, Torralba and Phillips and the inference is reasonable that such eviction occurred when the truck overturned on striking the second tree. By stipulation it was established that deceased died two days after the accident "as the direct result of the injuries he sustained on 21 August 1944 * * * while a passenger in a motor vehicle operated by accused". The accused confirmed this stipulation upon precautionary interrogation by the president of the court.

A mere recital of the facts is all that is necessary to fix upon accused criminal responsibility for Taylor's death. He killed Taylor while in the "commission of an unlawful act not amounting to a felony" within the purview of Sec.274 of the Federal Criminal Code (R.S. 5341, 18 USCA sec.453) quoted above.

> "Voluntary intoxication is an offense not only malum prohibitum, but malum in se, condemned as wrong in and of itself by very sense of common decency and good morals * * *. Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is malum in se. * * * It is gross and culpable negligence for a drunken man to guide and operate an automobile upon a public highway, and one doing so and oc-

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> casioning injuries to another causing death, is guilty of manslaughter. It was unlawful for defendant to operate his automobile upon the public highway while he was intoxicated; made unlawful by statute, and wrong in and of itself, and it was criminal carelessness to do so, and he was guilty of manslaughter, provided the death of Agnes Thorne was a proximate result of his unlawful act" (People v. Townsend -- Mich. -- , 183 N.W. 177, 16 ALR 902,905-906) (Underscoring supplied).

In this connection Winthrop's comments are most relevant:

> "Among 'disorders,' it may be noted here that simple drunkenness is in general a military offence in violation of this Article, whether committed by an officer or soldier. Samuel declares:-- 'It is not to be understood that drunkenness of itself is not a crime in the contemplation of the law martial. On the contrary it has always been a more heinous offence in the military than in the civil code.' Hough remarks that -- 'It ought never to be absent from the recollection of the soldier that drunkenness constitutes of itself a breach of military discipline.' So, in reviewing a case of an officer, Gen. Crook well observes: 'Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs'" (Winthrop's Military Law and Precedents - Reprint pp.722-723).

In the event accused's act in driving the truck while intoxicated was not "an unlawful act not amounting to a felony" under the circumstances of this case, the evidence clearly and beyond doubt shows that accused operated the motor truck at the time and place alleged in a violently reckless manner at an excessive speed and in spite of warnings given him of the presence of the cart on the highway. As a direct or proximate result of this reckless operation the deceased was thrown from the truck and sustained injuries from which he died. The degree and quality of accused's

negligence was far beyond that of ordinary civil negligence and is well within the classification of "gross", "culpable" or "criminal" negligence upon which his conviction of the crime of involuntary manslaughter may be sustained (CM ETO 393, Caton and Fikes; CM ETO 1317, Bentley; CM ETO 1414, Elia; CM ETO 1554, Pritchard; CM ETO 2926, Norman and Greenawalt). The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of accused's guilt of Charge I and its Specification.

7. The uncontradicted evidence shows that accused for over a period of four hours in public places in the presence of civilians (and in one place American military personnel were also present) drank intoxicating liquor with three enlisted men. He became intoxicated to a high degree and in such condition operated a Government vehicle upon the public highway in the vicinity of Naples, Italy. Through his reckless operation of the same, while in this drunken condition he was involved in a highway accident which resulted in the death of a soldier who was a passenger in the vehicle. By long established precedent such conduct was "unbecoming an officer and a gentleman" and constituted a violation of the 95th Article of War (Winthrop's Military Law and Precedents - Reprint - p.717; CM 187795, Hammond, 1 B.R. 83,92; CM 236725, Hyre, 23 B.R. 115; CM 239172, Strauss, 25 B.R. 75; CM ETO 3303, Croucher, and authorities therein cited).

However the Specification of Charge III alleges only that accused:

> "did * * * drink intoxicating liquors in the company of three enlisted men".

Such specification will not support a finding of guilty of a violation of the 95th Article of War.

> "To drink liquor with an enlisted man is, per se, no more disgraceful than to drink liquor in the presence of another officer, and where the drinking with one enlisted man occurred in a private tent, and the officer and enlisted man were the only persons in the tent, it is the opinion of this office that the offense was a violation of AW 96 and not of AW 95" (CM 119492 (1918), CM 124799 (1919), Dig. Op.JAG, 1912-1940, sec.453 (9), p.342).

Had the Specification alleged the facts and circumstances connected with and resultant upon accused's conduct in drinking

intoxicating liquor with and in the presence of the enlisted men, there would be no difficulty in sustaining the court's finding of guilty of Charge III and its Specification.

The Specification alleges that accused drank intoxicating liquor "in the company of three enlisted men". The draughtsman of the Specification obviously did not measure his words. He wrote in the vernacular and did not use words of legal art. A problem of interpretation arises, which could have been prevented if a little care and thought had been exercised by the draughtsman or by the staff judge advocate. An applicable meaning of "company" is:

> "State of being a companion or companions; act of accompanying; fellowship; companionship; society; friendly intercourse. * * * A person or persons affording companionship; an associate or associates. * * * (Webster's New International Dictionary - 2nd Ed., p.543).

The preposition "with" in one of its aspects is defined as:

> "Indicating association in respect of accompaniment; hence, along side of; among; in the company of; as companion of; also, in attendance as guest or in the service of" (Ibid, p.2940) (Underscoring supplied).

The following comment is pertinent:

> "'Together' means 'in company'; 'into or in union with each other as wholes or parts, so as to be combined or joined with each other; conjointly; in the same place or at the same spot with each other locally, as in company; at the same moment of time; simultaneously; contemporaneously; mutually; reciprocally'" (Clark v. Hadley 64 SW (Tenn.) 403,407; 20 W.and P. Perm 528).

There is a surprising absence of juridical interpretation of this commonly used phrase "in the company of" and except for the above-quoted authority the Board of Review is left to its own devices in construing the instant pleading. Considering however, the general meaning of the word "company" as above given and the association of the phrases "in company of" or "in company" with the words "together" and "with" it seems that it may be reasonably interpreted as meaning something more than "in the presence of". Rather it connotes mutual,

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contemporaneous and joint action or participation in an event or transaction by all persons present. Given such meaning the averments of the Specification may be construed as alleging that

> accused and three enlisted men in the presence of each other and as one group drank intoxicating liquors.

So construed there is no recital that accused and the three enlisted men drank intoxicating liquor in public or under the observation of other military personnel or of civilians. Insofar as the allegations declare, the drinking might have been in private with no one present except the accused and the three soldiers. Neither is there any averment of excessive drinking or of disorder or unseemly conduct of accused at the time of or as a result of such liquor drinking. The issue resolves itself into the narrow question:

> Is an officer guilty of an offense under the 96th Article of War when he, in private and out of observation of others and without disorder or unseemly conduct of any kind drinks intoxicating liquor in the company of a soldier or soldiers, when at the same time and place the soldier or soldiers likewise consume intoxicants?

The vast majority of prior holdings involve specifications containing allegations which support proof of facts in addition to the act of drinking intoxicants with and in the presence of soldiers. There are in these cases allegations and proof that the drinking was in public (CM 233491, Slaughter, 20 B.R. 9; CM 234558, Field, 21 B.R. 41,52; CM 236555, Johnston, 23 B.R. 57,60; CM 229549, Granosky, 17 B.R. 193; CM 234561, Nelson, 21 B.R. 55;) or was accompanied by disorderly conduct on the part of the officer while drunk (CM 239172, Strauss, 25 B.R. 75; CM 229412, Munson, 17 B.R. 139) or was during the performance of a military duty (CM 211931, Raymond, 10 B.R. 169,175). However the holdings in CM 119492 (1918) and CM 124799 (1919), if the digest of same correctly represents their substance (Dig.Op. JAG, 1912-1940, sec.453(9) p.342), require an affirmative answer to the question above propounded. The holding in CM 241597, Fahey, 26 B.R. 305 follows the precedent of the earlier cases.It is considered that the allegation of the place of the commission of the offense (Bivouac area of the Fiftieth Service Group) is descriptive merely as the locus of the offense and is hot an element of the same. This holding appears to be premised on the proposition that such fraternizing with enlisted men by an officer is conduct prejudicial to good order and military discipline and thereby denounced by the 96th Article of War.

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Practically the situation here presented will rarely arise inasmuch as such conduct on the part of an officer is generally accompanied by disorders and neglects and improper conduct of the patterns displayed in the cited cases. The issue is presented in the instant case because of careless pleading. As demonstrated above the evidence would have sustained the Charge under the 95th Article of War had the facts been pleaded properly.

The Board of Review concludes, however, that the Specification of Charge III states an offense under the 96th Article of War and the evidence is legally sufficient to support a finding of guilty of such offense.

8. The charge sheet shows that the accused is 35 years of age and that he was commissioned a second lieutenant, Army of the United States, 29 December 1942. He served as an enlisted man from 6 February 1934 to 28 December 1942.

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein indicated no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons cited above, 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 III and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and its Specification and legally sufficient to support the sentence.

10. Dismissal and confinement at hard labor are authorized punishments for violation of the 93rd and 96th Articles of War. 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 Sep. 1943, sec.VI, as amended).

_____ Judge Advocate

(DISSENT) _____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

3 FEB 1945

CM ETO 6235

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Epinal,
	)	France, 24 November 1944, Sentence:
Second Lieutenant REXFORD L.	)	To be dismissed the service and to
LEONARD (O-1305943), 77th	)	be confined at hard labor for one
Ordnance Company (D)	)	year. Eastern Branch, United
	)	States Disciplinary Barracks,
	)	Greenhaven, New York.

DISSENTING OPINION by SHERMAN, Judge Advocate

1. In the instant case the Specification of Charge III is so pleaded as to make drinking by an officer in the company of enlisted men an offense per se. In the Manual for Courts-Martial, 1928, it is stated with reference to disorders and neglects to the prejudice of good order and military discipline:

> "By the term 'to the prejudice', etc., is to be understood directly prejudicial, not indirectly or remotely, merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, confined to cases in which the prejudice is reasonably direct and palpable (Winthrop)" (MCM, 1928, par. 152a, p.187).

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> "To drink liquor with an enlisted man is, per se, no more disgraceful then to drink liquor in the presence of another officer, and where the drinking with one enlisted man occurred in a private tent, and the officer and enlisted man were the only persons in the tent, it is the opinion of this office that the offense was a violation of AW 96, and not AW 95" (CM 119492 (1918); 124799 (1919), Dig. Op. JAG, 1912-1940, sec.453(9), p.342).

The case just cited is distinguishable from the principal case in that drinking in a tent indicates that the drinking alleged took place on a military installation under circumstances obviously harmful to military discipline. In the case of CM 241597, Fahey, 26 B.R. 305, it was alleged in each of two specifications under Article of War 96 that accused, an officer, did

> "at the Bivouac area of the Fiftieth Service Service Group, near Camp Campbell, Kentucky * * * drink intoxicating liquor with Private Thomas M. Wooten * * *".

In both cases above referred to and relied upon in the opinion of the Board of Review to support the court's findings of guilty under Charge III and Specification, a place of the offense is described in the specifications from which it is indicated that the alleged drinking under such circumstances was prejudicial to good order and military discipline and for that reason are distinguishable from the principal case. Holding legally sufficient the court's findings under Charge III and Specification in the principal case renders it an offense per se for an officer to drink in the company of his son, an enlisted man, or his wife, an enlisted woman or under any similar situation not only in a tent or in a bivouac area but any place any where when such conduct might not in fact under the circumstances be prejudicial to good order and military discipline.

2. For the foregoing reasons, dissent is expressed as regards the holding of the Board of Review under Charge III and Specification.

Malcolm C. Sherman Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant REXFORD L. LEONARD (O-1305943), 77th Ordnance Company (D), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge III and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and its Specification, 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 6235. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6235).

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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 42, ETO, 10 Feb 1945.)

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

BOARD OF REVIEW NO. 2

14 MAR 1945

CM ETO 6236

U N I T E D S T A T E S	1ST BOMBARDMENT DIVISION
v.	Trial by GCM, convened at Army Air Forces Station 117, 29 November 1944.
First Lieutenant PHILIP A. SMITH (O-754982), Air Corps, 527th Bombardment Squadron (H), 379th Bombardment Group (H)	Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 61st Article of War.

Specification 1: In that First Lieutenant Philip A. Smith, 527th Bombardment Squadron, 379th Bombardment Group (H), did, without proper leave, absent himself from his station, AAF Station 117, U. S. Army, from about 2400 hours, 2 November 1944 to about 0300 hours 3 November 1944.

Specification 2: In that * * * did, at AAF Station 117, U. S. Army, on or about 3 November 1944, fail to repair at the fixed time to the properly appointed place of assembly for briefing for a combat mission.

Specification 3: In that * * * did, without proper leave, absent himself from his station, AAF Station 117, U. S. Army, from about 2400 hours, 4 November 1944 to about 1430 hours 5 November 1944.

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

Specification: In that * * * having been restricted to the limits of his site at AAF Station 117, APO 557, U. S. Army, effective as of 2400 hours 4 November 1944, did, at Bedford, Bedfordshire, England, on or about 5 November 1944, break said restriction by remaining in Bedford until 1430 hours 5 November 1944.

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

Specification: In that * * * having been duly placed in arrest at AAF Station 117, APO 557, U. S. Army, on or about 5 November 1944, did, at AAF Station 117, U. S. Army, on or about 10 November 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and was found guilty of all the charges and specifications. Evidence was introduced of one previous conviction by general court-martial for absence without leave from about 3 to 5 September, 11 to 12 September, and from 1500 to 1530 hours 26 September 1944 in violation of Article of War 61, and for breach of restriction on or about 11 September 1944 in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 1st Bombardment 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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3. Evidence introduced by the prosecution showed that at all times mentioned in the specifications accused was a first lieutenant, "navigator-bombardier", 527th Bombardment Squadron (H), 379th Bombardment Group (H) (R13,48). On 2 November 1944 accused left his station, Army Air Force Station 117 (R9). A base order required that officers leave the station only on pass. Accused had a pass good until 2400 hours that date (R29,30), but did not have permission to be absent after that hour (R13,26,30,33-35). On that date, he went to Bedford where at about 1550 hours he met his fiancee (R9). He missed "the midnight liberty run back" that night. Sometime thereafter, but not later than 0245 hours the following morning, no taxicab being available, he called his station for transportation, talking to the charge of quarters at the transportation office. This was arranged for and accused returned, arriving at the office of squadron operations at approximately 0330 hours, 3 November 1944 (R9, 10,40,69). His fiancee, a prosecution witness, testified that it was about "1:30 /am/" when accused, after calling a cab, left her "to come back to the field" (R9).

When accused arrived at the operations office, at 0330 hours that morning, he was informed, in answer to his own inquiry, that breakfast was scheduled for 0430 and briefing at 0530 hours. Accused said "All right" (R40). As a navigator-bombardier, it was his duty to attend the main briefing for pilots, copilots, navigators, and bombardiers and the separate navigation briefing which followed. The briefing was scheduled for 5:30 am, one hour after breakfast, on 3 November 1944 (R44,45). The men scheduled to fly on missions were awakened, according to custom, 45 minutes to one hour before breakfast (R45). The roll of those required to be present at the briefing for bombardiers and at that for navigators was called at those sessions. Accused failed to answer at either (R59). He was found undressed and in bed at "about 6 in the morning". The briefing had ended "a little before 6" (R40,41).

On Saturday night, 4 November 1945, accused's squadron held a dance at the officers' club on the station. Accused attended with his fiancee as his guest. They left the station in a jeep between 2200 and 2230 hours, driving to Bedford. He remained in Bedford until 1330 hours the next day (R10,12,39). Accused did not respond to a call for his presence by his commanding officer, made over the loud speaker shortly after the noon meal on 5 November (R30). This absence was unauthorized (R14,30,35).

Before taking his fiancee home on the night of 4 November, and while at the dance, accused was placed on restriction for seven days, starting at midnight that night, by Major James E. Crosby, Jr., his squadron commander (R13-15). Major Crosby said that accused

"come to me with the question as to whether he was going to be restricted to the site or not, and I told him that I had intended to see him earlier in the day, but now that he was here and I was talking to him, I was notifying him right now that he was to be restricted to the site as of 1200-2400, rather, Midnight that night, and that it was a lucky thing that he was at this party in the first place, but as long as he was here, I would allow him to stay until Midnight, and at that time he was to begin his restriction to his site. He told me that he didn't think that this was being fair, and I told him that I would question his attitude for that, and he said,--well, as far as he was concerned, that he felt his actions were more carelessness than anything else, and I told him I didn't care what he felt his actions were, to which he replied that he was a whipped man, and I again told him that I wasn't very much interested as to whether he was a whipped man or whether he wasn't a whipped man, and I told him, regardless, he was going to be restricted to the site for a week" (R14-15).

Accused was told also that he was not to leave his squadron site except to go to his meals and on "any operational missions" (R15). This restriction was not intended by Major Crosby as punishment under Article of War 104. He imposed this as commanding officer in order to have accused available for operational duty at all times pending court-martial proceedings (R18,20,27).

On 5 November 1944 Lieutenant Colonel Lewis E. Lyle, commanding officer of Army Air Force Station 117, gave accused a written order placing him in arrest in quarters (R20,56). By the terms of this order accused was required to remain within his squadron site except when going to and returning from meals. Absence of one hour from the squadron site was permitted for each meal. A further provisions of this order required that accused report to the squadron charge of quarters each hour during the day, upon arising in the morning and the last thing before retiring at night (R21,58; Pros.Ex.2). Mealtime at night commenced at 1700 hours and lasted for not more than two hours (R32,37). At 1745 hours, 10 November 1944, accused was seen by an enlisted man to enter the station theater. Accused sat down about two rows in

front of this witness. The latter was there from 1800 to 2000 hours and he did not notice accused depart (R49). This theater was located in the same building which housed the mess hall. It was approximately 175 to 200 yards from the site of accused's squadron (R50). Accused "was supposed to sign every hour" the roster in the office of the charge of quarters, except for an hour at mealtimes. On 10 November 1944 he did not sign this roster between about 1700 and 2000 hours (R31,32; Pros.Ex.2). Accused, at about 2000 hours that evening, said he had been "to the movies" (R37).

4. Accused's fiancee testified for thedefense. She met him in June 1944 and they became engaged. The couple made two applications for permission to marry, but each was denied. She described accused's condition thereafter as "very highly emotional and very highly nervous" (R61,62). The defense also established that accused had flown 27 combat missions and while with his former squadron he was being trained as a head bombardier. On the morning on which he was charge with having failed to repair for briefing, the flight was "scrubbed" (R63-66). Accused had called the charge of quarters twice, at about 0245 hours and 15 minutes later, 3 November 1944, in order to secure transportation back to the base. The charge of quarters commenced to awaken the several crews about 3:30 that morning. He went to accused's quarters but accused was not there. Told later that accused had come in (about that time (R40)), he evidently made no further effort to awaken accused and call him to duty (R68-70).

On cross-examination of prosecution witness, the defense showed, by the officer who called the roll at the briefing sessions, that he left right after the roll was called and that accused may have come in later (R60), may in fact have attended the navigation briefing (R47). Whether the flight schedule for 3 November was or was not scrubbed (R44,46,65), undoubtedly accused was not intended to be replaced as the navigator-bombardier of his craft, despite the policy revealed by the operations officer's testimony which rather strongly implied that briefing was a sine qua non to functioning in a flight (R45-46). This officer subsequently said (and with evident reluctance) that "after the mission had been scrubbed" he asked accused "whether he had gotten his flight plan" and that accused replied in the affirmative (R66). The same officer had charge of issuing passes to members of crews (R66). Accused flew on an operational mission Saturday, 4 November, the day of the dance (R66). (This officer's testimony was full of contradictions. At first he insisted that accused had flown a mission subsequent to his having missed his briefing and he fixed the date as 3 November (R45,46). Later he said that that flight had been cancelled and that accused had flown on 4 November (R65). He followed this by testifying that he had not permitted accused to fly 4 November (R66)). However, the charge of quarters on 3 November knew definitely that accused flew his mission on 3 November (R44). In any event, this officer, who

had charge of the issuance of passes, testified that the crew that accused was with on 4 November was authorized a 48-hour pass, issued in accordance with regular schedule and sequence (R66). The passes for this day were to start at 11 am, 4 November, and last until 6 November. The procedure was normally for the clerk in operations to call the orderly room and authorize the crew to go on pass (R67). On this Saturday the witness had "made a definite point that Lt. Smith /accused/ was not issued a pass". This last information was given as a nonresponsive answer to the question asked by the court, "Could the orderly room assume that the whole crew is on pass?" This question was directed to 4 November 1944 (R67). Major Crosby testified that, when he notified accused at the dance on 4 November of the restriction which was to start at midnight, accused "probably" (he also said, "That rings familiar") told Major Crosby that "he wished to see a member of the Ministry of Labor the next day, and he wanted to take the girl home that night". In reply to this Major Crosby testified that he said, "Have a good time tonight, and we will talk about it later, in the morning" (R15). Major Crosby had made up his mind to restrict accused the evening before, 3 November; and, although he saw accused on the afternoon of 4 November and had the opportunity, he did not restrict him until that night, at the dance (R15,16). The restriction to the site for seven days was not in writing (R18). The psychiatric examination of accused, made 22-25 November, disclosed no mental illness, a personality on the high normal emotional side and a behavior pattern which exhibited no abnormal mental trend (R61; Def.Ex.B).

Advised of his rights as a witness, accused elected to make the following oral statement, not under oath:

> "Gentlemen, I would like to say in my behalf that I am offering no excuses for whatever I may have done, but I would like the court to understand the motives behind it. Since June of this year I have been attempting to marry Miss Morley, legally, with permission of the army, and this permission has been refused twice, with no statement on the refusal other than that there was insufficient evidence to reopen the case on the second attempt. No investigation of Miss Morley was made. It was evidently turned down on other grounds. I would also like to say that it has not been my duty to be flagrantly disobedient of any orders or duty that might be imposed upon me, that I had reached the point where if I had finished my missions it was absolutely impossible, since fiances are not provided with transportation, for me to take Miss Morley back to the states with me. Major Crosby, during the time he was trying to help me, had told me that headquarters had informed him that the marriage would not be approved

at any time, whether I had finished my missions or not. The American Embassy had informed me that transportation could not be arranged for fiances, only for British subjects married to Americans. At none of the times in which I am accused of being absent were there any duties of any kind scheduled for me, other than the briefing, which I arrived in time to attend, but slept through the first 10 or 15 minutes of because I was not awakened. I believe that is all I have to say at this time" (R68).

5. Specification I, Charge I: Accused, absent on pass, failed to return to his station until about three hours after the expiration of his pass. This absence was unauthorized. Explanation was offered on the ground that accused missed the regular transportation service back to camp. But there was no evidence that if such were the fact it was not due to his own carelessness and neglect. Unfortunately, this episode, a violation of Article of War 61, though in itself of minor import, fitted in perfectly with the pattern of indifference to requirements of duty which seems to have characterized accused's behavior in the past as evidenced by his recent conviction of three similar offenses by general court-martial (CM ETO 4213, Smith). Probably but for this prior conviction, this dereliction would have been overlooked. In any event, it was the direct cause of the other offenses, for the commission of which he was also charged and tried.

Specification 2, Charge I: In this Specification accused is charged with failure to repair at a fixed time and properly appointed place of assembly for briefing for a combat mission. This conduct was charged under Article of War 61, and is an offense when committed by a soldier "through his own fault" (MCM, 1928, par.132, p.145). Accused returned late from a pass which had expired at midnight and reported in at about 0300, as charged, or 0330 hours as testified to. At the time he reported in, he was notified that breakfast would be at 0430 and the briefing session at 0530 hours. It was customary in such case for the men to be awakened at from 45 to 60 minutes before breakfast. For the purposes of a prosecution for failure to attend a briefing session, under Article of War 61, and in the light of the language employed by the Manual (supra), it is only fair to conclude that the officers subject to this duty had a right to rely upon being called and that their absence from such session would be excusable if they were not called. He was not in when the charge of quarters awakened the crews at 3:30 but he was told when he came in shortly thereafter. The purpose of the call was both to awaken the men and to notify them of the session. It is equally true that accused knew of the session. He was called again at 6:00 and found in bed asleep.

He was chargeable with personal responsibility for being awake and attending the session. It was only proved that accused was not present at the roll call of the session. He stated he came in later. Whether or not he is believed, there is no doubt that he failed, and through his own fault, to be present "at the fixed time" for the session. Such failure, as pointed out, is a violation of Article of War 61, as charged.

Specification 3, Charge I: Accused was actually absent from his station from about midnight of 4 November until 1430 hours the next day, as alleged. This absence was unauthorized. In the ordinary course of events, a pass for 48 hours would have been issued to accused as a result of his operational mission on 4 November, but the pass was not issued on this occasion. The operational officer testified that he made a definite point that accused was not issued a pass. Even though a certain degree of informality attended the issuance of passes at that post, the restriction imposed by the squadron commander the evening of 4 November was sufficient to put accused on notice that even had he been granted a pass it was automatically revoked by the subsequent restriction.

With respect to Charge II and its Specification, accused's squadron commander told him at the squadron dance on the night of 4 November that he would be restricted to his squadron site for seven days starting that midnight. This communication was oral and not in writing. It was not intended as punishment (for accused's derelictions the day before) but was to insure accused's attendance at and presence on all operational missions. He left camp that night at about 2200 hours and remained absent until 1330 hours the next day. On cross-examination it developed that accused also spoke of taking his fiancee home and of an appointment with a member of the Labor Ministry next day. To this his squadron commander said, "Have a good time tonight, and we will talk about it later, in the morning". This statement did not cancel the restriction nor did accused believe that it did for the very simple reason that accused did not return the next morning for that talk. The question remains as to whether accused was legally placed on restriction. Military courts have recognized the right of commanding officers to impose certain types of restriction when military necessity indicated the wisdom of such procedure in order to create and maintain efficienty. In CM 218385, Capitell (12 B.R. 39), the Board of Review found the record legally sufficient to sustain the findings of guilty of breach of restriction in violation of Article of War 96 when "this restriction was intended to last until the convoy returned to Pine Camp to insure accused's future presence for duty and not as a punishment for absence from duty that morning" (ibid., p.41). And in CM 251549, Allmeroth (33 B.R. 297), accused, an officer, having been alerted for overseas duty, was restricted with all combat crew personnel being so staged. This restric-

tion was not imposed as punishment but to secure the presence of combat crew personnel for movement overseas. He was found guilty of breach of this restriction. In sustaining the findings of guilty of this offense, the Board of Review implicitly recognized the legality of the restriction in question. In CM 216707, Hester, 9 B.R. 145, the question of former jeopardy was raised on proof that accused, following commission of the offenses for which he was being tried, had been in effect restricted and kept in camp by being denied leave privileges. The Board of Review said:

> "On neither of these occasions was the disciplinary action of the company commander taken under the provisions of the 104th Article of War but was rather an exercise of his personal judgment and discretion in making a decision with respect to routine administration of his company. In other words, his action consisted merely of a nonpunitive measure such as a commanding officer is authorized and expected to use to further the efficiency of his command, but which was not intended or imposed as a punishment for a military offense but purely as a corrective measure to create and maintain efficiency".

In CM 232968, McCormick, 19 B.R. 263, with respect to the question of punishment pleaded in bar, a question closely related to that now in issue, the Board of Review said:

> "It is true that punishment under Article of War 104 may be pleaded in bar of trial (par.69c, M.C.M.). But it is likewise true that a commanding officer may take nonpunitive measures, including admonition and reprimand, for corrective purposes, in order to further the efficiency of his command (par.105, M.C.M.), and that such measures do not constitute a bar to trial. It is apparent that the measures taken in the present case fall within the latter category. The surrender of the sidearms, the relief of accused as provost marshal, the restriction to one drink a day, and the warning, are all consistent with this concept rather than with punishment under Article of War 104. The plea in bar of 'motion' was properly overruled so far as this ground is concerned".

From these cases it appears that the employment of the technique of restricting military personnel is proper and authorized when not intended as punishment. Here the squadron commander testified under oath that the restriction which he imposed was not intended as punishment. The court had every right to believe that he was telling the truth. The restriction having been legally imposed, accused's breach thereof was an offense in violation of Article of War 96, as charged.

With respect to the Additional Charge and its Specification, the evidence is clear that at the time and place alleged accused attended a moving picture being shown in a building outside his squadron site. He was legally under arrest at the time and restricted to his squadron site by the terms of the order of arrest. True he was permitted to leave this restricted area for one hour for the purpose of attending meals at the officers' mess. And true this mess was in the same building as that of the moving picture show which he attended. But the order of arrest permitted him to go to this building for meals only and for no other purpose. What accused may have thought as to his right to remain in the building is immaterial to his guilt. Intention or motive is immaterial to the issue of guilt of breach of arrest, Article of War 69, "though, of course, proof of inadvertance or bona fide mistake is admissible in extenuation" (MCM, 1928, par.139a, p.153).

6. Accused is 24 years of age. He enlisted 8 September 1941 at Los Angeles, California, and was commissioned at Albuquerque, New Mexico, 12 September 1943, to serve for the duration plus six months.

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

8. The offense of absence without leave in violation of Article of War 61, and that of breach of arrest in violation of Article of War 69, when committed by an officer, are each punishable as a court-martial may direct.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

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

1. In the case of First Lieutenant PHILIP A. SMITH (O-754982), Air Corps, 527th Bombardment Squardeon (H), 379th 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 6236. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6236).

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

(Sentence ordered executed. GCMO 115, ETO, 15 April 1945.)

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

BOARD OF REVIEW NO. 2 6 FEB 1945

CM ETO 6255

U N I T E D S T A T E S	NINTH UNITED STATES ARMY
v.	Trial by GCM, convened at APO 339, U.S. Army, 17 November 1944. Sentence: Dismissal.
Second Lieutenant NORBERT JACOB (O-555164), IPW Team 82	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Norbert Jacob, Interrogation of Prisoners of War Team 82, Headquarters, Ninth United States Army, did, in the vicinity of Beaugency, France, on or about 25 September 1944, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer detailed to conduct an official investigation, make under oath a statement in substance as follows: that, since 16 September 1944, he had not purchased, or authorized

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anyone else to purchase for him, any money orders, with the exception of two in the amount of $50.00 each, which statement the said Second Lieutenant Jacob did not then believe to be true.

Specification 2: In that * * * did, in the vicinity of Beaugency, France, on or about 25 September 1944, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer detailed to conduct an official investigation, make under oath a statement in substance as follows: that he did not pay Technician Fifth Grade Otto Greimel for two postal money orders in the amount of $100.00 each, purchased by the latter for the said Second Lieutenant Jacob, on or about 22 September 1944, which statement the said Second Lieutenant Jacob did not then believe to be true.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Ninth United States Army, approved the sentence with the recommendation that it be suspended and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

On 25 September 1944, Lieutenant Colonel Francis B. Linehan, Assistant Inspector General, Ninth United States Army, was conducting an investigation into the circumstances surrounding the purchase of postal money orders at Army Post Office 339 (Ninth United States Army) with franc notes of large denominations, in an effort to determine the manner in which and the source from which such notes had been acquired (R7,9,10). Among the witnesses questioned during the course of this investigation was accused. On the date above noted, after having been sworn and advised of his rights under Article of War 24, he testified in substance that he had not, either personally or through anyone else, purchased any money orders since 16 September 1944 with the exception of two in the amount of $50.00 each which he had sent to his parents and wife, respectively. As the questioning progressed, accused was informed that there had been an allegation that on or about 22 September 1944, a Technician Fifth Grade had purchased two

money orders in the amount of $100 each on his behalf and he was asked if he knew of this transaction. In response to this question he stated, "I did not pay him for the money orders" (R11,12; Pros. Exs.A,B). Upon being questioned still further, accused reversed his position and testified that, subsequent to 16 September 1944, his wife he had purchased and sent to his parents and his bank money orders in the aggregate sum of $450. He further stated that on 22 September 1944 he requested Technician Fifth Grade Otto Greimel to purchase two money orders for $100 each on his behalf which Greimel had done, and that he reimbursed Greimel therefor on 23 September 1944. He also admitted that his earlier statements denying any such purchases with the two exceptions had been deliberately false (R13,14,15,29; Pros.Exs.A,B,C). The explanation offered by him for the giving of the false statements was that although he had purchased the money orders in question with his own funds he had sought to conceal the fact of their purchase for, under the circumstances existing at the time of the investigation, it might have been thought that the funds employed in their purchase had been unlawfully acquired. For this reason, he felt that truthful answers to the questions put to him might have appeared incriminating. He stated that when asked whether he personally or through anyone else had purchased the money orders in question, he "should have refused to answer instead of saying 'No'" (R15; Pros.Exs.A,B).

It was stipulated, the accused expressly consenting, that if Technician Fifth Grade Otto Greimel were present in court and sworn as a witness, he would testify that on 22 October 1944 he purchased two money orders in the amount of $100 each for and at the request of the accused and that accused later reimbursed him for the amounts expended in their purchase (R22; Pros.Ex.D). The purchase of such money orders by Greimel was corroborated by that of a mail clerk at Army Post Office 339 (R23,24,25).

It was also stipulated, the accused expressly consenting, that if Technician Fourth Grade Louis H. Smith, postal money order clerk, Army Postal Unit 56, were present in court and sworn as a witness he would testify that on 23 September 1944 a second lieutenant purchased four money orders in the aggregate amount of $250 at Army Postal Unit 56, and that the money orders so purchased were made out in the name of the accused (R31).

4. Accused, after having been advised of his rights as a witness, elected to make an unsworn statement. His statement purports only to give "a picture of the surroundings of the Prisoner of War cage in Beaugency where this investigation took place" and contains nothing strictly relevant to the issues here presented (R33). The defense called four character witnesses, all of whom testified that accused's character was good and that as a Prisoners of War Interrogator he had outstanding and exceptional ability. Certain of these

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witnesses also testified that, as few good men were available in this field, accused would be extremely difficult to replace (R34-39).

5. It was established by competent, uncontradicted evidence that accused, while testifying under oath during the course of an official investigation, made the statements as alleged in Specifications 1 and 2. The evidence adduced, together with accused's admissions, show that accused did not believe such statements to be true when made and further were given with an intent to deceive. The conduct of which accused was here found guilty constitutes a violation of the 95th Article of War (CM 232346, Staples; CM 221885, Bawsel; Cf: CM 227364, Becker; and see Winthrop's Military Law and Precedents, Reprint, 1920, p.714). Accused's subsequent retraction of his prior false statements did not neutralize or purge his original offense (Cf: CM ETO 1447, Scholbe).

6. The charge sheet shows that accused is 29 years of age, that he served as an enlisted man from 27 April 1943 to 17 June 1944 and was appointed a second lieutenant on 18 June 1944.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

6255

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant NORBERT JACOB (O-555164), IPW Team 82, 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 6255. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6255).

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

(Sentence ordered executed. GCMO 44, ETO, 13 Feb 1945.)

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

9 MAY 1945

BOARD OF REVIEW NO. 1

CM ETO 6260

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	
Privates BENJAMIN P. CALDERON (18068580) and ARTHUR L. KELLEY (37379442), both of Headquarters Battery, 219th Field Artillery Battalion	Trial by GCM, convened at Arlon, Belgium, 8 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private Arthur L. Kelley, Headquarters Battery, 219th Field Artillery Battalion, did at or near Sens, (Yonne), France, on or about 22 August, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Sens, (Yonne), France, on or about 7 November, 1944.

Specification 2: In that Private Benjamin P. Calderon, Headquarters Battery, 219th Field Artillery Battalion, did at or near Sens, (Yonne), France, on or about 22 August,

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1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Sens, (Yonne), France, on or about 9 November, 1944.

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

Specification 1: In that Private Arthur L. Kelley, Headquarters Battery, 219th Field Artillery Battalion, did at or near Sens, (Yonne), France from about 22 August, 1944, until about 7 November, 1944, falsely, wrongfully, knowingly, and unlawfully pretend and represent himself to be a Captain in the Army of the United States.

Specification 2: In that Private Arthur L. Kelley and Private Benjamin P. Calderon, both of Headquarters Battery, 219th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Sens, (Yonne), France, on or about 22 August, 1944, without authority, wrongfully take and carry away one truck, ¼ ton, 4 x 4, value of more than $50.00, property of the United States.

Specification 3: In that Private Arthur L. Kelley and Private Benjamin P. Calderon, both of Headquarters Battery, 219th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Sens, (Yonne), France, on or about 22 August 1944 without the consent of the owner, wrongfully take and carry away one sleeping bag, one air mattress, one officer's field coat, three officer's wool shirts, four officer's wool trousers, one combat jacket, and one pair combat boots, value about $145.00, the property of Captain Robert E. Heine.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the votes were taken concurring, was found guilty of the charges and specifications against him. No evidence of previous convictions was introduced as to either accused. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service,

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

3. Prosecution's evidence established the following facts:

On 22 August 1944, accused Kelley, who was driver for Captain Robert E. Heine of the 219th Field Artillery Battalion, was given permission by Captain Heine at the command post of the 137th Infantry, located in Sens, France, to drive to a store approximately five or six blocks distant from the command post to purchase a camera for the captain and film for members of the battalion (R8-10,13,14). Accused Calderon was given permission to go with Kelley for the purpose of furnishing protection against snipers and to guard the jeep while Kelley was in the store (R9-10,13,14). They were to return after buying the camera and film, which "should not have taken more than three-quarters of an hour to an hour" (R9,15). At approximately 1300 hours (R14) they set forth in the jeep used by Captain Heine (R10) and containing his bedroll and clothing (R10-11; Govt.Exs.D,E). When they failed to return, two searches were made for them on 22 August and other searches for the men and the vehicle were made on 23 August, but no trace was found (R15). Voluntary statements of each accused given to John B. Murphy, Agent, 29th Criminal Investigation Section, and voluntary statements made by each accused in the pre-trial investigation were introduced in evidence. In pertinent part, Kelley's statements read:

> "We bought the camera and films and then drove around town a little. We stopped and talked with some civilians and started drinking with them. After 2 or 2½ hours had passed we returned to regt CP but they had moved to a new location so we went there and asked for Capt Heine, but no one knew him. Calderon and I started to drink some more and forgot about going back. We stayed with civilians 3 or 4 days and were drinking most of the time. Then we decided to go back to the Bn but when we arrived at the place they had been they were no longer there. We drove on through the next town but could not find them. We were scared and decided we had messed up anyway, so we decided to go back to Sens. We stayed with the civilians.

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We told them we were on patrol. When the weather became cold I put on Capt Heine's field jacket which had captain's bars sewed on and when people asked if I was an officer, I said yes. We didn't need money as we ate and slept with civilians and our girls paid our bills if we went anywhere. I took Capt Heine's property out of the beep and left it with some civilians whose name and address I can't remember at present, but I could find the house. These things include Capt Heine's radio, bedroll, camera and some other things.

While we were absent from our organization we made one trip to Auxere and two or three trips to Paris. We got all the gas we needed from convoys that came through Sens. In Paris we stayed with some civilians we had met in Sens.

One time I was stopped in Auxere by a cavalry patrol and I pretended I was Capt Heine and that I was on a patrol.

While we were in Sens I posed as Capt Raymond C. Richards. We kept Capt Heine's beep as we intended to return when we ran out of money. We were getting tired of everything and wanted to return and to hear from home but we didn't know where to give ourselves up. We met some fellows who had been AWOL for 4 months and they told us to go to a replacement depot. We planned to turn ourselves in to the 19th replacement depot". (Govt.Ex. D).

"All during the period of my absence I posed as Capt. Raymond C. Richards, and wore the insignia of a Capt. in the Field Artillery of the United States Army. At the time of my apprehension by Lt. C. W. Bracey, Co. "A", 726 MP Bn., APO 513, I was posing as Capt. Richards". (Govt.Ex.E).

Accused Calderon's statement made in the pre-trial investigation is as follows:

"Pvt Kelley and I left the regimental CP of the 137th Inf regt in Capt Heine's beep at about

1300 on the 22 Aug, 1944, to purchase some films and a camera. We drove around the town a little. We ran into a bunch of civilians who were happy about the liberation and we started drinking with them. We stayed with these people over night and did not return to Capt Heine as we were too drunk. About three or four days later we returned to the place where the Bn was on the day we left, but they were no longer there. We drove on through the next town which was a couple of miles further looking for the Bn., but we did not find them so we returned to Sens. We met some girls and we lived and ate with them. I had 2 girls, both of whom lived in Sens, and I ate all my meals with them and stayed in their homes at night. The girls would give me 500 or 600 francs at a time and that was sufficient money.

Pvt Kelley and I made a trip to Auxere and 2 or 3 trips to Paris in our beep during the time of our absence. In Paris we stayed at the home of a friend we had met at Sens. We got all of our gas from government convoys and occasionally cigarettes.

During the time we lived in Sens Pvt Kelley posed as Capt Richards and I posed as his driver. Pvt Kelley wore Capt Heine's combat jacket with the bars sewed on and we told the people we were a military patrol.

When we left the 137th regt CP on 22 Aug, Capt Heine's bedroll, radio and some other things were in it. The radio was stolen from our beep, but I don't know what happened to the other things. We didn't try to sell the bedroll and we never sold or traded any government property.

We planned to return to the Bn. after Christmas and we planned to take the beep with us at that time. We had not tried to find the Bn since that time 3 or 4 days after the day we first left.

I was picked up by the MP on 9 Nov 1944 at the home of Mrs. Paul Pestel, 120 Rue Alsace Lorraine, Sens, France." (Govt.Ex.F).

The deposition of First Lieutenant Clarence W. Bracy, Company A, 726th Military Police Battalion, was admitted in evidence for the prosecution with the defense stating it had no objection (R16; Govt.Ex. C). The deposition established the following: That Lieutenant Bracy first met accused Kelley on 3 November 1944 and first knew him as Captain Richards; that on or about 0900 hours 7 November 1944, he apprehended accused Kelley at Hotel Croix Blanche, Sens, after he had become suspicious of accused, who gave his name as "Captain Raymond Charles Richards", and asked accused for his officer's identification card which he was unable to produce; that at the time of apprehension, accused was wearing a field-jacket with captain's bars, OD shirt with Field Artillery insignia and captain's bars, OD trousers, no cap, regular army shoes; that Kelley did not offer any reason in explanation of his conduct in offering a fictitious name and in wearing an officer's uniform without authorization, and later admitted that he was Private Arthur L. Kelley.

4. Each accused, after being advised as to his rights, elected to be sworn as a witness in his own behalf. Their testimony substantiated in almost every detail the facts established by the prosecution. Each reiterated the fact that he stayed away initially because he was drunk (R24,31, 32,35,38) and denied entertaining the intention of remaining permanently away from the service (R24,25,27,35,36,38,41,45). Such intention, however, was hedged with qualifications: each intended to return as soon as he ran out of money (R25,29,37,41); and each was going to return in the hope of receiving mail from home (R25,41), Calderon intending to return "sometime before Christmas" for this reason (R25,29). As justification for their prolonged absence Calderon testified that he "couldn't find the outfit" (R26,27) and Kelley that he feared "what we would get for being away in time of war" (R37,38).

Calderon saw 137th Infantry and 219th Field Artillery Battalion vehicles parked in Sens on 22 August 1944 and admitted that the only effort to find the organization made three or four days later was to drive to the old location of the battalion, which they discovered had moved, and then proceed "farther down the road" without finding the battalion (R28,29,31-32). Kelley testified that they drove approximately 60 miles out from Sens on this occasion (R35) and didn't find the battalion because it had departed by retracing the route used in entering Sens (R26).

Each stated he was drunk (R29,42) at the time they were stopped by a cavalry patrol and Kelley stated he was Captain Heine (R23,29,42,Govt.Ex.D). Calderon "probably could" have turned himself in to the military police in Paris, but "he didn't think of it" (R31). Kelley gave drunkenness as the reason for not surrendering himself in Paris (R39,42), but admitted he had been sober upon arrival in the city (R43). Calderon was "having a pretty good time" (R31) and Kelley had "a pretty comfortable set-up" (R37) in Sens.

When Kelley was questioned by Lieutenant Bracy, he said he was "Captain Richards" and when he could not produce an officer's identification card, he was arrested (R44,45). His purpose at the time in using the fictitious identity rather than his own was that he "had Captain Heine's combat jacket on, and there was nothing else /he/ could do" (R45).

The jeep had been returned to the accuseds' organization in "very good condition", and Captain Heine's clothing and equipment had been turned over to the military police, and in turn to the Quartermaster (R37-40).

5. Accused were charged with a capital offense, and the Board of Review will assume for the purpose of this holding that the admission of the deposition of Lieutenant Bracy as evidence for the prosecution was erroneous (AW 25; Winthrop's Military Law and Precedents (Reprint, 1920) p.355; Cf: CM ETO 1693, Allen).

The vital question for determination is whether the improper admission in evidence of the deposition "injuriously affected the substantial rights" of either accused within the purview of Article of War 37. In considering this question, the Board of Review (sitting in the European Theater of Operations) has quoted with approval the following test of legal sufficiency in the case of admission of incompetent evidence (CM ETO 1693, Allen; CM ETO 1201, Pheil):

> "It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of

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itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. CM. 127490 (1919)". (Underscoring supplied).

In the opinion of the Board of Review, the legally admissible evidence in the instant case clearly meets the requirements of the above test. Every material fact in the deposition was confessed by the accused. Substantial competent evidence, including sworn testimony of the accused, excluded "any fair and rational hypothesis except that of guilt" (MCM, 1928, par.78a, p.63) and furnished compelling basis for conviction.

6. Both accused were absent without authority from their organization until their apprehension two and one-half months later. Posing as an American officer and his driver on patrol, they had settled down to a comfortable life in Sens while their Division was pursuing the enemy across France (R41) and establishing a meritorious record in combat (R29). Though each previously professed the intention of rejoining his organization, the evidence clearly shows that neither made any real effort to return to military service at any time, despite several opportunities to do so. These facts form a substantial basis from which the court was justified in concluding that accused absented themselves from the military service with the intent of permanently abandoning it (CM ETO 6435, Noe, and authorities therein cited). The findings of guilty of the offenses alleged in the specifications under Charge II are fully supported by a plethora of competent evidence.

7. The charge sheet shows the following with respect to the service of accused: Calderon is 31 years of age and was inducted 14 March 1942 at Santa Fe, New Mexico. Kelley is 25 years of age and was inducted 19 August 1942 at Jefferson Barracks, Missouri. Neither had prior service.

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

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

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2 16 FEB 1945

CM ETO 6262

U N I T E D S T A T E S	THIRD UNITED STATES ARMY.
v.	Trial by GCM, convened at Nancy, France, 17 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ADAM WESLEY (34243521), 4150th Quartermaster Service Company.	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Adam Wesley, 4150th Quartermaster Service Company, APO 403, U. S. Army did, at 5 miles South of Sommesous, France, on or about 2130 hours 6 September 1944, with malice aforethought, willfully, deliberately, feloniously, and with intent, kill one Sergeant James Johnson, a human being by shooting him with a carbine U. S. caliber .30 MI.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for four hours in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dis-

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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 pursuant to Article of War 50½.

3. For the prosecution, Private First Class Willie B. Coleman, 4150th Quartermaster Service Company, testified that at about 2030 hours on 6 September 1944 his platoon, of which both accused and Sergeant James Johnson, the deceased, were also members, was returning to its bivouac area approximately five miles south of Sommesous, France, upon completion of a work detail (R7,13). As they went into the bivouac area, witness was in the lead, the accused was some fifteen feet behind witness and deceased was some two feet behind accused (R7). As accused stopped at his tent he said, "Whoever drunk up my cognac is lower than a son-of-a-bitch". At this

> "Sergeant Johnson said, 'Wesley you're talking too much,' but he had walked about five feet from Private Wesley and Private Wesley said, 'I wasn't talking to you.' Sergeant Johnson said, 'I keep on saying to you, Wesley, you talk too much,' and he had walked about ten feet from Private Wesley then. Private Wesley said, 'I wasn't talking to you, but if you drunk up my cognac, the son-of-a-bitch goes for you.' Sergeant Johnson stopped and Private Wesley said, 'Go on ahead, Sergeant Johnson or I'll blow your fucking brains out.' Sergeant Johnson * * * said, 'You're a damned liar', * * * turned around and started toward Private Wesley"(R8).

at this time deceased was about ten feet from the accused. Accused immediately said, "Don't come up on me", but deceased none the less continued walking in accused's direction. Accused repeated his warning, and, since deceased failed to stop, "slammed a bullet in the chamber" of his carbine. When deceased reached a point about four feet from the accused, accused repeated "Don't come up on me" for the third time and, without sighting, fired his carbine from a position with the butt about halfway between the arm pit and elbow of his right arm and the muzzle pointed toward the deceased. At the shot, deceased fell to the ground. Witness went over to the deceased and saw that he had been shot "right up on the upper left side, a hole about the size of the end of my finger". Deceased was then taken to the hospital (R8,9,10). At the time of the incident

deceased was in possession of a carbine but it was slung on his shoulder and witness did not see him remove it. Neither did witness see anything in deceased's hands as he was advancing toward accused (R10,11).

Private First Class Willie Jackson, 4150th Quartermaster Service Company, testified that on the evening of 6 September, as he was in his tent making his bed, he heard a shot after which he "seen all the men running in that direction so I ran down there and found Sergeant Johnson lying down". When he arrived at the scene he saw accused putting his carbine in his tent and heard him say, "Yes, I killed him and I'll kill any son-of-a-bitch that I don't like" (R16,17,18). Accused appeared calm at the time (R18). This witness also testified that he had known accused for about a year and a half and had never known him to provoke a fight. To the best of his knowledge, no ill feeling existed between accused and the deceased (R19). Accused was slightly larger in size that the deceased (R20).

Staff Sergeant Arthur C. Davis, 4150th Quartermaster Truck Company, testified that he was a platoon sergeant in that organization and that the deceased had been a section sergeant in charge of the section of which accused was a member (R22). At about 2030 hours on 6 September 1944, as the result of a report received by him, he went to the bivouac area where he found deceased lying on the ground. Deceased, who was unconscious at the time, was placed in a vehicle and taken to the hospital (R22,23). There a doctor removed deceased's shirt and the witness noted that deceased was wounded in the left chest (R24). He did not thereafter see the deceased. He estimated the deceased to have been a man about five feet nine and a half or ten inches in height and approximately 165 to 170 pounds in weight. He estimated accused's height at five feet ten or ten and one half inches and his weight at approximately 175 or 180 pounds (R25). When asked if he knew of any ill will between deceased and accused he stated that

> "at different times it has been called to my attention that Sergeant Johnson has told Private Wesley numerous times that he was going to mess him up, meaning as far as I know that on numerous occasions Private Wesley had been going out on details which Sergeant Johnson was in charge, and had been leaving the details going other places and Sergeant Johnson has got after him several times about it and stated he was going to mess him up if he didn't do better" (R26).

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He interpreted deceased's statement that he would "mess up" the accused as meaning he would report accused to the company commander for disciplinary action and not that he would mistreat accused physically (R26,28,29). On one occasion some two weeks previous to the date of the offense here alleged, deceased had "got after" accused whereupon accused stated, "I'm tired of you saying that you are going to mess me up and it's liable to be you that gets messed up". He also stated that, while the deceased "really did get after him [accused] quite a lot", to the best of his knowledge no actual fights had occurred between the two men. Accused was not a "trouble maker" nor of a quarrelsome disposition (R27). On the other hand, deceased had a quick temper (R28). He heard no dispute between accused and deceased while they were on detail on the day deceased was killed (R29).

It was stipulated with the express consent of the accused:

"a. That on or about the 6th or 7th of September 1944, Sergeant James Johnson, 4150th Quartermaster Service Company, APO 403, U.S. Army, at approximately 2130 hours, died in the 103rd Evacuation Hospital, U.S. Army;

b. That Sergeant James Johnson's death resulted from a gunshot wound, carbine;

c. That the bullet, which caused the above death, entered the body in the upper left abdomen; perforated the stomach, liver, lung; and left the body through the 8th interspace, right axillary line" (Pros.Ex.1).

4. On behalf of the defense, Private Munson Ingraham, 4150th Quartermaster Truck Company, testified that while on detail on 6 September 1944 "a few of the boys" had been given a quart of cognac and that deceased and two other men drank the entire bottle (R31,35, 36). This incident took place about noon (R35). That evening on the way back to the bivouac area accused told witness that deceased drank all the whiskey and had given him (accused) none. Accused repeated this remark when the men reached the bivouac area but directed such remark to witness and not to the deceased. The deceased told accused he was talking too much. He heard accused warn deceased "Don't come up on me" three times (R31,32). At the second warning deceased

"pulled a clip out of his pocket and again Private Wesley told Sergeant Johnson don't come up on him and at that time Adam [accused] raised his rifle and shot him" (R32).

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The weapon was held about waist high when the shot was fired (R33). Although deceased was in possession of a carbine at the time he made no effort to unsling it nor did he attempt to load it with the magazine which he had taken from his pocket (R32,36,37). Witness did not see a knife or any other object in deceased's hand at the time of the incident (R37).

After being advised of his rights as a witness accused elected to be sworn as a witness on his own behalf. He testified that while on detail on 6 September he and a corporal were given a quart of cognac which he entrusted to the corporal for safekeeping until after duty hours. When he reached the company that evening he asked the corporal about the cognac and was informed that deceased and the corporal had already consumed it. On learning this he said, "Well, that was mighty dirty of you to drink up all the whiskey and don't give me none". Deceased overheard this remark and told him he talked too much. Accused said

> "'Man, go on off'. He was full of that whiskey and drunk and I didn't know what he would do. He come walking up on me and he says 'you talk too much', and he is just as big as I am. I only weight about 156 and he weighs about 160 some and kept coming up on me and reached in his pocket to get a clip and moved his arm and the rifle falls down and could shoot as quick as I could. I was scared of him any way" (R39).

He was afraid deceased would hurt him and "begged him to stay back. Deceased was within about five feet of him when he shot. He did not intend to kill the deceased. Although he had never before had any arguments with deceased, deceased once told him "You're going on around here acting like you don't want to do nothing and I'm going to try to get you killed" (R39,40). On cross-examination, accused was questioned with respect to the specific actions of the deceased at the time deceased was advancing toward him. In this connection, accused stated that when deceased started to advance, his carbine, in which there was no magazine, was slung on his shoulder. When asked whether he saw deceased make any attempt to load his carbine with the magazine which he had removed from his pocket, accused replied, "Tried to take the rifle off. I didn't know what he was going to do". He stated, however, that deceased did not succeed in unslinging the weapon - "I reckon he was too slow" (R40). He further stated that when he saw deceased with the magazine in his hand trying to unsling his carbine he put a round in the chamber of his own carbine. He admitted that he did not "back up any"; rather, he "stood right still" since "if I had run, he would have shot me". He also stated that at the time he saw deceased try to unsling his carbine he fired, and did so for the purpose of stopping

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deceased in his advance. He stated that he "wasn't trying to kill" deceased but admitted that he knew a carbine was a lethal weapon. He repeated that deceased had been drinking at the time (R41,42). On examination by the court, accused said that on occasion he and deceased had "fussed" because he had been slow in the execution of deceased's orders. On these occasions deceased often said that he "was going to get [accused] killed" (R43,44). However, no arguments had occurred between him and the deceased on the day deceased was shot. On three or four occasions in the past deceased had threatened to mess accused up and accused understood this expression to mean "beat you or kill you or something like that". The last thing deceased said as he advanced toward him, just before the shot was fired, was "I'll kill you" (R44,45).

5. In rebuttal, the prosecution recalled Private First Class Willie B. Coleman who testified that he did not recall having seen deceased drink anything while on detail on the day of the offense here alleged nor did he notice anything unusual in his gait when they left the trucks and entered the bivouac area at the close of duty hours that evening. When deceased was walking toward accused immediately prior to the time the shot was fired, he heard him make no statement to the effect that he was going to kill accused. Neither did deceased make any effort to unsling his carbine. When deceased was lying on the ground after the shot was fired, his carbine was on his shoulder (R46-50).

Sergeant Davis was also recalled by the prosecution and testified that he had occasion to see deceased at various times on 6 September and had noticed nothing unusual in his behavior or about his breath. He sat some three feet from the deceased on the trip to the hospital and noticed no unusual odor at the time (R50,51).

6. It will be noted that the specification employed in the instant case does not follow the model form of specification set forth in the Manual in that it omits the word "unlawfully" and also alleges that accused killed deceased "with intent" rather than "with premeditation". However, the specification here employed alleges that the act was done "feloniously" and this word sufficiently alleges the unlawful character of the act (31 C.J., sec.252, p.701). Also where, as here, it is alleged that the act of accused was done "with malice aforethought" it is not necessary to allege, in addition, that it was done"with premeditation" (30 C.J., sec.304, p.112; Criminal Law from American Jurisprudence, Homicide, sec.262, p.336). Thus, the specification sufficiently alleges the crime of murder,

7. Murder is the unlawful killing of a human being with malice aforethought. (MCM, 1928, par.148a, p.162). The word "unlawful", as used in the above definition, means without legal justification or excuse (idem). In the instant case, the evidence conclusively shows that accused killed deceased and there is no suggestion in the record

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that the killing was legally justifiable. However, the record does suggest an attempt to show that the killing was legally excusable because done in self-defense. The evidence shows that an altercation arose between deceased and accused as a result of a disparaging remark made by accused concerning the consumption by someone of certain cognac to a portion of which accused felt himself entitled. When accused repeated this remark in a more pointed fashion, deceased began to advance upon him from a position some ten feet distant. Accused, whom the preponderance of the evidence shows to have been somewhat the larger of the two men, did not retreat but stood his ground and warned deceased not to "come up" on him. At the third such warning, when deceased was some four or five feet distant, accused fired the fatal shot. It is true that there was evidence of some ill-will between the two men, and that accused testified that immediately prior to the firing of the shot, deceased attempted to unsling and load his carbine and threatened to kill him. However, his account of deceased's actions immediately prior to the shooting was uniformly denied by the other witnesses. On these facts, it appears that accused had no reasonable ground to believe that he was in danger of death or great bodily harm and that it was necessary to kill to avert such danger. Thus, the court was justified in rejecting any theory that the killing was done in self-defense (Cf CM 235044, Bull. JAG, Vol.II, No. 9, Sept. 1943, sec.450, pp.340,341). With respect to the question whether there existed in this case the requisite malice aforethought to constitute accused's offense that of murder, it should be remembered that the term "malice aforethought" 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, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * * " (MCM, 1928, par. 148a, pp.163,164).

It was here shown that, at a time when deceased paused in his progress away from the accused upon hearing accused's epithet repeated, accused said, "Go on ahead, Sergeant Johnson or I'll blow your fucking brains out" and also that, shortly after the shooting occurred, accused said, "Yes, I killed him and I'll kill any other son-of-a-bitch I don't like". Further, although accused stated on the stand that he did not try to kill deceased, he admitted that the shot was fired to stop deceased's advance and that he knew that a carbine would "kill a person". The evidence thus supports the conclusion that the act was done with malice aforethought, as above defined. Nor does it appear that deceased's

death was inflicted in the heat of sudden passion, caused by adequate provocation. There was testimony that accused appeared calm immediately after the act was done. Further, deceased's statements that accused "talked too much" and was "a damned liar", even when coupled with his action in advancing toward accused, did not afford adequate provocation for accused's act (Cf CM 238138, Bull. JAG, Vol.II, No.10, Oct. 1943, Sec.450, p.382). The evidence thus supports the court's finding that accused was guilty of murder, as alleged.

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

9. The charge sheet shows that accused is 27 years of age and was inducted at Camp Blanding, Florida, on 23 July 1942. No prior service is shown.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

14 APR 1945

CM ETO 6265

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE) EUROPEAN THEATER OF OPERATIONS.
v.	)
Technician Fifth Grade JAMES R. THURMAN (15339038) and Private ROBERT W. POST (36583424), both of Troop A, 106th Cavalry Reconnaissance Squadron (Mechanized)	) Trial by GCM, convened at Paris, France, 14, 15 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

THURMAN

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

Specification 1: In that Technician Fifth Grade James R. Thurman, Troop A, 106th Cavalry Reconnaissance Squadron (mecz), in conjunction with Private Robert W. Post, did, at Ormoy, Yonne, France, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Paul Trabichet, a human being, by shooting him with a pistol.

Specification 2: In that Technician Fifth Grade James R. Thurman, Troop A, 106th Cavalry Reconnaissance Squadron (mecz), did, at Ormoy, Yonne, France, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Roger Benzi, a human being, by striking him on the head with a pistol and by shooting him through the head with a pistol.

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

Specification 1: In that * * * did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do him bodily harm, commit an assault upon Guy Ammonito by striking him on the head with a dangerous weapon, to-wit, a pistol.

Specification 2: In that * * * did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do him bodily harm, commit an assault upon Jean Chaunier by striking him on the head with a dangerous weapon, to-wit, a pistol.

Specification 3: (Finding of Guilty disapproved by reviewing authority).

POST

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

Specification: In that Private Robert W. Post Troop A, 106th Cavalry Reconnaissance Squadron (mecz), in conjunction with Technician Fifth Grade James R. Thurman, did, at Ormoy, Yonne, France, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Paul Trabichet, a human being, by shooting him with a rifle.

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

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

Specification 2: In that Private Robert W. Post, Troop A, 106th Cavalry Reconnaissance Squadron (mecz), did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do him bodily harm, commit an assault upon Guy Ammonito by shooting him in the leg with a dangerous weapon, to-wit, a rifle.

Specification 3: In that * * * did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do him bodily harm, commit an assault upon Jean Chaunier by shooting at him with a dangerous weapon, to-wit, a rifle.

Specification 4: In that * * * did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do him bodily harm, commit an assault upon Roger Benzi by shooting at him with a dangerous weapon, to wit, a rifle.

Specification 5: In that * * * did, at Ormoy, Yonne, France, on or about 30 August 1944, with intent to do her bodily harm, commit an assault upon Madame Jane Trabichet by threatening to shoot her with a dangerous weapon, to-wit, a rifle.

Specification 6: (Finding of Not Guilty).

Each accused pleaded not guilty to all charges and specifications and three-fourths of the members of the court present when the votes were taken concurring, accused Post was found not guilty of Specification 6, Charge II, and each was found guilty of the other respective charges and specifications except Specification 3 of Charge II as to accused Thurman, and Specification 1 of Charge II as to accused Post, of which each was found guilty by exceptions and substitutions of assault with intent to do bodily harm. No evidence of previous convictions was introduced as to either of accused. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specification 3, Charge II as to accused Thurman and of Specification 1, Charge II as to accused Post, approved the sentences as to each, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused James R. Thurman and Robert W. Post, members of Troop A, 106th Cavalry Reconnaissance Squadron, were stationed on 30 August 1944 near Ormoy, Yonne, France (R72, 73,95,96). Madame Benzi testified that this town had been liberated from

the Germans only five days previously and although there were no engagements with the enemy at the time near Ormoy, there were reports of some German troops hiding in the woods nearby (R18). At approximately 10 o'clock on the evening of 30 August 1944, the two accused entered the home of Monsieur and Madame Roger Benzi, French civilians residing in the village of Ormoy. Thurman was armed with a pistol and Post carried an M-1 carbine. In addition to Monsieur and Madame Benzi and their children Ilion and Nicole, the following persons were either visiting or residing in their home at the time: Monsieur and Madame Paul Trabichet, Monsieur and Madame Jean Chaunier and their daughter Anne, Madame Renee Benzi and Monsieur Guy Ammonito. Each of these persons, except thechildren and those who did not survive, witnessed at least part of the events that occurred on the evening in question and, after identifying Thurman as the "fair" and Post as the "dark" soldier, testified for the prosecution (R8,10,13,20,21).

Madame Roger Benzi stated that when the soldiers entered their home they seemed very cordial and friendly. They were welcomed, the soldiers shook hands with their hosts, and sat down. They made known the fact that they were lost and Roger Benzi secured a map, that was on top of a small wireless radio set, and in an effort to help them locate their camp showed them the roads around Ormoy. She added that:

> "The fair one /Thurman/ seemed to think the map strange and he took the map and crumpled it up" (R11).

The accused then indicated a desire to visit a latrine and were taken to one outside in the yard where they remained about 10 minutes and returned. Thereupon:

> "The fair one shut the door, locked the door and put the key in his pocket, * * * /he/ switched on the wireless. The dark one sat on a chair * * * with his finger on the trigger /of his/ rifle. * * * /When/ I tried to take the key from him /the fair one/ he knocked me * * *. I was frightened and * * * my mother-in-law * * * helped me with my little girl to get out by the window"(R13-15).

Madame Madeleine Chaunier testified that at this time the fair one began to threaten the occupants of the house while the dark one held his rifle on them. Thurman separated the men from the women at the point of a gun, the women being placed in front of the fireplace and the men lined up in the corner of the room (R20-22). With the butt of his revolver, he struck three of the men, Messrs. Benzi, Chaunier and Ammonito (R20-22,24,48,63), the fourth, Monsieur Trabichet, he took by the collar, led him from the others, pointed his revolver in the region of his heart, counted 'one,two, three' and "shot him coldly" (R22,47,63). Monsieur Trabichet fell to the floor immediately and lay motionless for about ten minutes. Later he moved and the "dark" one shot him "many times" with his carbine. His body was

riddled with bullets and "nearly cut in two from the throat downward" (R20-24,47,56,63). The fair soldier then struck heavy blows with the end of his revolver, on the faces and heads of Messrs. Chaunier, Ammonito and Benzi, knocking the latter down (R25,48,57). Soon thereafter he struck him again, crushing his skull. Later he fired a bullet through Benzi's forehead. (R24-26,40,48,57)

The fair soldier then placed himself in front of the women and menaced and tortured them for "about a quarter of an hour", while the dark one searched the pockets of Trabichet. After reloading his rifle, the dark soldier pointed the weapon at the women, laughing and grinning, and while they pleaded with him not to kill them, Thurman told him not to shoot. Having previously been ordered to sit down, the ladies were now ordered to stand up and to follow the fair one up the staircase. Halfway upstairs they were made to sit down on the steps with the dark one sitting on one of the lower steps (R27,28). He (Post) had his weapon pointed at them and would alternately put the gun's muzzle on Madame Chaunier's chest and would then kiss her. He became sick, and thinking to get rid of him, Madame Chaunier showed him a bedroom and persuaded him to lie down where he remained until the American patrol arrived (R29,31). In the meantime the fair one went through the upstairs rooms and found Madame Chaunier's little girl in her bed and sat down. Madame Trabichet, who had been following accused (Thurman) sat down on the bed to reassure and protect the little girl, with the girl between them. In a few minutes he "passed out" and fell off the bed, remaining on the floor until some members of the military forces "dragged" him down the staircase (R40).

The testimony of Madame Renee Benzi, Monsieurs Ammonito and Chaunier is substantially identical with and fully corroborates the statements of the previous witnesses. Madame Renee Benzi added that she also tried to escape by attempting to go through the window, following her daughter-in-law, but was prevented from doing so by the fair soldier, who pushed her "violently" back into the room (R38,39). Ammonito testified that after the fair one searched the men for weapons and found none, that he shot Monsieur Trabichet (R47,56), half strangled the other men, while "banging [their] necks against the wall" (R47). He called Trabichet a "Boche" and charged the other men with being German (R52). He struck the men with the end of his pistol and kept on striking them after they were down on the floor (R48-49). Ammonito lay motionless, "pretended to be killed", saw the fair one shoot Roger Benzi in the head and heard blood flowing from him like a "tap of water" (R48). The women pleaded for themselves and the lives of the children (R45-50). Monsieur Chaunier related that the dark soldier "discharged his carbine on the body" of Trabichet causing blood to spurt "all over the place" and that he made "wounds from the right shoulder nearly to the left side". Later the fair one assaulted Benzi by knocking him on the head with the butt of his pistol "at least ten times", causing his brains to be splattered on other bodies lying nearby (R54,55,57). The dark soldier fired many shots about the room and the fair one struck Madame Trabichet and made the women go up the stairs. The dark one got behind the women and pointed his carbine at them. As the accused

went up the stairs, Ammonito and Chaunier escaped out the window and reported the affair to the village Mayor. When they returned to the house about an hour later they found that the American military authorities had arrived (R57-58).

It was stipulated by both accused, their defense counsel, and the trial judge advocate that if Doctor Louis Fidon, a civilian, were present in court, he would testify that upon examination of the bodies of Paul Trabichet and Roger Benzi on 31 August 1944, he found numerous perforating bullet wounds on the head and chest of both men. He further found that the skull of Monsieur Benzi showed evidence of severe blows and bruises in the frontal bone region. Both men were dead at the time. He concluded that the cause of the deaths was due to bullet wounds inflicted the preceding day (R44;Pros.Ex.1).

4. After a full explanation of their rights as witnesses, each accused elected to be sworn and to testify in his own behalf.

Accused Thurman testified that he was trained as a reconnaissance scout to reconnoiter and look for anything of a suspicious nature. He landed in France, on 26 June 1944 and moved from Normandy to the Brest Peninsula, following the infantry, "mopping up" after the infantry and when the break through Normandy was effected worked with the reconnaissance element of the Third Army. He has been under rifle and machine gun fire and has had engagements with the enemy "off and on". He stated that reconnaissance men were then working in platoons, in the vicinity of Ormoy, covering five mile sectors, looking for "pockets of Germans" (R73,74). His unit was given instructionsto capture German stragglers, if possible, and although he had not taken any prisoners one of the company platoons had had a recent engagement with the enemy" (R74,75). On the night of 30 August 1944, when their unit moved into the vicinity of Ormoy, he and Post visited the town on pass, drank considerably at two cafes, and while trying to find their way back to camp met a French "FFI" man who told them that there were Germans in the town not wearing uniforms (R75). They became drunk and seeing a house with a light in a window they inquired regarding directions and were invited inside. There he observed a radio and heard a mixture of static and code that "sounded like German". He added that one of the men spoke English and when asked todirect them to their camp began "asking us a lot of questions about our outfit and where we had been, where we were going" and other "odd questions" (R73-76). The men "brought out" a map, showing the roads around Ormoy, offered them some drinks and reached for Post's carbine a couple of times" (R75,77,83). Post accompanied Thurman outside to the toilet where they decided that what they had seen and heard in the house was "pretty queer". They became suspicious that the men were German and decided to take them to thecommand post for questioning (R75,77), though they did not know where it was. Upon returning to the room, they told the people there "that we were going to take them back to the CP with us". Thurman remembers "hearing a crack" and feeling a "sting on my head" and on putting his hand there found blood and yelled to Post that he had been shot. He then shot one of the men and recalls seeing him fall and remembers searching him. He also remembers "very vaguely" hitting another man and seeing some women and also

a little girl in bed crying. He testified that he remembered nothing more until the day following though he states they were kept under guard all night (R78). Thurman does not remember shooting one man in the forehead and another in the chest (R87). The man he shot was offering no resistance and may have had his hands up (R93-94). His gun jammed after his second shot and before he went upstairs to hunt for Germans. He admitted they could have marched the people from the house before the shooting (R95). He admitted that he may have bumped his head on the latrine door but "don't remember" (R92). The injury on his head "wasn't exceptionally deep; it was enough to draw blood" (R94).

The testimony of accused Post corroborates Thurman's statements. His training had been similar (R96). He testified that he had been under German small arm, mortar and artillery fire, and had been in engagements with the enemy on four or five occasions when they had run into "small groups" of Germans of from "three and four up to twenty" lots of times (R97,98). He was drunk when he left the last cafe on the evening in question and his suspicions were aroused regarding the loyalty of the people whom he had met. "It seemed like I thought they thought he (Thurman) and I were bait trying to get information out of us" (R101). He heard Thurman "holler" that he was shot. Then he heard a shot and Trabichet fell. He knelt down in a corner and shot once in the direction of the man lying on the floor. He remembers "firing distinctly once, and firing vaguely a second time". Everything after this became "very vague" and he didn't remember very much for awhile. Then Thurman started upstairs, followed by the women and he started up after them. He remembers being at his station the following morning (R100,101,102). Post had heard no shots when Thurman shouted that he had been shot and other than Thurman's statement, he had neither seen nor heard anything to indicate that these people were dangerous. He had a clear recollection of a woman going out of the window (R104) maybe five minutes before Thurman shot the man. He remembers firing one shot at Trabichet (R105) on the floor but doesn't know why he did as he did not see him move, nor does he know why he fired the second shot (R106). He saw no weapons on these people (R110) and had not had any trouble with anyone that night. He was drunk (R111).

Captain George L. Perkins, Medical Corps, psychiatrist, after being qualified as an expert witness, testified that he examined both Thurman and Post on 11 November 1944 (R113). Based upon such examination and a study of accused he testified,

> "I feel that there is very strong evidence to support the likelihood of a state of temporary insanity due to intoxicants which would explain the behavior as being based on false notions which we call delusions or illusions existing at the time of the behavior, and I feel that my psychiatric examination also gives support to the contention that these men did not commit a premeditated crime of murder" (R117).

He concluded that temporary insanity was "probably" the cause of the crime and added that the state of anxiety and depression of both accused indicated that they had normal consciences (R121-124).

5. At the conclusion of the prosecution's case, the defense offered a series of motions, based upon the proposition that the evidence clearly showed the drunkenness of each accused and that they could not have entertained any premeditation or intention to kill but that the evidence established circumstances to the contrary. The motions were properly overruled (CM ETO 739, Maxwell; CM ETO 4020, Hernandez; CM ETO 4497, DeKeyser).

The Manual for Courts-Martial provides that "Voluntary drunkenness * * * is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (MCM, 1928, par.126a, p.136).

Intent being a necessary element of the offense of murder, the proof thereof may be established "either by independent evidence * * * or by inference from the act itself" (MCM, 1928, par.126a, supra, p.135). (Underscoring supplied).

Winthrop states "wrongful intent" may be signified by the existence of malice and that such results from a determined purpose, premeditation, deliberation, or brooding. He adds that:

> "The deliberate purpose need not have been long entertained /but/ is sufficient if it exist at the moment of the act" (Winthrop's Military Law and Precedents, Reprint, 1920, p.673).

Furthermore, in law, the element of malice is supplied by the mere commission of the act of homicide, for:

> "In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption" (Winthrop's Military Law and Precedents, supra, p.673).

Although the evidence shows that accused had been drinking on the evening in question the proof fails to rebut the evidence of malice as established by the prosecution. The accused both recognized the existence of certain facts, such as the presence of the radio and map in the room and they were conscious of the character and gravity of the series of questions asked them concerning their activities and the movement of their organiza-

tion all of which aroused their suspicions regarding the loyalty of their hosts, the accused believing them to be German spies or collaborators. They thereupon discussed among themselves the evidences of disloyalty they assumed they had discovered, which engendered a malice or hatred for the Frenchmen and they decided to take them to their command post for questioning. Such facts are also inconsistent with the proposition that accused were so drunk that they did not know what they were doing. On the contrary this evidence shows an intention to capture or kill the persons whom they erroneously believed to be their enemies. There is additional evidence that the accused walked straight. They were able to articulate and to fire accurately. Accused Thurman killed Roger Benzi. Both Thurman and Post shot Paul Trabichet who died soon thereafter. The charges that each accused "in conjunction with" the other did "with malice aforethought, deliberately kill" Monsieur Trabichet is therefore properly sustained, as each participated in his murder (CM ETO 3180, Porter; CM ETO 4020, Hernandez and authorities cited therein). The record contains substantial evidence that the murder was committed willfully and deliberately, as charged. Whether or not accused were in such a state of intoxication as to be able to entertain the requisite intent to kill was a question peculiarly within the province of the court (CM 223336, I Bull. JAG 159-163). The court having decided that the extent of the drunkenness of each accused was not such as to affect their mental capacity to entertain a specific intent and inasmuch as the record of trial contains substantial evidence to support this finding, such determination will not be disturbed by the Board of Review on appellate review (CM ETO 1899, Hicks; CM ETO 1953, Lewis and authorities cited therein).

With reference to the offenses other than murder, which were approved by the reviewing authority, the evidence is uncontradicted and fully establishes the commission of the offenses charged. Conviction of the crime of murder alone supports thesentences as to each accused.

6. The charge sheet shows that accused Thurman is20 years of age and that he enlisted, without prior service, at Fort Thomas, Kentucky, 16 November 1942. Accused Post is 20 years of age and was inducted without prior service at Fort Custer, Michigan, 11 March 1943.

7. There is attached to the record of trial a recommendation for clemency, which is signed by the president and all the members of the court which heard the case. This petition was received in the office of the Staff Judge Advocate, Seine Section, Communications Zone, this theater, after action was taken by the reviewing authority.

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

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9. The crime of murder is punishable by death or life imprisonment as a court-martial may direct (AW 92). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement isproper as to each accused (AW 42; Sec.275, Federal Criminal Code, 18 USCA 454; Cir. 229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

21 APR 1945

CM ETO 6268

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	
Private RAYMOND MADDOX (33553286), 3191st Quartermaster Service Company	Trial by GCM, convened at Seine Section, Paris, France, 21 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Training 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. Specification 2, Charge II alleges an offense under the 94th Article of War notwithstanding it is laid under the 96th Article of War. The unauthorized and wrongful sale on 22 October 1944 to a French civilian by accused of 225 jerricans and at least 225 gallons of gasoline, property of the United States furnished and intended for the military service thereof, was proved by substantial evidence. By reference to the quarter-annual report of the Quartermaster, European Theater of Operations, to the Quartermaster General for period 1 October 1944 to 31 December 1944 (CM ETO 5539, Hufendick), the value of the property is determined to be:

225 jerricans	at $2.00	$450.00
225 gallons gasoline	at 5/6 of .1934 per gal.	36.26
		$486.26

It is manifest from the evidence that approximately 1215 United States

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CONFIDENTIAL

gallons of gasoline were sold instead of 225 gallons as alleged. Each jerrican contained 4½ Imperial gallons or approximately 5.4 United States gallons. The term of imprisonment authorized for this offense is five years (MCM, 1928, par.104c, p.100).

3. The evidence is also substantial that accused was absent without leave from his organization from 21 October 1944 to 23 October 1944 (Charge I and Specification) and that he wrongfully carried a concealed weapon (Charge II, Specification 1).

4. The court committed an obvious error in permitting Agent Sullivan to testify to the contents of accused's written statement to him after the court properly excluded a copy of the statement (R15,17). The defense made timely objection to the practice and the error was thereby saved (MCM, 1928, par.116a, pp. 118-120; CM ETO 739, Maxwell; CM ETO 8690, Barbin and Ponsiek). Were the question of accused's guilty of the offense charged in doubt or if accused's conviction were dependent upon sketchy or fragmentary evidence (CM ETO 1201, Pheil; CM ETO 1486, MacDonald and MacCrimmon), the Board of Review would not hesitate to set aside the findings and the sentence. However, the legal evidence is of such robust and compelling strength that no conclusion other than accused's guilty is justified. The admission of the oral version of accused's statement was non-prejudicial error (AW 37; CM ETO 1486, MacDonald and MacCrimmon, supra; CM ETO 5032, Brown and Finnie and authorities therein cited).

5. The record is legally sufficient to support the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2 4 APR 1945

CM ETO 6288

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	
Private PETER C. FALISE, (32552801), 154th Replacement Company, 129th Replacement Battalion.	Trial by GCM, convened at AAF Station 594, England, 6 December 1944. Sentence: Dishonorable discharge (suspended) total forfeitures and confinement at hard labor for 1 year, 2912th Disciplinary Training Center, Shepton-Mallet, Somerset, England.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt. Peter C. Falise, 154th Replacement Co, 129th Replacement Bn (AAF), ASC, US Strategic Air Forces in Europe AAF-594, APO 635, did, at Eccleshall, Staffordshire, England, on or about 12 October 1944, with intent to commit a felony, viz., rape, commit an assault upon Pauline Hoggart by willfully and feloniously striking the said Pauline Hoggart on the face with his hand.

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

Specification except the words "with intent to commit a felony, viz., rape", substituting therefor the words "with intent to do bodily harm"; of the excepted words not guilty; of the substituted words guilty, and guilty of the Charge. Evidence was introduced of two previous convictions by special court-martial each for wrongful use of a government vehicle in violation of Article of War 96. Two-thirds 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 one year. The reviewing authority approved the sentence but suspended the dishonorable discharge until the soldier's release from confinement, ordered executed the sentence as thus modified, and designated the 2912th Disciplinary Training Center, Shepton-Mallet, Somerset, England, as the place of confinement. The proceedings were published by General Court-Martial Orders No. 2, Headquarters Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, 6 January 1945.

3. The evidence for the prosecution shows that on the evening of 12 October 1944, by prearrangement, accused met Miss Pauline Hoggart in a pub at Eccleshall, Staffordshire, England (R7,8,13). They visited the "George and Dragon" and "Bee Hive" pubs and drank beer during the course of the evening (R7,8). When the bar closed at about 10 o'clock, they left together and walked along a road a short distance from the city (R8,9,13,14). Accused wanted Miss Hoggart to go into a field but she refused. He kissed her and they proceeded further up the road where they found a gate and walked through and proceeded some distance into a field and stopped. Accused removed his raincoat and placed it on the ground. They sat down together and accused kissed the girl. She returned his kisses. He fondled her breasts and she did not object (R8,9,10,16,17). Accused then put his hand underneath her clothes, whereupon she became frightened and started to scream (R9,17). Accused struck the girl in her face with his hand or fist (R9,18). During this time Miss Hoggart was kicking and struggling. She asked him to let her go but he grabbed her by the throat and she "went out" - fainted (R9). The next thing she recalled was waking up and wandering about the field. She returned to Drake Hall, a hostel where she resided at about 3:30 o'clock in the morning (R7-9). Upon reporting the occurrences of the evening, she was placed in the "sick bay" by the night watchman (R9,10). At this time her hair was matted with blood and mud and both her eyes were black and swollen. She was "disheveled and distressed" (R25,30). The next morning she was examined by a physician who described her as being "rather shocked and in a state of nervous exhaustion" (R35). Her face and nose were injured and both eyes closed and "badly contused". She also sustained bruises on the innerside of her right thigh, the region of the vulva, the clitoris and multiple abrasions of the legs and she was bordering on hysteria. In the opinion of the doctor the facial bruises could not have resulted from only a single blow (R35,36). The bruises on the thigh were done by a forcible application of the knee on her thigh (R37).

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 the evening of 12 October 1944, he had a date with Miss Hoggart, whose acquaintance he had made about a month previously (R49-51). During the evening they visited several pubs in the town of Eccleshall and drank beer and brandy. At about 10 o'clock they left the "Bee Hive" pub and started walking towards Drake Hall, where Miss Hoggart lived. He asked her three times along the way to go into a field with him but she refused. (R52). They discussed the subject of intercourse together and he asked her to engage in the act with him. She replied that she "wouldn't intercourse" with accused but that she had "intercoursed before" (R61,64,65). Accused kissed the girl and then she went with him into the field. He spread his raincoat on the ground, removed his blouse and made a pillow of it, after which they both sat down (R52,53). He kissed her again and played with her breasts without the girl objecting. They both then lay down and he got on top of her and she still made no protests (R53). However when he unbuttoned his pants and took out his penis, she pushed it aside and bit his hand. This made him angry and as he is hot tempered, he "struck her a blow" with his fist (R53,63). When he learned that her nose was bleeding he used his handkerchief to wipe the blood from her face. He then asked her if she wanted him to take her home, to which she replied "I wouldn't walk with you" (R54,63). Thereupon, at approximately midnight, he picked up his raincoat and blouse and returned to his barracks (R54). He admitted that he wanted to have intercourse with Miss Hoggart but stated that he did not force her consent. He desisted when she objected to his advances (R59).

5. The Specification as drawn charged accused with assault with intent to commit a felony, to wit: rape, and the court, by exceptions and substitutions, found him guilty of a different offense, namely, assault with intent to do bodily harm. Such finding is not a lesser included offense in a Specification alleging assault with intent to commit rape (CM ETO 4825, Gray; CM ETO 6227, White). Accused having been charged with an assault involving a specific intent cannot legally be found guilty of an assault requiring an entirely different intent (1 Wharton's Criminal Law, 12th Ed., sec.841-842, pp 1128-1135).

> "It need scarcely be noted that while a court-martial may always convict of a lesser kindred offense, it is not empowered to find a higher or graver offense than the one charged, nor an offense of a different nature. * * * And this though the offense clearly shows that the greater and distinct offense was the one actually committed; for a party cannot be convicted of an offense of which he had not been notified that he is charged and which he has had no opportunity to defend" (Winthrop's Military Law and Precedents, Reprint, 1920, p.383). (Underscoring supplied).

It therefore follows that accused herein cannot properly be found guilty of an assault with intent to do bodily harm - an offense distinctly different from that charged. The Specification, in describing the assault with intent to rape, alleges that he struck her "on the face with his hand". Since the evidence conclusively shows that accused struck the girl a severe blow in the face with his fist, an assault and battery is clearly established and such offense is included in the allegation of the Specification (MCM, 1928, par. 149, p. 177; CM ETO 1177, Combess; CM ETO 1690, Armijo; CM ETO 4825, Gray; CM ETO 6227, White; CM 230541, Daniel; CM 220805, Peavy; CM 239839, Harrison; Bull JAG, November 1943, vol. II, No. 11, sec. 451(12), p.428).

> "Under charges for assault and battery with intent to commit * * * rape, the accused may be found guilty of assault and battery only" (Winthrop's Military Law and Precedents, Reprint, 1920, p.689).

It follows, therefore, that the record of trial is legally sufficient to support only so much of the findings of guilty as involve findings of guilty of the lesser included offense of assault and battery in violation of Article of War 96. The maximum punishment authorized for the commission of such offense is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (Table of Maximum Punishments, MCM, 1928, par.104c, p. 100).

6. The charge sheet shows that accused is 23 years and five months of age and was inducted 14 December 1942 at Fort Niagara, New York. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offense. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons herein stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of assault and battery in violation of Article of War 96 and only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month for a like period (MCM, 1928, par.104c, p.100).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private PETER C. FALISE (32552801), 154th Replacement Company, 129th Replacement Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of assault and battery in violation of Article of War 96, and only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay for a like period, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of assault with intent to do bodily harm, so vacated, be restored.

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

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

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

(Findings and sentence vacated in accordance with recommendation of Assistant Judge Advocate General. GCMO 119, ETO, 15 April 1945.)

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

BOARD OF REVIEW NO. 2

13 JUL 1945

CM ETO 6301

U N I T E D S T A T E S	XII CORPS
v.	Trial by GCM, convened at Metz, France, 5 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROY D. KIRBY (37537593), Company B, 166th Engineer Combat Battalion	

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

1. The record of trial in the case of the 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 Roy D. Kirby, Company B, 166th Engineer Combat Battalion, APO 403, U. S. Army, did, at Baerendorf, France, on or about 1700, 24 November 1944, desert the service of the United States by absenting himself from his place of duty without proper leave, with intent to avoid hazardous duty, to wit: to take up a defensive position as infantry under enemy shell fire, and did remain absent in desertion until he surrendered himself at Baerendorf, France, on or about 0830, 25 November 1944.

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

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

Accused was a member of Company B, 166th Engineer Battalion and was present when the company, on the afternoon of 24 November 1944, dismounted from trucks in the town of Kirrberg, France, and marched single file on the road leading to the town of Baerendorf which was held by the enemy. The terrain between these two towns included a hill situated on the left of the road in the direction of the march, overlooking Baerendorf, which lay about 500 yards beyond the hill (R7,8,13). The company was to operate as infantry and its mission was to take and hold that hill (R10). When the platoon to which accused belonged reached a point near the foot of the hill, an anti-tank gun opened fire on a tank moving down the road and the platoon itself was subjected to small arms fire. The men, including accused, sought cover in a ditch and remained there awaiting further orders from the company commander. While thus waiting they were subjected to fire by "88's", 20 mm. guns and bazookas (R7,14).

When the company commander arrived he ordered the men in the ditch to disperse and go up the hill (R7,13,17). Accused was present as they left the ditch and started up the hill. They did not all start running up at the same time. Their movement from the ditch covered a period of several minutes. At a hedgerow on the side of the hill about 100 yards from the ditch, the leader of accused's squad made a quick check of the men who were there and did not see accused and two other members of the squad. The squad leader's testimony on this point was as follows:

"We were still under fire and I made a quick check of all the men at the hedgerow and I was ordered to go up to the high part of the hill and we moved out there and didn't have a chance to check the men. I told the platoon sergeant I was short three men and moved up onto the hill and that is where we were stationed" (R11).

The squad leader further testified that there was a great deal of confusion and accused might have lost contact with the squad while going up the hill (R9,10). This was corroborated by the platoon leader who testified that "there was a general state of confusion" when the men were ordered to disperse and go up the hill (R14). The squad leader made his check at the hedgerow about 4:00 pm and although it was still daylight, it was raining and visibility was so low that one could not see clearly "from one side of the hill to the other" or recognize a man farther than 20 feet away. The hedgerows along the side of the hill were dense and the hill was constantly under shellfire (R9,11,15). The squad leader made other checks during the evening and night and did not find accused (R8). A man could have been lying in a small depression up on the hill and his presence not discovered unless he moved about (R16). After they reached the top of the hill, defensive positions were assigned to the men in different places (R15). The platoon leader first learned at 8:00 pm that accused was missing. A search of the area did not disclose his presence (R14).

At about 4:00 o'clock the next morning, the company commander went down from the hill to get his jeep. He searched the quarry which was about 300 yards from the hill in the direction of Kirrberg, and found some soldiers there but he did not know whether accused was among them. He also shouted loudly enough for everyone to hear. He then rejoined his company, which he had already placed in formation and marched it into Baerendorf (R13,18). Accused reported to his squad leader between 6:30 and 7:00 that same morning in Baerendorf, and stated to him that he had lost contact with the squad, and had been unable to find it until then (R8,12).

The company commander, a captain, testified that as a result of reports he received on absentees, he questioned accused at noon when the situation had eased up. Accused told him he was in the quarry the entire night, had not slept, and did not know the company had moved into Baerendorf (R18,19,20). Over objection by the defense, the captain was permitted to testify that accused afterward "made conflicting statements as to where he had been and changed his story saying he was on the hill". When cautioned by the prosecution to confine his testimony to what accused had actually said, he stated,

"I can't tell you definitely, there were four similar cases". Besides accused, he examined several other soldiers separately over a period of an hour and at the time he wrote up his testimony he "paid little attention due to the similarity of cases and hadn't outlined any definite story as to" accused. He was positive, however, that accused stated he had spent the night in the quarry (R19,20). Accused's place of duty that night was not in the quarry but on the hill (R21).

4. The evidence introduced by the defense was substantially as follows:

a. Technician Fourth Grade Alfred J. Prairie, a member of the same company and squad, testified that he was with accused on 24 November 1944. When the company commander ordered the men to disperse on the hill, Prairie and accused moved out of the ditch together and went up the hill. The squad's advance did not appear to be organized. Witness and accused were on the right end of the squad and either ahead of the other men or among the first. After reaching halfway to the ridge, they met enemy fire and "hit the ground" and remained there for about 15 minutes. Accused then got up, continued forward and went over the ridge. Prairie last saw him as he moved up the hill beyond the hedgerow. It was getting dark. Prairie stayed behind for 15 or 20 minutes longer and then moved up to the ridge. He could not see anyone there and concluded he had lost contact with the squad. He went down to the quarry, reported his predicament and was detailed to bring up coffee to a "particular ridge at the quarry and they would come down and get it". He did not see accused again until about 5:00 or 5:30 the next morning when he met him 600 or 700 yards from Kirrberg and 200 or 300 yards before reaching the quarry, under the following circumstances:

> "We were driving along the road in our jeep and someone hollered and I recognized the voice and stopped and I said 'Kirby' and he said 'Yes' and he got in and we went back to town" /Kirrberg/ (R27).

At the same time, when they were stopped, accused asked Prairie if he knew where the company was. Witness himself did not rejoin his squad until that morning (R24-30).

b. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness in his own behalf (R31) and testified in substance as follows:

After leaving the trucks at about 3:00 pm the company moved forward toward Baerendorf. Shellfire drove them for cover in a ditch. The captain then ordered them to leave the ditch and go up the hill.

There were two hills. The first was a small one at the quarry, and the other was a big hill beyond the quarry. He went up the big hill. After going about three-fourths of the way up the hill, accused and Prairie "hit the ground" where he remained about 10 minutes. He then left Prairie behind and moved up farther until he reached a hedgerow on top of the hill. There he could look out in the general direction from which the enemy was shelling. He could not see the rest of his squad. It was beginning to get dark and he stayed there about 45 minutes until it was "good and dark". He moved about along the hedgerow in an effort to locate his squad. It was raining, the night was very dark, and he could not see "any distance at all". Around 6:00 pm, after spending about 30 minutes looking about on top of the hill, he went back to the starting point. On the way down the hill he saw no one. At the bottom of the hill he met some infantrymen and asked them about his company. He was told that the engineers had gone back toward Kirrberg. He walked along the road toward Kirrberg and reached a point beyond the quarry where he found some half-tracks with infantrymen. He did not try to climb the hill again to look for his unit because it was too dark to see. He stayed with them until about 4:00 o'clock the next morning, when he went as far as the quarry looking for rations. He had had no supper and sleep. At no time during the night was he in the quarry. He finally met Technician Fourth Grade Prairie and Simons who were members of his outfit. He called to them and they stopped. He rode back with them. He reported to his squad leader who asked him where he had been and accused replied that he got lost. While he was at the half-track, accused did not know the company was on the hill. He heard no one call out for the men of his squad or company (R32-38).

5. Accused's statement to his commanding officer that he had spent the entire night in the quarry, when considered in connection with the action that occurred that same night and the part that accused was under a duty to play in it, amount in substance to a confession of guilt. The damaging character of the statement was aggravated by the improper reception of the company commander's testimony of his conclusion that accused had afterward "made conflicting statements as to where he had been". The Manual for Courts-Martial, 1928, paragraph 114a, page 116, provides as follows:

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"The fact that the confession was made to a military superior * * * will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior * * *".

The incriminating statements were elicited by questions propounded immediately after an engagement with the enemy by an aroused company commander to a soldier suspected of having deserted his unit during that very engagement. It does not appear that accused was warned of his privilege against self-incrimination. While the company commander had the right to question his men as to where they had been, confessions so obtained cannot be related in court unless the safeguards established by the law to prevent the reception of involuntary confessions have been observed. The record discloses that in this case no inquiry was made into the circumstances under which accused made the statement in question. The statement, since it amounted to a confession, was erroneously admitted in evidence (III Bull.JAG 227-228). Therefore, in determining the sufficiency of the evidence, the testimony of the company commander as to the statements made by accused must be excluded and the remaining evidence examined to see if it is of such quantity and quality as practically to compel findings of guilty of the offense charged or of any lesser included offense (CM ETO 1201, Pheil; CM ETO 1693, Allen; CM ETO 3931, Marquez).

Far from compelling a finding that accused quit his place of duty with intent to avoid hazardous duty, the evidence in the record, apart from his pre-trial statements, is reasonably consistent with the conclusion that accused without his own fault, but because of the confusion caused by enemy fire, rain and darkness, and the obstructions created by dense hedgerows, became separated from his unit and was unable to find it until early the following morning.

The Board of Review is of the opinion that the evidence is not legally sufficient to support findings of guilty.

6. The charge sheet shows that accused is 23 years and seven months of age and that he was inducted 5 August 1943 at Fort Leavenworth, Kansas. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review

holds the record of trial legally insufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 2

CM ETO 6302

24 MAY 1945

U N I T E D S T A T E S)	XII CORPS
)	
v.)	Trial by GCM, convened at Metz,
)	France, 5 January 1945. Sentence:
Private MANUEL SOUZA)	Dishonorable discharge, total
(31383973) Company B,)	forfeitures and confinement at
166th Engineer Combat)	hard labor for life. Eastern
Battalion)	Branch, United States Disciplinary
)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Manuel Souza, Company B, 166th Engineer Combat Battalion, APO 403, U. S. Army, did, at Baerendorf, France, on or about 1700 24 November 1944, desert the service of the United States by absenting himself from his place of duty without proper leave, with intent to avoid hazardous duty, to wit; to take up a defensive position as infantry under enemy shell fire, and did remain absent in desertion until he surrendered himself at Baerendorf, France, on or about 0830, 25 November 1944

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

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

On 24 November 1944, Company B, 166th Engineer Combat Battalion, of which company accused was a member, was moving forward in column as one of the components of Combat Command B, 4th Armored Division (R6,7,13). As the company neared the town of Kirrberg, France, Captain John R. Klug, commanding officer of Company B since 7 November 1944, received orders that his unit would dismount from its vehicles and move forward as infantry to a hill near Baerendorf, France, approximately two miles distant, where it was to take up a defensive position in support of a unit of armored infantry (R6,7,8,13,17). Upon receipt of these orders, Captain Klug left the company in command of a Lieutenant Rupert with instructions "to start them up the road" and went ahead to reconnoiter the assigned position (R7). The company thereupon dismounted and proceeded towards Baerendorf on foot, leaving its vehicles, together with certain drivers, mechanics and cooks, at Kirrberg (R7,8,14,17). As the first elements of the company arrived at the hill a defensive position was taken up, but, according to the company commander, the position "was not a clear cut one due to the fact that there was such a few men and I was pretty busy checking the platoons" (R7). He further testified:

> "Each squad was given a definite sector, the company itself in sort of a triangle with the CP at the apex toward town. Each platoon covered about 200 yards and each squad occupied approximately one-third of

that, probably some 80 yards, in a perfect triangle on the hill * * * We had a triangle with the first and second platoons pointing right at the town, the third platoon parallel to the front of the town" (R9,10,13).

Accused's squad was in the third platoon, which was last into position on the rear flank. Captain Klug testified that accused's place of duty was just east of a straight line between Kirrberg and Baerendorf perpendicular to the road (R13). However, as accused's squad neared the position at about 1530 hours, it was subjected to small arms fire. As a result, accused and the remainder of the squad took cover in a ditch near a quarry at the foot of the hill and remained there awaiting orders (R8,9,17,18). At this time Captain Klug came off the hill, noticed the men bunched up in the ditch, and "while I was going I told them to get the hell out of there and scatter out and get up the hill" (R7). In compliance with this order the entire squad began to move up the hill (R8). The accused's squad leader testified as follows with respect to the manner in which the squad dispersed:

"Q. The captain told the men to disperse, is that right?
A. Yes, sir.

Q. Over what territory did they disperse?
A. It came as a power of suggestion, the platoon commander led and we all followed on dispersed up the hill.

Q. Were you going to disperse in a column or perpendicular to the road that you were approaching the town on?
A. We weren't told exactly what method to use, we were just told to disperse up the hill.

* * *

Q. After the captain ordered the men to disperse at the time of the firing, was your squad ever reorganized as a squad?
A. We were never to my knowledge" (R16).

As the men moved up the hill they were shelled and started to dig in. At this time, which, insofar as can be gathered from the record, was shortly after the order to disperse was given, the squad leader checked his men. Accused was missing (R15,17). Either two (R15) or three (R17) other members of the squad also were missing. The process of

"stringing up the hill" required about an hour (R9). At about 1730 hours, as it was growing dark, the company received orders to move on into Baerendorf and later did so although the time when this move was accomplished is not disclosed by the record. At about 2330 hours that night, at a location not shown, a search through the company was made and again accused could not be found (R15). The company was relieved in Baerendorf at about 0900 hours the following morning. Accused reported to his squad leader at approximately 0900 hours "when the cooks and drivers came up".

Both while on the hill and while moving into Baerendorf the company was subjected to enemy fire (R7,8). Accused did not receive permission either from his squad leader or his company commander to leave his squad on the afternoon of 24 November (R13,18). The place of duty of accused's squad that afternoon was "up on this hill". Accused's squad leader testified that at the time in question the hill was a "dangerous place" (R18).

After being relieved at Baerendorf the company returned to Kirrberg to secure its vehicles and Captain Klug testified that at about 1200 hours on 25 November:

"A. I called for the men who were missing, got them together with their platoon sergeants and squad leaders and questioned them to find out where they were and why they didn't show up.

Q. At that time did Private Souza make any statement to you?

A. Yes, sir. I talked to Private Souza, I had all of them there together and I questioned him as to where he was and he said he was on the hill so I questioned him some more and the non-coms who were his direct superiors and they hadn't seen him and had made a search and couldn't locate him and after considerable questioning he admitted the hill he had been up on was about twenty feet up. He admitted he had gotten orders to go up on the hill but couldn't see any of the men and after some more questioning he said he started to go up but it was impossible to. It

was 3:30 when I initially gave him the order * * * It gave him about two hours of daylight. I would say it took until 4:30 stringing up the hill right from this quarry. He claimed he stayed at little while on the top of that little ridge over the quarry and was afraid to move up and finally when he got enough nerve he went back to town and couldn't see anybody there" (R9).

As the result of cross-examination by defense counsel the following colloquy occurred:

"Q. At the time Private Souza made these statements to you about which you have testified, on or about 1200 25 November, what had you done by way of informing him of his rights not to make any self-incriminating statements?
A. I made none.

Q. Will you repeat who was present at this inquiry which you made?
A. I had Private Souza, I can't tell you the exact line up.

Q. You had all the officers of the company?
A. I had Lieutenant Rupert and everyone here now. I had all of the men on trial except one.

Q. Did you call this group an informal board of inquiry?
A. No, sir, I didn't. We just came off the hill, I didn't know the men were gone, all I knew, my platoon commanders told me and I knew some were gone. It developed all got there except these four.

Q. My question was, did you set up what amounted to a formal or informal board of inquiry into Private Souza's case, and have that in your orderly room on 25 November?
A. I had no orderly room, it was the first time I had a chance to talk to these men and find out what their stories were. I did all the questioning.

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Q. Did you cross-examine them pretty severely?
A. Yes, sir. I was very upset.

Q. Do you think you did not inform this man that he had a right not to incriminate himself?
A. No, sir.

Q. Do you think he knew he had a right not to make a statement?
A. I don't see where I had to inform him, I wanted to know where he was, I wanted to know where in the hell he was during the night, those are natural questions.

Q. Did you understand at that time the accused might have the right not to answer any incriminating questions?
A. Yes, sir.

Q. Did you do anything to inform him of that right?
A. No, sir.

Q. Do you think, considering this man's intelligence and experience, that he answered the questions you asked with full knowledge he was not required to make any statements which degraded him?
A. Yes, sir. I think so.

Q. Do you think that this witness fully knew that he didn't have to make any statements which incriminated himself?
A. I think so.

Q. Upon what do you base that?
A. The men knew that it was a serious thing. In other words, I told these men before I ever started.

Q. I am not talking about the serious things, what I am trying to find out is whether or not the testimony you gave as to the statements of this man are admissible, whether he made these statements freely and voluntarily, is there anything he said which makes you think he had that knowledge?
A. I can't follow your line of reasoning.

Defense: I want to move at this time to strike from the record and testimony of this witness any references to statements made by the accused to him on the 25th of November at about 1200, particularly with reference to the statement wherein the accused said he was scared.

Prosecution: The prosecution takes the position that we have not introduced a confession but that the evidence that has been introduced comes under the provisions of the rules of evidence as laid out in the manual, paragraph 114 b., admissions against interest, and as such are admissible.

Law Member: Subject to objection by any member of the court, the motion of the defense counsel is overruled. (No objection).

Defense: No further questions" (R11,12,13).

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

5. a. In determining the legal sufficiency of the instant record of trial, the Board of Review is faced at the outset with the questions whether accused's statements to his commanding officer constituted admissions against interest or a confession and, if the latter, whether the confession was admissible in evidence as having been voluntarily made. The law member admitted the statements in question as admissions against interest. With reference to the distinction between admissions against interest and confessions, the following appears in the Manual (MCM, 1928, par.114a,b, pp.114,116,117):

"A confession is an acknowledgement of guilt. * * * A confession not voluntarily made must be rejected. * * * In many instances an accused has made statements which fall short of being acknowledgments of guilt but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in evidence without any showing that they were voluntarily made". * * *

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"The following are examples of admissions against interest: A statement made after arrest by an accused charged with homicide in a dance hall, that he was in the hall when the homicide occurred; a statement made to a sheriff by an accused charged with desertion that he was tired of working for the Government and did not want to work for it any longer".

and the following extract from Wharton's Criminal Evidence, 11th Ed., 1935, Vol.II, sec.580, pp.954,955).

"A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt. In other words, an admission, as applied to criminal law, is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only to establish the ultimate fact of guilt".

The following quotation is also relevant in this connection:

"A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime (State v. Masato Karumai, 126 P.(2d) 1047,1052).

In applying the rules above stated to the instant case, the following facts are pertinent. Upon receiving information leading him to believe that accused and other alleged offenders had absented themselves from their stations during the previous afternoon and night, Captain Klug called them together and examined them in the presence of other company officers and noncommissioned officers for the express purpose

of ascertaining "where they were and why they didn't show up". After being questioned at some length, accused stated, among other things, that "he had gotten orders to go up on the hill" and that he "was afraid to move up and finally when he got enough nerve he went back to town he couldn't see anybody there". While accused did not, in so many words, acknowledge that he was guilty of a violation of Article of War 58 as supplemented by Article of War 28, he admitted all of the elements of the offense with which he was later charged, viz, that he left his place of duty and went back to town because he was scared. Viewed realistically and in their entirety, and having regard to the manner in which these statements were elicited, such statements, although separately made in response to questioning, amounted in sum to an acknowledgment of guilt (Cf; CM ETO 292, Mickles; CM ETO 1201, Pheil). The Board of Review is therefore of the opinion that the statements of the accused constituted a confession rather than admissions against interest and should be so regarded in determining their admissibility into evidence.

b. Having reached the conclusion above stated, the question arises whether accused's confessions were admissible in evidence as having been voluntarily made. In this connection, the following statements are from the Manual for Courts-Martial (MCM, 1928, sec. 114a, p.116):

> "It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a prima facie showing to this effect may be required before evidence of the confession itself is received. No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.
>
> A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made * * *

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> The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior".

Here, accused's statements were not only made to a military superior but were made to such superior after accused was examined "pretty severly" and at some length in the presence of other military superiors. This being true, further inquiry into the circumstances was required and it became incumbent upon the prosecution to show that the statements were voluntarily made (CM 233453, McFarland, 20 B.R. 15 at 22; Winthrop's Military Law and Precedents, Reprint, 1920, p.329; and see Johnstone v. United States, (CCA 9th, 1924) 1 F (2d) 928; 38 ALR 116 at 120). The captain as an attribute of command had a perfect right to question his men as to where they were, but he could not repeat their statements in court without showing that certain legal requirements were met. Evidence that accused was advised prior to making his confession that any statements he might make could be used against him and that he need not make any statement which might tend to incriminate him, which is always competent evidence tending to show that any confession made subsequeht thereto was voluntary, is lacking in this case. Rather, the record affirmatively shows that no such warning was given. Aside from the company commander's statement that he informed the accused that he was confronted with "a serious thing" and his unsupported expression of opinion to the effect that he though accused understood "that he didn't have to make any statement which incriminated himself", the record is bare of any evidence tending to show that the statements of accused were not induced by hope of benefit or fear of punishment inspired by a person competent to effectuate such hope or fear. The Board of Review is accordingly of the opinion that the prosecution failed to sustain the burden of showing that the statements were voluntary, which burden arose because of the conditions under which the statements were made, and that the confession was therefore erroneously admitted into evidence (CM 220604, Antrobus, 13 B.R. 11; CM 222148, Griggs, 13 B.R. 269; CM 233543, McFarland, 20 B.R. 15).

c. This being true, the following rule becomes operative in passing upon the record of trial:

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved" (CM 130415, Dig.Op. JAG, 1912-1930, sec.1284, p.634; and see CM ETO 1201, Pheil, and authorities therein cited; CM ETO 4701, Minnetto, and authorities therein cited).

Under the rule above stated, it become necessary to determine whether the evidence here of record, aside from accused's confession, is of sufficient probative force as virtually to compel a finding that the accused voluntarily absented himself from his squad with intent to avoid hazardous duty. Briefly restated, the evidence shows that accused dismounted with his squad near Kirrberg and proceeded with it some two miles to a hill near Baerendorf. As the squad neared the position at about 1530 hours, it was subjected to small arms fire as a result of which the men took cover in a ditch and awaited orders. The company commander ordered the men to disperse and accused, together withthe rest of his squad, started to move up the hill. Rather shortly thereafter, the squad leader checked his men and found accused to be missing. A search throughout the company at approximately 2330 hours that night also failed to reveal his presence. He was not again seen until he reported to his squad leader at 0900 hours the following morning in Baerendorf. Thus stated, the evidence rather strongly supports the inference that accused quit his place of duty with intent to avoid hazardous duty. However, a closer examination of the evidence casts doubt upon the strength of this inference, It is difficult to escape the conclusion that the situation at the hill near Baerendorf was somewhat disorganized during the period when accused was first found to be missing. The position taken up by the company was not, at least initially, "a clear cut one". The order given to the men by the company commander, who was newly in command, was indefinite. His testimony shows that he came off the hill, saw the men bunched up in the ditch and "while I was

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going I told them to 'get the hell out of there and scatter out and get up the hill'". Despite his testimony as to the precise deployment of the men and the exact place of duty of accused, the testimony of the squad leader indicates that the men were not told in what manner or over what terrain they were to disperse. The area into which the men advanced was under enemy fire and the process of "stringing up" the hill required about an hour. It is difficult to determine from the record the time when the first check of the men was made but it was apparently rather shortly after the order to disperse was given. The first check was apparently only squad wide and in this connection it should be remembered that the squad leader testified that "to my knowledge" the squad was never reorganized as such subsequent to the order to disperse. It is also significant that, in all, either one-third or one-fourth of the squad was missing at the time the first check was made. The time when the company moved on into Baerendorf is not shown by the record although it was shown that orders to do so were received "about dark" which other evidence in the record shows to have been about 1730 hours. Thus, the company may have moved from the hill at the time the search for accused was made at 2330 hours that night. Accused reported to his squad leader in Baerendorf at 0900 hours the following morning. As above seen, under accepted doctrines accused's confession must be deemed inadmissible and cannot be considered in evidence because not voluntarily made. When the confession is excluded, the remaining evidence by no means excludes the very real possibility that, in the disorganization resultant upon the dispersion of the men due to enemy fire and the orders of the company commander, accused became separated from his squad, was thereafter unable to locate it, remained lost during the hours of darkness, and reported to his unit upon locating it the following morning. This being true, it cannot be said that the evidence of record, aside from accused's confession, is of that quantity or quality as practically to compel in the minds of reasonable and conscientious men a finding of guilty. It follows that the findings of guilty should be disapproved.

6. For the foregoing reasons, 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 of Operations
APO 887

BOARD OF REVIEW NO. 1

CM ETO 6333

28 FEB 1945

UNITED STATES v. Private ALBERT DeRUBIS (31048208), Company C, 28th Infantry, and Privates RUBIN T. CLARK (34209335), and CURTIS E. POSEY (15058968), both of Casual Detachment 43, Field Force Replacement Depot 8, 3rd Replacement Depot	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Port Arms, 581 Antrim Road, Belfast, Northern Ireland, 24 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor - DeRUBIS, eight years; CLARK, 14 years; POSEY, 14 years. DeRUBIS: Federal Reformatory, Chillicothe, Ohio. CLARK and POSEY: United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Confinement in a penitentiary is authorized upon conviction of desertion in time of war by Article of War 42 and upon conviction of the crime of housebreaking by Article of War 42 and Title 22, section 180 of the District of Columbia Code (1940). However, prisoners 25 years of age and younger and with sentences of not more than ten years will be confined in a Federal correctional institution or reformatory. Designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement for accused DeRubis is therefore proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended by Cir.25, WD, 22 Jan. 1945). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for accused Clark and Posey is also proper (Ibid., sec.II, pars.1b(4), 3b).

_____ Judge Advocate

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