E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 9421
CM ETO 10578

VOLS. 21-22

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 21 B.R. (ETO)

including

CM ETO 9421 - CM ETO 9989

(1945)

Office of The 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. 3

18 MAY 1945

CM ETO 9421

U N I T E D S T A T E S	IX TACTICAL AIR COMMAND
v.	Trial by GCM, convened at APO 595, U. S. Army, 8 February 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant LOREN R. STEELE (O-862103), 379th Air Service Squadron, 74th Service Group	

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

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

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

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

Specification 1: In that Second Lieutenant Loren R. Steele, AC, 379th Service Squadron, 74th Service Group, did, at Site A-92, on or about 20 October 1944, knowingly and willfully apply to his own use and benefit, two (2) olive-drab, wool shirts of the value of about eight dollars and forty-four cents ($8.44), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at Site A-92, on or about 26 October 1944, knowingly and willfully apply to his own use and benefit about one thousand (1000) cigarettes, of the value of about two dollars and thirty-four cents ($2.34), and about one hundred (100) packages of candy, of the value of about two ($2.00) dollars, all of the aggregate value of about four dollars and thirty-four cents ($4.34), being the cigarette and candy contents of about ten (10) cases of ten-in-one rations, the property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 83rd Article of War.

Specification 1: In that * * * did, at St. Trond, Belgium, on or about 20 October 1944, wrongfully dispose of by barter with one Francois Jans Kicken, two (2) olive-drab, wool shirts of the value of about eight dollars and forty-four cents ($8.44), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at St. Trond, Belgium, on or about 26 October 1944, wrongfully dispose of by barter with one Emmy Blanckert, about one thousand (1000) cigarettes, of the value of about two dollars and thirty-four cents ($2.34), and about one hundred (100) packages of candy of the value of about two ($2.00) dollars, all of the aggregate value of about four dollars and thirty-four cents ($4.34), being the cigarette and candy contents of about ten (10) cases of ten-in-one rations, the property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of, the specifications and charges, except the words in Specification 2, Charge I and Specification 2, Charge II "one hundred (100) packages of candy, of the value of about two($2.00) dollars, all of the aggregate value of about four dollars and thirty-four cents ($4.34)", substituting therefor in each case the words "forty packages of candy of the value of about eighty cents ($.80), all of the aggregate value of about three dollars and fourteen cents ($3.14)", of the excepted words not guilty and of the substituted words guilty.

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 two years. The reviewing authority, the Commanding General, IX Tactical Air Command, 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, describing it as "wholly inadequate punishment for an officer convicted of such shameless breach of trust and ghoulish misappropriation of United States military stores and disposing of them to his own profit", designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The following evidence was adduced by the prosecution:

In the morning of 20 October 1944, accused asked Sergeant Warren H. Bryant, Squadron Armorer, 379th Air Service Squadron, to accompany him to a shop in the town of St. Trond, Belgium, for the purpose of appraising a pistol there on sale. On reaching the shop, the sergeant gave his opinion as to the approximate value of the weapon and accused agreed with the shopkeeper, whose name was Kicken, to trade two olive-drab shirts, size 16-32, for it. He and the sergeant thereupon returned to the squadron area and went to the squadron supply tent. Accused entered the tent and in a few minutes came out with two shirts which were the property of the Squadron Supply. They returned to the shop and accused exchanged the shirts for the pistol (R7-9).

On 26 October 1944, accused again came to the squadron supply office and asked Sergeant Bryant to help him open some cases of ten-in-one rations which were the property of the Squadron Supply and were stored in the supply office. The cases were marked "10-in-1" and "U.S.Army". Accused said he had "a deal on" for approximately one hundred packages of cigarettes and that the rations were his only source of supply. They proceeded to open ten cases of the rations and removed from them forty or fifty bars of chocolate and 100 packages each containing ten cigarettes. Accused mentioned that as long as the major didn't see them open anything/would be all right. He then took the candy and cigarettes and drove to a camera store in St. Trond. He entered the store, carrying the cigarettes and chocolate, and emerged some time later without the cigarettes and candy, but with a camera (R9-12).

It was stipulated between the parties that the two shirts and the candy and cigarettes alleged to have been misapplied by ac-

cused were of the value described in the specifications (R7).

4. Accused, after being warned of his rights by the president of the court, elected to take the stand and testify under oath (R13). He stated that at the time of the alleged offense, he was Squadron Supply and Transportation Officer and that the Squadron Supply was under his jurisdiction. He specifically stated that he made no denial of the charges and specifications and admitted that he wrongfully disposed of property of the United States Government. He also admitted having exchanged the candy and cigarettes described by the prosecution with one Emmy Blanckert for a camera. No money was involved in this transaction, but in connection with his acquisition of the pistol, he paid Kicken 1300 francs in addition to the two shirts. He disclaimed any intent of "deceiving" the government and was unaware at the time that he was doing anything wrong (R13-15).

In behalf of accused, excerpts from his record were read to the court, showing that he had been a commissioned officer for 18 months, had graduated from the Yale School of Communications, and had had ratings varying from "very satisfactory" to "superior" prior to the time of commission of the offenses charged (R12-13).

5. The elements of the offenses charged under Article of War 94 (Charge I, Specifications 1 and 2) are admitted in the pleas of guilty, and furthermore, are fully proved by the evidence introduced by the prosecution and by the testimony of accused. Hence there is no doubt that the record of trial is legally sufficient to sustain the findings of guilty of this Charge and its specifications.

With respect to Charge II, it is apparent that the specifications thereto should have been laid under Article of War 94 rather that Article of War 83. There is no allegation that accused, in the words of the statute, "willfully, or through neglect" suffered military property to be "wrongfully disposed of", but rather it is alleged that he himself did "wrongfully dispose" of such property by barter. In other words, the specifications, which follow the form provided in the Manual for Courts-Martial for violations of Article of War 94 (MCM, 1928, Appendix 4, p.252), allege the direct commission by accused of a wrongful disposition of government property. While originally, Article of War 83 or its earlier counterpart denounced offenses of this character, it has been "practically superseded" in this respect by Article of War 94 (Winthrop's Military Law and Precedents (Reprint 1920) p.558). Hence, it is the latter Article under which the specifications should have been charged in this instance. Allegations merely to the effect that accused

"wrongfully disposed" of military property by barter are insufficient for the purpose of charging that such wrongful disposition was committed either "willfully" or "through neglect" as required by the article (See CM 217868, Schiedinger, 11 B.R.329). However, as previously stated, the specifications properly set forth violations of Article of War 94 and hence, the designation of the wrong article is not material in this case (CM ETO 5032, Brown and Finnie). All elements of the offenses thus charged are adequately proved by the prosecution's evidence and accused's testimony, and, in addition, are admitted by the pleas of guilty.

6. The charge sheet shows that accused is 23 years and three months of age. He enlisted 31 July 1942 at Fort Sheridan, Illinois, and was commissioned second lieutenant, Army of the United States, 20 May 1943, at AAFTTC Yale University, New Haven, Connecticut. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and the specifications thereof, legally sufficient to support the findings of guilty of Charge II and the specifications thereof in violation of Article of War 94, and legally sufficient to support the sentence.

8. Dismissal, total forfeitures and confinement at hard labor for two years are authorized, in the case of an officer, as a penalty for violation of Article of War 94. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Benjamin P. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Davis Judge Advocate

(6)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant LOREN R. STEELE (O-862103), 379th Air Service Squadron, 74th Service 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 of Charge I and the specifications thereof, legally sufficient to support the findings of guilty of Charge II and the specifications thereof in violation of Article of War 94, and legally sufficient to support the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 9421. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9421).

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

(Sentence ordered executed. GCMO 189, ETO, 30 May 1945).

CM ETO 9421

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

BOARD OF REVIEW NO. 2

18 MAY 1945

CM ETO 9422

U N I T E D S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Sergeant CLETE O. NORRIS (37082314), 3384th Quartermaster Truck Company	)	Trial by GCM, convened at Verviers, Belgium, 9 February 1945. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Clete O. Norris, 3384th Quartermaster Truck Company, did, at or near Boelhe, Belgium, on or about 6 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Captain William E. McDonald, a human being, by shooting him with a gun.

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 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 the execution thereof pursuant to Article of War 50½.

3. The 3384th Quartermaster Truck Company, to which all witnesses belonged except two medical and one military police officer, was quartered in a chateau some 150 yards from a cafe, at Boelhe, Belgium, on 6 January 1945 (R13). Accused, Technician Fifth Grade Stevenson, Private John W. Nelson and a number of other soldiers from his unit were in Sergeant Lignon's room on the evening of 6 January (R12,29,30). While there, about nine o'clock Nelson gave Stevenson a pistol (R7,12) a P .38 similar to Prosecution's Exhibit A (R29,33) with loaded magazine (R8). Nelson found the pistol next morning under the pillow of his bed (R7,8,9). While checking the guards between 10 and 11 o'clock that night, loud talking was heard in the direction of the cafe; and the sergeant of the guard, on going to the cafe, found accused (R13,21) with other of the unit (R22,27,29) drinking, playing with their weapons (R14,19) and having a good time. Accused and Stevenson seemed more intoxicated than the others (R13,19), but accused was not staggering (R20) and talked coherently (R21). The sergeant attempted to get accused and the other men to leave the cafe and accused pointed his gun at him (R14,19). Stevenson had a P.38 (R14,17) fully loaded which accused took and refused to return to him (R29). The majority of the men left at the sergeant's request and, after another drink or two, accused finally left carrying both the pistol and his carbine (R14,17,18,20). Shortly after, what sounded like a pistol shot was heard (R14) and about five (R15) or ten (R22) minutes later, Captain McDonald came in and at his orders the rest of the men left the cafe (R23). It was a dark night with plenty of

snow. A little way down the road the last ones leaving the cafe met two people (R15,24) and continuing arrived in camp just after 11 o'clock.

About ten minutes later, one shot was heard and a few minutes later, three more. Someone shouted that Captain McDonald had been shot and on rushing to the cafe they found two carbines and a helmet outside and Captain McDonald where he had been carried in and layed on a sofa (R16). The helmet had two bars on it (R17). On examination at the hospital, where Captain McDonald was taken unconscious, it was found that he had a penetrating wound on the right side of the head from which he died (R25), at 0545 hours 9 January 1945 (R26). Death was caused by the gun shot wound penetrating the brain and which could have been made by a bullet from a P.38 (R25) or a carbine (R26). Stevenson with some one else was seen on the road about half way from the cafe to the chateau by some of the soldiers leaving the cafe that night about ten o'clock. Stevenson was standing against the curb facing the road with another soldier who did not answer when spoken to and who was not recognized (R27-28).

Stevenson testified he left the cafe about eleven o'clock - with accused who turned around and went back towards the cafe after they had gone about halfway and then caught up with him again about five minutes later as he got to the camp gate. Accused had his carbine and the pistol (R31,34). They had met Captain McDonald just as they entered the road to return to camp and he had taken Stevenson's carbine and told them to go on to camp (R31). Shortly after accused turned and went back (R32), Stevenson stopped and turned around when he saw a light come on (R32,34) and heard some one say halt. He then heard a shot (R32) and saw the flash (R34) and heard something like a steel helmet or metal fall (R32). The flashlight was burning when the pistol was fired and was then immediately dropped (R37). Accused then caught up to him "walking a little fast" and said (R33) "Here is your pistol" (R34), "Come on, I am going to bed" (R33). Stevenson could not identify the individual holding the light when it came on and did not know where accused was at that time. The light was 12 or 15 feet from the cafe (R36). He personally put the pistol back under Nelson's pillow (R37).

Privates Toomer and Sullivan were on duty that night from ten till 12 o'clock as guards at the entrance to the chateau. They could hear loud talking at the cafe (R41,43) and could recognize accused's voice. About 11:15 Captain McDonald came by and went towards the cafe and shortly thereafter some 18 or 20 fellows came through the gate. About ten minutes later, they heard a shot and a helmet fall. Stevenson whom Toomer recognized from his voice (R41,42,43) and another fellow (R41), whom Toomer didn't recognize (R42,43) but whom Sullivan said was accused (R45,47), came in through the post (R41-43,45,47). Some man came by and said the Captain had been shot (R43). Toomer fired his carbine (R43) twice (R46) and both went to the cafe where they found Captain McDonald lying on his back beside the cafe. Sullivan laid his carbine beside the Captain (R46) whose helmet and rifle also lay nearby (R47) and they carried him into the cafe (R46). Outside the cafe where the accident happened, two carbines were found near a pool of blood together with a steel helmet with captain's bars (R49) identified as that of Captain McDonald (R50), the helmet having a hole in it (R49). A bullet mark was found on the building and a slug out of a weapon (R48).

First Lieutenant Ernest F. Liebmann, Commanding Officer in the 10th Military Police Battalion, investigated the shooting of Captain McDonald and was present when accused made a signed, sworn statement (R51) on 11 January 1945, which statement was admitted in evidence as Prosecution's Exhibit G (R52), the body of which reads as follows:

> "On the nite of Jan 6, 1945, the nite of the shooting - that is the only way I can remember it - , I was in Sgt Ligon's room during the early part of the evening We were drinking 2 bottles of Cognac and some beer. There were probably eight or nine of us drinking it. I had quite a bit to drink, and I was feeling good when I left. I went over to the Cafe where the trouble happened and started drinking Cognac and beer there. There were a lot of our boys there I can remember Pvt Knight, Sgt Newman, Pvt Patton, T/5 Jesse Stevenson, and Pvt Ogelsby. I took my carbine to the Cafe

with me. I do not remember ever taking it off my shoulder. I drank for a while in the front barroom, and I remember the lady there dancing with Pvt Bryan I think it was. I later went back to the kitchen and seeing Sgt Newman there and also Stevenson and Patton.

I remember going back to the front room again with Stevenson. I don't recall how I got the pistol; I had been drinking too much. I remember walking out the door with the pistol but I don't remember how I got from Stevenson or what I did with it while inside the cafe. I can remember Stevenson trying to get me to leave the cafe; we finally left through the side door. I had the pistol in my right hand as I went out. After I was outside I fired once and then again a short distance farther on. I don't know why I did it, but I did. Stevenson and I then started walking up the road towards camp. I don't remember giving Stevenson my carbine. I remember meeting someone coming down the road and Stevenson mentioned Capt McDonald. We started on up the road again; I don't remember dropping the pistol. I know I stopped, turned around and started walking back towards the Cafe. I walked down near the Cafe when someone shone a flashlight in my face. I raised the pistol and fired it at the person holding the flashlight. I can't remember anything being said by myself or the person I shot at - Captain McDonald. I then saw a light falling and I heard a helmet strike the walk. I turned without looking at the person I had shot and ran on and caught up to Steve. I did not know it was the Captain I had shot, but I knew he was down at the Cafe.

When I caught up to Stevenson, we went back to Camp through the guard gate-Post #2. I can't recall just what I did with the pistol. The next thing I can remember is sitting in the orderly room while they were questioning the other men. I had drunk a lot that evening, and I cannot remember everything I did. I

> do remember firing the pistol at the person near the Cafe who flashed the light in my face. I didn't intend to kill anyone, and it must have been the drink which made me do it. This is all I can remember, and it is the truth.
>
> /s/ Clete O. Norris" (Pros.Ex.G).

4. As a witness for the defense, Stevenson testified that they drank a quart of cognac in Sergeant Lignon's room on the evening in question; accused was there drinking and he later saw him in the cafe where

> "he was talking a little loud * * *. He acted like he was drunk. He had a little too much anyway" (R54).

He staggered a little (R54). Although they had no arguments, accused pointed a pistol at him; later they left the cafe together and started up the road and accused stopped. When he later caught up with him again, Stevenson asked accused what went on and accused answered, "Come on, I am going to bed". He walked like he had been drinking but "was still on his feet" (R55).

Sergeant Wiley M. Newman, a good friend of accused (R58), saw him drinking in the cafe that night and acting a little bit intoxicated (R56,57) and told him to leave (R57) which accused did after taking another drink (R56). Accused had gone when Captain McDonald came in the cafe (R57).

Sergeant John W. Jones saw accused take four drinks of cognac at the cafe that night. He was "wobbling" and took two drinks just before he left the cafe. Jones later saw accused standing, with Stevenson, about 25 yards from the cafe (R58-60).

Second Lieutenant Eugene H. Swanzey testified that though accused's efficiency was good as a noncommissioned officer, he "had heard things that would lead me to believe that friction could exist" between accused and the company commander (R60).

Accused on being advised of his rights as a witness, elected to remain silent (R61-62).

5. Murder is the unlawful killing of a human being with malice aforethought. To prove the offense it must be proved that it was so committed (MCM, 1928, par.148a, pp.162-164). The evidence indicates and the accused admits that he shot Captain McDonald. The only question requiring consideration is whether there was "malice aforethought".

> "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" (Ibid., p.163).

Malice aforethought may exist when the act is unpremeditated and it is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner, providing in all cases there are no circumstances serving to mitigate, excuse or justify the act.

> "In order that the implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary and probable result would be to take life" (29 C.J., sec.74, p.1101).

Accused had been drinking during the evening and was apparently feeling some of the effects of it. He, with the other soldiers, had been ordered out of the cafe and he at least was loathe to leave for he refused to go until he had consumed at least one more drink. The inference is

reasonable that after he had gone a short way towards camp with Stevenson, he decided to return to the cafe for another drink and as he approached the cafe he was halted and a flashlight thrown on him. He had left the place earlier carrying a pistol in his hand. When halted by the person with the flashlight, he raised and fired his pistol at the person stopping him but when the light was immediately dropped and he heard the helmet strike the ground, he hurriedly returned to Stevenson, thrust the pistol in his hand and announced that he was going to bed. He fled from the scene of the crime, got rid of the weapon used and retired from the picture as quickly and quietly as possible. He had committed murder (CM ETO 3585, Pygate; CM ETO 7253, Hopper; CM ETO 9291, Clay).

While accused had been drinking, he walked without difficulty, his speech was coherent and he unquestionably knew what he was doing. His recollection of events of the night is clear. Voluntary intoxication does not excuse but may be shown in mitigation. The question of whether accused was so intoxicated that he could not have entertained the necessary intent to make the act murder, was one of fact for determination by the court. In the absence of substantial, competent evidence that he was so intoxicated, the findings of the court were fully justified (CM ETO 2007, Harris, Jr.; CM ETO 7253, Hopper).

6. The charge sheet shows accused to be 26 years and ten months of age and that he was inducted 25 September 1941, at Jefferson Barracks, Missouri. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

9422

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Sergeant CLETE O. NORRIS (37082314), 3384th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, 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 9422. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9422).

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 174, ETO, 26 May 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

7 MAY 1945

CM ETO 9423

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
v.	)	Trial by GCM, convened at Chaudfontaine, Belgium, 22 February 1945. Sentence: Dismissal and total forfeitures.
Captain EUGENE J. CARR (O-22905), Company C, 158th Engineer Combat Battalion	)	

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 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 85th Article of War.

Specification: In that Captain Eugene J. Carr, Company C, One Hundred Fifty-Eighth Engineer Combat Battalion, was, in the vicinity of Floreffe, Belgium on or about 24 December 1944, found drunk while on duty as Commanding Officer of Company C, One Hundred Fifty-Eighth Engineer Combat Battalion.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions by general courts-martial, one for violation of

(18)

the 96th Article of War on 16 February 1943 with sentence of reprimand and forfeiture, one for violation of the 96th Article of War on 18 April 1943 with sentence of reprimand and forfeiture, and one for violation of the 95th and 96th Articles of War on 14 February 1944 with sentence of dismissal, which sentence was suspended.

He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, First United States Army, approved the sentence, but because of evidence showing to his satisfaction that accused, though not insane, was not wholly responsible for his actions at the time of the commission of the offense, remitted the confinement and forwarded the record of trial for action under Article of War 48. The Commanding General, European Theater of Operations, confirmed the sentence as approved, and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Prosecution's evidence proved the following facts:

On 24 December 1944, accused was the Commanding Officer of Company C, 158th Engineer Combat Battalion (R18). On that date, the battalion bivouacked at Floreffe, Belgium, and was in the course of being reorganized and re-equipped after strenuous operations in and about Bastogne during the German mid-December 1944 offensive (R21; Cf: CM ETO 7413, Gogol). At about 1930 hours on that date, accused and other officers of the battalion consumed an unstated amount of intoxicating liquor (R7).

At approximately 2315 hours, accused was seen by his battalion executive officer, Major John A. Bailey. He carried the odor of alcohol on his breath, but

> "he was quite steady and rational in every respect * * * and he did not appear to have lost control of himself" (R15).

He then asked permission to attend mid-night mass, which request was granted (R15). About 15 minutes later, Major Bailey received a report that accused was creating a disturbance in the quarters of one of the platoons of Company B (R15,17). He went to the barracks and discovered accused in the care of a sergeant and other enlisted men who were attempting to remove him to his quarters (R15).

> "He was irrational, having illusions, he was giving orders to the men to alert themselves, to various non-coms to alert their particular platoons or companies. He was apparently in a different world from the rest of us" (R17).

Major Bailey, saw "that Captain Carr was not himself" and "decided to try to humor him along". He informed him the battalion was "alerted and would soon be ready to move out", and thereby induced him to go to the battalion command post with Major Bailey, where for some time accused looked at maps. However, when the radio stopped, he showed he was under the hallucination that it was the only means of communication and ordered it to be repaired at once. After about thirty minutes, Major Bailey persuaded him to go to bed and escorted him to his quarters upon the promise that the battalion would be alerted (R16). Accused, however, did not go to bed (R16), but talked irrationally and annoyed other officers who were in bed (R14). Major Bailey, upon hearing that accused was again disorderly, returned to the quarters and ordered accused to bed. Fellow officers undressed him but he "crawled into bed on his own power" (R16).

Witnesses who observed accused during the period between 2300 hours and the time he was ordered to bed by Major Bailey described his condition as "pretty good" but that he didn't know "what he was talking about" (R8); "intoxicated" (R9); "drunk" (R11,12); "intoxicated the way he looked" (R13); and "definitely intoxicated". He wasn't rational" (R16).

4. Evidence for the defense summarizes as follows:

Lieutenant Colonel Sam Tabet, commanding officer of the 158th Engineer Combat Battalion, described in detail the activities of the battalion between 17 December and 24 December 1944. It was engaged in combat with the enemy in

and around Bastogne during the German offensive and Company C under accused's command performed vitally important missions. With respect to accused's conduct he testified:

> "Captain Carr at that time left nothing that I would desire in a company commander. He did such an excellent job that we recommended him for a Silver Star" (R20).

Accused stated he understood his rights clearly, and elected to be sworn as a witness on his own behalf (R22). He gave a vivid description of the combat activities of his company and of himself from 17 December 1944 (the day following the commencement of the German offensive) to Christmas Eve in the fighting in the proximity of Bastogne. His chief mission was to protect a vital railroad bridge across the Wiltz river and to cover the withdrawal of the battalion on 22 December. In regard to the episode of Christmas Eve he testified:

> "Well, it was Christmas Eve and the Colonel invited me around for a drink or two. We gathered up all of the officers of the Battalion. All of the officers were bivouaced in this one room and we gathered up there and had a few drinks" (R25).

He declared he did not remember anything of importance with respect to subsequent events (R25).

> "I was awakened the following morning by the Group Surgeon who informed me that I was after some cheerful talk, that I was going to the hospital" (R25).

Lieutenant Colonel William G. Srodes, Medical Corps, consultant in neuro-psychiatry in the office of the Surgeon, First United States Army, testified that in a person suffering from battle fatigue, there could develop a sensitivity to alcohol (R26). In response to a hypothetical question propounded by defense counsel which included a recital of accused's battlefield activity of six days duration prior to 24 December and the substance of prosecution's evidence, Lieutenant Colonel Srodes expressed the opinion that

"The alcohol could act as a trigger mechanism releasing an unusual response to stimuli and a relatively small amount of alcohol in an individual who had the strain and who was susceptible to the strain could react in that way " (R28).

5. The evidence is definite and uncontradicted that accused, on the evening of 24 December 1944, drank liquor until he was in a highly intoxicated condition. Whether he was naturally hypersensitive to alcohol or whether his extreme intoxication was induced by battle fatigue were matters wholly outside of the scope of inquiry by the court on the issue of accused's drunkenness.

"Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (MCM, 1928, par.145, p.160).

The evidence as to accused's conduct and condition at the time and place alleged is convincing that he was drunk within the meaning of the 85th Article of War. The issue of drunkenness was essentially one of fact and the finding of the court, being supported by substantial evidence, is binding on the Board of Review on appellate review (CM ETO 1065, Stratton; CM ETO 1267, Bailes; CM ETO 1953, Lewis; CM ETO 3577, Teufel; CM ETO 4184, Heil; CM ETO 4619, Traub; CM ETO 4808, Jackson; CM ETO 5453, Day; CM ETO 5767, Palmer).

The only important question for determination is whether accused, when he became intoxicated, was "on duty" within the meaning of that term in the 85th Article of War.

"In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this Article (MCM, 1928, par.145, p.160).

(22)

> "Again, in time of war, and especially in the field before the enemy, the status of being on duty, in the sense of this Article, may be uninterrupted for very considerable periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war, - 'an officer, when his regiment is in front of the enemy, is at all times on duty.' In a more recent Order of the War Department, in the case of an officer found drunk while on duty in command of a company 'on an expedition against hostile Indians,' it was held by the Secretary of War that - 'the nature of the service and the safety of the command certainly constitute this a duty in the sense of the Article'" (Winthrop's Military Law and Precedents (Reprint, 1920) p.614).

Commencing on 17 December 1944, accused's battalion was engaged in active combat with the enemy. It had withdrawn on 23 December to Floreffe (R8) to reorganize and reequip. The Board of Review will take judicial notice of the fact that in this territory at this time the Germans were engaged in their mid-December offensive (CM ETO 7413, Gogol, supra). Accused was commander of Company C. He had not been relieved from this duty and was acting in this capacity on Christmas Eve at the time he became intoxicated. The fact that the battalion executive officer, Major Bailey, gave him permission to attend midnight mass immediately prior to the period when his intoxication became manifest, did not relieve him from his duty status. The following quotation is appropriate:

> "It would be unrealistic and a denial of the factual situation to conclude that /the/ order to accused removed him from a 'duty status' and temporarily placed him on an 'off duty' status until he received further orders * * *, which would serve to restore him to a 'duty status.' Oppositely the evidence compels the conclusion that he remained 'on duty' during the interval" (CM ETO 3577, Teufel).

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty (CM ETO 3302, Pyle; CM ETO 3304, De Mott; CM ETO 3714, Whalen; CM ETO 3725, Cox; CM ETO 4339, Kizinski; CM ETO 5010, Glover).

6. The charge sheet shows that accused is 28 years, one month of age, and was a cadet at the United States Military Academy from 1 July 1936 to 11 June 1940, when he was commissioned in the Regular Army.

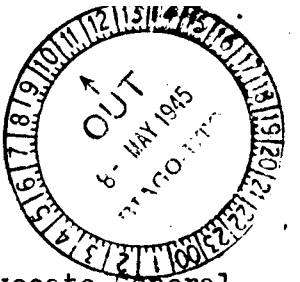
7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty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

8. A sentence of dismissal is mandatory upon a conviction of Article of War 85 in time of War (AW 85; MCM, 1928, par.103, p.92), and forfeiture of all pay and allowances due or to become due is a proper added punishment (AW 85).

Judge Advocate

Judge Advocate

Judge Advocate



(24)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain EUGENE J. CARR (O-22905), Company C, 158th Engineer Combat Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as confirmed by you.

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 9423. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9423).

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

(Sentence ordered executed.GCMO 146, ETO, 17 May 1945).

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

BOARD OF REVIEW NO. 1

26 APR 194

CM ETO 9424

U N I T E D S T A T E S	)	2ND AIR DIVISION
	)	
v.	)	Trial by GCM, convened at AAF Station 120, APO 558, U. S. Army, (England), 8-12 January 1945. Sentence: To be hanged by the neck until dead.
	)	
Private GEORGE E. SMITH, JR. (33288266), 784th Bombardment Squadron, 466th Bombardment Group (H)	)	
	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George E. Smith, Jr., 784th Bombardment Squadron, 466th Bombardment Group (H), did, at Honingham, Norfolk, England, on or about 3 December 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Eric Teichman, a human being, by shooting him with a rifle.

He pleaded not guilty and, all of the members of the court present at the

9424

time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for being disorderly in uniform in a public place in violation of the 96th Article of War. 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, 2nd Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The following facts proved by the prosecution are undisputed:

At about 1330 hours on Sunday, 3 December 1944, accused and Private Leonard S. Wojtacha, 61st Station Complement, 466th Bombardment Group, left their proper station at Attlebridge Airdrome, near Honingham, Norfolk, England, for the purpose of hunting (R36,37,93; Pros.Ex.11). Each carried a .30 caliber issue carbine and ammunition (R37). After proceeding about a quarter of a mile, each fired several rounds at an oil drum in a field (R37,38; Pros.Ex.11). Not far beyond this point accused fired at a cow which then "started runing around with one of its front legs up in the air". When Wojtacha asked him the reason for the act, he did not answer. He was laughing (R47,51). They entered the woods on the estate of Sir Eric Teichman, passed near his house on an old abandoned road, and began firing at a squirrel (R37; Pros.Ex.11). The squirrel jumped from tree to tree as they shot, and they followed it until they reached a tree near the top of a hill (R38; Pros.Ex.11). This point was about a mile from the airdrome, and about 300 yards east of and in front of Sir Eric's home (R13,14,19,55,83,107). It was in a wooded area, overgrown with bracken or underbrush about three feet high (R15,16,22,23,59,62,105). It required the two soldiers about 45 minutes to walk that distance, and accused was happy and laughing during the trip (R40,51).

At about 1400 hours, Sir Eric, who had finished his noonday meal a few minutes before, heard the shots and informed his wife that he was going to investigate (R10). He was last seen alive by members of his household as he left his home and walked down the drive (R11). He was a man in good health of about 60 years of age, but badly stooped or hunchbacked (R11,12,25,27). His normal height would have been six feet, but due to his deformity he was no more than about five feet tall (R12).

Sir Eric cameupon accused and Wojtacha as they stood on opposite sides of the tree about 30 feet apart looking up into the branches for the squirrel (R48,49; Pros.Ex.11). Accused told Wojtacha, "Look out. There is an old man behind you" (R38,48,49). Wojtacha glanced over his shoulder, saw Sir Eric about 15 feet behind him, walking forward

"slumped over", and carrying a cane (R38,40,48,49). Accused never noticed the cane, presumably because of the underbrush (R96,100; Pros.Ex.12). Wojtacha started walking towards accused. When he was abreast of him and few feet to his right, he heard Sir Eric say "Just a minute. What are your names?" (R38,49,50). He heard accused say, "Get back, Pop" and then almost immediately the firing of a shot (R39,50). Accused had fired with the gun from his hip (Pros. Ex.11). Sir Eric slumped to the ground face downward at a distance variously estimated as between eight and 42 feet from accused (R39,49,50; 54,105; Pros.Ex.11). Either accused or Wojtacha said "Let us get out of here" (R39;Pros.Ex.11). The two left rather hastily (Pros.Ex.11).

Accused did not remember the words between him and Sir Eric, nor did Wojtacha see the actual killing, as he was looking at neither accused nor Sir Eric at the time (R39; Pros.Ex.11). He saw him immediately afterwards, however (R39,40). There is no evidence that accused was acquainted with or recognized Sir Eric and he never indicated he had any fear of him (R106). The ground between accused and Sir Eric was nearly level but sloped slightly up towards Sir Eric (R38,60,84).

On the return trip to the airdrome, Wojtacha was frightened, but accused was happy, calm, gay and normal (R51). They passed near an old man walking with a dog. Wojtacha said "There is the old man walking down the road". Accused's answer was: "I must have missed him. I should have shot him again" (R40,51; Pros.Ex.11). As they walked along, accused broke off a twig and pushed it into his gun barrel either to clean or to jam it. When it snapped, he said "Now I have got my troubles" (R40,51; Pros.Ex.11). The two reached accused's barracks at 1450 hours, hid the guns under a table in another soldier's room, visited accused's room for five minutes, and parted company (R40-41,50). Accused lay on his bunk, calm and smiling (R52).

When Sir Eric did not return for tea, searches were begun at about 1700 hours but his body was not found until about midnight. He had been dead for many hours, and apparently never moved after he was hit (R12-14, 18-20,26,32,56,59,83,107). An autopsy the next day revealed the bullet had entered his right cheek, shattered the jaw completely, was deflected downward by two vertebrae in the neck, broke two ribs and passed out of the body under his left shoulder blade (R25, 26,58,107). It was not such a wound as could have been caused by a spent (slow moving) bullet (R30). The bullet was found covered with blood next to Sir Eric's skin beneath his undershirt (R57,58,108). It was the cause of death (R28). There were no powder burns, which indicated that the gun was more than six feet away when the shot was fired (R29,30). The autopsy also revealed that he had eaten a meal less than an hour before his death (R27).

On the morning of 4 December 1944, all men in accused's

organization were ordered to turn in their arms. Accused surrendered the carbine originally issued to him, numbered 2036239 and bearing his name. It had a piece of weed stalk jammed in the barrel (R70-79).

On 5 December accused came up to Wojtacha's table at the mess hall and told him "Don't say anything. Let them find out for themselves" (R41).

The Provost Marshal learned that accused and Wojtacha had gone hunting during the afternoon in question (R95). On 6 December, he confronted Wojtacha with this evidence and with casts of footsteps made at the scene of the crime (R43,44). Wojtacha was scared and made a full statement (R45,91). The next morning accused was told he would be charged with murder and was being warned of his rights when he interrupted to say "I shot him". After careful further warning he made a complete written confession which was received in evidence (R87,90,91, 93,107,109,110; Pros.Ex.11). Accused was calm, did not appear frightened, and acted in a normal manner (R90,111). In the confession, his story coincides exactly with the account herein, although he did state that at some time during the day before 1300 hours he had drunk about 15 coffee cups of beer.

During the afternoon, Wojtacha and accused voluntarily took the Provost Marshall and civilian officials over the route they had followed on 3 December to the scene of the shooting. They reenacted the events preceding the killing, and the crime itself (R100-103). The drum was found with bullet holes in it; empty shells were picked up where they said they shot at the drum and also where accused shot at the cow (R100,110). Accused was calm, co-operative and friendly towards Wojtacha (R104).

Subsequently, the accused's carbine and the bullet found on Sir Eric's body were examined by a ballistics expert, Dr. Henry Smith Holden, Director of the Home Office Laboratory at Nottingham, England. After study and comparison with test shots, he was satisfied beyond reasonable doubt, that the bullet was fired from accused's carbine, number 2036239 (R57,61,67,111-113; Prox.Ex.15).

4. The accused, after his rights were fully explained to him, elected to remain silent (R241,242).

The evidence for the defense was as follows:

Accused's score on the Army General Classification Test was only 67, which placed him among the lower 15 or 20 per cent in his organization. He had six convictions by courts-martial (R118). He once cut off

the tails of two pet white mice because he thought they would look cute with bob tails, though he was usually kind to them (R125,127, 142). He once kicked his dog to quiet him, but he was ordinarily fond of him and careful to provide food and water (R125,141). He was unusually fond of pets (R140,141). Sometimes he slept on the floor by the fire instead of in his bed, saying it was warmer there (R125,139,145,148). He was tidy in his room, took pride in his appearance, and was always shining his buttons and polishing his shoes (R139,140). He never sat down to eat at the mess where he worked, but always "grabbed a sandwich"(R150). He occasionally stood and stared into space (R151,155,161,168). He once became angry at a smoking stove and took it from the room (R150). To salvage a pair of new shoes because he did not like rubber soles, he cut the soles off, but continued to wear the shoes and did not turn them in to the supply office (R144,146,160,190,191). He did not go out with his fellows, or play cards or go with girls (R128,140). He was considered a normal, happy soldier and was well liked (R127,130,137, 145,156,163), but inclined to be excitable and raise his voice (R159, 162). Once when he was struck in an argument, he threatened to get a cleaver for use against his assailant, but did not (R159). Accused had 17 tattoo markings on his body (R242,243). He was a good worker (R168). His service record shows his religion as Protestant (R118).

At 1600 hours on 3 December accused was seen lying awake on his bed (R142). Later he went to sleep (R130). At about 1700 hours there was a rumor that Sir Eric had been killed. Accused having been awakened, broke into the conversation about the rumor to say: "Maybe its a good thing the old bastard is dead" (R143,146,147). Accused was acting normally and did not appear worried (R143,144). Shortly thereafter he went to the home of civilian friends, who had invited him the day before. There he ate hearily, played the gramaphone, whisteled and danced about, and was to all appearances entirely happy. He played with the dog, had it "play dead", and played with the cat. There was nothing unusual in his behavior (R129-134). He left about 2030 hours, and until 2200 hours visited a public house, where he drank a beer or two and behaved normally (R134,136). Around 2330 hours he was ordered from the mess hall because he was unkempt in appearance and slightly drunk (R122,123). The next morning he was calm and normal (R126,145). The investigating officer testified that accused was calm and collected, though voluble at the investigation (R171). In jail, he was happy and cooperative, and apparently gained about 15 pounds (R180). There at the suggestion of his defense counsel he wrote a number of essays. These were introduced in evidence and reveal incoherency, illiteracy and some viciousness (R188;Def.Exs. B-I). While in jail accused was visited by a Catholic chaplain, and

convinced him of his Catholic faith. He told the chaplain, however, that he had made no statement to the authorities about the shooting and two weeks later admitted this was a lie (R173-179).

The defense presented evidence by a farmer that his cow was, in fact, shot in the left leg at some time after 1200 on 3 December and before the next morning (R184,185).

Major Leo Alexander, Medical Corps, Chief of Psychiatric Section, 65th General Hospital, examined accused on 2, 4 and 5 January 1945, and diagnosed his condition as:

> "(1) Constitutional psychopathic state, with inadequate and immature personality, emotional instability, schizoid traits, and explosive (poorly repressed) primative-sadistic agressiveness; severe. (2) Mental deficiency, borderline, mental age nine years. In older psychiatric terminology.....Mentally defective, homicidal degenerate" (R195,200).

In this doctor's opinion, the accused knew right from wrong, but was not impressed with the seriousness of the difference (R200,205). His ability to adhere to the right was impaired, but not necessarily destroyed (R205,206). He was not insane (R202,214). The average mental age of the Army is 14 years (R208). A psychopath is a person who has a defective personality, and "schizoid" means "crazy" (R198). Accused had crazy traits, or a split personality partly withdrawn from reality, but no organic disease of the brain (R198,206). His condition was due to mental deficiency, and lack of moral restraint or inhibitions to restrain his sadistic subconscious emotions (R201, 209,210). Because of heredity and environment, he had little will or intellect to repress these emotions (R206,210). He fired <u>almost</u> automatically as suited his emotion at the moment (R202,203). If he had feared punishment he would not have fired (R210). That is why his ability to adhere to the right was only impaired, not abolished, and the reason the impulse was not irresistible (R202,205,211; Def. Ex.J). His emotion was to kill the squirrel, and the killing urge which inhibitions did not restrain, was transferred suddenly but <u>not</u> automatically to the man who interfered with his wishes (R201-203,209-210). The accused secured an emotional gain from the killing, from flaunting it before the investigating officer, and from his predicament at the trial (R211). He was dangerous, might have killed men before, and would probably do so again if left at large (R204,217). Drinking liquor would reduce his conscious restraint against subconscious emotions (R201). He bordered on insanity (R204), but his criminal responsibility, though impaired, was not abolished (R202; Def.Ex.J).

Major Thomas A March, Medical Corps, Chief of Neuropsychiatry, 231st Station Hospital, examined accused 8 December 1944 and 2 January 1945 (R219,225). His diagnosis of accused's condition was: "Constitutional psychopathic state; inadequate personality and schizoid tendencies or traits" (R232). In his opinion accused knew right from wrong, and had the ability, though somewhat impaired, to adhere to the right (R223, 226,233; Def.Ex.K). His will to adhere to the right was tainted not with insanity, but by abnormal emotional tendencies (R228,234). Accused's actions were subject to poor control and faulty judgement, and he had homicidal tendencies (R223,233; Def.Ex.K).

Dr. John V. Morris, Medical Superintendent of the Norfolk County Mental Deficiency Institutions, examined accused on 1 and 3 January 1945 (R235,236). His diagnosis was: "Schizophrenia" (R236;Def. Exs.N,O). In his opinion, the condition of accused was such that he might at times be able to distinguish right from wrong, but if he had an impulse to do something wrong, he would not have enough control or reasoning power to resist. He was subject to uncontrollable impulses (R239; Def.Ex.O). In this case, the deceased interfered with accused's pleasure and he fired the shot on uncontrollable impulse, irrespective of consequences to himself or to society (R239,240). Accused is an anti-social type, without regret of the killing, and whose permanent restraint is necessary (R238,240). His testimony was that the brain of accused is diseased, and that he suffers from early Schizophrenia (R240). He did not state whether he considered him "sane" or "insane" in those exact words.

5. There are several evidential questions to be considered:

a. The court admitted photographs of the body as discovered at the site of the homicide and of the renactment of the crime by the accused and Wojtacha (R66,101-103,110;Pros.Exs.2-7,13,14). The defense did not object. As to the former, there was no prejudicial inflammatory effect (Seadlund v. United States(CCA 7th 1938) 97 F. (2nd) 742). Concerning photographs of reenactments of crimes and accidents to show a version thereof disputed by the opposing party, the authorities are in conflict as to admissibility (Annotation, 27 A.L.R. 913). Some courts leave the matter within the court's discretion (United Verde Ext. Mining Co. v. Jordan (CCA 9th 1926) 14 F. (2nd) 304, cert. denied, 273 U. S. 734, 71 L.Ed. 865 (1926); Sprinkle v. Davis (CCA 4th 1940), 111 F.(2nd) 925). Where such photographs are faithful reproductions of uncontradicted testimony, as in this case, they are clearly admissible:

> "If the photographs * * * portrayed conditions as they actually were, and about which there was no dispute, they would be competent" (Nunnelly v. Muth, 195 Ky. 352, 242 S.W. 622, 27 A.L.R. 910 (1922)).

b. The testimony of the ballistics expert, due to his illness at the time of trial, was introduced by stipulation. Accused by his affirmative action in agreeing to the stipulation waived his constitutional right to be confronted by this witness (R111-113; Diaz v. United States, 223 U.S. 442, 450, 56 L.Ed.500, 503 (1912); Sullivan v. United States (CCA 8th 1925), 7 F.(2nd) 355, cert. denied, 270 U. S. 648, 70 L.Ed.779 (1926); CM ETO 8451, Skipper).

c. Evidence of accused's previous convictions by court-martial, and of the opinion of a psychiatrist that accused might have killed people before, were elicited by the defense (R93,118,204; Pros.Ex.11). They constitute a part of the insanity defense, and the error, if any, under such circumstances was self-invited and nonprejudicial (CM ETO 5584, Yancy).

It is concluded therefore that the questions of evidence were properly resolved.

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

The evidence shows without any conflict that accused purposely shot the deceased without provocation and in no fear of his own safety. His motive was to attack the person who interfered with his pleasure. The confession, admitted in evidence, coincides with the otherwise full proof of these facts. The defense sought to avoid responsibility for the acts confessed, on the ground that the accused was insane, and it is in this point that lies the only issue in the case.

In effect, the two Army psychiatrists agreed that accused knew right from wrong, and that he was sane. The civilian psychiatrist testified that accused might at times be able to distinguish right from wrong, but that he could not adhere to the right and in this instance acted upon the uncontrollable impulse of a diseased brain. The Army psychiatrists were of the contrary opinion and testified that accused had the ability, though somewhat impaired, to adhere to the right, and that his actions here involved were not quite automatic.

The test as to mental responsibility under military law is

whether the accused was "so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par.78a, p.63).

In applying this rule, the Board of Review had held that it is no defense to a charge of sodomy that an accused homosexual had difficulty in adhering to the right (CM ETO 3717, Farrington). In the case of a constitutional psychopath who was accused of rape and murder, evidence that he was sane and had the ability to adhere to the right was held sufficient to sustain conviction, even though he had difficulty in so adhering and had only "partial responsibility" (CM ETO 5747, Harrison).

These decisions, binding here, are supported by the rules of the civil courts. Subnormal mentality not constituting legal irresponsibility is no defense to crime (14 Am. Jur., sec.32, pp.788,789; State v. James, 96 N.J.L.132,114 Atl.553, 16 ALR 1141 (1921); Annotation, 44 ALR 584). "It is the duty of /such/ men who are not insane or idiotic to control their evil passions and violent tempers or brutal instincts" (Bast v. Commonwealth, 124 Ky.747, 99SW 978). For an accused to be absolved from responsibility, it is necessary that

> "his will, * * * the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control" (Davis v. United States, 165 U. S. 373, 378, 41 L.Ed.750, 754 (1897), underscoring supplied).

Moral insanity and irresistible impulses disconnected from true insanity, are invalid as defenses (1 Wharton's Criminal Law (12th Ed.1932), secs. 60-64;pp.84-93; Annotation 70.ALR 659)

In the instant case, there is competent evidence that accused was sane, and that he could adhere with difficulty to the right. His ability so to adhere, according to that testimony, was impaired because he had no moral restraint. A powerful restraint to crime, other than moral, is fear of punishment. Those same persons whose will power is weakened to the extent of being without conscience, constitute the class who need the latter restraint most. To fail to punish a murderer, whom the court's findings place among that malevolent group who find it hard to do right, is to encourage and not to deter crime.

It is not for the Board of Review to weigh evidence, and in

view of the record, it must conclude that the court properly found on the competent evidence adduced, that the accused was legally sane.

7. The charge sheet shows that accused is 27 years eight months of age and was inducted 13 August 1942 at Pittsburgh, Pennsylvania, to serve for the duration of the war and six months.

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

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

B. Franklin Pitts Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

9424

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private GEORGE E. SMITH, JR. (33288266), 784th Bombardment Squadron, 466th 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, 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 9424. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9424).

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 128, ETO, 1 May 1945.).

9424

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

BOARD OF REVIEW NO. 2

26 MAY 1945

CM ETO 9461

U N I T E D S T A T E S	)	BRITTANY BASE SECTION (successor
	)	of LOIRE SECTION), COMMUNICATIONS
v.	)	ZONE, EUROPEAN THEATER OF OPERATIONS
	)	
Private First Class LENARD BRYANT (34552389), 3117th Quartermaster Service Company	)	Trial by GCM, convened at Le Mans, France, 14 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and 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 92nd Article of War.

Specification: In that Private First Class Lenard Bryant, 3117th Quartermaster Service Company, did at or near a spot on National Highway 157 about 15 Kilometers toward Bouloire from LeMans, France, on or about 28 September 1944 forcibly and feloniously, against her will, have carnal knowledge of Madame Eliane Scalvino.

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

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

3. The evidence for the prosecution as related by the 32-year-old prosecutrix shows that at five pm on 28 September 1944, she was proceeding along the road towards her residence at Bouloire when she was thrown in a ditch by accused and then dragged into the nearby woods (R6). As she was shouting for help accused prevented her from crying by putting his fingers upon her mouth. He held her very tightly around her mouth. She could not breathe freely. Her neck was sore for two days (R6,17). When accused approached her she called "help, help" several times (R6). She struggled, losing an earring, and her skirt was torn on the left side (R6). Accused was drunk (R15).

Accused was accompanied by two others, a black negro and a mulatto, but otherwise the road was deserted (R6). She was dragged about 50 meters into the woods by the three soldiers, and by gestures made to understand that she was to lay on the ground (R7). Accused produced a knife (Pros. Ex.1) from his pocket, placed the fingers of his left hand on the blade of the closed knife and frightened prosecutrix into compliance with his desires (R6,7). Accused returned the knife to his pocket long enough to get on top of her when his turn came, and at one point he knelt before her and again took the knife out of his pocket. She was "afraid for my life" and snatched the knife out of his hand. When accused got on top of her he unbuttoned his trouser flap and penetrated her vagina with his penis (R8,10). She yielded only because she was afraid of being killed (R15).

When they were all finished prosecutrix ran to the road where she met a civilian motorcyclist (R9). In her hand she carried her panties, two shoes, a harmonica and the knife (R10). The motorcyclist directed her to a motorcycle military policeman stopped about 10 meters from them. She apprised him of her difficulty by gestures and he unsuccessfully attempted to get the three soldiers out of the woods. Assistance was received from a second motorcycle military policeman, who entered the woods armed with a revolver and brought one soldier out (R10,18,23), who was identified as the accused (R19,23).

On cross-examination, she testified she was pushed into the woods by accused and his friends, one holding her on each side, and one walking behind her (R14). She was roughly treated from the beginning, feared for her life and so yielded to their desires (R14),

lying down as directed as she was afraid of being killed or choked (R15). She was in the woods about an hour and a half with the three soldiers about 50 meters from the road but did not cry for help or attempt to escape earlier for fear of being killed or choked (R15). She denied positively that any money was offered to or accepted by her (R78,79).

A military policeman, who had stopped his motorcycle on this highway in order to eat his supper, testified he heard a woman crying in the woods (R18) and stood up and saw a woman come running from about 30 yards back in the woods. She ran towards a passing civilian, who directed her to him. Her face was marked and swollen on the right side (R18,23); she was crying, nervous and hysterical and he had to support her to keep her from falling to the ground (R19,23). Another military policeman, who actually went into the woods after the accused, corroborated the testimony of the preceding witness (R23), adding that at the time he first saw accused the fly of his trousers was unbuttoned (R23). He identified the prosecutrix as the hysterical woman (R23), saw the other military policeman supporting her at the time of this occurrence (R25), and he took accused and her to military police headquarters in Le Mans (R23).

An American Army doctor, who examined the prosecutrix several hours after the alleged rape, found her extremely nervous and upset. There were several rather short, broad, shallow scratches about the level of the nose on her right cheek, several fresh bruises on the lateral aspects of both hips and two or three very superficial, extremely narrow scratch marks on the anterior surface of both thighs. Examination of the genitalia revealed neither external or internal violence. There was considerable tenderness of the constrictor muscles of the vagina. Microscopic examination of the vaginal contents did not disclose the presence of any spermatozoa (R27). It was impossible for him to state whether prosecutrix had recently engaged in sexual intercourse (R27,28).

After an agent of the Criminal Investigation Division testified as to its voluntary nature (R32), a confession signed by the accused was received in evidence over objection by defense counsel (R63,64, Pros. Ex.2). The accused testified that the CID agent "jarred me with his pistol" - "He punched me" and said "'I am tired of hearing you lying'; then he hit me again, hit me in the stomach with his fist" (R43). These charges by accused are categorically denied by the agent, who took the disputed statement from accused, and by another agent who was present at the time (R52-61). In this statement accused relates that he grabbed the girl by one arm; she struggled, attempting to get away; he and two others pulled her towards the woods and they fell into a ditch; they picked her up from the ground, and pulled her towards the woods near the highway; when they reached the woods he and his two companions had sexual intercourse with her.

4. After his rights were fully explained to him, accused elected to be sworn and testified in his own behalf. He related that on the afternoon in question he and two companions were drinking cognac and cider when the prosecutrix happened along (R66,67). He asked her to engage in sexual intercourse at the same time showing her 100 francs (R67,68). He caught her by the hand and they went about 50 yards into the woods, where he gave her the 100 francs which she accepted, and he proceeded to have intercourse with her (R68). He wasn't successful in this first attempt and after a short while he again covered the prosecutrix and engaged in the act (R68,69). By representing that she had to urinate, the woman got away and ran "hollering" to the road (R69). Some time after this a military policeman apprehended him in the woods and took him to military police headquarters (R69).

A medical officer, called by the defense, testified that a blood alcohol determination test performed on accused about 2000 hours; 28 September, showed a result of 3.7 milligrams per cc. He further testified that a level of 3.7 indicates intoxication by well recognized medical criterions; the standard ordinarily accepted being 1.5 milligrams per cc. (R77).

5. The evidence established by the testimony of the victim, the admissions of accused and in the confession accused made to the CID agent, beyond doubt the first element of the crime of rape, viz., carnal knowledge of Madame Scalvino by the accused (CM ETO 3933 Ferguson and Rorie).

If accused accomplished the act of intercourse by force, and without the consent of the prosecutrix the crime of rape is complete. The prosecutrix testified she yielded to accused because he threatened her with a knife, maltreated her generally and she was "much afraid for my life". This is in part corroborated by the confession of accused in which he stated he grabbed the girl by one arm; she tried to get away and did put up a struggle; he and two others pulled her towards the woods and they fell into a ditch in the process. Further support for the victim's version of the incident is found in the evidence of her prompt complaint to the military policeman, the testimony of two members of the military police and an Army doctor as to her hysterical condition immediately after the acts complained of, and the presence of bruises and scratches on her person.

Opposed to the foregoing is accused's sworn testimony at the trial in which he relates a story of assignation for a monetary consideration. There was, therefore, presented an issue of fact to be considered and determined by the court. By its findings the court has resolved this issue against accused and the Board of Review

is of the opinion there is competent, substantial evidence to support the court's findings. Inasmuch as it was within the exclusive province of the court to determine this issue of fact, it will not be disturbed by this Board upon appellate review (CM ETO 4194, Scott).

The sharp conflict between the evidence of the prosecution and that of the accused with respect to securing his confession also presented an issue of fact as to its voluntary character. Inasmuch as the validity of the confession is supported by very substantial evidence in the record, the ruling of the law member admitting it in evidence will not be disturbed (CM ETO 4055, Ackerman).

When accused's rights as a witness had been explained to him, the law member inquired if there were any questions by either of the colored members of the court. In response thereto a member of the court volunteered his professional opinion (professional psychologist) as to accused's mental capability to understand his rights under Article of War 24 (R36). This was irregular, but if it was at all harmful, the prosecution and not accused was prejudiced.

6. The charge sheet shows that accused is 24 years and one month of age and was inducted 29 October 1942 at Fort Bennett, Georgia. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

16 JUN 1945

CM ETO 9467

U N I T E D S T A T E S	)	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private First Class MAURICE D. ROBY (32319390), 433rd Ordnance Motor Vehicle Assembly Company (Portable)	)	Trial by GCM, convened at Rouen, Seine Inferieure, France, 2 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
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 First Class Maurice D. Roby, 433rd Ordnance Motor Vehicle Assembly Company (Portable) did, at Post No. 1, Depot O-652, Rouen, France, on or about 0005 hours, 22 December, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Thomas F. Kirkpatrick, a human being by shooting him with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. 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 under Article of War 50½.

3. Prosecution's evidence, without contradiction showed that accused shot and killed Private Thomas F. Kirkpatrick at Depot O-652 Rouen, France about 0005 hours on 22 December 1944. Accused, as a witness on his own behalf, admitted the homicide and that he was the responsible agent therefor (R26,27).

a. Accused and deceased were, on the date aforesaid, members of the permanent guard of Depot O-652. Accused was actually on duty at Post No. 1 - the entrance gate of the installation - having relieved deceased from guard duty about two hours previously. Deceased had been absent from the station and returned a few minutes prior to the homicide. Accused and deceased engaged in a verbal dispute as to the form of entry to be placed in the guard book with respect to a motor vehicle which had come to the gate of the depot camp but had not entered it. They stood at the end of a wooden platform near the guardhouse (R11,14,15). In the course of the conversation between the two soldiers, accused exclaimed:

> "I'll show you who is guard (R7) 'I'm on guard and I'll do as I please" (R11).

Prosecution's witness, Private Francis X. Siebert described ensuing events thus:

> " * * * Kirkpatrick [deceased] started to walk towards the guardhouse, about that time Roby [accused] backed of about eight feet from the guardhouse, and when he started to count, he said, 'When I count three you better be gone' * * * At the count of one, he slid the bolt of the carbine and put a round in the chamber. Two, he brought the rifle down and aimed it at Kirkpatrick, and at three he fired"(R12).

> "At the time when Private Roby made the statement [the two men were] about two feet apart. And as soon as Private Roby made the statement, he started to back off, and when he did, he was about eight feet from where Kirkpatrick was standing * * * when Roby made the remark he would count, Kirkpatrick turned around and started to walk towards -- it wasn't a complete

about face, because the move made more or less a right face to walk toward the entrance of the guardhouse when Roby backed off toward the middle of the road and Kirkpatrick started to walk to the guardhouse while Roby counted" (R17).

When the shot was fired Kirkpatrick was walking away from Roby toward the guardhouse (R17). As deceased fell, Private Armand D. Gerard endeavored to grab him but accused shouted "Leave him alone". Deceased moaned and moved slightly and then was guiet (R7). Gerard corroborated Siebert's testimony in principal part (R7,9,10).

The bullet entered deceased's body on its left side, passed through the sixth rib and lodged in the pulmonary artery from where it was removed (R23; Pros.Ex.1). He died as a result of

"hemorrhage following multiple perforations of the vacular system by gun shot. Death must have been almost immediate, considering the large vessels involved" (Pros.Ex.1).

Neither accused nor deceased was under the influence of alcohol or drugs at the time of the homicide (R11,18,23).

4. Accused, as a witness on his own behalf, described the events of the homicide as follows:

"He called me a cock-sucker, and we were swearing back and forth at one another. And he was pushing me backwards.

* * *

Kirkpatrick was fairly high when he was doing his arguing with me. He was not in a jovial mood, but pretty antagonistic" (R26,27).

He further asserted that he did not intend to fire; that he never completed the "count of three"; that "the gun had gone off the meanwhile"; that he manipulated the bolt of his carbine and placed a shell in the chamber merely "to scare" deceased and denied he leveled the gun at him, but declared he held it at port arms with his hands grasping it parallel to his waist (R28).

Technician Fourth Grade Francis J. S. Konieczny of accused's organization testified that while he was in bed about 75 to 100 yards from the guardhouse on the night of 21-22 December 1944, he heard "the count given of One - Two, and a shot fired" (R24,25).

5. The circumstances surrounding the homicide present two questions for consideration: (a) whether accused killed deceased in self-defense,

(46)

and if not (b) whether the killing was under such circumstances as to reduce the degree of homicide from murder to voluntary manslaughter. The court resolved all conflicts in the evidence against accused. The Board of Review will examine the record of trial to determine if the court's findings are supported by competent, substantial evidence (CM ETO 895, Davis, et al; CM ETO 9194, Presberry).

a. The rule of law controlling the instant situation is stated thus:

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par. 148a, p.163).

A mere casual reading of the record of trial will convince any reasonably-minded person that accused and deceased were engaged in no "sudden affray". At most it was an exchange of profanity and obscene epithets. Deceased was unarmed; accused was armed. Accused threatened deceased with violence and supported his threat by allowing deceased "the count of three" within which time to leave. Deceased then commenced his retreat and with his back partly turned to accused received the fatal wound in his left side. Under these circumstances, there were no reasonable grounds for accused to believe that it was necessary for him to kill deceased in order to save his own life or protect himself from great bodily harm. The theory of self-defense was a fictitious one and of no legal merit (CM ETO 9194, Presberry, supra).

b. Neither accused nor deceased was intoxicated. The quarrel involved no dispute of importance, and it was not a violent one. As stated above, it was an exchange of profane and obscene epithets.

> "At common law mere language, however aggravating, abusive, opprobrious, or indecent, it is not regarded as sufficient provocation to arouse un-

governable 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; CM ETO 6229, Creech).

Accused acted deliberately, first by warning deceased and then by "count of three" fixing a time limit for deceased's departure. Deceased acted upon the ultimatum and commenced his retreat. When his back was partly turned to accused the latter shot him. Accused's actions in themselves furnished proof of cold-blooded, cruel deliberation and factual malice. The dividing line between murder and manslaughter in military jurisprudence is well demonstrated in CM ETO 10338, Lamb, wherein the following is quoted with approval:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, 12th Ed., sec.423, p.640; 20 Am.Jur.189).

The instant case demonstrates clearly the presence of factual malice - the badge of the murderer - in a positive, decisive manner. This homicide was manifestly murder; not manslaughter (CM ETO 6682, Frazier; CM ETO 7315, Williams; CM ETO 11178, Ortiz).

6. The charge sheet shows that accused is 34 years 10 months of age and was inducted 20 April 1942 at Fort Jay, New York, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

16 JUN 1945

CM ETO 9468

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private PRESTON OWENS (34223711), 3544th Quartermaster Truck Company (Transportation Corps).	Trial by GCM, convened at Liege, Belgium, 10 February 1945. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Preston Owens, 3544th Quartermaster Truck Company (TC), did, at or near Courcelles, Belgium, on or about 13 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Jacob E. Jones, a human being, by shooting him with a gun.

(567)

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 wrongfully and knowingly using gasoline to make fire in violation of Article of War 96. All members of the court present at the time thevote 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 the provisions of Article of War 50½.

3. The evidence for the prosecution was as follows:

About noon on 13 January 1945 accused and other soldiers were shooting dice in one of the squad rooms of the 4129th Quartermaster Service Company at Courcelles, Belgium (R6,19,23). An argument arose over a certain bet which by agreement was referred to Private Jacob E. Jones, a member of accused's company, for settlement (R19-20). His decision offended accused who "said something about fighting and jumped up". As he did so Jones hit him and a fist fight between them lasted about two minutes before they were separated by others present (R6,14,19,20, 29).

Accused was bleeding from the mouth or left side of his face, described as "very badly" by one witness and "just a little" by another, and carried a big swollen mark over one eye (R11,14,24,31,36). Jones got the better of the exchange of blows (R20) and was a little larger than accused and more muscular (R23-24). The state of accused's feelings immediately after the short fight was variously described by witnesses as "ruffled" (R40), "must have been mad"(R15), "more or less excited by the injustice done to him" (R40), "I never saw him in a rage like that before" and "mad enough to kill him" (R12). Accused picked up a model 1903 army rifle, which was forcibly taken from him by Privates First Class Cesar B. Lewis and Frank McKinney, members of his company, and a half minute (R33) thereafter, he walked to an adjoining room and obtained a carbine, of which he was disarmed by Lewis after a

struggle in both rooms (R7,14,20-21,32,34,37). He then sat on his bed and said, "I don't care", adding, "I'm gonna kill that 'mother fucker'" (R8,17). Lewis was "disgusted" and told both men they ought to be ashamed of themselves (R8,16). Jones asked, "Are you going to eat, Lewis?" The latter replied, "Yeah", and the two went down to the mess hall together, the mess hall and the kitchen consisting of two separate rooms downstairs (R8,21,34).

About a minute after they left accused got up and went to his duffle bag, secured a clip of ammunition and put it in his pocket (R30). He returned to sit again on his bed for about a half minute (R22) to between two and three minutes (R26,30), then again got up and obtained his rifle. As Private Henry Taylor, of the same company as accused, observed this move, he hollered to McKinney, "Don't let him put the clip in it". McKinney started toward accused and then backed away as the latter shoved a clip into the weapon (R22). Regarding this incident McKinney testified:

> "When he gets up the second time and gets his rifle and puts a clip in there, he put the gun on me; so I just back up off of there"

and continued down the stairs and said, "No shooting, boy". Accused said, "Don't get rough". As McKinney reached the mess hall in advance of accused, he said, "Jones, Jiggs, look out" (R30). Accused was walking pretty fast and did not appear excited. McKinney went on outside (R31).

Meanwhile, Jones and Lewis were in the kitchen and had been in the mess hall "just long enough for us to walk downstairs and walk up to the table and ask if they had anything to eat - about a minute and a half or two minutes" when Lewis, hearing someone shout, "Look out! Don't shoot that boy!" (R9,10,15,17,35,38), broke into a run and "got behind the boiler" as he saw accused coming in the door holding a carbine at high port. Jones "ran towards the gas cans" which were lined up beside the wall, but had "no way out" (R39). Lewis heard a shot and saw Jones on the floor where he also saw blood (R9-10,11,15, 18,27,38).

Staff Sergeant William C. Hague, 4129th Quartermaster Service Company, testified that he was in the mess hall at the time of accused's entrance (R37) and got on the floor as the latter came across the room, pulling the bolt of his carbine so that "one round fell out and another one went in" (R39). Accused was very cool and "a little more composed. Upstairs he was ruffled" (R40). Jones dropped his mess gear and ran towards accused who shot him as he held the carbine at his hip (R39). Accused then went out the door and surrendered his weapon to another soldier (R16).

An autopsy was performed on the body of Jones on 15 January 1945, which revealed that he had received a fatal bullet wound, the bullet entering his left chest and coming out through the lower left back. No powder burns were apparent (R41). The projectile tore the apex of the left ventricle of the heart causing death (R42).

4. After being advised of his rights (R42), accused elected to make an unsworn statement, in effect, that on 13 January 1945 he was on his knee shooting craps. Jones struck him and knocked him on the carpet. Blood on his field jacket came from his lips. His eye was swelled up so he couldn't see (R43).

5. The evidence in this case leaves no reasonable doubt that when accused fired his rifle at Jones, he did so with the intention of killing or causing him grievous bodily harm, or with the knowledge that one or the other of such consequences would probably flow from his act. This intent or knowledge, even in the absence of premeditation, is sufficient to supply the "malice aforethought" required for conviction of murder under Article of War 92 (CM ETO 5745, Allen; MCM, 1928, par.148a, p.163), unless the killing was committed in the heat of sudden passion caused by adequate provocation. In such case, it would constitute voluntary manslaughter rather than murder (MCM, 1928, par.145a, pp.163-165).

It was the function and duty of the court and the reviewing and confirming authorities to weigh the evidence, and determine whether passion under adequate provocation not cooled by the passing of time reduced the crime from murder to manslaughter. Its finding of either

the greater or the lesser offense, on the facts herein, would be legal and appropriate (Stevenson v. United States, 162 U.S. 313, 40 L.Ed. 980; CM ETO 292, Nickles). While the Board of Review in a proper case will not be hesitant in holding there is no substantial evidence of malice (CM ETO 82, McKenzie; CM ETO 10338, Lamb), the deliberateness of this crime after the quarrel had been broken off and accused disarmed, first of a rifle and then a carbine, precludes disturbing the findings upon appellate review (MCM, 1928, par.148a, p.164, and par.126a, p.136; CM ETO 6662, Frazier and cases therein cited).

6. The charge sheet shows that accused is 27 years and four months of age. He was inducted 15 June 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman
MALCOLM C. SHERMAN Judge Advocate

B. H. Dewey Jr.
B. H. DEWEY, Jr. Judge Advocate

(54)

1st Ind.

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

1. In the case of Private PRESTON OWENS (34223711), 3544th Quartermaster Truck Company (Transportation Corps), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The circumstances of this case follow the pattern of a killing by accused shortly after his quarrel with deceased which appears in such cases as CM ETO 6682, Frazier, CM ETO 3042, Guy, and CM ETO 3180, Porter, in each of which accused received a life sentence. Because of these cases, the past fair record of service of this accused, and all the circumstances surrounding his offense, commutation would not be inappropriate.

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 9468. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9468).

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

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

(Sentence confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures and confinement for life. Pursuant to par. 87b, MCM 1928 so much of previous action dated 3 April 1945 as inconsistent with this action recalled. Sentence as commuted ordered executed. GCMO 500, ETO, 23 Oct 1945).

9468

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

BOARD OF REVIEW NO. 2

28 MAY 1945

CM ETO 9469

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at Susterseel, Germany, 15 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ROBERT D. ALVAREZ (39554011), Company F, 137th Infantry	)	

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

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1. The record of trial in the case of the 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 specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Robert D. Alvarez, Company "F", 137th Infantry did, in the vicinity of Benney, France on or about 11 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until

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he returned to his organization on or about 23 December 1944.

Specification 2: (Disapproved by confirming authority)

He pleaded not guilty and all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for ten days in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 35th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 50½ /AW 48/. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 2 of the Charge. He confirmed the sentence, but due to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence presented by the prosecution was substantially as follows:

Accused is a rifleman in Company F, 137th Infantry. About 11 September 1944 his company was located on the Moselle River (R8,9,13). Prior to this date the company had attempted to cross the river but was driven back by machine gun fire (R9). The company had been told that their mission was to cross the river (R9) and accused was present "when they passed the order down" (R14). He was present on 11 September 1944 when the river crossing movement was begun. The company went around the side of a town, marching in a column and some engineers were going in another direction. Accused started out with his unit in a column, "he got in the wrohg column or something", did not make the river crossing and was not seen again until around 27 December 1944 (R9,13). When they made the crossing, the company met "very little" enemy resistance but they all knew the enemy "was out there somewhere" (R13,14).

After the investigating officer testified as to its voluntary nature, a sworn statement made by accused was received in evidence, defense counsel stating that there was no objection (R18; "Govt".Ex.C). It is, in pertinent part, as follows:

> "I first went AWOL from my Company at the time of the Moselle River crossing about the 10th or 11th of September, 1944. I went to a little town and stayed with some Seventh Army engineers for quite a while. I turned myself in around the 4th or 5th of December to the Seventh Army MP's at Maricourt".

4. The accused after his rights as a witness were fully explained to him (R18), elected to remain silent and no evidence was introduced in his behalf.

5. The evidence presented by the prosecution establishes that accused was missing from his company from 11 September 1944 until the latter part of December. This is sufficient evidence of the corpus delicti to support the admission into evidence of accused's sworn statement wherein he admits going absent without leave about the 10th or 11th of September, 1944 (MCM, 1928, par.114a, p.115; CM ETO 4915, Magee). Thus, the first element of the offense of desertion viz, absence without leave, is proved by competent and substantial evidence, From all the uncontradicted facts established by the evidence the court was warranted in inferring that accused left his organization with the intent to avoid hazardous duty (MCM, 1928, par.130a, p.143; CM ETO 8242, Bradley). Accordingly, all the elements of the offense alleged in Specification 1 of the Charge are fully established by the evidence (CM ETO 1406, Pettapiece).

6. The charge sheet shows that accused is 21 years of age and was inducted 14 January 1943. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private ROBERT D. ALVAREZ (39554011), Company F, 137th 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 5½, 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 9469. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9469).

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

(Sentence as commuted ordered executed. GCMO 195, ETO, 7 June 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 9470

U N I T E D S T A T E S v. Private JOHN SAFFORD (34071077), 4145th Quartermaster Service Company	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 12 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
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 and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

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

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

Specification: In that Private John Safford, 4145th Quartermaster Service Company, European Theater of Operations, United States Army, did, at Grandcamp Les Bains, France on or about 19 September

1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Chelles, France, on or about 11 November 1944.

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

Specification: In that * * * did, at Chelles, France, on or about 11 November 1944, knowingly and wilfully apply to his own use and benefit one GMC 2½ ton truck of the value of more than $50, property of the United States, furnished and intended for the military use thereof.

CHARGE III: Violation of the 96th Article of War. (Findings of guilty disapproved by reviewing authority)

Specification: (Findings of guilty disapproved by reviewing authority)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of five previous convictions all by special courts-martial, four for absences without leave for one, one, two and three days respectively in violation of Article of War 61 and one for breach of restriction and absence without leave for one day in violation of Articles of War 96 and 61 respectively. All of the members of the court present at time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of Charge III and its Specification, approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years, that the execution of that portion thereof adjudging dishonorable discharge be suspended until the soldier's release from confinement, and that Loire Disciplinary Training Center, Le Mans, France, be designated as the place of confinement. The confirming authority, the Commanding General, European Theater of Operations,

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

3. a. Charge I and Specification. Accused was absent from his organization from 19 September 1944 to 11 November 1944, when his absence was terminated by apprehension. The long period of absence - 52 days - coupled with proof of his unauthorized use of Government motor vehicles during his delinquency and the fact that although he had continuous opportunity to surrender himself to military authorities he failed to do so, fully justified the court in concluding that he intended permanently to absent himself from the military service. He is a deserter (CM ETO 12045, Friedman , and authorities therein cited).

b. Charge II and Specification. Prosecution's evidence and accused's own statement proved that he was in unauthorized possession of and used for his own convenience and benefit on 11 November 1944 a 2½ ton 6 x 6 Government truck of a value of more than $50.00. The offense denounced by the ninth paragraph of the 94th Article of War, viz.,

> "who * * * applies to his own use or benefit * * * property of the United States furnished or intended for the military service * * * shall, on conviction thereof be punished * * *".

was fully proved (CM ETO 13276, Clower and Westbrook; CM ETO 11936, Tharne, et al; CM ETO 9288, Mills).

4. The charge sheet shows that accused is 24 years, four months of age and that he was inducted 28 March 1941 at Alexandria, Virginia, 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 committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of Private JOHN SAFFORD (34071077), 4145th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9470. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9470).

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

(Sentence as commuted ordered executed. GCMO 310, ETO, 6 Aug 1945).

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

BOARD OF REVIEW NO. 2

9 JUN 1945

CM ETO 9541

U N I T E D S T A T E S	) NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Privates ALFRED ONOFREO (31281012), Company A, and FRANK A. VEZZETTI (42008469), Company B, both of 92nd Chemical Mortar Battalion	) Trial by GCM, convened at Le Mans, Sarthe, France, 16 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, 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 arraigned separately and with their consent were tried together upon the following charges and specifications:

ONOFREO

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

Specification: In that Private Alfred Onofreo, Company A, 92d Chemical Mortar Battalion, did, at Evacquemont, France, on or about 2 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Luce, France, on or about 6 December 1944.

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

Specification 1: In that * * * did, at Paris, France, on or about 5 December 1944, know-

ingly and willfully apply to his own use and benefit one truck, ¼ ton, 4 x 4, "jeep" of a value of more than $50, property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * did, at or near Luce, France, on or about 6 December 1944, knowingly and willfully apply to his own use and benefit one truck, 2½ Ton, 6 x 6, of a value of more than $50, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that * * * did, at or near Luce, France, on or about 6 December 1944, feloniously take, steal, and carry away about 495 gallons of gasoline, of the value of about $370, property of the United States, furnished and intended for the military service thereof.

VEZZETTI

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

Specification: Identical with Specification of Charge I against accused Onofreo except for the appropriate substitution of the name and company of accused.

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

Specification 1: In that Private Frank A. Vezzetti, Company B, 92d Chemical Mortar Battalion, did, at Paris, France, on or about 5 December 1944, knowingly and willfully apply to his own use and benefit one truck of a value of more than $50, property of the United States furnished and intended for the military service thereof.

Specifications 2 and 3 are identical with Specifications 2 and 3 of Charge II against accused Onofreo, except for the appropriate substitutions of the name and company of accused.

Each accused pleaded guilty to the Specification of Charge I, except the words "desert" and "in desertion", substituting therefor the words "absent himself from", of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge I but guilty of a violation of Article of War 61, and not guilty as to Charge II

9541

and the specifications thereunder. Three-fourths of the members of the court present at the time the vote was taken concurring, each was found guilty of all the charges and specifications. Evidence was introduced of two previous convictions by special court-martial against Onofreo, one for absence without leave for four days in violation of Article of War 61 and one for disrespect toward his superior officers in violation of Article of War 63, and one previous conviction against Vezzetti by special court-martial for absence without leave for six days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, 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 life". The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused Onofreo was an ammunition handler in Company A, 92nd Chemical Mortar Battalion (R6,7) and accused Vezzetti an ammunition handler in Company B of the same battalion (R9,10).
A search was made for Onofreo on 2 September 1944 about 1900 hours and he could not be found (R7). He has been absent from his company since that date (R8,9). It was stipulated by accused Onofreo, his defense counsel and the prosecution that the morning report of Company A for 3 September 1944 contains the following entry: "Alfred Onofreo, 31281012, duty to AWOL,2000 hours, 2 September 1944" (R10).

Although a search was made, accused Vezzetti could not be found in his platoon area on 1 September 1944 and he has not been seen in his organization since that date. It was stipulated by the accused Vezzetti, his counsel and the prosecution that the morning report of Company B for 3 September 1944 contains the following entry: Frank A. Vezzetti, 42008469, duty to AWOL, 2000 hours, 2 September 1944 (R9,10).

At about 1800 hours, 6 December 1944, both accused were seen loading gasoline on a 6 x 6 truck belonging to the 513th Ordnanace Heavy Maintenance Company. The corporal of the guard, who saw them, went to the guardhouse and told the guard there to check the truck on its way out to determine if accused had "a slip authorizing them to get the gasoline". He returned to check the gasoline dump and they were gone. He overtook the accused about three miles down the road. They were driving the truck he had seen inside the dump and it contained 99 cans of gasoline, each can having a capacityof five gallons. He questioned accused, placed them under arrest and brought them back to the guardhouse. These events took

place about three kilometers from the center of Chartres (R10,11, 12,13,15). An abandoned jeep, bearing number 20348072, was found about 25 yards from the gasoline dump the next morning (R16). The truck has a value of $2,495.00 (R16)and it was stipulated by the accused, defense counsel and the prosecution that the gasoline involved has a value in excess of $50.00 (R20).

It was stipulated by the prosecution, the defense and the accused that if Warrant Officer (Junior Grade) Charles E. Bradley, ASN W-2120541, 312th Ferry Squadron, 385th AAF Station, were present he would testify that a ¼ ton, 4 x 4 jeep which he had left parked in front of the Seine Section Headquarters in Paris on the morning of 6 December 1944, was missing. The serial number of the vehicle is 20348072, and it is the property of the United States Government assigned to the 312th Ferry Squadron (R13). The value of a ¼ ton jeep is $1,000.00 (R16).

After being properly warned of their rights both accused made pre-trial statements to a "CIS" agent in which each admitted being absent without leave since the latter part of August. Onofreo admitted he stole a jeep in Paris on 5 December 1944; Vezzetti admitted he knew it was stolen and both admitted driving in it to an ordnance dump in Chartres on 6 December 1944 where they loaded gasoline on a 6 x 6, 2½ ton truck. They both admit stealing the gasoline and the truck and being arrested shortly after they drove away from the dump (R18; Pros.Exs.2,3).

Each accused in his statement implicates the other and the court was not instructed that each statement was to be considered solely against the one who make it. This was harmless error since each accused in his own statement substantially admitted what was stated against him in the other's statement.

4. Both accused, after their rights as witnesses were fully explained to them (R20,21), elected to make one unsworn statement through their defense counsel as to Charge I only, substantially as follows:

On 2 September 1944 they left their respective company areas and went to Paris, about 35 miles away. They remained in Paris, and vicinity most of the time they were absent. They left all their personal equipment in their company areas and were never out of uniform. At one time in Paris they turned themselves in to the military police as being absent without leave but they were told to get out of town and find their units. This was sometime in October or early November. At no time did they intend to remain out of the military service (R21).

5. "Desertion is absence without leave accompanied by the intention not to return" (MCM, 1928, par.130a, p.142). That both

accused absented themselves from their organizations at the time alleged is clearly proved by the evidence and their admissions to the "CIS" agents and in their unsworn statement at the trial. The only question presented to the court was whether they intended to remain permanently away from their organization. The uncontradicted evidence of the prosecution establishes the fact that 95 days after their original absence they were apprehended in the act of stealing an Army truck loaded with gasoline. The court was fully justified in inferring from their long continued absence in an active theater of operations and from their activities therein that accused did not intend to return to the military service. Accordingly there is competent, substantial evidence to support the findings of the court as to the offense alleged in the Specification of Charge I as to both accused (MCM, 1928, par.130a, p.143; CM ETO 11173, Jenkins).

Concerning Specifications 1,2 and 3 of Charge II there is ample evidence in the record of trial to justify the court's findings with respect thereto. In addition both accused in their statements to the "CIS" agent admit they stole the truck and the gasoline. Accused Onofreo admitted he stole the jeep and Vezzetti admitted riding in it to Chartres, knowing it was stolen. Thus, all the elements of these offenses are established by competent, substantial evidence (MCM, 1928, par.150i, p.185).

6. The charge sheets show that accused Onofreo is 20 years, nine months of age and was inducted 19 January 1943 at Waterbury, Connecticut, and accused Vezzetti is 20 years of age and was inducted 6 August 1943 at Newark, New Jersey. Neither had any prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of the crime of desertion in time of war by Article of War 42, upon conviction of applying to one's own use property of the United States furnished or to be used for the military service by Article of War 42 and

and section 36, Federal Criminal Code (18 USCA 87); upon conviction of larceny of property of the United States of a value exceeding $50, by Article of War 42 and section 35 (amended), Federal Criminal Code (18 USCA 82). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

12 MAY 1945

CM ETO 9542

U N I T E D S T A T E S	)	NINTH UNITED STATES ARMY
	)	
v.	)	
	)	
First Lieutenant HAROLD ISENBERG (O-1582386), Quartermaster Corps, 688th Quartermaster Battalion	)	Trial by GCM, convened at Maastricht, Holland, 8 February 1945. Sentence: Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that First Lieutenant Harold Isenberg, 688th Quartermaster Battalion, while acting as unit censor for the 543d Quartermaster Depot Supply Company, on or about 10 March 1944, at or near Hill Camp, Westbury Wilts, England, did, in violation of Circular 65, Headquarters European Theater of Operations, U. S. Army, dated 26 August 1943, wrongfully repeat and discuss information contained in a communication written by Private Norman R. Davis, 543d Quartermaster Depot Supply Company, and censored by the said Lieutenant Harold Isenberg.

Specification 2: In that * * * while acting as unit censor for the 543d Quartermaster Depot Supply Company, on or about 26 August 1944, at or near Mosles, France, did, in violation of Circular 33, Headquarters European Theater of Operations, dated 21 March 1944, wrongfully repeat and discuss information contained in a communication written by Private Martin Rubin, 543d Quartermaster Depot Supply Company and censored by said First Lieutenant Harold Isenberg.

Specification 3: In that * * * while acting as a unit censor for the 543d Quartermaster Depot Supply Company, on or about 26 August 1944, at or near Longville, France, did, in violation of Circular 33, Headquarters European Theater of Operations, U. S. Army, dated 21 March 1944, wrongfully repeat and discuss information contained in a communication written by Private Mike Leyva, 543d Quartermaster Depot Supply Company, and censored by said First Lieutenant Harold Isenberg.

Specification 4: In that * * * while acting as unit censor for the 543d Quartermaster Depot Supply Company, on or about 27 October 1944, at or near Maastricht, Holland, did, in violation of Circular 33, Headquarters European Theater of Operations, dated 21 March 1944, wrongfully repeat and discuss information contained in a communication written by Technician Fourth Grade Joe Saurez, 543d Quartermaster Depot Supply Company, and censored by said First Lieutenant Harold Isenberg.

Specification 5: In that * * * while acting as a unit censor for the 543d Quartermaster Depot Supply Company, on or about 1 August 1944, at or near Mosles, France, did in violation of Circular 33, Headquarters European Theater of Operations, dated 21 March 1944, wrongfully repeat and discuss information contained in a communication written by Master Sergeant Thomas L. Dornwell, 543d Quartermaster Depot Supply Company, and censored by said First Lieutenant Harold Isenberg.

Specification 6: In that * * * while acting as a unit censor for the 543d Quartermaster Depot Supply Company, on or about 24 July 1944, at

or near Mosles, France, did, in violation of Circular 33, Headquarters European Theater of Operations, U. S. Army, dated 21 March, 1944, wrongfully repeat and discuss information contained in a communication written by Private Martin Rubin, 543d Quartermaster Depot Supply Company, and censored by the said First Lieutenant Harold Isenberg.

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

Specifications 1-6: Same as Specifications 1-6, Charge I.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Ninth 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 and withheld the order directing execution thereof pursuant to Article of War 50½.

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

Specification 1, Charges I and II: In March 1944, accused was an officer of the 543rd Quartermaster Depot Supply Company and was charged with the duty of censoring the mail of the enlisted men of the organization. One evening in the early part of the month while the company was stationed at Hill Camp, Westbury, Wilts, England, Sergeant Frederick H. Mumford, company transportation sergeant, went to the orderly room to get his pass. Accused was censoring mail and while reading a letter written by Private Norman R. Davis of the company, remarked to the sergeant that "it was funny the way some things caught a man's eye". He thereupon read a sentence from the letter to the effect "I hope you are not disappointed in me not being a second lieutenant as the war is not won only by lieutenants", saying to the sergeant "Norman R. tickles me". The sergeant knew accused was referring to Private Davis, since he was generally known in the company as "Norman R." (R8-11).

Specification 2, Charges I and II: On or about 26 August 1944, accused was censoring a letter written by Private Martin Rubin, a member of the company. The organization was then stationed at Longville, France. Accused read the letter to Staff Sergeant Elzie M. Hopwood, who was assisting the company clerk and happened to be present at the time, telling the sergeant that the letter had been written by Rubin. The letter was addressed to The Philadelphia

Inquirer and dealt with a civilian railway operators' strike in Philadelphia (R17,19).

Specification 3, Charges I and II: On the same day (26 August 1944), while accused was censoring a letter written by Private Mike Leyva of the company, he said to Sergeant Hopwood "Get a load of this" or "Listen to this", and read the letter to him. In the letter which was addressed to a girl with whom he apparently was not acquainted, Leyva described himself and in an effort to give the girl an idea of where he was located, said something like "could that be the soft music of Paris I hear in the distance?" (R17-20,22).

Specification 4, Charges I & II: One morning in the latter part of October, 1944 while the organization was at Maastricht, Holland, accused was censoring mail in the company orderly room while Staff Sergeant James Ellett was also working there. Accused said "Listen to this" or "How about this", and proceeded to read a sentence from a letter written by Technician Fourth Grade Joe Saurez wherein the writer said "I am a sad sack" or "damn sad sack". Accused told the sergeant that the letter from which he was reading was written by Saurez who was a member of the company (R23-25).

Specification 5, Charges I and II: On or about 1 August 1944, the company was located at Mosles, France. Accused was censoring mail and while examining a letter written by Master Sergeant Thomas L. Dornwell to his wife, read excerpts from the letter to Sergeant Hopwood, such excerpts containing frequent repetitions of the words "darling" or "sweetheart". Accused stated to Hopwood that the letter was written by Dornwell and remarked laughingly that "some of the boys in this company sure get mushy" (R16,17,18).

Specification 6, Charges I and II: Approximately 24 July 1944, at Mosles, France, accused was censoring a letter written by Private Martin Rubin. The letter contained a poem written by Rubin, the subject of which was life in a foxhole. Accused read the poem to the company mail clerk who was present at the time, remarking that Private Rubin was good at writing such poetry (R12-15).

4. Accused, having been warned of his rights by the law member, elected to remain silent (R32-33).

Evidence introduced in behalf of accused included testimony of the 543rd Quartermaster Depot Commander to the effect that accused was a man of excellent character and had always conducted

himself as a gentleman. He also described him as conscientious, loyal and efficient in the performance of his duties. The Depot Commander stated that it was the practice in his organization after mail had been censored, to have the company mail clerk seal the envelopes, sign the name of the censoring officer thereto and deliver them to the Army Post Office. There had been two previous instances of miscensoring in the organization consisting of improper disclosures of the contents of censored letters, although accused was not involved in either of them. As a result of these incidents, a rule was established that mail would not be taken from the orderly room to be censored. Because of certain additional duties performed by accused in March 1944, the Depot Commander did not believe that he was engaged in censoring mail during that month except possibly for the last three days. He did not know whether ETOUSA Circulars 65, 1943 and 33, 1944 had been distributed to his organization, but censorship regulations had been received and it was his practice when such regulations came in to refer them to the officers concerned with the direction that they be read and initialed. He was aware that enlisted men's mail was to be treated in a confidential manner (R25-31).

5. The court was asked to take judicial notice of Circular 65, Headquarters, European Theater of Operations, 26 August 1943, and Circular 33, Headquarters, European Theater of Operations, 21 March 1944, both providing that unit censors will not repeat or discuss information contained in communications censored by them (R6-7).

6. Conviction was obtained in this case upon identical specifications charged under both Articles of War 95 and 96. There is no question that the record of trial fully supports the findings of guilty under the 96th Article (Charge II and Specifications), since there is ample evidence to justify the conclusion that there was a disclosure by accused of the contents and authorship of the letters specified, in violation of theater directives then in force. Such a violation of standing administrative directives constitutes a disorder or neglect to the prejudice of good military order and discipline under the 96th Article of War (CM ETO 1538, Rhodes). In two instances, Specifications 1 and 4, the exact date of commission of the offense has not been proved, although the approximate date is fixed in each case. However the offenses are such that time is not of the essence and since the specifications clearly give notice of the offenses charged, failure to prove the exact date is immaterial (See CM ETO 1538, Rhodes, p.21). In any event, the approximate dates proved are close enough to fall within the "on or about" phraseology of the specifications. It was entirely proper that judicial notice be taken of the circulars of the European Theater of Operations (CM ETO 1538, Rhodes; CM ETO 1554, Pritchard),

and the record contains ample evidence to justify the court's inference that accused as an experienced censor was aware of the elementary and commonly known principle of censorship embodied therein (CM ETO 1538, Rhodes, p.26; CM ETO 1554, Pritchard, p.19).

With reference to the sufficiency of the record to sustain the findings of guilty of violations of Article of War 95, it is first necessary to consider exactly what accused did from a factual point of view. This is not a case of the improper opening and reading of the mail of another which is described by Winthrop as constituting a violation of Article of War 95 (Winthrop's Military Law and Precedents (Reprint 1920), p.714). Accused had authority in his capacity as censor to read the letters in question, and his offense consisted solely of a violation of theater directives forbidding the disclosure and discussion by a censor of matters contained in censored mail except as required in line of duty. In all six instances accused disclosed not only the contents, but also the authorship of letters written by enlisted members of his organization and entrusted to him for censorship purposes. In each case, disclosure was made to an enlisted man of the same organization who happened to be present while accused was censoring the letter in question. None of these men had any right or reason to know the matters disclosed. The disclosures were made casually, although intentionally, and without any apparent malicious motive or intent to injure the authors of the letters. With the possible exception of the letters of Sergeant Dornwell and Private Leyva (Specifications 3 and 5), it cannot be said that the comments of accused and the nature of the matters disclosed were such as to justify an inference that the disclosures were made for the purpose of ridiculing the writers of the communications, nor can it be said that they had such effect. The question, therefore is whether disclosures made by a censor under the circumstances outlined above constitute conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. It is the conclusion of the Board of Review that it does. The censorship of mail is a military necessity imposed by the requirements of security. Any unnecessary extension of the invasion of privacy inherent in censorship constitutes a breach of trust or confidence on the part of the officer guilty thereof. Regardless of the presence or absence of any malicious intent, the deliberate and indiscriminate disclosure by a censor of the contents and authorship of a soldier's mail to other soldiers of the same organization is a flagrant violation of the writer's absolute right of privacy in this respect. A breach of trust of this character seriously impairs the morale and discipline of the command, destroys confidence in the integrity of military administration, and represents a sufficiently grave departure from the standards of conduct required of a commissioned officer to constitute a violation of Article of War 95 (Winthrop's Military

Law and Precedents (Reprint, 1920), pp.710-716; see also CM ETO 3292, Pilat).

7. The charge sheet shows that accused is 27 years and five months of age, enlisted in the National Guard 21 October 1940 and entered on active duty as an enlisted man 24 February 1941 at New Haven, Connecticut. He was commissioned 19 February 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. Dismissal and total forfeitures are authorized punishments for an officer upon conviction of a violation of Article of War 96. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95.

Benjamin H. Keesler Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(80)

1st Ind.

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

1. In the case of First Lieutenant HAROLD ISENBERG (O-1582386), Quartermaster Corps, 688th Quartermaster Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9542. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9542).

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

(Sentence ordered executed. GCMO 156, ETO, 20 May 1945).

9542

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

BOARD OF REVIEW NO. 3

9 JUN 1945

CM ETO 9544

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Krefeld, Germany, 14, 16 March 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Sergeant VITO T. RAPOLAS (32909632), Technician Fifth Grade NIEVES M. DIAZ (32295142), and Private PETER J. KENEC (33472872), all of Company L, 335th Infantry	

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

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

2. Accused were tried jointly on the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Peter J. Kenec, Company L, 335th Infantry, Technician Fifth Grade Nieves M. Diaz, Company L, 335th Infantry, and Sergeant Vito T. Rapolas, Company L, 335th Infantry, acting jointly and in pursuance of a common intent, did, at Baerl, Germany, on or about 8 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Anna Hersbaun, Baerl, Germany.

(82)

Each accused pleaded not guilty and, three-fourth of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification and Charge. Evidence was introduced of two previous convictions against Rapolas, one by special court for entering an off-limit area in violation of Article of War 96 and one by summary court for absence without leave for one day in violation of Article of War 61, and of two previous convictions by special court against Kenec, both for absence without leave for one and two days respectively in violation of Article of War 61. No evidence of previous convictions was introduced against Diaz. 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 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 under Article of War 50½.

3. The evidence for the prosecution was as follows:

At about 1430-1500 hours, 8 March 1945, Anna Kersbaun was in the kitchen of her home at Baerl, Germany, when the three accused entered. One of them had been to the house several times before. All were armed, Kenec with a pistol and the others with something "larger which they carried over their shoulders". Anna's father, mother and sister were also in the house at the time (R9-10,22). Kenec beckoned to the father and mother and indicated with gestures that they were to go to the cellar. They complied and Kenec then told Anna to go upstairs (R10-11). She started to go, but felt uneasy and slightly sick and wanted to come down again and join her parents. Kenec, however, pulled out his pistol and told her to continue up the stairs, pushing her with his hand. They finally reached her bedroom and Anna, being apprehensive, screamed for her father several times and then shouted for her sister, Sophie (R11-13,23). Sophie had meanwhile left the room where she had been when accused arrived and had gone into the kitchen. Diaz and Rapolas

were seated there at a table. Sophie called to her parents who replied from the cellar, telling her that the soldiers had ordered them down there and asking what had happened to Anna. She then called Anna's name, and hearing a faint reply from above, started upstairs. As she reached the top of the stairs, Kenec came towards her with Anna behind him looking very frightened. Sophie asked what Anna was doing there, but accused drew his pistol and ordered her downstairs. She returned and tried to leave the house, but Rapolas and Diaz took her by the arm and told her to sit down. They likewise refused to permit her mother to come up from the cellar (R22-24).

In the meantime Anna and Kenec were in the bedroom. He motioned to her to lie on the bed and when she cried and tried to get to the door, he took hold of her and threw her down. She attempted to get up, but he pointed his pistol at her heart saying "Kaput Schiessen (Shoot dead)". He then pulled down her slacks and underwear and had intercourse with her. She did not cooperate and lay very stiffly, trying throughout to keep him away from her. Penetration however was accomplished. The act caused her a good deal of pain and upon its conclusion, she noticed blood on her bed (R13-14,19-20).

When Kenec finished he went downstairs and a few minutes later, Diaz came up. He took hold of her, put her on the bed and had intercourse with her. She was too weak to defend herself although she tried to resist and did not cooperate. Penetration was effected. As Diaz was leaving, Rapolas entered the room. He did the same thing that Kenec and Diaz had done. By this time, Anna was no longer able to resist. After Rapolas left, she lay on the bed shaking and suffering pain (R15-17, 21,25).

Approximately four hours after the alleged rapes, Anna was examined by a medical officer (R26). The examination revealed evidences of minor bruises and lacerations on the opening of the vaginal canal which may have resulted from recent intercourse. There was no fluid except the normal female secretions (R26-27). No microscopic examination was made and it was impossible to say whether spermatozoa was present (R29-30). In the opinion of the medical officer, Anna had not been a virgin and the nature of the bruises and lacerations were such that he doubted that three forcible penetrations had been made, stating "She

may have had the first, but I doubt very much if she had the second or third" (R31). The medical officer also stated in the course of his testimony that he did not think Anna had had intercourse and also that "She may have had intercourse, but I would bet my last bottom dollar that she was not raped".

The day after the alleged attacks, men from several platoons of accused's company were marched past Anna's mother and sister. No identification was made by either of them. The three accused were not a part of this line-up, being on duty at the time. However, the mother picked out another member of the company as having been at her house on a previous occasion and from him the names of accused as persons who had been there with him were obtained. Apparently the mother also gave a description of two of the assailants. The company commander sent for accused and placed them in a formation with six or seven other men. Both the mother and sister then separately identified them. Accused and five or six other men were then taken to the home of the victim and she too picked accused out of the group (R7-9,18-19, 32,71,76-81,85-86).

4. Accused, after being warned of their rights, elected to take the stand and testify under oath (R33,43, 49). All testified to the same effect. They stated that on 8 March 1945, the company was on guard in foxholes overlooking the Rhine. Accused Rapolas was in charge of a section including Diaz and Kenec. Between 1200 and 1215 hours, Rapolas' section relieved the section on duty. Three men were placed in a foxhole with one machine gun, and two (Diaz and Kenec) in a foxhole with another. Rapolas took his position in a foxhole midway between them. Diaz' and Kenec's hole was to the right of Rapolas' and about ten yards distant. The three men on Rapolas' left were on active guard the first three hours and then Kenec and Diaz took over. All however were in the positions for the entire period, leaving them only at 1715 hours to go to chow. Rapolas left his foxhole once about the middle of the afternoon to relieve himself. Otherwise all three remained in their respective holes throughout the afternoon. Kenec testified that he "could have been" to Anna's house several days previously in the course of an inspection made by

members of the company of all the houses on the street to search for weapons. However, he did not remember that particular house or having seen Anna on the occasion. The house was about three-quarters of a mile or a fifteen minute walk from the foxholes (R34-41,44-52).

The testimony of accused was corroborated in many respects by that of several of their fellow members of the company. Thus, the fact that accused took the positions described by them at 1200 hours and left at about 1715 hours when relieved for chow was corroborated by three witnesses (R53,54,62); two witnesses saw Rapolas get out of his foxhole to relieve himself at about 1430 hours (R60,63); a witness testified that he delivered a message to Rapolas in his foxhole either personally or by telephone at about 1400 hours (R57); another witness testified that he went to Rapolas' foxhole to borrow an egg at about 1430 hours and saw him at that time (R54,61); and three witnesses who were stationed at nearby points testified that although they were unable to see accused in their holes, they did not see them leave them at any time during the period from 1430 hours to 1530 hours (R60-61, 63-64,65-67), two of such witnesses stating that no one could have left the foxholes and come to the rear without being observed by them (R61,66).

5. Two serious questions are raised by the record of trial in this case. One concerns the matter of penetration and the other the question of identity of accused as the victim's assailants. Both are purely questions of fact arising out of inconsistencies in the testimony. As the Board of Review has often held, the determination of such questions lies within the province of the court and therefore, the Board's only concern is whether the court's findings on the issues are supported by substantial competent evidence. If they are, they cannot be disturbed (CM ETO 6148, Dear and Douglas).

As to the penetration, the difficulty arises not from the victim's testimony which clearly and unequivocally shows penetration by each accused, but rather from the testimony of the medical officer. The evidence given by this witness was confused, showing at one point that the abrasions were such as to indicate that the victim may have had intercourse, at another that the witness thought she had not, and at another that there may have been one forcible penetration, but that he doubted that there had been three. Considering this testimony along with that of the victim, it is considered that the court was justified in believing that at least one penetration

had been made. It is immaterial in this connection whether the actual penetration or penetrations were forcible inasmuch as the victim was shown to have resisted to the fullest extent required of her under the circumstances (See CM ETO 5805, Lewis and Sexton). Furthermore, in view of the joint character of accuseds' enterprise, no more than one penetration need be shown, it being unnecessary to prove that each accused had intercourse with the victim (CM ETO 7518, Bailey,et al). Hence as far as the issue of penetration is concerned, the finding of guilty as to each accused is supported by substantial evidence regardless of whether one, two or three penetrations are regarded as having been proved and regardless of whether the actual penetration was accompanied by force.

With respect to the issue of identity, the evidence of the prosecution and that of the defense squarely conflict. Both the victim and her sister positively identified accused at the trial as the assailants. Accuseds' testimony, however, shows that they were on the line throughout the entire afternoon in question. The evidence given by other defense witnesses corroborates accuseds' account of their movements to a considerable extent, although no one purports actually to have seen them between approximately 1430 and 1715 hours which constitutes the crucial period from the point of view of the time of commission of the rapes. The court apparently disbelieved the defense witnesses insofar as their testimony was at variance with that of the prosecution's and since its determination of the question is supported by substantial competent evidence, it cannot be disturbed by the Board of Review. As for the third party evidence of the identification parades, no identification was made at the first and hence the evidence of what occurred there is not objectionable as hearsay (CM ETO 9446, Jacobs). The victim, her mother and sister identified accused at subsequent parades, but inasmuch as accused were not in custody or confinement at the time, the evidence of such identification is not objectionable on the grounds discussed in CM 270871, IV Bull.JAG 4.

6. The charge sheet shows the respective ages of accused as follows: Rapolas - 21 years and two months; Diaz - 35 years and two months; Kenec - 26 years and six months. Rapolas was inducted 31 March 1943 at Newark, New Jersey; Diaz, 1 April 1942 at Fort Jay, New York; and Kenec, 3 December 1942 at Philadelphia, Pennsylvania. None had prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B W Dewey Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

13 AUG 1945

CM ETO 9565

UNITED STATES	102ND INFANTRY DIVISION
v.	Trial by GCM, convened at APO 102, U. S. Army, 8 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES B. STRANGE (35102610), Company L, 405th Infantry.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James B. Strange, Company L, 405th Infantry, did, at Beggendorf, Germany, on or about 8 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 3 February 1945.

He pleaded guilty to the Specification except the words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit:--Combat with the enemy, and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 3 February 1945," substituting therefor the words "absent himself without leave from his organization and did remain absent without proper leave," of the excepted words, not guilty, of the substituted words, guilty, and not guilty to the Charge, but guilty of a violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. Evidence was introduced of two previous

convictions by special court martial for absences without leave of 9 and 11 days in violation of Article of War 61. 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. Summary of evidence for Prosecution:

On 7 December 1944 accused was transferred from Headquarters Company, 405th Infantry, to Company C, 405th Infantry. He joined the latter at Beggendorf, Germany, sometime between 1900 and 2130 (R7,13,18) and was taken to his squad. There was some talk about the next objective. As reported by Private First Class Joseph Martinek of accused's organization,

> "It was mostly about the Roer River. It was our next objective. No doubt we would cross it. Anyway the Ninth Army would. It was our next objective. That was the rumor going around."

Accused was present during this conversation but does not appear to have joined therein. He was wearing "an officer's cap" and was advised to "take it off and not wear it into the line." He said he would - that he was going to take his clothes back to the Red Cross at Palenberg (R12-16). The next morning, 8 December 1944, accused "was gone" (R15) and was not again seen by his company commander until the day of trial. He had no permission to be absent (R8). At that time the division was on the line and the regiment (405th Infantry) in reserve. Operations against the enemy were contemplated (R9). Two or three days before (R12), the platoon leaders had been made aware of that fact and told to inform all members of the organization (R11). On 8 December the front was at Roerdorf, Linnich and Flossdorf, some six or seven miles from Beggendorf. Division forward headquarters were at Ubach, approximately a half or three-quarters of a mile to the rear of Beggendorf. In all the company stayed at Beggendorf about a week and a half. There was occasional shell fire and there were several air alerts (R12).

On 3 February 1945 accused was apprehended by military police at Liege, Belgium, in front of the "G.I.Gardens." On the way to headquarters with the military police, he stopped and said, "I am AWOL. If you turn me in I am in for a lot of trouble. Don't turn me in and I will go back myself" (R16-18).

Without passing on its relevancy the court took judicial notice that the German winter counter offensive commenced about 16 December and continued for about four weeks (R19). On 17 December, the company was at

Suggerath, Germany, and the company commander was present with plans for repelling a counter attack. While admitted without objection, the president noted his failure to see its relevancy (R10). There was no ruling on defense's request that judicial notice be taken that the Roer River operations did not commence until 23 February 1945 (R19).

A duly authenticated extract copy of the company morning report for 9 December 1944, showing accused absent without leave as of 0600 hours 8 December 1944, was introduced without objection. While the company commander testified he signed the original entry, the extract shows it to have been signed by another (R8-9;Ex.A).

In rebuttal, prosecution recalled Martinek who reiterated accused was present during the discussion but took no part therein:

> "The only thing said was that it was our next objective. We knew we had to cross the Roer River. We believed we was the ones. * * * I guess I didn't know much about it. I was just a new fellow [replacement of four days] and what we heard was from the older fellows. * * * [How soon it would be] was not said. We didn't know. The company had just come back from the front lines" (R34-36).

4. After his rights were explained to him accused elected to take the stand and testify. He was inducted 4 April 1941 (R21,28). He received from 5 to 8 weeks basic training at Camp Shelby, Mississippi (R29), and remained there for about 18 months serving as a truck driver in the 138th FieldArtillery (R28). In November 1942 he joined the 102nd Division at Camp Maxey, Texas (R21). He was assigned to 802nd Ordnance as a truck driver (R22). With the 802nd, "I didn't receive basic training. I instructed it. But not infantry, just close order drill and the manual of arms" (R29). He came overseas with Headquarters Company (R22). About the middle of October 1944, he joined Headquarters Company, 405th Infantry. He was assigned as driver for the Red Cross Field Director. On 7 December he was transferredand taken to Company L as a rifleman (R22-23). The commanding officer told him nothing about the tactical situation (R24). In the conversation as to which Martinek testified, nothing was said about impending operations or what the company was going to do (R24-25). Had anything been said about crossing the Roer he would have heard it (R30). The conversation was"about how long the war would last and where the fellows were from" (R24-25,30). They did tell him the company was in reserve (R25). Martinek just said his clothes were "too good to wear," 'not that they were "too good to wear on the line" (R30). The next day about 1530 hours he went to the rest center at Palenberg, after telling the squad leader he was going there, to leave his clothes. He remained there for a couple of hours (R25) and started to return (R26,31). He changed his mind and decided to go to Paris:--

> "I figured I would just take off a few days. I figured I wasn't a rifleman and would not have much chance on the

line. * * * I felt I wanted to get some infantry training. * * * I thought I would get a special court martial, be put in detention or something and then they give infantry training" (R31).

He was qualified with the M1 and the carbine, had run the infiltration and transition courses and had been in the chlorine gas chamber (R29). It took him about three days to get to Paris (R26,31), where he stayed for about five weeks (R26). At first he stayed at the Red Cross Hotel but later slept in chairs at "The Rainbow Gardens" (R26). He decided to return when he heard of the break-through, around 18 December, but no one could get out the city except in a shipment (R26,32). He left Paris on 27 January and went to Rheims where he stayed two days. From there he went to Liege and was picked up about 35 minutes after arriving. His destination was Maastricht where he intended "to turn * * * in to the Ninth Army stockade." He wore his uniform constantly and never had any intention of not returning (R27).

5. At the close of prosecution's case, defense moved for a finding of not guilty insofar as desertion was concerned. The motion was denied. At the close of its case the defense renewed, and thereby saved, its motion. Again it was denied. Since there was some substantial prosecution evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tended to establish every essential element of the offense charged, the court's ruling was proper (MCM,1928,par.71d,p.56; CM 235407, Claybourn, 22 B.R. 1,34). The division was on the line with accused's company (and regiment) in reserve some five or six miles to the rear. Operations against the enemy were contemplated. When accused joined he was told not to wear his officer's cap on the line. At that time other members of his squad expressed the opinion that the company would participate in the Roer crossing. In all the company was at Beggendorf for about ten days during which time there was occasional shell fire and several air alerts though it does not appear whether either occurred in the few hours accused was with the company. This evidence, coupled with all reasonable inferences and applicable presumptions, fairly tended to establish every essential element of the offense charged (see CM ETO 11006, Mazzeo; CM ETO 11404 Holmes). The court's ruling having been found to have been proper, consideration may be given to evidence presented by the defense.

While denying that the conversation of his squad related to contemplated operations, accused did admit he was told the company was in reserve. His stated reason for absenting himself clearly indicates that he did so to avoid the duties of a rifleman on the line. That he "figured" he "wasn't a rifleman" in no way excused his conduct (CM ETO 10402, Wolf).

6. Some points require independent comment.

a. The relevancy of the German offensive some eight or nine days after accusedabsented himself seems extremely dubious to say the least. The intent to avoid hazardous duty must exist at the time of absence (CM ETO 5958, Perry, et al). That accused cannot be charged with foreknowledge

of the offensive is obvious. However, no substantial rights of the accused were injuriously affected. The statements of the president and law member clearly indicate the court did not consider this as relevant on the matter of intent. And accused testified he left because he "figured" he would not have much chance on the line.

Failure of the court to rule on defense's request that court take judicial notice that the Roer operations did not commence until 23 February 1945 did not injuriously affect the substantial rights of accused. The postponement lacked significance as to intent unless accused claimed a foreknowledge thereof. This accused did not claim.

b. It is unnecessary to consider whether the extract copy of the morning report was competent. Accused pleaded guilty to absence without leave. In addition, there was competent oral evidence, including accused's testimony, establishing his absence without leave.

7. The charge sheet shows that the accused is 25 years eleven months of age and that he was inducted, without prior service, on 4 April 1941.

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

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as theplace of confinement is authorized. (AW 42; Cir.210,WD,14 Sept 1943, sec.VI as amended).

B R Sleeper Judge Advocate

Malcolm C. Sheinman Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

14 JUN 1945

CM ETO 9572

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at
	)	Esch, Luxembourg, 31 January
First Lieutenant WILLIAM O.	)	1945. Sentence: Dismissal,
DAWSON (O-1053946), Battery	)	total forfeitures and con-
A, 129th Antiaircraft Artil-	)	finement at hard labor for
lery Gun Battalion, (Mobile).	)	one year. Eastern Branch,
	)	United States Disciplinary
	)	Barracks, Greenhaven, New York

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

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1. The record of trial in the case of the 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 William O. Dawson, 129th Antiaircraft Artillery Gun Battalion (Mobile), did, without proper leave, absent himself from his organization at or near Differdange, Luxembourg, from about 1700 hours, 19 December 1944 to about 2300 hours, 19 December 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at or near Differdange, Luxembourg, from about 1000 hours, 10 January 1945 to about 0930 hours, 11 January 1945.

(96)

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

Specification: In that * * * was, on or about 2300 hours, 19 December 1944, drunk in uniform in a public place, to wit, on a public highway at or near Differdange, Luxembourg.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority the Commanding General, Third United States Army, approved the sentence but remitted so much of the confinement at hard labor as was in excess of one year and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence presented by the prosecution was substantially as follows:

Accused was executive officer of Battery A, 129th Anti-aircraft Gun Battalion on 19 December 1944 and for 15 months prior thereto (R22). On that date his unit was stationed near Differdange, Luxembourg (R6,7,27). At about 2230 hours that day the battalion medical officer was summoned to the scene of an accident about one mile and a half to two miles from Battery A on the road toward Hussigny (R7,8) where he arrived about 2300 hours and found a truck some 20 or 30 feet down an embankment, with the accused lying against the left rear wheel (R8). Accused was in uniform. The accident occurred on the main highway from Differdange to Hussigny (R8,9). When the medical officer approached him, accused spoke to him in a voice quite a bit louder than ordinary, stating he was not hurt. Later he complained that his left leg and right shoulder hurt him. He was not suffering from shock and at the scene of the accident no injuries to him were evident (R9,10,13). His breath smelled of drink, his speech was loud and thick and in the opinion of the medical officer he was "medium drunk" (R11,12,19). In the hospital where accused was taken for examination (R8), he kicked at the doctor who attempted to examine his leg and he fought with the technicians who attempted to undress him. When asked for his dog tags "he let out a great big laugh and said he hadn't had any for months and never bothered with them" (R12). The x-rays taken of him showed no evidence of any injury (R9) and he returned to his battery area that night (R8).

Standing orders in effect on 19 December 1944 required that the commanding officer or unit commanding officer of the battery have permission before leaving the battery area and either the battery commander or executive officer had to be present with the battery at all times. On that day the battery commander was absent until 1830 hours and accused was in charge of the battery (R22,24,25). He had not been authorized to be absent from his organization on 19 December 1944 (R20). There was no activity in the battery area on this day and it was a usual custom for a battery officer to check cafes in the area looking for men who might be there without authority (R21,22). On 20 December accused made a sworn statement to a battalion officer in which he admitted drinking some four or five beers and two or three schnapps in Nick's Cafe by the battery motor pool on 19 December 1944. He further related that he left this cafe about 1700 hours looking for battery personnel. Assisted by Private T. A. Milan, he checked several cafes and then went to see a friend of his, who operates a cafe across from the battalion headquarters. About 1930 hours they left for their battery and Private Milan waved down a truck. Accused got in the rear of the truck and as it turned a curve down a steep grade it "slipped on something" and threw him off the truck (R28; Pros.Ex.2).

A duly authenticated extract copy of the morning reports of accused's unit for 10 and 11 January 1945, showing accused absent without leave from 1000 hours on 10 January 1945 to 0930 hours on 11 January 1945, was received in evidence by the court.

4. The defense presented testimony substantially as follows:

On 19 December 1944 accused met Private Thomas A. Milan, of his organization, in a cafe located near the motor pool and asked Private Milan to accompany him while he checked cafes for men of their organization (R29). About 1700 hours they left the battery area, making one stop in Oberkorn and eight or ten stops in Differdange, checking cafes for battery personnel (R30,33). They remained about a half hour in the last cafe and at about 1900 hours started back to camp (R33,34). Accused got on a truck without any difficulty, there was nothing incoherent in his speech and he was sober when he left the last cafe (R31). Private Milan consumed six or seven drinks of schnapps after 1700 hours on that day and had one drink with accused (R35). Two noncommissioned officers of accused's battery, learning of an accident, went to investigate (R36). Accused recognized one noncommissioned officer (R40). The other testified accused had a black eye, scratches over his forehead, one eye and his chin, and a large lump on the back of his head. This soldier could not state if accused was drunk or not as "he was probably more dazed from the accident than anything else" (R36,38) and he could understand everything accused said (R37).

(98)

On 10 January 1945 there was no activity in the battery area (R42). At about 0930 hours on this day a driver in his battery drove accused into Esch and was directed to return and pick him up at the same place about 1600 hours. The driver returned as instructed but accused did not appear. The driver was not certain he returned to the same place where he dropped accused that morning (R44,45,46,47).

After his rights as a witness were fully explained to him (R48), accused elected to remain silent.

5. The offense of absence without leave as alleged in Specification 1 of Charge I is established both by the evidence placing accused outside the battery area and his own admission in his sworn statement that he left the area at the time alleged. Convincing evidence was presented showing that accused had a duty to remain in the area and that his absence was unauthorized. There is substantial evidence to support the findings of the court (MCM, 1928, par.132, pp.145,146).

The unimpeached entries in the morning reports of accused's battery, properly received in evidence, establish his unauthorized absence as charged in Specification 2 of Charge I (MCM, 1928, par. 130a, p.143).

Though disputed there was competent evidence that accused was drunk in uniform on a public highway and as this was a question of fact for the sole determination of the court its findings will not be disturbed by the Board of Review (CM ETO 9461, Bryant).

6. The charge sheet shows that accused is 24 years seven months of age and that his commissioned service began 1 April 1943. The following prior service is shown:

"Enlisted Regular Army 30 September 1939.
Served 3 yrs., 5 mos. as enlisted man."

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. An officer convicted of a violation of Articles of War 61 and 96 is punishable by fine or imprisonment, or by such other

punishment as a court-martial may adjudge, or by any or all of said penalties (AW 61,96). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

(100)

1st Ind.

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

1. In the case of First Lieutenant WILLIAM O. DAWSON (O-1053946), Battery A, 129th Antiaircraft Artillery Gun Battalion, (Mobile), 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 9572. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9572).

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

(Sentence ordered executed. GCMO233, ETO, 28 June 1945).

9572

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

BOARD OF REVIEW NO. 1 31 MAY 1945

CM ETO 9573

U N I T E D S T A T E S)	30TH INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Kerkrade, Holland, 29 November-1December, 1944.
)	
First Lieutenant BASIL C. KONICK (O-1293606), Cannon Company, 120th Infantry)	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. 1
RITER, BURROW 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: Violation of the 96th Article of War. (Finding of guilty disapproved by confirming authority)

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

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

Specification 1: In that 1st Lt. Basil C. Konick, Cannon Company, 120th Infantry Regiment, did

at Nonancourt, France, on or about 29 August 1944, in his testimony before a general court at the joint trial of 1st Lt. Basil C. Konick, Headquarters, 120th Infantry and Corporal Fred A. King, Jr., Division Artillery, 30th Infantry Division, make under oath the following statement in substance: That he did not know that the money which he found at Tarigni-sur-Vire on 28 July 1944, was good until Corporal Fred A. King, Jr., returned from the Army Post Office of the 30th Infantry Division on 31 July 1944, which statement was false, and the said Lieutenant then knew it to be false.

Specification 2: In that * * * did at one-half mile west of St. Lo, France, on or about 1 August 1944, in his statement to Lt. Col. James C. Dempsey, Inspector General, 30th Infantry Division, make under oath the following statement in substance: That out of the money the said Lieutenant found at Tarigni-sur-Vire, France, on 28 July 1944, all he took was 41,000 francs, which statement was false, and the said Lieutenant then knew it to be false.

ADDITIONAL CHARGE II: Violation of the 80th Article of War.

Specification 1: In that * * * did, at La Foret, France, on or about 29 July 1944, wrongfully dispose of the following captured property of the United States, namely, 17,000 francs, value about $340.00, thereby receiving as advantage and benefit to himself and another person connected with himself, to-wit, his wife, Mrs. Betty Z. Konick, the sum of $340.00.

Specification 2: In that * * * did, at one-half mile west of St. Lo, France, on or about 1 August 1944, wrongfully dispose of the following captured property of the United States, namely, 13,750 francs, value about $275.00 thereby expecting as advantage and benefit to himself and another person connected with himself, to-wit, his wife, Mrs. Betty C. Konick, the sum of $275.00.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

He pleaded not guilty and was found not guilty of Additional Charge III and all specifications thereunder, and guilty of the remaining charges and specifications. Evidence was introduced of one previous conviction by general court-martial for making a false statement with intent to deceive an officer and wrongfully attempting to convert money into United States postal money orders in violation of Articles of War 96 and for failing to turn in captured money in violation of Article of War 80. 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, 30th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of guilty of the original Charge and Specification, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

On 28 July 1944 accused, a member of Cannon Company, 120th Infantry, together with two other officers and an enlisted man, while investigating a German regimental headquarters at Tarigni-sur-Vire, France, found a box about the size of an iron field safe, which was almost full of French francs. He and the others put all of the money in their pockets (R9,10). On either that day or the next, accused showed a ten-franc note (similar to the ten-franc notes in Pros.Ex.1) to the Deputy Civil Affairs Officer for the 30th Division and asked if it was a good note. That officer answered that it looked good to him but suggested that they show it to the French Liaison Officer. This was done, and the Liaison Officer stated that it was good and that he "preferred it to our invasion money because he knew it to be good money" (R30,31).

Private John W. Roseberry, whose duty on 29 July was the issuance of United States postal money orders in the Army Post Office of the 30th Infantry Division located at La Foret, France, testified that on that date a Lieutenant Konick entered the post office, stated he wanted some money orders, and asked whether the French francs he had with him were good. Witness replied that this money, issued in France during the German occupation (similar to the money in Pros. Ex.1), had been declared good the week before. Thereupon, the officer made out four money order application forms in the total amount of $340, and delivered French currency to Roseberry - mostly 500-franc notes. Witness stated that he was unable to recognize at the trial the accused as the officer in question (R38-40). Each application is dated 29 July 1944, made payable to "Pvt Betty Z. Konick" of Westover Field, Mass., and is signed by "Lt. B C Konick O 1293606 120th Inf APO 30 PM N Y" (Pros.Exs.11,12,13, and 14).

On 31 July, near St. Lo, France, accused gave 41,815 francs to Corporal Fred A. King and told him to convert this money into three $100 money orders payable to accused's wife and into certain other money orders. During a discussion as to whether the money was good, accused stated that he knew it was good because the French Liaison Officer had told them that the money was issued by the French Government and that it was valid. Corporal King then took the money to the Army Post Office and purchased the money orders (R13,14,18,36). The money which Corporal King paid to the Army Post Office was received in evidence as Pros.Ex.1, and consisted of the Bank of France German-issue type currency amounting to 41,815 francs with serial numbers running in separate consecutive order (R14,16,17,18).

Also on 31 July (whether before or after the 41,815-franc transaction on the same day is not clear from the record) accused gave a money order clerk at the Army Post Office 15,000 francs with which to pay postal charges on a package for him and to use the remainder for money orders payable to Betty Z. Konick. The next day, 1 August 1944, the clerk secured the money orders, two for $100 each and one for $75 (Pros.Exs.2,3, and 4) and gave them to Corporal King to turn over to accused (R14,33). When accused handed the money to the clerk, the latter asked if the money exceeded his base pay, and accused replied that he won it at poker (R33). This money was the same type as that in Pros.Ex.1, mostly 100-franc notes. The clerk did not recall seeing any Allied money (R33,34).

On or about 1 July accused had received $78.82 for his June pay from the finance officer. He was paid in French francs and invasion francs, but the finance office at that time issued no money like that of Pros.Ex:1 except the 100-franc notes. This was the first payment made to the division since it landed on the continent (R45,46).

Lieutenant Colonel James C. Dempsey, Inspector General of the 30th Infantry Division, in the course of his duties interviewed accused on 1 August. During the interview, in which Colonel Dempsey questioned him about the money which Corporal King had presented at the Army Post Office on 31 July, accused stated that the majority of the "41,000 French francs" was found by him and Sergeant Rose in a box lying on the floor of a house and that "The 41,000 francs was all I took" (R26,27). This statement was made under oath (R30).

On 29 August at Nonancourt, France, in a joint trial for other offenses by a general court-martial of accused and Corporal King, accused stated under oath that the first time he knew the money was good was when Corporal King came back from the Army Post Office (R23).

4. Accused, after his rights as a witness were explained to him, elected to be sworn and testified substantially as follows: During the month of July he found a box in a German command post captured by his regiment (R66,67). The 41,815 francs, comprising Pros.Ex.1, were the francs which came from the command post and which he delivered to Corporal King (R74). Although he had no way of proving it, some of it was his own property (R75). Notwithstanding the fact that the French Liaison Officer informed him that the money found in the box was valid, he was not satisfied with the officer as an authority and did not know whether the United States considered it valid. All he took was 41,000 francs as he so informed Colonel Dempsey (R69). None of the 17,000 francs and the 13,750 francs used to buy money orders came from the German command post, but those francs were given to him on 25 July by Sergeant Willie C. Messer, who had since died. Sergeant Messer had asked that this money be kept for him until he designated the person to whom to send it (R70,71). Accused never played poker with the money, but made the statement about having done so out of "pure joking" (R78). His wife was Betty Z. Konick (R71,72).

(106)

Witnesses for the defense testified that the box found in the German command post had approximately the following dimensions: 19½ by 12½ by 9 inches (R58,61; Def.Ex.C). It was stipulated that a witness, if present at the trial, would testify that Sergeant Messer on or about 25 July 1945 "had a lot of money with him", and that the former commander of the 120th Infantry would testify that accused was an officer of good character and a fine soldier (R81).

5. In the opinion of the Board of Review, the evidence in this case is sufficient to support the findings of guilty of the charges and specifications as approved by the confirming authority.

a. Specification 1, Additional Charge I:

1. The evidence in the record is sufficient to warrant the court's finding that accused knew the French francs were valid before Corporal King returned from the Army Post Office on 31 July 1944. Two days previously, accused had secured money orders with the same kind of money; two or three days before, he had been informed by the French Liaison Officer that the money was valid and when he delivered the money to Corporal King, accused stated that he knew the money was good. The only reasonable conclusion is that accused had knowledge of the validity of the French francs prior to Corporal King's return from the Army Post Office, and hence accused's testimony under oath at the trial of 29 August 1944 was false and was known by him to be false when given.

Although Specification 1 is laid under the 96th Article of War it charges the crime of perjury denounced by the 93rd Article of War.

> "Perjury is the willful and corrupt giving, upon a lawful oath * * * in a judicial proceeding or court of justice, of false testimony material to the issue or matter of inquiry (Clark) 'Judicial proceedings or course of justice' includes trials by courts-martial (Wharton Crim.Law).
>
> The false testimony must be willfully and corruptly given; that is, with a deliberate intent to testify falsely." (MCM, 1928, par. 149i, p.174).

The fact that the specification was erroneously laid under the wrong article is immaterial (CM ETO 10282, Vandiver and Coelho; CM 198262, Miller, 3 B.R. 223 (1932)).

The Board of Review has examined the record of trial in United States v. Konick and King (CM ETO 3887). Such examination reveals that the alleged false testimony of accused therein was directly material to the issues involved. There is substantial evidence in the instant record of trial that accused in the former proceedings willfully and corruptly gave the testimony alleged; that it was false and he knew it was false when uttered by him. The falsity of the perjured statement was under the circumstances, proved by more than the uncorroborated testimony of a single witness (MCM, 1928, par.149i, p.175; CM 157772 (1923) Dig.Op.JAG 1912-1940, sec.451(53), p.332). The court's finding of guilty is supported by substantial evidence.

2. Although the court reporter testified that the testimony of accused at the former trial was under oath (R24), there is no direct evidence that the oath was administered by a person having authority to do so. It may be presumed, however, in the absence of a showing to the contrary, that the requirements of Article of War 19 were obeyed.

3. Defense counsel objected to the reading of excerpts from the record of the trial of 28,29 August 1944 (CM ETO 3887) and requested that the entire record be introduced. Thereupon the trial judge advocate offered the entire record. The law member then stated:

> "The law member feels only those excerpts that are material and relevant to this case should be introduced. There may be parts in there that have no bearing on this case. Go over the things that you are going to introduce and offer as evidence with the Defense and then find out if there is any objection to it " (R21).

It is recited that the prosecution and the defense counsel conferred on the proposed offer of evidence. After the prosecution offered certain excerpts in evidence, the defense counsel, after the law member inquired whether the defense had any objections, responded: "One objection which has been overruled. No objection" (R24). The excerpts were then received in evidence.

Assuming that the defense counsel still insisted upon his objection that the entire record be introduced (a matter not clear from the recitals in the record), no error resulted from the overruling of the objection. When the entire record is available to both prosecution and defense, as appears here, the better rule seems to be that it is a matter for the discretion of the court whether only the relevant, material portions of the record should be introduced or whether the entire record should be introduced, leaving it to the other side to use the remainder where only portions are originally introduced.(2 Wharton's Criminal Evidence (11th Ed., 1935), sec.785, p.1352; 22 CJ, sec.929, pp.815,816). Accused's substantial rights were not injuriously affected by the ruling of the court.

b. Specification 2, Additional Charge I:

1. The most difficult question involved in this case is whether the evidence is sufficient to prove that accused took 30,750 francs or some other amount in addition to the 41,815 francs from the German command post on 28 July 1944. In the opinion of the Board of Review, the evidence, fairly considered, is sufficient to exclude any reasonable hypotheses except that accused did so.

Among the circumstances leading to this conclusion are the following: One day after finding the francs, accused paid approximately 17,000 francs for money orders in the total amount of $340 payable to his wife; three days after the finding, accused, in two separate transactions, delivered 41,815 francs for money orders in the amount of $300 payable to his wife, and other money orders, and 15,000 francs chiefly in payment for money orders for $275 payable to his wife. Since his division landed on the continent, only one payment on 1 July 1944, had been made by the finance office before the time of these dealings, and then no French francs like those in Pros.Ex.1 were issued, with the exception of some 100-franc notes (and accused stated he did not think he received from the finance office any 100-franc notes similar to those in Pros.Ex.1). The June pay of accused, paid on 1 July 1944, was $78.82 (approximately 3900 francs). All of the money involved in the transactions consisted of French francs issued by the French Government under the German occupation, and similar to the francs admitted in evidence as Pros.Ex.1. Accused informed the post office clerk he won the money playing poker. These facts, when considered

with the surrounding circumstances of the transactions, present a compelling case against accused. His explanation that Sergeant Kesser, deceased at the time of the trial, had given him the 17,000 francs and the 13,750 francs was not corroborated. It was in conflict with the factual situation proven by clear, competent evidence. The court was within its province in disbelieving and rejecting it as not a reasonable hypothesis. There was obviously presented a factual issue for resolution by the court and its determination is binding on appellate review (CM ETO 895, Davis, et al; CM ETO 11072 Copperman, and authorities therein cited).

The court properly held, therefore, that the statement made to Colonel Dempsey on 1 August 1944 that all he took was 41,000 francs, was false. That accused knew the statement was false when he made it, necessarily follows.

2. The statement was under oath, but there is no direct evidence that the oath was administered by an authorized person. Colonel Dempsey was the Inspector General of accused's division, and he interviewed accused during the course of his duties as such officer. An inference from the evidence seems proper that Colonel Dempsey was duly detailed to conduct an investigation so as to be authorized to administer oaths under the provisions of Article of War 114. Even had such authority been lacking, however, accused's false statement under the circumstances proven constituted an act bringing discredit upon the military service and hence be punishable under Article of War 96 (CM 261341, III Bull. JAG 423 (1944)).

c. Specifications 1 and 2, Additional Charge II:

1. As discussed above, the evidence in the record is sufficient to prove that, at the times and places alleged in these two specifications, accused paid for money orders, made to the order of his wife, with the francs found at the German command post, in the amounts stated.

The offenses are alleged as a violation of Article of War 80 and the allegations substantially follow the forms prescribed in the Manual for Courts-Martial for violations of that article (MCM, 1928, Appendix 4, p.246).

Article of War 80 provides as follows:

> "ART.80. Dealing in Captured or Abandoned Property.-- Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties".

Although this article appeared in the military code for the first time in the Revision of 1916, it was based upon a Civil War statute which had been found necessary during that period (Report of Senate Committee on Military Affairs, Calendar No. 122, Senate, 64th Cong. 1st Session, Report No. 130, 9 February 1916, p.79). Like Article of War 79, this article is in accordance with the principle of the law of modern war and of nations that enemy property captured in war becomes the property of the government or power by whose forces it is taken, and not the property of the individuals who take it. Private persons may not capture enemy property for their own benefit (see Davis' Treatise on Military Law (Third Edition 1915) p.362; Winthrop's Military Law and Precedents (Reprint, 1920) p.557).

The provisions of Article of War 80 are not discussed in the Manual for Courts-Martial, 1928, but in the 1921 edition a useful discussion is found. Therein it is pointed out that this article is broader than Article of War 79 in that Article of War 80 protects abandoned as well as captured property and private as well as public captured or abandoned property. With reference to the provisions relating to dealing in captured or abandoned property, the 1921 edition states:

"This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease, or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any other person directly or indirectly connected with himself. The expectation of profit need not be founded on contract; it is enough if the prohibited act be done for the purpose, or in the hope, of benefit or advantage, pecuniary or otherwise" (MCM, 1921, par.430, p.387).

The elements of proof are stated as follows:

"(a) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property.

(b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself" (MCM, 1921, par.430, pp.387,388).

In the opinion of the Board of Review, the evidence in the record is sufficient to prove each element of the offense, as above set forth, under Article of War 80.

2. A final question remains--the plea of former jeopardy asserted by the defense as to additional Charge II and specifications (R7). The portions of the record of trial on 29 August 1944, introduced by the defense in support of its plea (R88,89), show that the charges in that case related to the 41,815 francs. The offenses charged in the present case are obviously separate and distinct offenses and hence there was no double jeopardy (MCM, 1928, par.68, p.53; CM 124566 (1919), Dig. Op. JAG 1912-40, sec.397(1), p.242). The court correctly ruled against the contentions of the defense (R103).

6. The charge sheet shows that accused is 23 years and five months of age, entered on active duty on 15 September 1942 as a second lieutenant, and served with Headquarters, 120th Infantry from 25 September 1942 to date. No prior service is shown.

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

8. A sentence of dismissal, total forfeitures, and confinement at hard labor is authorized upon conviction of an officer of an offense in violation of Article of War 80 or 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW-42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of First Lieutenant BASIL C. KONICK (O-1293606), Cannon Company, 120th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9573. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9573).

E. C. McNeil

(Sentence ordered executed. GCMO 202, ETO, 9 June 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

7 JUN 1945

CM ETO 9595

U N I T E D S T A T E S	)	29TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	APO 29, U. S. Army, 6 March
Private HOMER L. DE LAURIER (36899245), Company I, 116th Infantry	)	1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that, Private Homer L. De Laurier, Company I, 116th Infantry, did, at Mersenhausen, Germany, on or about 21 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by the Military Police on 5 January 1945.

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

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

3. Clear and convincing evidence was presented that accused, a rifleman in Company I, 116th Infantry (R6,14), failed to return to his company at Heerlen, Holland, from a 48 hour pass which expired 21 December 1944 (R6,7,9,12) and that accused did not have permission to be absent after that date (R12). While dressed in civilian clothes, accused was apprehended in Antwerp, Belgium, on 5 January 1945, by the British military authorities (R14).

After his rights were fully explained to him (R13), accused upon his return to his organization, told his company commander that he went to Antwerp, where he met a sailor who wanted to take him back to the United States. This sailor told him it would be necessary for him to have civilian clothes in order to board the ship. After securing the civilian clothes he went to the dock where he was supposed to meet the sailor but the ship had sailed and as he was roaming around the docks he was picked up by the British dock guards (R13).

4. While a sworn witness on his own behalf, accused admitted that on 21 December 1944 he failed to return from a pass to Heerlen and vicinity because he had been up to the front and "had some instinct about not killing", He just went "to pieces up there" (R16). He reaffirmed his pre-trial statement to his company commander with respect to meeting the sailor who wanted to take him back to the United States and his apprehension while wearing civilian clothes (R17). He further stated that at the time he was contemplating his return to the United States he did not intend to return to the 29th Infantry Division (R19) but preferred being in prison in America to being a rifleman in his company if he had to kill (R26).

5. There is, therefore, substantial evidence that accused at some time during his absence entertained the intent not to return to his place of duty (MCM, 1928, par.130a, p.142) and which fully justifies the court's finding of guilty (CM ETO 2842, Flowers; CM ETO 4526, Archuletta; CM ETO 6195, Odhner).

6. The charge sheet shows that accused is 21 years of age and was inducted 24 January 1944 at Detroit, Michigan. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1 25 AUG 1945

CM ETO 9597

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, 16 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ADAM JUSIAK, JR. (32269514), Company C, 318th Infantry.	)	

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

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

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

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

Specification 1: In that Private Adam Jusiak, Jr., Company C, 318th Infantry, did, in the vicinity of Lixieres, France, on or about 21 October 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at or near Bambiderstroff, France, on or about 26 November 1944.

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Specification 2: In that * * *, did, in the vicinity of Seingbouse, France, on or about 29 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 Merlebach, France, on or about 8 December 1944.

Specification 3: In that * * *, did, in the vicinity of Grentzingen, Luxembourg, on or about 22 December 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at 305th Medical Battalion Clearing Station in the vicinity of Warken, Luxembourg, on or about 11 January 1945.

CHARGE II: Violation of the 69th Article of War. (Finding of guilty disapproved by reviewing authority).

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: (Finding of guilty disapproved by reviewing authority).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 1 of Charge I, except the words "surrendered himself at or near Bambiderstroff, France, on or about 26 November 1944", substituting therefor the words "returned to military control at or near Nancy, France, on or about 18 November 1944", of the excepted words, not guilty, and of the substituted words, guilty; guilty of Charge I and the remaining specifications thereof; and guilty of Charge II and its specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 22 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced

to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the finding of Specification 1, Charge I, as found the accused guilty of absenting himself without leave from the vicinity of Lixieres, France, from 21 October 1944 to 18 November 1944, in violation of Article of War 61, only so much of the finding of Specification 2, Charge I, as found the accused guilty of absenting himself without leave from the place and during the period alleged, in violation of Article of War 61, and only so much of the finding of Specification 3, Charge I, as found the accused guilty of desertion as charged, terminated in a manner not stated, and disapproved the findings of Charge II and its specifications, 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. Extract copies of morning reports, which showed the original reports to have been signed by the regimental personnel officer during the period 25 October to 30 November 1944, purported to establish the absences without leave alleged in Specifications 1 and 2 of Charge I. With respect to these reports, the defense counsel stated in open court:

> "I wish to state here that I have examined the morning reports which are being presented in this case. They are signed by the Regimental Personnel Officer and I realize they were prepared under his direction and authenticated by him and not the company commander. I understand that this was done according to the circular of Third Army and has been done in the organizations ever since we came to France in August of 1944. I have no objection to them since they reflect the true state of affairs insofar as the accused is concerned" (R6).

As to Specification 3, a like entry dated 8 January 1945, introduced in evidence, showed accused: "Fr arrest in Quarters to AWOL as of 22 Dec 44" (R6-8; Pros.Exs. A-G).

Near Colmar, Luxembourg, on the afternoon of 10 January 1945, accused was found in a comatose condition asleep in the snow. His breath smelled heavily of alcohol

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and he did not regain consciousness until evening. His condition was diagnosed at the hospital as "Acute Alcoholism, severe" (R10,11,13). Sometime subsequently, apparently about the 14th or 15th of January, he told the driver of a jeep who was ordered to take him to his company, and later the company commander, that there were "not enough men in the Army to take him back to the front lines", that he was not going, and that he could not stand it (R12).

Testimony as to tactical operations was in substance that the company was with the 4th Armored Division "a little past the middle of December * * * going to Bastogne, to meet this combat outfit" (R9).

4. No evidence was introduced by the defense, but the accused after his rights as a witness were fully explained to him, elected to make the following unsworn statement through counsel:

> "I have tried and tried to stand up under artillery and mortar fire but find I am unable to do so. I have become extremely nervous and cannot perform my duties efficiently. I have asked to be relieved from front line duty but to no avail. I have used alcoholic drinks to steady my nerves and to regain my composure, however, this has not helped me. I do not want to stop fighting for my country. I believe it is my duty to do all that I can and all that I am capable of doing to defeat the Germans. I will do any type of work but I just cannot stand the continuous shelling. On 18 November 1944, I was told I was under arrest, given a rifle, ammunition and my pack and sent to my squad and I took part in an attack that night. I joined the 80th Infantry Division at Fort Dix, New Jersey" (R13,14).

5. a. Specifications 1 and 2, Charge I:

The reviewing authority approved only so much of the findings of guilty of each of these specifications as involved absence without leave, terminated in the first instance on 18 November 1944. The entries in the morning reports as to the absences alleged were signed by an officer not authorized by then current regulations to sign them. The fact that a Third Army circular of 12 April 1944 (Cir. No. 3, sec.V, par.3) authorized unit personnel officers to

prepare morning reports did not authorize such officers to sign them. The acts of preparation and signature are separate and distinct (pars.5,6, AR 345-400, 7 May 1943, then current; pars.4,42, ibid, 1 May 1944, next revision; pars.4,43, ibid, 3 Jan. 1945). According to Webster, "prepare" means "to make ready". The analogy of a lawyer who is authorized to prepare, but not to sign, wills and deeds is pertinent. Although these morning reports would therefore have been otherwise inadmissible (CM ETO 7686, Maggie and Lewandoski), the defense counsel in open court agreed to their correctness and in effect judicially admitted, or stipulated to, the facts therein contained (CM 199641, Davis (1932), 4 BR 145). Having thereby relieved the prosecution of the burden of proceeding with the evidence, accused may not now receive the benefit of their original inadmissibility. The evidence as to these specifications is therefore legally sufficient to support the findings of guilty as modified by the reviewing authority.

b. Specification 3, Charge I:

By reason of the Theater directive (sec.4, cir.119, Hqs., European Theater of Operations, 12 Dec. 1944), authorizing personnel officers to sign morning reports, and the pertinent Army Regulations (par.43, AR 345-400, 3 Jan. 1945), the report in evidence was without question competent to establish the absence without leave beginning 22 December 1944, which is presumed to have continued until the return to military control proven as of 10 January.

The remaining question is whether or not this absence without leave was with the intent to escape hazardous duty. The proof of the tactical situation is scant. Judicial notice will be taken only that the date of 22 December 1944 was during the opening stages of the great German winter offensive, that some of the heaviest fighting of that offensive occurred in and around Bastogne, and that this was at a time of great apprehension in the area (CM ETO 7413, Gogol; CM ETO 8358, Lape and Corderman). Thus the evidence as to operations, aided by judicial notice, is proof only that the organization was in an active zone at a crucial time. Accused's statements on 14 or 15 January when confronted with return to combat of his intent not to serve in action again, was some evidence from which reasonable inferences may be drawn as to the state of his mind 19 days before that date when considered in connection with his unsworn statement. Lastly, his unsworn statement at the trial, although couched in terms of nervousness, is in the plainer meaning of its language an admission of continuing fear and cowardice. From the evidence therefore, in the opinion of the Board of Review, the court was justified in

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inferring that when accused left his company on 22 December he did so with the craven intent to avoid serving the country in the hazards of battle (CM ETO 8172, St. Dennis; CM ETO 8519, Briguglio; CM ETO 8690, Barbin and Ponsiek; CM ETO 11503, Trostle).

6. The charge sheet shows that accused is 29 years, 11 months of age and was inducted 11 June 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

Wm. F. Sussman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll 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
CM ETO 9601

4 JUN 1945

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, 13 and 18 March 1945. Sentence as to each accused: CIUCIO: Dishonorable discharge, total forfeitures and confinement at hard labor for life. MENENDEZ: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates LOUIS F. CIUCIO (34205679) and HENRY M. MENENDEZ (32011060), both of Company A, 28th Infantry.	)	

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

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

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

CIUCIO

CHARGE: Violation of the 75th Article of War.

Specification: In that Private (then Staff Sergeant) Louis F. Ciucio, Company "A", 28th Infantry, being present with his company while it was engaged with the enemy, did at Vossenack, Germany on or about 2000 3 December 1944, shamefully abandon the said company and seek safety by concealing himself, and did fail to rejoin it until he was apprehended by military authorities on 1700 2 February 1945.

MENENDEZ

CHARGE: Violation of the 75th Article of War.

Specification: In that Private (then Staff Sergeant) Henry M. Menendez, Company "A", 28th Infantry, being present with his company while it was engaged with the enemy, did at Vossenack, Germany, on or about 0630 3 December 1944, shamefully abandon the said company and seek safety by concealing himself, and did fail to rejoin it until he was apprehended by military authorities on 1700 2 February 1945.

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 Specification preferred against him, excepting the words "being present with his company while it was engaged with the enemy" and "fail to rejoin it", substituting therefor the words, "remain absent", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of violation of the 75th Article of War and guilty of the 61st Article of War. Evidence was introduced against accused Ciucio of two previous convictions by special court-martial for absences without leave, one for eight days and ten days respectively, and one for nine months and 11 days, both in violation of Article of War 61. No evidence of previous convictions was introduced against accused Menendez. 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, Ciucio for the term of his natural life and Menendez for the period of 20 years. The reviewing authority approved only so much of the finding of guilty of each specification as involves a finding of guilty of absence without leave and the apprehension of accused by military authorities at the time and at the place alleged, approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence was undisputed that on 2 December 1944, each accused was a staff sergeant with Company A, 28th Infantry, which was then in a holding position in the town of Vossenack, Germany, and receiving enemy artillery fire. On the following day the company made an attack in the vicinity of Brandenburg, Germany, and the absence of both accused was discovered after the company's objective was reached. Neither had permission to be absent and the aid station concerned had no record of the evacuation of either

of them. On 2 December the presence of Menendez was noted at a "rest camp" operated under the supervision of the Regimental Surgeon at a place about one mile from Vossenack near the Regimental Command Post. The unauthorized absence of both accused terminated upon their apprehension and return to military control at Vossenack on 2 February 1945. The evidence fully supports the court's findings of guilty, by exceptions and substitutions, as modified by the reviewing authority, of absence without leave by each accused in violation of Article of War 61, in each instance a lesser included offense of that originally charged and alleged in each specification under Article of War 75 (CM 130412 (1919); CM 126647 (1919), Dig. Op. JAG, 1912-1940, sec.433(3), p.304).

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

Ciucio is 34 years of age and was inducted 21 May 1942 to serve for the duration of the war plus six months.

Menendez is 26 years of age and was inducted 7 March 1941 to serve one year. His period of service is governed by the Service Extension Act of 1941.

Neither accused had prior service.

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

6. The penalty for absence without leave is such punishment as a court-martial may direct (AW 61). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each accused is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2 12 MAY 1945

CM ETO 9611

U N I T E D S T A T E S	V CORPS
v.	
Private FRANK P. PRAIRIECHIEF (38088739), Company C, 56th Signal Battalion	Trial by GCM convened at Mechernich and Ahrweiler, Germany, 21,24 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
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 charges and specifications:

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

Specification 1: In that Private Frank P. Prairiechief, Company "C" , 56th Signal Battalion, did, at Mechernich, Germany, on or about 14 March 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Frau Anna Kohlgraf, with intent to commit the felonies of rape and assault with intent to do bodily harm with a dangerous weapon therein.

Specification 2: In that * * * did, at Mechernich, Germany, on or about 14 March 1945, with intent to do bodily harm and with intent to commit the felony of rape, commit an assault and battery upon

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Frau Anna Kohlgraf, by willfully and feloniously threatening the said Frau Anna Kohlgraf with a dangerous weapon, to wit: his gun, by pointing it at her in a threatening and demanding manner, and by striking, pushing, grabbing and holding her.

Specification 3: In that * * * did, at Mechernich, Germany, on or about 14 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per annum with Frau Anna Kohlgraf forcibly and against her will.

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

Specification: In that * * * did, at Mechernich, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anna Kohlgraf.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction, by special court-martial, for being drunk in uniform in camp, in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 14 March 1945 accused was a member of Company C, 56th Signal Battalion which organization was located at Mechernich, Germany (R25,62). At about 10:20 pm on the evening of this date Frau Anna Kohlgraf, aged 60, and her daughter, Kaethe, were awakened by the breaking of glass in the window of their home at 15 Rosengraben Strasse, Mechernich (R6,14). Upon descending the stairs with a candlelight they discovered an American soldier standing in the hall, whom they described as neither black nor white and whom they later identified as the accused, an American Indian (R13,14,16,21,28). He was also identified in court (R13,16). According to these witnesses, accused pointed his gun at them, saying "Comrades" (R7,15). He spoke English and they spoke German, neither understanding the other, except a very few words (R7,15,45). The daughter Kaethe, ran to the house of a neighbor and remained there during the evening. She and

her friends were afraid to venture outside and to come to the aid of her mother (R7,15). Following the daughter's departure accused took the woman, Anna, by the arm, led her out the door, and down the street where he threw her on the groud, hit her on the chin and mouth, tore her underpants and raped her against her protestations. She pleaded with accused, saying, "Comrade don't do it, I am an old woman" (R7). He led the woman further down the road towards the woods, where he "started raping" her again. According to the witness, accused raped her "about four or five times" (R7). "Once from the front and twice from the rear" (R8). During these acts he put his penis in her "vagina" while she was lying on her back, and in her "rectum" while she was bent over forwards, in which latter position he pushed her (R8). After accused completed these sex acts, Anna ran away and was "picked up" by a guard, who took her to the nearby military government headquarters (R7,11,12). At the time she left the house with accused she wore a jacket, underpants, a slip and a pair of shoes (R7,8). She identified her underpants and slip, which were torn, stained and muddy (Pros.Ex.A and B) (R9,10). Upon investigation of the incident, it was discovered that the ground on an embankment near the Kohlgraf residence was "freshly disturbed" and "all kicked up". It was apparent that "a struggle had taken place" there (R23). Accused's field jacket, post exchange ration card, the top of a fountain pen, a pair of scissors and other miscellaneous items were found there (R23). He admitted ownership of each of these items (R24). On 15 March 1945 Captain Berhard H. Lunine, the battalion surgeon, made an examination of both accused and the victim. He found that accused had a small cut or wound on his right wrist and scratch marks on his chest. Theunderwear which he was wearing and a pair of "OD" trousers found in his barracks bag were stained with blood and mud. Accused voluntarily advanced the statement that the trousers were worn by him on the previous night (R33,34). The pair of pants were received in evidence, without objection by the defense (Pros.Ex.D) (R34). The examination of the woman disclosed that her condition was "one of shock" (R35). Her left eye was blackened and her nose bruised. She suffered a minor injury to her lips and mouth and received numerous small wounds and scratches in the region of her right shoulder and on both thighs (R35). Photographs depicting the injuries of the victim on 15 March 1945 were identified (Pros.Exs. C and G) and exhibited to the court (R35,36,55). A vaginal and rectal examination of her on the day following the assault was undeterminative. There were no wounds or lacerations of any kind discovered in the region of the vagina or rectum of the German woman (R41).

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 14 March 1945, together with two other soldiers, he drank five bottles of wine. Accused drank three bottles himself. He remembered leaving his quarters about 9:10 o'clock pm

and going down the road and meeting a woman. Following this, he remembered nothing until the next morning when he was awakened. His pants were muddy and according to accused he "figured" that he must have fallen down the night before. His helmet, rifle and field jacket were missing and upon searching for them he found the gun lying against a fence and the other items beside the road near the Kohlgraf house. He identified the field jacket, and the "PX" ration card so found as his property.(R63,64). He was stopped by a member of the military police and taken to the house where he saw a Captain Brady who showed him a broken window and charged him with breaking it. Accused replied that he did not remember going to the house or breaking the window. He was later examined by a medical officer (R62-67).

Privates Clarence Goff and John B. Childs, both members of the 56th Signal Battalion, corroborated accused's testimony that he had been drinking on the evening in question. Goff testified that accused drank "right smartly", beginning at about 8:00 o'clock pm and that by 9:00 o'clock he had consumed the greater portion of five bottles of wine. He next saw him at midnight, "When he brought a woman in with him" (R42,43). His condition at this time was "pretty drunk" (R44). He asked for a flashlight. Goff overheard accused talking with the woman in the next room of their quarters. He was speaking English and she German (R45). He was unable to understand the nature of their conversation but he was positive that they were not quarreling (R46). Childs testified that he saw accused at about 5:30 pm that same day and that he appeared to have had a few drinks at that time; he was not drunk, in fact, "he was sober". Later, however, at about 12:30 that night he heard someone calling him and upon going out in the hall of their barracks he saw accused "leaning against a table" and "so drunk that he could hardly stand up" (R47). He also saw a woman about half way up the stairs. She appeared to be drunk and was "plenty dirty", like she had been "falling around in the dust" (R48). Childs flashed a light in her face and noticed that she was an old woman but he did not observe any scratch marks or wounds or blood on her face (R48,49). He led her out the door and pointed in the direction of the military police station at the command post (R48-52).

Captain Thomas E. Timney, Medical Corps, testified that he examined the woman the day following the alleged assault and that there was no evidence of penetration, bleeding, lacerations or bruises in the vicinity of the woman's anus or vagina (R54,57). He indicated that there is a "great difference" in tolerance in the effect of alcohol upon whites and Indians (R55,59).

It was stipulated by and between the prosecution and defense that, if present and available as witnesses, three medical officers would testify they examined accused on 18 and 19 March

and that their diagnosis was, "alcoholism, acute, with pathological intoxication". Although accused was "sane and responsible" they found that at the time of the commission of the offenses his mental state, while under the influence of alcohol -

> "did not permit of his being able to differentiabe between right and wrong, to adhere to the right, and to appreciate the consequences of his acts " (R61,Def.Ex.A).

It was further stipulated that the character of accused's services prior to the present offenses was "very good" (R61).

6. Competent uncontradicted evidence establishes that accused broke the window and entered the house of Frau Anna Kohlgraf at Mechernich, Germany, in the nighttime on 14 March 1945. He was identified by this woman and her daughter as the American soldier present in her house on the evening in question. He was later seen with her at his quarters that night. He was also identified in court. Accused was thus properly identified as the person charged with the commission of the offenses alleged.

Specification 1 of Charge I alleges burglary by breaking and entering the dwelling of Frau Kohlgraf "with intent to commit the felonies of rape and assault with intent to do bodily harm with a dangerous weapon therein". Burglary is defined as the "breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. The term 'felony' includes, among other offenses so designated at common law * * * rape, sodomy" (MCM, 1928, par.149d, p.168). Assault with intent to do bodily harm with a dangerous weapon has been declared to be a felony by statute (AW 42, sec.276, 18 USCA, 455). The proof herein shows that, after breaking and entering the house of Frau Anna Kohlgraf, accused assaulted this German woman by pointing his gun at her as alleged. Later he raped the woman. The establishment of the latter fact shows conclusively accused's intent in breaking and entering into the house. He was therefore properly found guilty of Specification 1 as charged.

Concerning Specification 2, the evidence establishes that accused grabbed the woman by the arm, struck her on the face and mouth, and pointed his rifle at her. His speech and actions indicate that his manner was "threatening and demanding", as charged. The evidence thus supports the courts finding that accused committed an assault and battery in violation of the 93rd Article of War (CM ETO 1177, Combess, CM ETO 1690, Armijo; CM ETO 6288, Falise).

Concerning Specification 3 of Charge I and the Specification of Charge II (sodomy and rape) the only direct evidence bearing upon the commission of these offenses consists of the testimony of

the German victim, Frau Anna Kohlgraf. She testified that following the assault upon her, accused led her outside the house and down the road where he threw her on the ground, tore her pants and raped her against her will. According to the witness she protested, saying "Comrade don't do it, I am an old woman". However, he pursued his desires and later led her towards some woods where he again raped her. He also commited the acts of sodomy. In support of her testimony, the circumstantial evidence shows that a violent and vicious assault was in fact committed on Anna Kohlgraf. Her face and body was bruised and beaten. Accused was absent from his quarters on the night in question and remained with this woman for about two hours. His jacket and certain of his personal property was found at the scene of the struggle the following morning. The clothing of both the accused and the victim was discovered with stains of mud and blood thereon. He had been drinking that night. Such evidence affords sufficient corroboration of the direct testimony of the German woman that accused committed the offenses of sodomy and rape as charged (CM ETO 1743, Penson; CM ETO 3964, Lawrence; CM ETO 3858, Jordon; CM ETO 4266, Guest; CM ETO 6224, Kinney and Smith).

Although the evidence shows that accused was under the influence of alcohol during the evening in question, the facts disclose that he was capable of walking, of handling the woman, and of physically accomplishing all the acts involved in the offenses as shown. He was able to walk down the road with the woman after breaking into her house. He talked with her and called her comrade. He was able to find his way to his quarters and to direct the woman there with him. He sufficiently remembered enough of what happened on the evening of his association with her to return to the scene of the assault and struggle the next morning to recover his lost clothing and equipment. All of these facts indicate that accused was not so intoxicated as not to know what he was doing. The law is well settled that voluntary drunkenness does not constitute an excuse for the crime of rape nor destroy the responsibility of the accused for his misconduct (1 Whaaton's Criminal Law (12th Ed.,1932), sec.66,p.95); CM ETO 5609, Blizard; CM ETO 5641, Houston; CM ETO 8691, Heard). Although it was stipulated that if available as witnesses three medical officers would testify that following an examination of accused they made a diagnosis of acute alcoholism and pathological intoxication and that they were of the opinion that at the time of the commission of the offenses accused's mental state was such that he was unable to differentiate between right and wrong, to adhere to the right and to appreciate the consequences of his acts, it has been held that notwithstanding the opinion of psychiatrists, which it was proper for the court to consider, it was the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behavior under certain conditions and to find upon all the evidence that at the time of the offense accused was capable of distinguishing right from wrong and of adhering to the right (CM NATO 2047, III Bull. JAG 228). Such a finding was inherent

in the findings of the court in this case that accused was guilty as charged. The determination of accused's state of intoxication was essentially a question for the court and its determination, where supported by substantial evidence, will not be disturbed by the Board on appellate review (CM ETO 1953, Lewis; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer and authorities therein cited).

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

7. The charge sheet shows that accused is 24 years and nine months of age and was inducted 7 March 1942 at Fort Sill, Oklahoma. He had no prior service.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

15 AUG 1945

CM ETO 9643

U N I T E D S T A T E S	XXIX TACTICAL AIR COMMAND (PROVISIONAL)
v.	
Private EARL V. HAYMER (39116498), Detachment A, 2076th Quartermaster Truck Company (Aviation), 32nd Service Group	Trial by GCM, convened at Site A-89, APO 151, U. S. Army, 1 March 1945. 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, BURROW and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Earl V. Haymer, Detachment "A", 2076th Quartermaster Truck Company (Aviation), did, at or near Louvain, Belgium, on or about 2 January 1945, unlawfully and feloniously prejudice the success of the United States forces by wrongfully disposing of one hundred fifteen (115) gallons of aviation engine oil, military property of the United States, vitally needed

in combat operations, in that he, the said Private Earl V. Haymer, did cause said aviation engine oil to be removed from AAF Strip A-89, Belgium, and to be delivered to a Belgian civilian, one Joseph Luyx, who had wrongfully and illegally agreed to purchase the same from the said Private Earl V. Haymer.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for driving a Government vehicle at an excessive rate of speed in violation of Article of War 96. 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 No. 13, Headquarters XXIX Tactical Air Command (Provisional), APO 151, U. S. Army, 16 March 1945.

3. A casual reading of the Specification of the Charge makes it apparent that the pleader attempted to allege facts which would elevate the offense from that denounced by the ninth paragraph of the 94th Article of War to the offense of interfering with the war effort in violation of the 96th Article of War within the principles announced in CM ETO 8234, Young, etal.; CM ETO 8236, Fleming, et al.; and CM ETO 8599, Hart, et al. However, there is no proof of those facts which would support the greater offense. The effort to make "judicial notice" do the work of factual proof was futile (CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski). However, the absence of such proof does not preclude the treatment of the Specification herein as alleging the lesser included offense of unlawful disposition of Government property furnished and intended for the military service under the ninth paragraph of the 94th Article of War (CM ETO 9987, Pipes; CM ETO 11075, Chesak; CM ETO 11076, Wade).

4. The Specification is in legal substance and effect identical with those involved in CM ETO 11075, Chesak, supra, and CM ETO 11076, Wade, supra. Reference is made to the holdings of the Board of Review in said cases for the construction and interpretation of same. Upon the authority of said holdings the Board of Review concludes that the instant Specification alleged that accused

"did wrongfully dispose of 115 gallons of aviation engine oil, property of the United States, furnished and intended for the military service thereof by causing the same to be removed from AAF Strip A-89, Belgium and to be delivered to a Belgian civilian * * *".

The Specification as thus construed and reformed stated an offense under the ninth paragraph of the 94th Article of War (CM ETO 9288, Mills). The fact that it was laid under the 96th Article of War is immaterial (CM ETO 1057, Redmond; CM ETO 3118, Prophet; CM ETO 3740, Sanders, et al.; CM ETO 6268, Maddox). The further fact that the Specification also failed to allege the value of the property of which disposition was made is not material. In alleging the crime of wrongfully and knowingly selling or disposing of Government property furnished and intended for the military service thereof under the ninth paragraph of the 94th Article of War the value of the property is not an element of the offense. The gravamen of the crime is the sale or disposition, wrongfully and knowingly, of Government property furnished and intended for the military service (CM ETO 5539, Hufendick, and authorities therein cited). In the absence of allegations and proof of value of the property involved the court was authorized (as is the Board of Review upon appellate review) for the purpose of determining the punishment, to take judicial notice

"Price of articles issued or used in the Military Establishment when published to the Army in orders, bulletins, or price lists" (MCM, 1928, par.125, p.135).

Consistent with this provision of the Manual for Courts-Martial reference may be had to the "Stock List, Class 06-B Fuels and Lubricants, published by authority of the Commanding General, Army Air Forces" dated 15 December 1944 (Cf: CM ETO 5539, Hufendick) to determine the value of the oil involved in this case. On page 8 of said Stock List appears the following:

	SS NR GAL
"Oil - Lubricating Class D SAE NO 70 Spec VV-O-496 5 gal can — for target air craft use"	

The cost per gallon is stated to be 34 cents. One hundred fifteen gallons of oil at 34 cents per gallon amounts to $39.10. By reference to the Table of maximum punishments (MCM, 1928, par.104c, p.100), the maximum sentence which might be imposed upon accused is dishonorable discharge from the service, total forfeitures and confinement at hard labor for one year.

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5. a. The foregoing conclusion is premised on the assumption that there is substantial evidence in the record of trial that accused did "wrongfully dispose of 115 gallons of aviation engine oil". It is this aspect of the case that presents the serious problem. The evidence is undisputed that accused originated the idea of stealing the oil and selling it to the Belgian civilian, Luyx. He also attempted to implement the scheme by soliciting the aid of the soldiers, Ziegler and Dolan in its execution, and thereafter he supposed he diredted the methods and means of procuring the oil and delivering it to the prospective purchaser. The two soldiers after reporting accused's solicitation to superior authority, acted under direction of Captain Hayes and the military police. They simulated their participation in the criminal transaction and carried out and performed what accused assumed were his orders and directions. Accused himself was under restriction and did not leave his company area.

b. It is necessary to determine exactly the act which is charged as constituting the wrongful disposition of the oil. The Specification particularizes the "wrongfully disposing" of the oil by the phrase

> "did cause said * * * oil to be removed from AAF Strip A-89, Belgium and to be delivered to a Belgian civilian".

It is therefore manifest that the Specification confined the wrongful disposition of the oil to causing the removal of the same from the air strip and its transportation to and delivery at the garage of the Belgian civilian. It did not encompass the ultimate sale and delivery of the oil to the prospective purchaser. Such wrongful removal of the oil from its rightful place of storage and its transportation and delivery into the Luyx garage is well within the ambit of the offense denounced by the ninth paragraph of the 94th Article of War.

> "This term, wrongful disposition, however, like the designations of misappropriation and misapplication which precede, is, in practice, not always employed in a strict sense, and it would not be exceeding the privilege of military pleadings to charge as a 'wrongful disposition,' under this Article, any illegal appropriation, diversion, or employment, knowingly made, of money or other property of the United States, not clearly constituting a larceny or embezzlement" (Winthrop's Military Law and Precedents (Reprint, 1920), p.709) (Cf: CM ETO 9288, Mills).

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The allegation in the Specification that accused "did cause said * * * oil to be removed * * * and to be delivered" is a statement of fact which also served to describe the method by which accused allegedly effected wrongful disposition of the oil. Technically, the draughtman confined the prosecution to proof of this wrongful act. Had this specific averment been omitted, nevertheless the Specification would have stated facts constituting an offense under the ninth paragraph of the 94th Article of War (CM ETO 9288, Mills).

c. Although under section 332, Federal Criminal Code (18 USCA 550), an accessory before the fact may be charged and convicted as a principal, it is still necessary to ascertain and apply the common law rules in order to determine whether a person who is absent when the crime is committed by another is guilty as a principal under the statute (United States v. Pritchard (W.D. S.C. 1944) 55 F Supp. 201; Morei v. United States (CCA 6th 1942), 127 F (2nd) 827,830; Backun v. United States (CCA 4th 1940), 112 F (2nd) 635).

The Board of Review (sitting in Washington) with the approval of The Judge Advocate General, has consistently adopted and applied section 332, Federal Criminal Code in the administration of military justice (CM 210619, Jewell, 9 B.R. 283,293 (1938); CM 253660, Brown, 35 B.R. 31,41 (1944); CM 240646 (1944), III Bull. JAG 188). In the European Theater, the Board of Review, with the approval of the Assistant Judge Advocate General in charge of the Branch Office with the European Theater, has likewise directly applied the statute in cases coming before it on appellate review: (CM ETO 5968, Rape and Holthus, and cases therein cited; CM ETO 10860, Smith and Toll).

d. At common law accused, if guilty at all, was an accessory before the fact and not a principal. He did not participate in the physical removal of the oil, but was in his company area and was not present when it occurred (14 Am. Jur. secs.96,97, pp.833,834; Pearce v. Oklahoma (CCA 8th 1902) 118 F 425).

> "An accessory before the fact is one who, though absent at the commission of a felony, procures, counsels, or commands another to commit said felony subsequently perpetrated in consequence of such procurring, counsel, or command. To constitute such an accessory it is necessary that he should have been absent at the time when the

felony was committed; if he was either actually or constructively present, he is, as has been seen, principal" (1 Wharton's Criminal Law (12th Ed. 1932) sec. 263, pp.350-352).

"There are several things that must occur in order to justify the conviction of one as an accessory before the fact:

(1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense.

(2) That he was not present when the offense was committed.

(3) That the principal committed the crime" (22 CJS, sec.90, p.163).

e. It is elementary at common law that one cannot be convicted as an accessory before the fact where there is no evidence that the principal committed the crime charged (1 Wharton's Criminal Law (12th Ed. 1932), sec.263, p.352; 16 CJ, sec.127, p.134; 22 CJS sec.90, p.163). This rule has not been changed by the enactment of section 332, Federal Criminal Code (18 USCA 550). (United States v. Howitt, et al (S.D. Florida 1944) 55 F Supp.372; Manning v. Biddle (CCA 8th 1926) 14 F (2nd) 518; Yenkichi Ito v. United States (CCA 9th 1933) 64 F (2nd) 73; Cf: Gallot v. United States (CCA 5th 1898) 87 F 446). It is therefore necessary to determine whether Ziegler and Dolan by their act of removing the oil from the air strip to the Luyx garage committed the offense charged viz, wrongful disposition of Government oil. If they were guiltless of the offense it follows under the authorities cited above that accused cannot be held.

f. The evidence further shows that the police knew the movements of the two supposed confederates, Ziegler and Dolan, and as soon as the oil was unloaded from the motor truck they appeared at the garage and reclaimed it for the Government. Accused and Luyx had previously agreed on the purchase price, but the appearance of the military police forestalled its payment to Ziegler and Dolan. It was in fact never paid.

Ziegler's and Dolan's removal of the oil from the air strip was performed under the orders and directions of the military police. It is therefore an indubitable fact that their acts were free from criminal intent, a vital element of a criminal act (22 CJS, sec.29, p.84).

> "Under the common law a crime consists of two elements — namely, an evil intention and an unlawful action. 'Actus hon facit reum, nisi mens sit rea', in the words of the maxim. A crime is not committed if the mind of the person doing the unlawful act is innocent; a guilty intent is essential. The intent must exist at the time of the unlawful action, for no subsequent felonious intention will render the previous act felonious" (14 Am.Jur, sec.23, pp.782-783).

Not only was there a total absence of criminal intent on the part of Ziegler and Dolan, but they in truth committed no criminal act.

> "In order to constitute a criminal offense, there must be a sufficient criminal act or omission as well as criminal intent. Mere criminal intention is not punishable; nor is one punishable for an act which is not criminal because he thought it was and therefore had the necessary criminal intent * * * the act and intent must concur" (16 CJ sec.51, pp.83-84).

The evidence shows clearly that the company commander, after receiving information as to accused's intended action, referred Dolan to the police for instructions. Thereafter he did not take any further action in the case. He thereby placed Ziegler and Dolan at the disposition of the police. Subsequently, the two soldiers acted under the direction of the police and they did exactly as they were instructed. There is but one conclusion inferable from this evidence and that is that the oil was removed from the air strip with the knowledge and consent of proper authority. If in truth the police were usurping authority they did not possess in directing the removal of the oil from the air strip, it was part of the prosecution's case to show such fact. In the absence of such proof, it must be concluded that the military authorities in charge of the oil storage cooperated with the police and gave their consent and approval to the orders given by the police to the two soldiers. Under such state of the evidence, it is impossible to discover any criminal conduct in the actions of Ziegler and Dolan.

It follows from the foregoing that inasmuch as Ziegler and Dolan committed no offense accused was not guilty as accessory before the fact of the offense charged. As to whether he was guilty of some other offense, the following language is relevant:

> "where the solicitation is not in itself a substantive offense or where there has been no progress made toward the consummation of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative" (1 Wharton's Criminal Law (12th Ed.1932) sec.218, pp.288-289).

Nor may he properly be held guilty of conduct to the prejudice of good order and military discipline in soliciting the removal of the oil as such offense is not a lesser included one within that charged.

6. Prosecution's evidence presents also another facet which requires that the record of trial be held legally insufficient to support the findings of guilty.

Beyond doubt Ziegler and Dolan, while simulating obedience to accused's commands, were in fact emissaries and agents of the police and were doing no more than was required by the latter. The two soldiers did not in truth and fact agree to accused's plan, but oppositely by their prompt report of it to their company commander they affirmatively indicated their refusal to be parties to the proposed illegal transaction. At the time they removed the oil from the air strip and transported it they were working neither for themselves nor for accused, but for the police. Consideration of the question whether there was an entrapment becomes necessary.

The rule of law governing the defense of entrapment is stated thus:

> "'When the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute', such conduct on the part of the officials amounts to entrapment and may constitute a defense (Sorrells v. United States, 287 U.S. 435, 77 L.Ed. 413). Where, however, the criminal intent originates in the mind of accused, the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense, does not defeat the prosecution (Grimm v. United States, 156 U.S. 604, 39 L.Ed.550)(CM ETO 8619, Lippie et al).

The above quotation is from the holding in CM ETO 8619, Lippie, et al, which was adopted and approved in CM ETO 13406, Weiskopf and CM ETO 11681, Henning. Interesting examples of the practical application of the principles are found in Woo Wai v. United States (CCA 9th 1915), 223 F 412; Billingsley v. United States (CCA 6th 1921) 274 F 86; cert. denied 257 U.S. 656, 66 L.Ed. 420 (1921); Zucker v. United States (CCA 3rd 1923) 288 F 12, cert. denied, 262 U.S. 750,756, 67 L.Ed. 1218 (1923); Lucadamo v. United States (CCA 2nd 1922) 280 F 653; Farber v. United States (CCA 9th 1940), 114 F (2nd) 5, cert. denied, 311 U.S. 706, 85 L.Ed. 458 (1940); Morei v. United States (CCA 6th 1942), 127 F (2nd) 827).

The foregoing general rule is qualified, however, by an important limitation:

> "In cases of entrapment, however, it must appear of course that the person charged with the offense did himself every thing necessary to make out a complete offense against the law. Nothing that was done by the person present with the knowledge and consent of the victim will be imputed to the accused; and if, in order to constitute the offense, it is necessary that something done by such person shall be imputed to the accused, then the prosecution will fail" (16 CJ, sec.57, p.90; 22 CJS, sec.45, p.104).
>
> "It is, of course, necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail" (State v. Neely, (1931) 90 Mont.199, 300 Pac.561, 86 ALR 271).

See also State v. Decker,(1929) Mo. , 14 S.W. (2nd) 617, 66 ALR 499; Shouquette v. State, (1923) 25 Okla. Crim.Rep.169, 219 Pac.727, 66 ALR 506. The above statements of said limitation and qualification manifestly declare that an accused's acts in themselves must be unlawful and criminal and they must be performed with criminal intent in order to sustain a verdict of guilty.

It is clearly apparent that all of the acts constituting the offense charged, to wit, the wrongful disposition of the oil by causing it to be removed from the air strip to the civilian garage were performed by the police through their decoys Ziegler and Dolan. In order to hold accused, these acts must be imputed to him. Under the rule above quoted such situation is fatal to prosecution's case.

7. The charge sheet shows that accused is 23 years of age. He was inducted 8 December 1942 at San Francisco, California, 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 the offense. For the reasons herein stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

B. Franklin Pater Judge Advocate

Wm. F. Amram Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 AUG 1945 TO: Commanding General, United States Forces, European Theater, 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 EARL V. HAYMER (39116498), Detachment A, 2076th Quartermaster Truck Company (Aviation), 32nd Service 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.

(Findings and sentence vacated. GCMO 385, ETO, 29 Aug 1945).

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

BOARD OF REVIEW NO. 1

3 AUG 1945

CM ETO 9665

U N I T E D S T A T E S	103RD INFANTRY DIVISION
v.	Trial by GCM, convened at APO 470, U. S. Army, 27 March 1945.
Privates JAMES P. HAMILTON (37722313) and JAMES F. McCORMICK (34962747), both of Company L, 411th Infantry	Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 50 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

HAMILTON

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

Specification: In that Private James P. Hamilton, Company L, Four Hundred Eleventh Infantry, did, without proper leave, absent himself from his or-

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ganization in the vicinity of Saulcy, France, from about 24 November 1944, to about 27 November 1944.

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

Specification: In that * * * did, between Provencheres, France, and Barr, France, on or about 29 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and shirk important service, to wit: combat against the enemy, and did remain absent in desertion until he was returned to military control, at a time, place and manner unknown.

McCORMICK

CHARGE I: (Identical with Hamilton)

Specification: (Identical with Hamilton except for appropriate substitution of name)

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

Specification: In that Private James F. McCormick, Company L, Four Hundred Eleventh Infantry, did, between Provencheres, France, and Barr, France, on or about 29 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and shirk important service, to wit: combat against the enemy, and did remain absent in desertion until he was apprehended at Gray, France, on or about 3 January 1945.

Each accused pleaded guilty to Charge I and its Specification, guilty to the Specification of Charge II, except the words "desert the service of the United States with intent to avoid hazardous duty and shirk important service, to wit: combat against the enemy" and "desertion", substituting therefor, respectively, the words "absent himself from" and "without leave", of the excepted words not

guilty, and of the substituted words guilty, and not guilty to Charge II, but guilty of a violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, McCormick was found guilty of both charges and specifications preferred against him, and Hamilton was found guilty of Charge I and its Specification preferred against him and of Charge II and its Specification except the words "returned to military control at a time, place and manner unknown", substituting therefor, respectively, the words "apprehended at Gray, France on or about 3 January 1945", of the excepted words not guilty, and of the substituted words guilty. No evidence of previous convictions was introduced as to either 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 50 years. The reviewing authority approved each 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 for each accused. The proceedings were published in General Court-Martial Orders as to Hamilton, Number 21, and as to McCormick, Number 22, Headquarters 103rd Infantry Division, APO 470, U. S. Army, 4 April 1945.

3. a. Specification, Charge I:

In support of each accused's plea of guilty, the prosecution introduced evidence that the company commander received a report of their absence, for which he gave no permission. It was stipulated that both were apprehended 27 November 1944 near Epinal (France) (R10,11).

b. Specification, Charge II:

The company commander on or after 29 November 1944 sent the company supply sergeant and armorer artificer to Epinal as a guard to bring back the two accused. They did not bring them back (R11).

On 29 November the division classification officer secured a group of reinforcements from a replace-

ment depot and four men from a stockade at an undisclosed location. He made a record of the four men and the two accused's names were on that record (R11,12). His testimony on cross-examination was in part as follows:

"Q Did you pick up these two men?
A Yes sir.

Q Are you sure?
A Yes sir.

Q How are you sure if you don't know the men by sight? Do you recognize these men as the two men you picked up?
A No, I don't" (R12).

The same day at Provencheres, France, the classification officer turned over 88 men to the regimental S-1 clerk. The clerk made a record of four of these men who were pointed out to him by someone, and on this record the names of the accused appeared. He took a roll call at Provencheres but the record does not show whether accused answered. They did not answer at his subsequent roll call at Barr, France. He could not identify the accused (R13,14). One of the reinforcements left Provencheres on a truck with four men who were not reinforcements. After an intermediate stop on the trip to Barr, he noticed they were not present on the truck. He was not questioned as to identification (R14, 15).

Evidence as to tactical operations of accused's unit consisted of the following testimony by the company commander:

"Q Tell the court, the best you recall, the activity in which your organization was engaged from about the twenty-ninth of November nineteen forty-four to the third of January nineteen forty-five.
A Between those dates the battalion was an assault battalion, in contact with the enemy. We came in contact with the enemy in Lembach, Clembach and the Siegfried Line. From there we moved to St Nicholas in defensive positions.

Q. Was your organization in the so-called Vosges campaign?
A Yes sir.

Q State whether or not this activity called for combat duty against the enemy.
A Yes sir, it did" (R10).

Testimony was stipulated that the accused were apprehended at or near Gray, France, on 3 January 1945 (R15,16).

4. Each accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in their behalf (R16).

5. Because of the pleas of guilty to absences without leave, the only question in this case is whether the evidence supports convictions of desertion under Charge II. To justify convictions of desertion and to brand the accused with the disgrace of cowardice and dishonor in the service of the Country, to be punished here by confinement at hard labor for fifty years, the evidence must be clear and convincing. Conjecture and vague testimony will not suffice. It had to be fairly proven in open court in this case that they absented themselves in the midst of personal dangers in combat, or that such dangers were, when their absence began, within their knowledge, real, personal and imminent. Far short of such tests is the proof here.

There is no certain evidence that their company was in battle on 29 November 1944. If it were, the inference is that the action was at Lembach, 44 miles to the north of Barr as authentic maps show, and Barr is on no direct or main route from Provencheres to Lembach. There is no evidence that accused knew of any battle, of where they were going, nor of what their personal status would be at the undisclosed destination. There is no evidence of what their assignments in the company were, nor whether their immediate prospect was confinement, investigation, or duty in such assignment.

Each accused pleaded guilty to an absence without leave between Provencheres and Barr. Because of such pleas, perhaps it can be inferred from the weak evidence that these accused were on the truck with the reinforcements. There is no other evidence of hazardous duty in

the case. That single fact is too barren to be the basis of an inference of cowardly intent (CM ETO 5958, Perry and Allen; CM ETO 7532, Ramirez; CM ETO 8358, Lape and Corderman; CM ETO 8649, Siglaski).

Judicial notice will not save the prosecution's case. The Board of Review will notice judicially the generally and commonly known facts that Strasbourg, a few miles to the north of Barr, fell to the French on 23 November 1944, and that there were at the time of this offense German troops beyond the Rhine 14 miles east of Barr. Judicial notice will not be taken of the exact disposition of our own and enemy troops at a specific time, or of the amount, kind and proximity of hazardous enemy fire at such time and place, for such matters are not of common knowledge. Proof of such hazards is required (CM ETO 8358, Lape and Corderman; CM ETO 8649, Siglaski).

The specification is not broadened by the use of the phrase "and important service", for the reason that the words "combat with the enemy" specify and limit the duty and service alleged.

6. The charge sheet shows the following with respect to accused: Hamilton is 27 years of age and was inducted 16 September 1943 at Fort Leavenworth, Kansas, McCormick is 19 years of age and was inducted 15 March 1944 at Fort Bragg, North Carolina. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification preferred against each accused, only so much of the findings of guilty of Charge II and its Specification preferred against each accused as involves findings that he did, at the time and place alleged, absent himself without proper authority from his organization and did remain absent for the period found, in violation of Article of War 61, and legally sufficient to support the sentences.

8. The designation of Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr., Hq. European Theater of Operations, AG 252, Op. PM, 25 May 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat.724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Privates JAMES P. HAMILTON (37722313) and JAMES F. McCORMICK (34962747), both of Company L, 411th 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 Specification, Charge II, and Charge II, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which they have been deprived by virtue of that portion of the findings so vacated, viz: conviction of desertion in time of war, be restored.

3. The difficulty with this case is that the charges were not proper and it was poorly tried. The investigation papers included statements that accused absented themselves while under fire on 24 November 1944. This expected testimony justified a charge against each for running away from his company while before the enemy, under the 75th Article of War, or desertion to avoid hazardous duty under the 58th Article of War. If under Charge II ordinary desertion were alleged, absence without leave from 29 November 1944 to 3 January 1945 is so prolonged that intent to desert could be inferred from the absence terminated by apprehension. But the specification alleged desertion with intent to avoid combat with the enemy, which therefore had to be proved. That proof, if it existed, was not brought before the court. As there is no way to remedy the defect in the record, the action taken by the Board of Review and myself is necessary. The absences without leave, to which accused has pleaded guilty, are three days and 35 days; the appropriateness of the sentence is proper for consideration.

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

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

(As to accused McCormick, findings disapproved in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 336, ETO, 17 Aug. 1945).

(As to accused Hamilton, findings disapproved in part in accordance with recommendation of Assistant Judge Advocate General.GCMO 337, ETO, 17 Aug. 1945).

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

BOARD OF REVIEW NO. 3

9 JUN 1945

CM ETO 9681

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Ahrweiler, Germany, 18 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CLAUDE E. BENNETT, Jr., (35232443), Medical Detachment, 23rd Infantry	)	

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

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

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

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

Specification 1: In that Private, then Private First Class, Claude E. Bennett, Jr., Medical Detachment, 23d Infantry, did, at or near Vielsalm, Belgium on or about 1200, 15 October 1944, desert the service of the United States and did remain absent in such desertion until apprehended at or near Vielsalm, Belgium on or about 2 November 1944.

Specification 2: In that * * * did, at or near Vielsalm, Belgium on or about 2 November 1944, desert the service of the United States and did remain absent in desertion until apprehended at or near Petit-Langlir, Belgium on or about 23 January 1945.

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Specification 3: In that * * * did, at or near Ovifat, Belgium on or about 27 January 1945, desert the service of the United States and did remain absent in desertion until apprehended at or near Vielsalm, Belgium on or about 7 February 1945.

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

Specification: In that * * * a prisoner lawfully in confinement in the 2d Infantry Division Stockade, did, at or near Nidrum, Belgium on or about 9 February 1945, attempt to escape from such confinement.

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

Specification: In that * * * having been duly placed in confinement in the 2d Infantry Division Stockade, on or about 26 January 1945, did, at or near Ovifat, Belgium, on or about 27 January 1945 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 27 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

Accused was a member of the Medical Detachment, 23rd Infantry. He had been given a 48 hour pass to the Division Rest Camp at Vielsalm, Belgium, which expired at noon on 15 October 1944. He failed to return from his pass and shortly after noon was reported absent. A search of the area was unsuccessful and he never returned to the organization. His absence was without authority (R7,9-10,12,14).

On 2 November 1944, he was observed by the military police in Vielsalm, Belgium. He had apparently just had a fight and there was blood on his hand. The military police placed him under arrest and took him to the aid station(R16).

There he was put in an ambulance to be taken to the clearing station at St. Vith. En route, he announced his intention of jumping out and before anything could be done to prevent him, he did so. The driver and assistant driver tried to find him, but were unable to because of darkness (R16-19). He remained absent until 23 January 1945 when he was apprehended in civilian clothes by a CIC agent in Petit-Langlir, Belgium (R8). Three days later on 26 January 1945, he was confined in the division stockade at Ovifat, Belgium, pursuant to instructions received from his organization. He was placed under guard and informed that he was in confinement and that the guards had instructions to shoot if he attempted to escape.

On 27 January 1945, he was found to be missing, having gone to the latrine and failed to return. He had not been given permission to leave (R14,19,20,22). On 7 February 1945, accused was again apprehended, this time by the military police at Vielsalm, Belgium (R8). He was taken to the division stockade at Nidrum, Belgium, where he was again informed that he was under guard and in confinement. A few hours later, he attempted to escape and was found by one of the guards hiding in a barn about a block from the stockade. He was returned to the stockade and next day transferred to the First Army stockade (R20,21,23).

Prior to the incidents above described, accused had performed his duties as a litter bearer in an excellent manner. He had often been under fire and had performed well under such conditions. He had been wounded twice and had earned the Purple Heart with Oak Leaf Cluster. He had been recommended for the Bronze Star for taking a jeep with casualties out from under fire (R10,12,13,15).

4. Accused, having been warned of his rights by the president of the court, elected to remain silent (R25-26). Evidence for the defense showed that he had received the Purple Heart with Oak Leaf Cluster for wounds in action (R24-25).

5. Accused had been found guilty of three successive desertions arising out of a continuous 110 day absence without leave from his organization (Charge I and Specifications). This absence was twice interrupted by brief returns to military control, and although there is some question whether the first interruption need have been considered as a return to military control for this purpose, there is no objection to the manner of charging adopted in the case (see CM ETO 9957, Robinson). The question therefore is whether in view of the total absence of any evidence of intent to avoid hazardous duty or important service, there is sufficient proof of intent not to return to sustain the findings of

guilty of each of the three alleged desertions. As for the second and third absences (Specifications 2 and 3, Charge I), the evidence clearly justified the court in drawing an inference of the necessary intent. In the second, the mere duration (82 days), entirely apart from the fact that the absence began with an escape from military control and ended with apprehension in civilian clothes, is sufficient to raise the inference (CM ETO 1629, O'Donnell). In the third, the absence commenced with an escape from confinement and ended with apprehension followed by an attempt again to escape. These circumstances are likewise enough to raise an inference of intent not to return (MCM, 1928, par.130a, p.144). As for the first absence (Specification 1, Charge I), the duration (17 days) is too short to give rise in itself to any such inference (CM ETO 8631, Hamilton). However, this absence, from accused's point of view, was merely part of a continuing course of conduct involving more than three months additional absence without leave punctuated by the wearing of civilian clothes, an escape from military control, an escape from confinement, and an attempted escape from confinement. Under these circumstances, therefore, the court was fully justified in inferring that the intent not to return accompanied the first absence as well as the other two (CM ETO 9957, Robinson).

The court also reached findings of guilty of an escape from confinement and an attempted escape from confinement in violation of Articles of War 69 and 96 respectively. Since the evidence contains ample proof of all elements of these offenses as set forth in the Manual for Courts-Martial (MCM, 1928, pars.139b and 152c, pp. 154,190), the record of trial is legally sufficient to support the findings and no discussion thereof is necessary.

6. The charge sheet shows that accused is 21 years and three months of age and was inducted 22 June 1943. He had no prior service.

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

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

B R Sleeper Judge Advocate

Marsden C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1 16 MAY 1945

CM ETO 9745

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates FRANKLIN L. ADAMS (36892505) and LANDIS LONG (32552176), both of 4403rd Quartermaster Service Company	Trial by GCM, convened at Liege, Belgium, 1,17 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years and six months. Loire Disciplinary Training Center, Le Mans, France.

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. Both accused were convicted of involuntary manslaughter and of violation of an order not to fire weapons except in emergency or at the enemy. The evidence showed that each fired at a rabbit just prior to the shooting of the victim. Expert ballistic testimony connected the fatal bullet with a carbine, numbered 6,100,100, offered in evidence as having been in the possession of accused Long at the time of the fatality. With respect to the subsequent disposition of accuseds' weapons, Sergeant Marvin B. Bailey, Corps of Military Police, testified that when the accused were placed in custody shortly after the fatality, he took their carbines from them and tagged each with the name and serial number of the owner, but not with the serial number of the carbine (R41-42). Bailey kept the weapons in a locker for a time, and then returned them to the commanding officer of the 4403rd Quartermaster Service Company. He obtained a signed receipt for their return. He further testified:

> "Actually I handed the guns to a Captain whose name I don't know but I believe Lieutenant Farr, the Commanding Officer [of the 4403rd Quartermaster Service Company] was there. * * * Lieutenant Farr and Lieutenant Sedbury were both around" (R41-42).

He either handed the weapons to Lieutenant Farr or to the Captain (R42). The weapons were tagged at that time (R42). Lieutenant Farr testified that he received the carbines from "a Captain and an enlisted man" whose names he couldn't remember, that each weapon at that time had a tag on it showing the name and serial number of an accused, that he had a record of "those numbers", that the company records did not reveal the number of the rifle issued to each accused, and that he had no other way of identifying the weapons which were issued to accused (R43). Neither carbine was offered in evidence prior to the adjournment of court for the purpose of having a ballistic examination made (R43).

In his testimony after the court reconvened, Lieutenant Farr stated that he received the weapons from "a Major Ryan who was investigating officer in this case" (R44) or from "a Captain, either the Executive Officer or the Adjutant to Major Ryan" (R45). Each carbine was at that time tagged with the name of an accused and with the serial number of the carbine (R44,45). (It is noted that Bailey had testified that when he tagged the weapons, he did not include their numbers on the tag (R42)). As to the carbine numbered 6,100,100, attributed by its tag to accused Long, Lieutenant Farr stated that he knew it was different from any other carbine because "This was my carbine in England. I used it on the rifle range" (R44). Over objection by the defense, both carbines were admitted in evidence, the trial judge advocate stating:

> "The prosecution wishes to make it a matter of record that the prosecution attempted on several occasions to tie in this missing officer and can neither find the officer nor the man who made the first investigation" (R46).

The ballistics expert identified the carbines on which he made his tests as being those introduced in evidence and having been previously delivered to him by Captain Klafter, the trial judge advocate (R47).

Although the evidence is ambiguous as to just how Lieutenant

Farr received the carbines, there is sufficient evidence to justify the inference that the weapons as tagged by Bailey were physically delivered either by him or in his presence to Lieutenant Farr, the witness who identified the weapons in court. Bailey testified that he delivered the carbines either to the Captain in the presence of Lieutenant Farr or to Lieutenant Farr; the Lieutenant testified that he received the weapons "from a Captain and an enlisted man". In view of Bailey's testimony, it may be inferred that he was the enlisted man. There is therefore sufficient evidence to justify the court in finding that the weapons identified by Lieutenant Farr and subjected to the ballistic tests were those taken from the possession of accused by Bailey shortly after the fatal incident (Cf: CM ETO 3200, Price).

3. Competent substantial evidence supports the finding of guilty of involuntary manslaughter as to accused Long. In view of the evidence that the fatal bullet came from Long's gun, the question arises whether the similar finding of guilty as to accused Adams may be sustained on the ground that he was knowingly engaged in the wrongful joint enterprise which caused the fatality (CM ETO 393, Caton and Fikes; CM ETO 2926, Norman, et al). Proof establishing that one of the accused did the killing, but failing to establish which one, would support the findings of guilty as to both (Cf: State v. Newberg (Oregon 1929), 278 Pac. 568, 63 ALR 1225; Regina v. Salmon (1880) L.R. 6 Q.B. Div. 79 (Note, 5 ALR 603,609)). See Oliver v. Miles, 144 Miss. 858, 110 So. 66, 50 ALR 357 (1926) (Joint civil liability of members of a hunting party). The principle of the above cited cases is not based on the difficulty of proving who fired the fatal shot, but on the fact that the wrongful hunting or target practice is considered one wrongful transaction, and the guilt of each accused is bottomed on his participation therein. Here both Long and Adams violated a standing order which prohibited the discharge of fire arms except in emergency or at the enemy. Their hunting expedition was an unlawful enterprise not amounting to a felony. Proof of the exact source of the fatal bullet does not exculpate Adams, who knowingly and jointly participated in the promiscuous shooting (CM ETO 393, Caton and Fikes, supra; CM ETO 2926, Norman et al, supra).

4. 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.

5. In the event the dishonorable discharges are suspended, the designation of the Loire Disciplinary Training Center, Le Mans,

France, as the place of confinement is authorized (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

BOARD OF REVIEW NO. 1

19 MAY 1945

CM ETO 9751

U N I T E D S T A T E S)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
Privates EDWARD WHATLEY (35407129), and WALTER A. WHITE (38152568), both of 524th Quartermaster Car Company)	Trial by GCM, convened at Flawinne, Belgium, 27 March 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for six months. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

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

Specification 1: In that Private Edward Whatley and Private Walter A. White, both of 524th Quartermaster Car Company, acting jointly and in pursuance of a common intent, did, at or near Leuze, Belgium, on or about 14 November

1944, wrongfully and knowingly sell to Alfred Feuillen, about three (3) jerricans of gasoline of the value of about $15.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

Specification 4: (Finding of not guilty)

CHARGE II: Violation of the 96th Article of War. (Findings of not guilty)

Specification 1: (Findings of not guilty)

Specification 2: (Findings of not guilty)

Each accused pleaded not guilty, and was found guilty of Charge I and Specification 1 thereof, and not guilty of Specifications 2, 3 and 4 of Charge I and of Charge II and its specifications. No evidence of previous convictions was introduced as to accused Whatley. Evidence of one previous conviction by summary court was introduced as to accused White for willfully and unlawfully leaving his vehicle unattended on a public thoroughfare in violation of the 96th Article of War. 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 six months. The reviewing authority, as to each accused, 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 the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 287, Headquarters Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army, dated 5 April 1945.

3. Prosecution's evidence to support the findings of guilty of Specification 1, Charge I, was as follows:

Monsieur Louis Feuillen of Leuze, Belgium, testified that both accused visited his home in October 1944 and also on 28 January 1945 to see his son, Alfred Feuillen, concerning the sale of gasoline. On the last stated date while in his home they were arrested by the military police (R6,7). Alfred Feuillen stated that accused sold him six cans of gasoline during the month of October 1944, but denied that he purchased gasoline from accused at any other time (R7,9,29, 31,32). The law member excluded all testimony by Alfred Feuillen pertaining to the purchase of gasoline from accused during the month of October 1944.

The pre-trial statement of accused Whatley (R14; Pros.Ex.1) stated in pertinent part:

> "I, Private Edward (NMI) Whatley, did, on or about 14 November 1944, in the company of Private Alonzo Cisco come to Leuze, Belgium. The two of us brought three (3) cans of gasoline which we sold to a civilian, who runs a cafe in Leuze, for seven hundred fifty francs (750 francs)".

Accused White in his pre-trial statement (R20; Pros.Ex.2) declared with respect to the pertinent transaction:

> "I, Private Walter A. White, did, with Privates Whatley and Cisco, on or about the first half of November 1944 come to Leuze,Belgium at which time we sold six (6) or seven (7) cans of gasoline to a civilian who operated a cafe in that town. I received as my share of the proceeds seven hundred (700) francs".

4. Each accused after his rights were explained to him elected to remain silent.

5. It is elemental that:

> "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. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (Underscoring supplied) (MCM, 1928, par.114a, p.115).

A most casual examination of the record of trial shows that the prosecution's evidence of the corpus delicti did not even approach the minimum of proof necessary to permit the admission of accuseds' statements. If Alfred Feuillen's testimony with respect to the October purchase is considered, notwithstanding it was stricken by the court, it is manifest that the prosecution alleged accused sold three cans of gasoline on 14 November 1944 and proved the sale of six cans at a time at least two weeks prior thereto. This is not proof of any relevant matter. The court therefore rightfully excluded Alfred Feuillen's testimony pertaining to the purchase of the six cans of gasoline in October. Further, there is no proof that the Government gasoline and cans were missing on about 14 November 1944. Therefore, there is not even a scintilla of proof of the corpus delicti of the offense charged. Accused cannot be convicted on their confessions alone (CM ETO 1042, Collette; CM ETO 2185, Nelson; CM ETO 8234, Young, et al). The record is legally insufficient to support the findings of guilty and the sentences.

6. In considering the instant case the Board of Review has assumed that the extrajudicial statements of the accused (Pros.Exs. 1,2) were admissible in evidence. However, the evidence of the facts surrounding their procurement is of such suspicious nature as to give rise to the inference they were involuntary and were secured under duress. Anything to the contrary herein appearing notwithstanding, the Board of Review does not decide whether said statements were admissible or not.

7. For the reasons hereinbefore 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 sentences.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operatinns. 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 Act 20 August 1937 (50 Stat.724; 10 USCA 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 USCA 1522) is the record of trial in the case of Privates EDWARD WHATLEY (35407129) and WALTER A. WHITE (38152568), both of 524th Quartermaster Car Company.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and the sentences be vacated and that all rights, privileges and property of which each accused may have been deprived by reason of such findings and sentences so vacated, be restored.

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

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

(Findings and sentences vacated. GCMO 193, ETO, 29 May 1945).

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

BOARD OF REVIEW NO.1

16 APR 1945

CM ETO 9753

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Luneville, France, 7 March 1945. Sentence as to each accused (execution of sentence suspended as to NEAL): Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates ROBERT L. PEARSON (34813398) and WARREN A. NEAL (35874038), both of Company M, 179th 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 accused Pearson named above has been examined by the Board of Review.

2. The execution of the sentence as to accused Neal was suspended, due to his creditable performance in combat, in General Court-Martial Orders Number 82, Headquarters 45th Infantry Division, 31 March 1945.

3. The charges were served on accused Pearson on 5 March 1945 and he was arraigned and tried on 7 March 1945. The record of trial shows that the case was brought to trial at that date "due to the uncertainty of the tactical situation" and that it was stated in open court that the accused had no objections to being tried at that time (R3,5). Under such circumstances no prejudice to the substantial rights of accused is disclosed (CM ETO 8083, Cubley, and authorities therein cited).

4. 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

(174)

is of the opinion that the record of trial is legally sufficient 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

26 JUN 1945

CM ETO 9779

U N I T E D S T A T E S v. Technicians Fifth Grade CARL H. STANLEY (34673463) and CARTER SHEPHERD (38138989), both of 3988th Quartermaster Truck Company	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Rouen, Seine Inferieure, France, 8 March 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 15 years. Loire Disciplinary Training Center, Le Mans, France.

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 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 holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Technician Fifth Grade Carter Shepherd and Technician Fifth Grade Carl H. Stanley, both, 3988th Quartermaster Truck Company, Transportation Corps, acting jointly, and in pursuance of a common intent, did, at or near Gourney, France, on or about 2 December 1944, prejudice the success of the United States Forces, by wrongfully and unlawfully disposing of fourteen (14) jerricans of gasoline, containing approximately seventy (70) gallons of gasoline, military property of the United States, vitally needed for combat operations.

Each accused pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to 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 20 years. As to each accused, the reviewing authority approved the sentence, but reduced the period of confinement at hard labor to 15 years, ordered the execution of the sentence as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 111, Headquarters Channel Base Section, Communications Zone, European Theater of Operations, 8 April 1945.

3. At the time the pleas of guilty were made each accused received a full and complete explanation by the law member of the effects of the plea, but he erroneously stated that the maximum sentence which could be imposed by the court included hard labor for life. Defense counsel indicated that Stanley understood clearly the procedure but questioned Shepherd's comprehension of the realities of the situation. The law member asked

> "Well does the defense desire to make a motion for severance, or would the defense prefer a recess for the purpose of explaining or clarifying the case further?" (R5)

Defense counsel replied:

> "I think that would be, probably be best procedure to allow me some time to talk with the man a little more fully * * * " (R5).

Thereupon the court recessed for ten minutes and upon reconvening defense counsel addressed the court thus:

> "I've explained to Corporal Shepherd, the procedure and conditions under which he has made his plea, and I believe that he fully understands what has gone on before him and what he has done, and he wishes to continue the plea of guilty" (R5).

The trial judge advocate then asked each accused personally if he wished his plea of guilty to stand and received affirmative answers in each instance (R5).

Thereafter the prosecution introduced testimony which showed that the accused delivered 14 five-gallon cans of Government gasoline to French civilians and that they were arrested by military police while in the act of making delivery of same (R6). The terminal and operations officer of the gasoline pipe line terminals at Le Haye du Puit, Le Havre, Air Strip 71, also testified that in December 1944 the available gasoline in storage at said terminals was 42% of the storage capacity which was the "low point" of the gasoline supply and that authorities "begin to worry quite a bit about the gasoline situation when it gets below fifty percent" (R7). Accused's organization was a trucking company which drew its gasoline from Quartermaster Depot 355. The depot received the gasoline in bulk from the terminals and placed it in cans of five gallons capacity which it delivered to the trucking company (R7). The officer did not know whether the trucking company consumed the gasoline received by it in the operation of its own vehicles or whether it delivered some to combat troops (R8).

4. With the pleas of guilty standing and after the prosecution had rested, defense counsel on behalf of each accused made an unsworn statement wherein it was admitted that the accused wrongfully and unlawfully disposed of the gasoline described in the Specification, but it contained the declaration that

> "A Frenchman, who was unknown to them * * * asked them if they had any gasoline that they would sell them, and offered them a rather fabulous price for it. * * * They were not informed by any one that there was a shortage of gasoline, and they did not go far enough, of course into the matter to consider that they were doing any more than disposing of some gasoline of which they knew they had no right to. They wish to make such amends as possible under the circumstances. * * * They received no money from the Frenchmen for the gasoline at that time" (R9).

After defense counsel had made the unsworn statement on behalf of accused, the vital part of which is quoted above, the following colloquy occured:

> "The defense rests.
>
> Prosecution: The prosecution, in view of the contents of the unsworn statement, desires to call another witness. If the court please, the prosecution requests a five minutes recess.
>
> President: A recess will be granted.
>
> The court then took a recess until 1030 hours, at which hour, the personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats.
>
> Defense: I would like to ask the prosecution if this testimony is being put on in rebuttal.

Prosecution: The prosecution would like to introduce this as further evidence in the case.

Defense: The prosecution rested, and there is no testimony before the court on the part of the defendants. At this time I will impose an objection to any rebuttal testimony being offered.

Prosecution: The prosecution believes that in the interest of obtaining a full military justice, at any time, even after the prosecution has rested, the court, in its discretion can permit any witness or additional evidence to be brought before the court at any time.

Law Member: Your objection is overruled, Mr. Defense Counsel" (R9).

The prosecution thereupon introduced supplemental evidence to the effect that upon search of the motor truck which was in the possession of accused at the time of their arrest, a handkerchief was found concealed in the front seat which bore the laundry mark "S 3463" (the same being the initial of Stanley's surname and the last four digits of his serial number). The handkerchief contained "thirty-eight thousand * * * and two or three hundred eighty-five francs" (R12). Also introduced in evidence was the voluntary extrajudicial statement of accused Stanley (R11; Pros. Ex.1) wherein he admitted the transaction with the Frenchmen and concluded:

"I was,with the help of Carter, unloading the gas when the patrolmen came up and had us put the gas back on the truck, and escorted us to Headquarters in Gournay. There were only thirty-six (36) cans of gasoline and the money that I was paid I wrapped in a handkerchief and hid behind the seat".

5. a. The Specification to which each accused pleaded guilty alleged that accused prejudiced the success of the United States Forces by a wrongful disposition of

14 jerricans of gasoline, military property of the United States, "vitally needed for combat operations". The Board of Review has heretofore specifically reserved the question whether such a specification alleges any more than a violation of the ninth paragraph of Article of War 94 (CM ETO 6226, Ealy).

In CM ETO 8234, Young, et al, the specifications were held to charge a wrongful disposition of United States military property under such circumstances as to constitute an interference with the war effort in violation of Article of War 96:

> "Specifications 2 to 7 inclusive charge that the several accused did at the time and places alleged
>
> 'wrongfully dispose of /cigarettes/ property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations'.
>
> * * *
>
> The specifications when considered as a whole allege something more than the unauthorized disposal of Government property furnished or intended for the military service thereof under the 9th paragraph of the 94th Article of War. 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. 1926, 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".

In CM ETO 6226, Ealy, the wrongful disposition of government gasoline was charged. The Board of Review held that to sustain a charge of the weight and seriousness of that involved in the Young case there must

> "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" (underscoring supplied).

It will be assumed (without deciding) that the allegations of the Specification of the instant case are sufficient to meet the test of the Young case and that they state facts constituting the offense of more seriousness and gravity under the 96th Article of War than is involved in a charge under the ninth paragraph of the 94th Article of War.

b. The Manual for Courts-Martial specifically provides:

> "Whenever it appears to the court that the plea of guilty may have been entered improvidently or through lack of understanding of its meaning and effect, or whenever an accused, after a plea of guilty makes a statement to the court, in his testimony or otherwise, inconsistent with

> the plea, the president or law member, if so directed by the president, will make such explanation and statement to the accused as the occasion requires. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty" (MCM, 1928, par.70, pp.54,55) (Underscoring supplied).

The question presented by the record of trial is of vital importance to accused. Upon its determination depends the length of their confinements.

It is manifest from the foregoing that both the prosecution and the court proceeded cautiously and with due and proper regard for the rights of the accused in accepting the pleas of guilty. Defense counsel likewise performed his full duty toward his clients by inviting the court's attention to Shepherd's evident lack of understanding of the effect of his plea of guilty. The fact that the law member in explaining to the accused the punishment which might be imposed upon them had an erroneous and exaggerated idea of same did not prejudice accused inasmuch as he erred on the side of severity. The record shows that the pleas were made by accused consciously and deliberately. There was no overreaching by the prosecution, and the court, acting with circumspection, made certain that accused were fully informed as to the heavy penalty which might be imposed upon them.

After pleas of guilty have been received there is no requirement of law that the prosecution must prove its case against accused. The finding of guilty may be supported solely on the plea of guilty (Winthrop's Military Law and Precedents (Reprint 1920), pp.278,279; CM 212197, Rocker, 10 B.R. 223 (1939)), and

> "evidence adduced during the trial can be considered only as indicative of the existence of extenuating or aggravating circumstances, as the case may be, surrounding the commission of the offense to which accused pleaded guilty and of which he was found guilty" (CM 212197, Rocker, 10 BR 223, 225 (1939); CM ETO 612, Suckow; MCM, 1928, par.78, p.62).

The effect in law of a plea of guilty is that of a confession in open court of the offense charged. It is desirable that some evidence of the circumstances be shown so that the reviewing and clemency authorities may each intelligently function (CM ETO 1266, Shipman; CM ETO 1588, Moseff; CM ETO 2765, DeVol; CM ETO 2776, Kuest). It may be assumed that up to the time the unsworn statement was made by defense counsel the prosecution presented its evidence on the hypothesis that it was submitted for informatory purposes only within the purview of the quoted statement from the Rocker case, supra. However, after the unsworn statement was made the atmosphere of the case changed radically. In spite of the objection of defense counsel the prosecution introduced rebuttal evidence (which included accused Stanley's extrajudicial statement) which traversed the unsworn statement that accused received no money from the French civilians in payment of the gasoline. The evidence was true rebuttal evidence and not further explanatory evidence, but there was nothing irregular in this practice because the prosecution is specifically authorized to "rebut statements of fact" contained in unsworn statements of accused (MCM, 1928, par.76, p.61).

The greater and more serious offense of diverting military supplies from the usual and ordinary channels of distribution which would ultimately deliver the same to combat troops as delineated in the Young case includes the lesser offense of unlawfully and wrongfully disposing of Government property furnished and intended for the military service denounced by the ninth paragraph of the 94th Article of War (CM ETO 9987, Pipes; CM ETO 9288, Mills).

The assertion of defense counsel that accused

> "were not informed by anyone that there was a shortage of gasoline" (R9)

was not a defense to the greater charge, because the prosecution was under no duty to prove that at the time accused diverted the 14 jerricans of gasoline from the usual channels of distribution they knew that there existed a shortage of gasoline. However, it is apparent from the unsworn statement including the last before mentioned assertion, that the defense by implication denied the guilt of accused of the greater offense in spite of the fact of their pleas of guilty thereto, while simultaneously it admitted an unlawful disposition of the gasoline as denounced by the ninth paragraph of the 94th Article of War. There was at least sufficient notice to the court that the defense had made a statement which if not inconsistent with the pleas was certainly indicative of their improvident entry and of a lack of complete understanding of their meaning and effect, and that protective action under paragraph 70 of the Manual for Courts-Martial, 1928 (quoted supra) was required. Notwithstanding this situation, the president and law member of the court remained silent and when defense counsel objected to prosecution's rebuttal evidence, the law member overruled the objection.

It is the opinion of the Board of Review that the situation thus revealed was prejudicial to accused and that it is its duty to consider the record of trial as if the president of the court exercised his authority under paragraph 70 of the Manual above quoted, caused the pleas of guilty to be changed to not guilty and thereby placed upon the prosecution the burden to prove beyond reasonable doubt that accused committed the offense alleged. Such disposition of the case on the state of the record here disclosed is dictated by the fact the greater offense under the 96th Article of War is essentially a wartime offense and even in a theater of active combat operations can be committed only under the circumstances and conditions particularly discussed in the holding in the Young case and such circumstances and conditions must be both alleged and proved (CM ETO 7506, Hardin; CM ETO 6226, Ealy; supra).

6. a. In the attempt to prove the circumstances and conditions in the European Theater of Operations on 2 December 1944 with respect to gasoline, as is required by the principles of the Young case, the prosecution

adduced testimony that the gasoline in storage at the terminals at La Haye du Puit, Le Havre, Air Strip 71, amounted to 42% of the storage capacity; that it was the low point of gasoline supply and was the cause of concern to the military authorities charged with the duty of supplying gasoline to the American Armed Forces. This was relevant and material evidence but it was only the commencement of the required proof. It stopped far short of the proof that accused, when at the place alleged they diverted the gasoline, "prejudiced the success of the American arms" (CM ETO 6226, Ealy, supra). The distinction between the situation shown by the proof in the Young case and the situation shown in the instant case is best demonstrated by the following quotation from the holding in the Young case:

> "Evidence, independent of accused's statements showed that there had been wholesale thefts of cigarettes, chocolate and assorted food supplies from railroad trains at the times and places alleged in the specification. 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 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 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".

In the instant case the prosecution proved a shortage of gasoline in storage at the terminals (a condition for which accused were in no degree responsible). It showed that accused had wrongfully and unlawfully disposed of 14 jerricans filled with gasoline. There its proof stopped. There is not a scintilla of evidence that there had been wholesale and repeated unlawful and irregular diversions of gasoline from the regular channels of distribution at the time and place alleged. Additional evidence was necessary in order to show that the disposition made by accused was part of greater unlawful diversionary activities and that there was a resultant prejudice to the success of the American arms. Therefore, there was a total failure to parallel the conditions similar to those which existed at the time of the theft of the cigarettes by the accused in the Young case. The prosecution therefore failed to establish accused's guilt of the greater offense of diverting vital supplies under the 96th Article of War (CM ETO 7506, Hardin; CM ETO 6226, Ealy, supra).

b. The evidence clearly established accused's guilt of wrongfully and unlawfully disposing of 14 jericans of gasoline, property of the United States, furnished and intended for the military service thereof in violation of the ninth paragraph of the 94th Article of War (CM ETO 5539, Hufendick; CM ETO 9288, Mills).

By reference to the quarter-annual report of the Quartermaster, European Theater of Operations, to the Quartermaster General for the period 1 October to 31 December 1944 submitted under the provisions of the "Lend-Lease" Act (Act March 11, 1941, c.11; 55 Stat.31; 22 USCA secs.411-419) it is seen that both 73 and 80 octane petrol (gasoline) is valued at .1934 cents per Imperial Gallon. The price per United States gallon will be 5/6 of the price per Imperial Gallon (Webster's New International Dictionary (2d Ed.) p.1029). Therefore the gallon value of gasoline involved in this case on 2 December 1944 was .16117 cents and the total value of the gasoline disposed of by accused (70 gallons at .16117) was $11.28. By means of the same report the value of the jerricans at the time and place alleged was $2.00 each or a total of $28.00 (CM ETO 9288, Mills,

supra; CM ETO 5539, Hufendick, supra). The total value of the gasoline and jerricans, therefore, was $39.28.

7. The authorized sentence for wrongfully and unlawfully disposing of property of the United States, furnished and intended for the military service thereof, of a value of more than $20.00 and less than $50,00, is dishonorable discharge, total forfeitures and confinement at hard labor for one year.

8. The charge sheet shows that accused Stanley is 21 years three months of age and was inducted into the military service on 10 May 1943 at Fort Bragg, North Carolina, and that accused Shepherd is 31 years of age and was inducted into the military service on 1 June 1942 at Tyler, Texas. The term of service of each accused is the duration of the war plus six months and neither accused had any 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 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 only so much of the findings of guilty as involves a finding that accused at the time and place alleged did wrongfully and unlawfully dispose of 70 gallons of gasoline and 14 jerricans of a total value of $39.28, property of the United States furnished and intended for the military service thereof, and so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

10. 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 PM, 25 May 1945, par.2).

_____ 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

27 APR 1945

CM ETO 9784

U N I T E D S T A T E S	)	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private CHARLES L. GREEN (37134033), 3486th Quartermaster Truck Company	)	Trial by GCM, convened at Marseille, France, 3, 10, February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Federal Reformatory, Chillicothe, Ohio.

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

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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 felonious taking of Government property furnished and intended for the military service thereof (Specification 1) and its subsequent wrongful disposition (Specification 2) are distinct offenses under the 94th Article of War. An accused may be guilty of both offenses although the identical property is involved in each offense. (MCM, 1928, par. 27, p.17, par.150i, p.184; CM NATO 1135 (1944) III Bull. JAG 13).

3. The record of trial is legally sufficient to support the sentence. Confinement in a penitentiary is authorized upon conviction of larceny of property of the United States furnished and intended for the military service thereof of a value exceeding $50.00 by Article of War 42 and section 35 (amended) Federal Criminal Code (18 USCA 82). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, 3a, as amended by Cir.25, WD, 22 Jan.1945).

_____ Judge Advocate

_____ Judge Advocate

9784

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

14 MAY 1945

CM ETO 9796

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trialby GCM, convened at APO 95, U.S. Army (France), 28 March 1945.
Private First Class DONALD C. EMERSON (16097199), Company I, 378th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Donald C. Emerson, Company "I", 378th Infantry, did, at Uerdingen, Germany, on or about 0630, 5 March 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: An attack against an enemy, and did remain absent in desertion until he surrendered himself at Rott, Germany, on or about 1700, 7 March 1945.

He pleaded guilty, except to words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: An attack against the enemy and did remain absent in desertion", substituing therefor the words, "without proper leave absent himself from his organization", to the substituted words guilty, to the excepted words not guilty, to the Charge not guilty, but guilty of a 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 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 is clear and replete that accused's organization on the night of 4 March 1945 was under orders to advance against the enemy on the next morning. Accused was with his company in the front lines on the night preceding theadvance, and was in close association with his fellow soldiers. While he denied that he was present with his squad when it was "briefed" as to its expected activities, he admitted, while a witness on his own behalf, that he "turned in" his bedding roll the next morning under orders. The record of trial indicates that the company personnel was notified of the intended movement through regular channels of communication. Accused admitted his unauthorized absence and also admitted that he left his unit immediately prior to its departure. There is, therefore, substantial evidence from which the court was authorized to infer that accused in fact knew of the prospective advance of his organization against the enemy and that with this knowledge he became "jumpy and shaky" and deliberately left his place of duty to avoid prospective battle hazards. The court's finding of guilty was fully justified (CM ETO 8083, Cubley; CM ETO 7189, Hendershot; and authorities therein cited).

4. The charge sheet shows that accused is 21 years one month of age and that he enlisted 18 June 1942 at Chicago, Illinois, to serve for three years plus 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. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

14 AUG 1945

CM ETO 9810

UNITED STATES	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville, France, 20, 21 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class TEAMER JOHNSON (38117424), 569th Ordnance Ammunition Company	)	

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 First Class Teamer Johnson, 569th Ordnance Ammunition Company, did, at Bois de Girancourt (Vos), France, on or about 17 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one, Mister Charles Hemmerle, a human being by shooting him with a carbine, caliber 30 M1.

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

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

3. Prosecution's evidence showed that at about 6 pm on 17 November 1944, in the village of Bois de Girancourt, France, accused endeavored to obtain schnapps, first from deceased and later from his neighbor, by exchanging a can of gasoline therefor, and was assured by deceased that this would be arranged at the latter's home (R12,17-18,23-25,81). Accused, apparently sober at this time, left but returned in a drunken condition about 8 pm, entered deceased's house without invitation and, upon again demanding schnapps, was given a small amount of fruit juice. (R13-14,18-19,24-25). After about 15 minutes, deceased asked him to leave the house and, while engaging in conversation with him, followed him to the door, where accused stepped outside (R15-16,18-19,82). After talking with deceased for about another minute, accused shot him in the abdomen with his carbine (R16-17,18-19,44-47,48-52,57,83;Pros. Exs.C,D,F,G,H). Two days thereafter (R32) (two days before his death, which was caused by the wound)(R39-40,42-43)) deceased, while aware that he was in extremis (R37,40,41) made a dying declaration that "the negro" shot at him with a carbine (R41-42).

4. After accused's rights were explained, the defense stated he elected to remain silent (R78). The defense introduced testimony of alibi witnesses to the effect that on the evening in question accused was at the mess hall of his organization (a walk of at least ten and at most 30 minutes from the village (R7,9)) at about 5:30 or 6 pm (R66), in his billet about 6:30 (R58-60), in the supply room between 6:30 and 6:45 (R62-64), and again in his billet about 7 or 7:30 (R65-66, 69), and that he came into his billet and went to bed about 8:20 (R71-73, 75).

5. The court was justified in believing that accused deliberately shot his victim because of his anger and disappointment occasioned by deceased's refusal to furnish him with schnapps after deceased's assurance that he would do so. Deceased's conduct was clearly insufficient to constitute adequate provocation to make the homicide voluntary manslaughter instead of murder, even were there evidence in the record to show that accused shot in the heat of passion (CM ETO 2007, Harris; CM ETO 6682, Frazier, and authorities therein cited). The defense evidence adduced for the purpose of establishing that accused was at his organization at the time of the offense, at most, created an issue of fact for the determination of the court, whose election to believe the prosecution witnesses' positive identification of accused as the guilty negro

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soldier, both at two pre-trial line-ups and at the trial, will not be disturbed upon appellate review (CM ETO 3837, Bernard W. Smith). The court was justified in determining against accused the issues of whether he killed his victim with malice and whether he was sufficiently under the influence of alcohol to destroy his mental capacity to entertain the general criminal intent necessary to murder. The evidence reveals an unjustified and cold blooded murder which, in the opinion of the Board of Review, fully warrented the findings of guilty (CM ETO 10002, Brewster, and authorities therein cited; CM ETO 14141, Pycko).

6. The charge sheet shows that accused is 23 years five months of age and was inducted 26 June 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Riter Judge Advocate

Wm. F. Lawson Judge Advocate

Edward L. Evans Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

27 APR 1945

CM ETO 9822

U N I T E D S T A T E S	)	83RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Argenteau,
	)	Belgium, 20 February 1945. Sentence:
Private KENNETH L. KIRKBRIDE	)	Dishonorable discharge, total forfeitures
(35174088), Company A, 329th	)	and confinement at hard labor for life.
Infantry	)	Eastern Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Kenneth L. Kirkbride, then Private First Class, Company A, 329th Infantry, did at or near Gurzenich, Germany, on or about 17 December 1944, run away from his Company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

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 dis-

honorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 17 December 1944 accused was a rifleman in the third platoon of Company A, 329th Infantry (R7,11,14). On that date this company was located near Gurzenich, Germany (R7,14), was committed to action, attacking the town of Rolsdorf from a line of departure in Gurzenich (R14). The company moved out at 1000 hours. Its mission was to help clear Rolsdorf then held by the Germans, and to drive on to the Roer River (R7). The Rolsdorf objective was taken that day, and the company command point was moved there the following day (R14). When the Roer River was reached on the 19th, the engagement was concluded, and the company remained in Rolsdorf for five or six days (R12,15). After the company entered Rolsdorf and before the company command point was moved from Gurzenich, communication between the two towns which were about one mile apart (R7) was maintained by telephone (R15).

Technical Sergeant Edward Bredberg, platoon sergeant and acting leader of the third platoon, prior to the attack on the morning of 17 December 1944, had instructed accused and the other members of the third platoon regarding the formal attack order and the route they were to travel (R7). Before they moved out, accused could not be found for about 45 minutes. After he was found, Sergeant Bredberg gave him a reel of wire, telling him to lay the wire regardless of what happened in order that contact might be maintained with the company command post. Before jumping off in the attack, they encountered shell fire. After they had moved approximately 300 yards, a shell dropped close by and accused dropped the reel and ran into a building. Sergeant Bredberg sent Sergeant Hendrickson after him and accused returned and picked up the reel again. The platoon then moved up another 300 or 400 yards, when they were held up by the Battalion Commander (R8). At that time Sergeant Bredberg observed the reel lying on the ground and not seeing accused again sent Sergeant Hendrickson to find him, this time without success. The platoon then moved into Rolsdorf, and reached a point about 400 or 500 yards from the Roer River. They stayed in buildings in Rolsdorf that night, but accused was not present with the platoon (R9). He remained absent without authority, from the company from 17 December 1944 to 24 January 1945 (R10,13,15-17).

An extract copy of the morning reports of Company A, showing entries dated 18 December 1944 and 26 January 1945, was introduced and received in evidence without objection by the defense (R10; Pros. Ex.1). These entries showed accused: "Dy to AWOL, 0500 17 Dec 44" and "AWOL to dy 24 Jan 1945, 1000".

Recalled as a witness for the court, Sergeant Bredberg testified that after the accused had put the reel down for the seond time, an order was received relieving the platoon of the responsibility of laying the wire. As accused had left, the sergeant did not relay this order to him (R29,30).

4. The accused after his rights as a witness were explained to him, elected to make a sworn statement, and testified on direct examination that after the platoon moved out a shell came over and blew off his helmet. He set the wire down, got his helmet, and went into the building where there was "a medic" from his platoon. Later they started moving out again. A major called at him to hold it up, and then someone gave an order to move out. He went into a courtyard, where there was a group of Company E men but no Company A men, and started looking for the latter. The shelling began again, and he and the others there went into a basement. After the shelling lifted, he came out of the building but did not go back to his reel of wire because word had been passed back to him to "leave a Headquarters man pick it up". Seeing no one from his company, he remained there four or five days, staying with some tankers and eating with them until the 104th Division came to relieve the 83rd Division. He stayed with the 104th Division until after Christmas and then started walking in search for the 83rd Division, staying with different outfits. At a replacement depot, where he gave a false name though saying he was from the 83rd Division, he was placed in a guardhouse. On the 19th or 20th of January the military police took him to Aachen, and he returned to the 83rd Division on the 22nd or 23rd of January (R22-24).

On cross-examination accused testified that the cellar in Gurzenich where he stayed was 200 or 300 yards from where he had put the reel of wire down the last time. He started looking for his company about a half hour after he had left the reel. It never occurred to him at the time to go back to where he had left the reel and follow it in either direction, though he still knew where he left the reel and it was broad daylight. He admitted that he had no authority to be absent from his company. Although he ran into officers in Gurzenich during the four or five days he spent there, he did not report to any of them. An order had been passed down the line to him that he was to leave the wire lie and turn it over to a headquarters man, and when he learned of this order, he went back to the house where he was staying. He was not the last man in his platoon, there being an assistant squad leader behind him (R23-27).

Private First Class Wynn E. Garland, a witness for the defense, testified that at about 1000 hours he saw accused in the basement of a house on a corner in Gurzenich while the Germans were shelling them (R28). Sergeant Bredberg, recalled as a witness for the defense, testified that he gave instructions concerning the attack to his platoon about a quarter to ten or ten minutes to ten, and that a security was not put out until after the attack order was given (R20-21).

5. The evidence in this record, in the opinion of the Board of Review, presents a clear-cut case of misbehavior before the enemy within the meaning of Article of War 75. There was ample evidence of each element of the offense alleged (Cf: CM ETO 1659, Lee).

The fact that accused failed to follow the telephone line leading to his company command post when he was but 200 or 300 yards away from the reel he had been carrying; that his company remained for five or six days less than a mile from where accused stayed and the other circumstances shown to exist here, negative any contention that the accused in good faith had become lost and that he tried to locate his company.

The duly authenticated copy of the morning reports of Company A, 329th Infantry, shows pertinent entries dated 18 December 1944 and 26 January 1945 of accused's unauthorized absence. In addition to these morning reports, there is an abundance of evidence in the record, including the accused's own sworn testimony, that he was absent without authority for the period alleged.

6. The charge sheet shows that accused is 30 years and eight months of age and was inducted 10 May 1943 at Akron, Ohio. He had no prior service.

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

8. The penalty for misbehavior before the enemy is death or such other punishment as the 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 authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

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APO 887

BOARD OF REVIEW NO. 2

28 JUL 1945

CM ETO 9823

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Buttgen, Germany, 5 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM G. BENNETT (42145317), Company D, 331st Infantry	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private William G. Bennett, Company D, 331st Infantry, did, at or near Langlir, Belgium, on or about 14 January 1945, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

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 was substantially as follows:

Accused was an ammunition bearer in the second platoon of Company D, 331st Infantry (R6,7,9,18). On or about 14 January 1945 this company was located in Langlir, Belgium, and was attached to Company A, a rifle unit, for the purpose of protecting its flanks. The enemy was dug in about 1500 yards south of Langlir and on 14 January 1945 Company D had been ordered to clean out the woods south of the town (R7,10). About 0100 hours that morning (the 14th), the company moved out in an attack and accused was not with his squad at this time nor at any time while this attack was in progress. About 1930 or 2000 hours on the same day the company withdrew back to Langlir to spend the night. The second platoon was billeted in a barn and a few minutes after their arrival there, accused entered (R7,10,11). His squad leader told him that the squad "was going up on the line the next morning" and he should get all his equipment ready as he (accused) was going to go with them (R7). The squad leader did not have any further conversation with accused at this time and the latter "got his stuff together".

About 0700 hours the next morning accused's squad leader again told him to prepare to join the squad as they were moving out soon. After breakfast the squad moved out in an attack and although a search was made for him, accused could not be found and he was not with his squad during the attack on this day. He had not been authorized to be absent from his squad during the attacks on 14 and 15 January 1945 (R8,9,11,18). About three hours after his platoon went into the attack on 15 January 1945, accused was seen in Langlir by his platoon sergeant, who told him to stay around the billets and roll up the bedrolls in which the men had slept (R11). The sergeant then detailed accused to guard the bedrolls and somewhat later on in the day took him up in the woods to their objection of the previous day to recover some equipment and a body. When they returned he was again detailed to guard the bedrolls. A few hours later the sergeant took him to the aid station to secure a carbine and a pistol belt and instructed him to return to the billets as soon as he got this equipment. This happened about 1600 hours and the sergeant did not see him again until 2 February 1945. About this time on 15 January, some airplanes appeared and bombed the edge of the woods approximately 800 yards from Langlir and strafed a column of American tanks on the road (R11,12,13,14). On this same day Private Charles C. Andrade

of accused's unit was engaged moving the motor pool from Hebronval to Langlir, Belgium. While driving his jeep he was strafed by enemy aircraft and got out and took cover under a tank. Accused joined him under the tank and when the strafing was over, Andrade asked him where the company was, to which he replied "up in the front". Andrade then asked him to go up there with him and accused said he would not go and headed for the rear. Accused did not offer any explanation for his refusal to accompany Private Andrade up to the front (R15).

Sergeant William G. Allen, the second platoon messenger of accused's unit, saw accused standing near Company A command post with other members of his platoon a few minutes before the platoon moved out in the attack in the early hours of 14 January 1945. Sergeant Allen told accused and the others that they were alerted to move out in the attack. Accused was not present when the platoon moved out in the attack. In the evening of that day Sergeant Allen found accused in a stable adjoining the mortar platoon and told him to get his equipment as he would return for him in five minutes and lead him back to the gun positions. Sergeant Allen further told him not to leave that room until he returned. In no more than ten minutes he returned and, although a search was made, accused could not be found, so he returned to the gun positions without accused (R19-23). Accused although not authorized to be away from his company during any of that time (R18) was not present for duty with his squad and company from 14 January 1945 until 2 February 1945 (R19,20,21,22,23).

4. Accused, after his rights as a witness were fully explained to him (R24), elected to be sworn and testified in substance as follows:

His unit went into the town of Langlir on 13 January 1945 and were trapped there by three tiger tanks. The next morning they were called out and then again were sent into a building in Langlir. They remained there that evening and there was still considerable shelling taking place (R24). About 2300 or 2400 hours on 13 January 1945 his unit started across a field, "and there was artillery in there ", "and that is where I went off my bean like". It was the first attack he was in and he was "just scared". Although no one authorized him to do so he returned to the company command post, from where he was sent down to the mortar platoon until the next day. He remained there all that night and all the next day until Sergeant Allen came for him in the afternoon of 14 January 1945 (R26,27). Sergeant Allen told him to get his equipment and be there in five minutes. He secured his equipment from the barn but before Sergeant Allen came back, his company returned for a twenty-four hour rest (R25). That evening his squad leader told him to be ready as they were jumping off the next morning. He was in the barn with his company in the morning (15 January 1945) and when they did not move out right away he went back with the mortar platoon and was talking with some of the fellows. Close to dinner time he went back to where his company had been and they were gone. He missed the attack on the preceding day

and also on this day. Sergeant Rummel came along and he told him what had happened. He was told to guard the bedrolls and then he was sent up with Sergeant Rummel to get a man who had been killed in action. When he returned Sergeant Rummel took him to the aid station to get a carbine and a gas mask. They did not have any guns at the moment and he was told to wait there as there would probably be one there soon. Sergeant Rummel returned to the command post where the mortar platoon was and, while he (accused) was standing there at the aid station, some enemy planes came over and started bombing and strafing. He ran out into a field near a road where there were some tanks and jumped into a shell hole. He then started up a hill to get farther away from the bombing and strafing. While he was up there it became dark and he was afraid to come back because he did not have a rifle and did not know the password. That night he stayed in a little shack about a mile or so up on top of this hill. The next morning he met a sergeant who told him to return, that he was absent without leave. Fearing he would be court-martialed, he became scared and did not want to return. He went to another town and stayed there and after much debate with himself finally decided to return which he did. On cross-examination accused stated,

> "I did leave on account of the bombing. I wanted to get away from the bombing" (R24,25,26,27,30).

He categorically denied that he ever jumped under a tank with Private Andrade or that Andrade ever asked him to return to the company (R25).

5. The essential elements of the offense charged in the Specification of the Charge are: (a) that the accused was serving in the presence of an enemy; and (b) that he misbehaved himself by running away (MCM, 1928, par.141b, p.156). The evidence presented by the prosecution, buttressed by accused's admissions in his sworn testimony, clearly establishes that he left his unit without authority, knowing they were about to move out to attack the enemy. The court's finding of guilty is fully sustained by the evidence (CM ETO 4820, Skovan).

6. The charge sheet shows that accused is 23 years eight months of age and was inducted 20 June 1944 at Fort Dix, New Jersey. No prior service is shown.

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

8. The penalty for misbehavior before the enemy is death or such other punishment as the 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).

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BOARD OF REVIEW NO. 1

2 JUL 1945

CM ETO 9824

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Echt, Holland, 16 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HENRY T. WENSING (33916508), Company B, 119th 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 65th Article of War.
(Motion for dismissal granted) (R10).

Specification: (Motion for dismissal granted).

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

Specification: In that Private Henry T. Wensing, Company B, 119th Infantry, did at Wurselen, Germany from about 27 October 1944 to about 29 November 1944, wrongfully fraternize with German Civilians, this in violation of Memorandum Number 64, Headquarters Ninth United States Army, dated 6 October 1944.

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

(210)

Specification: In that * * * did, at Bardenburg, Germany, on or about 20 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Wurselen, Germany on or about 29 November 1944.

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

Specification: In that * * * did, at approximately two miles northwest of Stoumont, Belgium, on or about 19 December 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Aywaille, Belgium on or about 6 February 1945.

He pleaded not guilty. During the course of the trial the court granted the motion of the defense for the dismissal of Charge I and its Specification "because of the inability of prosecution to prove same" (R10). Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge II as involved a finding that accused did, at Wurselen, Germany, on or about 29 November 1944, wrongfully fraternize with German civilians in violation of Memorandum No. 64, Ninth United States Army, dated 6 October 1944, 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 in the record is clear and uncontradicted that accused was absent without leave from 20 October 1944 until 29 November 1944 as alleged under Charge III and from 19 December 1944 to 6 February 1945 as alleged under the Additional Charge. The finding that he had intent to avoid hazardous duty when he absented himself on 20 October is supported by evidence of the close proximity of the company to the enemy and by testimony that shortly before he left he received an order to go to his position in a slit trench and to keep his equipment on because his squad would probably move at a few minutes' notice (R8). The finding that he had a like intent also when he absented himself on 19 December is supported by testimony that on that day accused, having been told, while in his foxhole, by his squad leader that the enemy was going to attack, that

an American battalion was withdrawing through them, and that they had to hold at all costs, left after the enemy firing commenced (R15). This proof sustains the findings of guilty of the offense of desertion from the service as alleged in the specifications under Charge III and the Additional Charge (CM ETO 5958, Perry and Allen, and authorities cited therein). The record also supports the findings, as approved by the reviewing authority, that accused was guilty of wrongful fraternization with German civilians under Charge II (CM ETO 6203, Mistretta; CM ETO 10967, Harris).

4. The charge sheet shows that accused is 24 years two months of age and was inducted 21 January 1944 at Greensburg, Pennsylvania, 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 the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

6. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW42; Cir.210, WD, 14 Sept.1943, sec.VI as amended).

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

11 AUG 1945

CM ETO 9836

U N I T E D S T A T E S	)	106TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Saint Quentin, France, 4 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN H. CAVE, JR. (36528888), Company I, 424th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John H Cave Jr, Company I, 424th Infantry, did, in the vicinity of Neuhof, Germany, on or about 10 February 1945, desert the service of the United States by absenting himself without proper leave from his command with intent to avoid hazardous duty, to wit: duty with his organization in a defensive position in an active combat area.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of

two previous convictions, one by summary court for disobedience of the lawful order of a non-commissioned officer in the execution of his office in violation of the 65th Article of War and one by special court-martial for quitting post without being properly relieved in violation of the 96th 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 for the prosecution was substantially as follows:

Accused was a rifleman (R14) in Company I, 424th Infantry (R6), joining the company as a replacement on 1 or 2 February 1945 (R8). About 60 to 70 percent of the men in this company around this time were new replacements (R7). On 7 February the company, comprising 95 men, moved to the vicinity of Neuhof, Germany, took up a sector approximately 1100 yards wide between the two battalions of the regiment, with the mission to hold the sector in a defensive position, and remained in that position during the next 17 days. The company was in contact with the enemy from the night of 7 February to and including the night of 12 February. The first seven or eight days in the sector were very active. During the first three or four days the company was subject to heavy artillery and mortar fire and combat patrols were active against the American line. On the night of 9 February accused's command received artillery and small arms fire, and enemy patrols were active, especially on the right flank (R6,7,9,15).

Accused's squad, consisting of 13 or 14 men, held six positions, one of them being called the "hot corner", where there was considerable action. From this position on the right and on the left Germans could be seen all of the time. Accused was assigned to the "hot corner" (R14,15,19). This position was a hole about a foot deep covered by logs and shelter halves (R10).

Because the weather was wet and cold, members of the squad were sent to the company command post, located in a pill box, to warm themselves, each member being sent there once a day. The normal length of stay was an hour to an hour and a half (R11,16). This command post was, at the most, 400 yards from the squad's position, a ten minute walk (R18) and between the positions was a well-worn trail (R19).

At about 0830 or 0900 hours on 10 February accused was sent to the command post with another man and was told that he could stay one and a half hours at the maximum, that he must then return so that two other men could be sent there (R11-12,17). At 1100 hours his squad leader went to the command post and saw accused still there, changing his socks, and told him two or three times to start back to his position. A lieutenant also told him to return. The squad leader stayed at the command post approximately an hour, until about noon, then returned to check positions. At this time it was daylight, there was snow on the ground, and the trail was easily seen. He failed to find accused in his position. A "little later" he checked again and accused was still not in his position. The company runner from headquarters was then put in the "hot corner". Accused's squad leader failed to see him during the remainder of the day. The last time he saw accused was when he was getting warm in the command post (R17,18,19). The platoon sergeant also made a search along the line and along the two routes to the command post. He failed to find accused in his position and in fact never found him at all (R12).

After being informed of his rights under Article of War 24 (R20) accused made a sworn pre-trial statement substantially as follows: As a "combined rifleman, and conscientous objector to combat duty", on 7 February he was transferred from a signal company to Company I. On 10 February, after returning to his foxhole from the command post where he had been sent to "warm up", he picked up his musette bag and was looking for souvenirs when he became lost in the woods. Being unfamiliar with the sector, he headed west to avoid wandering behind the German lines. After walking through the woods a few hours, he met an engineer outfit, which gave him a ride part way to a town. He received another ride in a truck going to Ebertange, where he slept with a field artillery outfit, after explaining to the commanding officer that he was looking for his company. The next morning he decided to report to his old signal company for orientation and at 0900 hours on 13 February, reported to an officer of that company, who furnished transportation to the headquarters of the 424th Infantry. He had arthritis and poor eyesight. He believed that his becoming lost was due to a condition of shock caused by "artillery, etc." during the previous days, and also due to a hand grenade thrown by him the previous night which rebounded off a tree and exploded about five feet from him, a dirt bank preventing him from being hit by shrapnel.

> "As we moved into the remote, inaccessible area where I became lost in the dark, I was naturally unfamiliar with the surrounding terrain, as we had only been there a few days. All this, and no passes or furloughs in 11 months too!" (Pros.Ex.1).

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4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R22).

5. Clear and convincing evidence supports the court's finding that accused was guilty of desertion as alleged in the Specification. His conduct was of the pattern of the well known and understood "battle line" desertion cases (see cases cited in CM ETO 5958, Perry and Allen; CM ETO 8760, Mascuillo). The proof that accused was assigned to a foxhole in the "hot corner", as described in the evidence, amply supported the finding of existing hazardous duty, and an intent to avoid such duty was properly and readily inferable from his conduct.

6. The Specification, which contains no allegation of the length of accused's absence, is not therefore defective although it is preferable to allege the duration. The offense of desertion is complete when a soldier absents himself without authority from his place of service with the requisite intent (MCM, 1928, par.67, p.52; par.130a, p.142), and proof of the duration of the absence is not essential to sustain a conviction of the offense (CM ETO 2473, Cantwell; CM ETO 9975, Athens and Haberern).

7. The charge sheet shows that accused is 31 years, eight months of age and was inducted 21 September 1942 at Detroit, Michigan, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Riter, Judge Advocate

(SICK IN HOSPITAL), Judge Advocate

Edward L. Stevens Jr., Judge Advocate

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

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 9839

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class WILLIAM A. WELLS (32991455), Company D, 315th Infantry Regiment, 79th Division.	Trial by GCM, convened at Paris, France, 5 February 1945. Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class William A. Wells, Company D, 315th Infantry Regiment, 79th Division, European Theater of Operations, United States Army, did, on or about 12 November 1944 desert the services of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 23 December 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.

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 40 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, ordered the sentence as thus modified executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders No. 245, Headquarters Seine Section, Communications Zone, European Theater of Operations, 29 March 1945.

3. In presenting its case, the prosecution, after first entering into a stipulation with the defense that accused was a member of the armed forces of the United States both at the time of the alleged offense and at the time of trial, offered in evidence an "extract copy of morning report of Company D, 315th Infantry, showing the accused from duty to AWOL 1300 hours 12 November 1944". The defense objected to the introduction of this document on the ground that "the officer, whose signature appears at the bottom of the report, is not present in court to authenicate [sic] it". His objection was overruled and the extract copy admitted into evidence. It is in the following form (R5; Pros.Ex.1):

"Wells William A. 32991455
Pfc Company D, 315th Infantry
EXTRACT COPY OF MORNING REPORT OF -
Company 'D' 315th Infantry
32991455 Wells William A. Pfc
fr dy to AWOL 1300

Co D, 315th Inf, APO 79 US Army 12 Nov 44
I, BERNARD V. DEUTCHMAN, Capt, 315th Inf, certify that I am the Personnel officer of 315th Infantry and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at APO 79, US Army for the dates indicated in said copy which relates to Wells, William A, 32991455, Pfc, Company D, 315th Infantry

/s/ Bernard V. Deutchman
/t/ BERNARD V. DEUTCHMAN
Captain, 315th Infantry,
Personnel Officer".

The only other evidence of record is a stipulation that accused was "returned to military custody by apprehension at Paris, France on or about 23 December 1944" (R5). Accused was not shown to have expressly consented to the making of this stipulation.

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

5. a. Defense counsel objected to the introduction of the extract copy of the morning report on the ground that the officer who executed the certificate of authentication was not personally present in court for the purpose of authenticating the document in question. However, the Manual expressly provides that

> "A copy of any book, record, paper or document * * * in any command or unit in the Army may be duly authenticated * * * by a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. Thus, 'A true (extract) copy: (Sgd.) John Smith, Capt. 10th Inf. Comd'g, Co. A, 10th Inf.' would be sufficient, prima facie, to authenticate a paper and copy of an original company record of Company A, Tenth Infantry" (MCM, 1928, par.116a, pp.119,120).

Thus, the objection of the defense that the prefferred document was inadmissible on the ground stated was without merit.

b. However, it will be observed that the document introduced into evidence as an extract copy of the morning report of Company D, 315th Infantry, is defective in that although it shows accused from duty to absent without leave it fails to show the date upon which this change of status occurred. On its face, it consists only of an entry in the company morning report for an undisclosed date and a certificate dated 12 November 1944 reciting that the copied entry is a true and complete copy of the original. For the reasons set forth in the similar case of CM ETO 9204, Simmers, the extract copy of the morning report here introduced is without probative force to show the date of accused's initial absence. The only other evidence of record is the stipulation that he "was returned to military custody by apprehension on or about 23 December". It must be admitted that the phrase "returned to military custody by apprehension" is more or less a term of art in military law, employed almost exclusively in cases where the offense involved is absence without leave or desertion, and as such, might be said to support the limited

inference that accused was absent without leave on the day of his apprehension, i.e., 23 December 1945 (cf. CM ETO 4915, Magee). Even so, standing alone and without more, it is an extremely narrow base for the inference suggested (cf. EM ETO 7381, Hrabik). Further, so to interpret the stipulation would be to convict accused upon the strength of a stipulation alone. The manual provides that

> "A stipulation need not be accepted by the court and should not be accepted where any doubt exists as to the accused's understanding of what is involved. A stipulation which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands * * * should not ordinarily be accepted by the court" (MCM, 1928, par.126b, p.136).

If interpreted as above suggested, the stipulation is inconsistent with accused's plea of not guilty. It was not shown that he understood the effect of the stipulation or that he consented to its use. Under these circumstances, it is concluded that the stipulation, standing alone, does not constitute substantial evidence upon which to base a conviction of the lesser included offense of absence without leave. It follows that the findings of the court must be disapproved in their entirety.

6. The charge sheet shows that accused is 32 years of age and was inducted on 27 July 1943 at Camp Upton, New York. No prior service is shown.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B V Dewey Jr Judge Advocate

1st Ind.

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

1. 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 USC 1522), is the record of trial in the case of Private First Class WILLIAM A. WELLS (32991455), Company D, 315th Infantry Regiment, 79th Division.

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

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

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

(Findings and sentence vacated. GCMO 338, ETO, 17 Aug 1945).

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

BOARD OF REVIEW NO. 1

3 AUG 1945

CM ETO 9843

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private GEORGE W. McCLAIN (34573611), 445th Company, 85th Battalion, 19th Replacement Depot	) Trial by GCM, convened at Paris, France, 31 January 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater 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 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 George W. McCLAIN, 445th Company, 85th Battalion, 19th Replacement Depot, European Theater of Operations, United States Army, did, at 19th Replacement Depot, European Theater of Operations, United States Army, on or about 20 November 1944 desert the service of the United States Army and did remain absent in desertion until he

[illegible] 1-[illegible]

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was apprehended at Paris, France, on or about 26 November 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, ordered the sentence executedas thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court Martial Orders No. 242, Headquarters Seine Section, Communications Zone, European Theater of Operations, 28 March 1945.

3. The morning report of accused's company of 22 December 1944, of which an extract copy was introduced in evidence, contained the following entry:

"34573611 McClain, George W Pvt remark dy to AWOL 0630 hrs 29 Nov 44 on 8 Dec 44 M/R is corrected to read dy to AWOL 0630 hrs 20 Nov 44." (R4; Pros.Ex.1).

He was apprehended at a hotel in an undisclosed place on 26 November 1944. At the time he wore civilian clothes and Army shoes. No Army clothing was visible. When asked by the military police for identification, his reply was "No compris". The police were suspicious, waited outside the hotel, and after accosting him as he departed, succeeded in getting him to speak English and admit his identity. His identification tags were on his person (R5-7).

4. The defense counsel stated that accused's rights as a witness had been fully explained to him, which accused affirmed and thereupon elected to make the following unsworn statement:

"I was partly in civilian clothes when I was arrested because my uniform was in no condition for wear. My uniform was in my room wet. I did have my identification tags on at the time of my arrest and an Army shirt and GI shoes. I had no intention of deserting the Army of the United States " (R7-8).

5. Charges were preferred on 29 November 1944. The entry in the morning report was therefore made 23 days subsequently. The exact question as to the competence of such a morning report was decided in CM ETO 12951, Quintus. It was there held that because morning reports do not depend for their validity upon contemporaneity but upon the duty of the responsible officer, with integrity, to learn and record the true facts, and because they must be made correct for many reasons other than to serve as evidence in court, delayed entries in morning reports, even though made after charges are preferred, are competent evidence of the facts recited. The reasoning is sound, and we adhere to it in this case.

With respect to the proof of desertion the Board of Review is of the opinion that there was substantial evidence from which the court could infer the intent on the part of accused to remain permanently absent from the military service. The unauthorized absence was from replacement channels in an active theater of operations, terminated by apprehension. Accused was in civilian clothes and in his effort to avoid return to military control feigned ignorance of his native language. It is no matter that the absence was short; the brevity thereof was not of his making. At the time of his apprehension his conduct was obviously irregular when judged by military standards and pointed away from an intention to return to military control. His arrest eliminated the opportunity for further exploitation of his absence from military control but did not erase inferences which arise from his conduct. Under such circumstances the duration of the absence has but little weight in determining his culpability. A prima facie case was made, from which the court could reasonably infer the requisite specific intent, and the defense not having gone forward with the proof (for the unsworn statement is not evidence), the Board of Review will not disturb the finding upon appellate review (CM 229813 (1943), II Bull. JAG., 62; CM ETO 1317, Bentley; CM ETO 527, Astrella; CM ETO 1629, O'Donnell).

6. The charge sheet shows that accused is 24 years of age and was inducted 18 November 1942 at Columbus, Georgia, to serve for the duration of the war plus six months. No prior service is shown.

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

8. The penalty for 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 authorized (Ltr. Hq., European Theater of Operations, AG 252 Op PM., 25 May 1945).

_____ 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 9847

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private GEORGE TENGRIAN (33391968), Company E, 47th Infantry	Trial by GCM, convened at Paris, France, 29 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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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 Board of Review, upon appellate review, will take judicial notice of Price List, Subsistence Items, Number 11, Office of the Chief Quartermaster, Headquarters Communications Zone, European Theater of Operations, dated 1 October 1944, and in effect on 5 December 1944, the date of the larceny alleged in Specification 1 of Charge II (MCM, 1928, par.125, p.135; CM ETO 952, Mosser; CM ETO 1538, Rhodes). The value of the preserved butter computed according to prices stated in the price list on the date of the theft was $85.76.

3. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affected 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.

Judge Advocate

Judge Advocate

Judge Advocate

9847

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

BOARD OF REVIEW NO. 1 : 1 AUG 1945

CM ETO 9857

U N I T E D S T A T E S	)	79TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at Gulpen, Holland, 1 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DAVE HARRELL (38342633), Company H, 315th 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 Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Dave Harrell, Company "H" 315th Infantry, then Private First Class Dave Harrell, Company "H" 315th Infantry did, at Bayon, France on or about 11 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at Surbourg, France on or about 10 January 1945.

Specification 2: In that * * * did, at Niederbetschdorf, France on or about 15 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until his return to military control at Charmes, France on or about 5 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both 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 Article of War 50½.

3. Accused was a member of a rifle squad, when at 1100 hours on 11 November 1944, he attended a company formation which was told by the Company Commander that the unit was alerted to move to an assembly area and make an attack. At a second formation at 1600 hours, he was absent, and despite thorough search, could not be found in the company or regimental area. The absence was without permission and continued until 10 January 1945.

On 15 January 1945, accused was sent from the regimental stockade to the company command post. The first sergeant told him of his assignment to his old platoon then in the town of Hatten, France, and took him back to the battalion command post to secure transportation to that unit, having informed him of the purpose of this trip to battalion headquarters. When the first sergeant went into the battalion command post, he left accused by the door. There, another sergeant told him how difficult and heavy the battle was at the time in Hatten. After a query as to the location of the latrine, accused left without authority and was not present in the organization until

5 February 1945. On 15 January, the company was, in fact, heavily engaged at Hatten.

4. All the elements of desertion to avoid hazardous duty are shown by the evidence under each specification. It is clear that the accused twice left his organization to avoid the hazardous duties his country required of him, and the court rightly inferred such absences were with intent to desert. Having abandoned his comrades and left them without his help, he stands properly convicted of the cowardly offense of desertion (CM ETO 6637, Pittala; CM ETO 8083, Cubley; CM ETO 8690, Barbin and Ponsiek; CM ETO 8610, Blake).

5. The charge sheet shows that the accused is 21 years of age, and was inducted 1 March 1943 at Lubbock, Texas, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

9857

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

BOARD OF REVIEW NO. 1 | 3 AUG 1945

CM ETO 9862

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Rixingen, Belgium, 21 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private KENNETH H. IRWIN (33437791), Company H, 315th 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 Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Kenneth H. Irwin, Company "H" 315th Infantry, then Private First Class Kenneth H. Irwin, Company "H" 315th Infantry did, at Bayon, France on or about 11 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at the vicinity of Surbourg, France on or about 10 January 1945.

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Specification 2: In that Private Kenneth H. Irwin, Company "H" 315th Infantry did, at the vicinity of Hatten, France on or about 16 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at the vicinity of Weitbruch, France on or about 29 January 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. 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. a. Specification 1:

Accused was a member of Company H, 315th Infantry, which on 11 November 1944 was in a rest area at Bayon, France. He was present at a formation that morning, when the company was alerted to move, but absent at a subsequent formation that day when details of the move were given. An unsuccessful search was conducted; his absence was without permission; and he remained continuously so absent until 10 January 1945 (R6-8,11). Reference to authentic maps reveals that Bayon is located on the Mozelle River, 17 miles southeast of Nancy, and the Board of Review will take judicial notice that the Metz-Strasbourg general offensive began 8-10 November 1944, and that the front lines had then been long stabilized in the foothills of the Vosges Mountains about twenty miles east of Bayon. Receipt of an alert by accused and this company in a rest area close to the battle lines, followed by his immediate unauthorized absence, clearly distinguishes the case from CM ETO 5958, Perry and Allen, and constitutes a set of facts from which the court could reasonably infer intent to avoid hazardous duty (CM ETO 6637, Pittala; CM ETO 7413, Gogol; CM ETO 8519, Briguglio).

b. Specification 2:

On 15 January 1945, accused was brought by his platoon sergeant forward from the regimental stockade to the company command post. He was told by his first sergeant that he would be taken to

Hatten (France), to rejoin his platoon. The first sergeant then took him to the battalion command post to make arrangements for transportation to Hatten. There, he left accused by the door and entered the command post. The company was then engaged with the enemy at Hatten only four kilometers distant. Accused, without any authority whatsoever, left the area while the first sergeant was inside the command post, and remained continuously absent from his organization until 29 January (R8-10,12). The case is within the pattern of CM ETO 6637, Pittala. As all the military world knows, there was not a possibility that accused could be at a battalion command post within four kilometers of battle and not know of the existence thereof. Since he knew where he was bound, and of the dangers, no logical inference could be drawn from the evidence but that from fear he shirked the terrible duties of combat which others performed without his aid (CM ETO 7312, Andrew; CM ETO 8690, Barbin and Ponsiek; CM ETO 11503, Trostle).

4. The charge sheet shows that accused is 21 years of age and was inducted 22 February 1943 at Pittsburgh, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2 — 7 SEP 1945

CM ETO 9877

U N I T E D S T A T E S	78TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bonn, Germany, 31 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class CALVIN P. BALFOUR (32907682), Company H, 310th Infantry	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Calvin P. Balfour, Company H, 310th Infantry, did, near Ohlenberg, Germany, on or about 12 March 1945, run away from his platoon, which was then engaged with the enemy, and did not return thereto until on or about the following day.

Specification 2: In that * * * did, near Honnef, Germany, on or about 15 March 1945, run away from his platoon, which was then engaged with the enemy, and did not return thereto for the reason that he refused so to do.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 30 years. The approving authority approved the sentence, designated 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 is clear and conclusive that Company H, 310th Infantry, was actively engaged with the enemy on 12 March and 15 March 1945. Accused was with his organization on both of said dates while it was thus engaged. The proof is undisputed that on the two occasions alleged that accused deliberately and consciously left his place of duty in the front line of combat and sought and found safety in the rear at the company command post. As to both specifications all of the elements constituting the offenses charged under the 75th Article of War were proved by substantial evidence (CM ETO 4783, Duff and authorities therein cited; CM ETO 13458, Stover).

4. The accused, after his rights were explained to him elected to remain silent, but, without objection from the prosecution the defense introduced in evidence

> "the conclusion reached by the psychiatrist as a result of his examination of accused" (R14).

These "conclusions" were included in a written report of (Def.Ex.A) Major M. R. Plesset, Medical Corps, dated 21 March 1945, and are as follows:

> "2. Unfitness to plead at the time of the trial:
>
> a. Is he able to understand the nature of the proceedings at a Court-Martial? Yes
> b. Is he able to object to any member of the Court? Yes
> c. Is he able to instruct his Defense Counsel? Yes
> d. Is he able to understand the details of the evidence? Yes
> e. Is he able, with advice and assistance of legal counsel, to conduct the defense of his case? Yes

3. Criminal Responsibility:

	In My Opinion
a. Was he at the time of the alleged offense suffering from a defect of reason resulting from disorder of the mind?	Yes
b. Did such defect of reason prevent him from knowing the nature and quality of the act which he was doing?	Yes
c. Did such a defect of reason prevent him from knowing the consequences of such an act?	Yes
d. Or, if he did know, was his mental state such that he was unable to refrain from such act?	Yes

4. Evidence as to Behavior:

a. Was the accused suffering at the time of the offense from any emotional or physical disorder which might have affected his behavior? Yes

(1) If so specify:

Fear Reaction

(2) State how this might affect his behavior:

By disturbing his judgment and disturbing his self-control.

b. Is punishment likely to diminish the chances that he will repeat this or similar offenses? No

c. Is punishment likely to increase or decrease his efficiency as a soldier? Decrease

5. Medical Disposition:

a. Is any treatment required immediately, during detention, or after release?	Yes
b. Is punishment likely to aggravate his mental condition or to precipitate other mental disturbances?	No
c. Is any other action (e.g. transfer after sentence) recommended?	No

6. Any further remarks considered desirable: NONE

7. Conclusion:

a. That the accused is sufficiently sane or intelligent, to conduct or to cooperate in his defense.

b. That the accused, at the time of the alleged offense was not free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right".

5. With respect to accused's mental and physical condition on the dates of the offenses, witnessex for the prosecution testified as follows:

First Sergeant James M. Jordon:

"Q - What was the accused's mental condition as you observed it on the 12th day of March 1945?
A - I would say that he is in his right mind, sir.

Q - Was he excited?
A - No, sir.

Q - Would you say he was calm?
A - I would say, sir, that he was calm. I could see no visible evidence of excitement.

Q - How was his mental condition as observed by you on the 15th day of March?
A - He still seemed calm and he appeared to be normal (R9)".

Staff Sergeant Fred L. Gray:

"Q - What appeared to be Private Balfour's mental condition at this time? [On 12 March when witness observed accused at the company command post].
A - Well, sir, I really couldn't say. All I can say is that he seemed normal to me. He was scared.

Q - Did he seem to know what he was doing?
A - Yes, sir.

Q - Did you ask him if he knew what he was doing?
A - Yes, sir.

Q - What did he say?
A - The question I asked him was if he had permission to come back to the CP to

leave his platoon. He stated he did not have permission. He did not ask anybody. He had just taken off" (R11).

Prosecution's evidence also showed that when accused ran away from his company on 15 March and appeared at the company command post,

"The captain asked him why he had come back and he said he just came back, he couldn't take it any more. The captain gave him a direct order to go back to the front, to go back to his platoon, and he refused to obey the direct order, and said he would rather be court-martialed" (R11).

"The captain explained to him just what it would mean if he refused a direct order, what he could get from a court-martial. The captain also stated a case that had happened before and had been published on a memorandum. He made it clear to the man just what he would get out of a court-martial. The captain asked him if he knew what he was doing and the man told him 'yes'" (R12).

The psychiatric report was, of course, hearsay but in view of its admission without objection by the prosecution (R14) the above quoted excerpts therefrom will be treated as original testimony by Major Plesset given by him in open court. This use of the report is favorable to accused and affords him its maximum value as evidence.

It is manifest that there is disclosed in the record of trial a conflict of testimony which it was the duty of the court to resolve. By its findings of guilty there was implicitly included therein a finding that accused was sane on the date of the commission of the offenses. There was no duty on the court to pass upon the issue of accused's sanity as a separate issue (CM ETO 2023, Corcoran). The question as to accused's mental capacity was one of fact and it was peculiarly an issue within the prerogative of the court. Its finding is entitled to the presumption that it is correct and the Board of Review will concern itself only with the question whether the finding is supported by competent substantial evidence (CM ETO 4095, Delre; CM ETO 5747, Harrison, Jr.; CM ETO 9424, Geo. E. Smith, Jr.; CM ETO 9611, Prairiechief; cf: CM ETO 3963, Nelson; CM ETO 4219, Kenneth K. Price; CM ETO 8747, Andoscia).

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Opposed to the opinion of the psychiatrist is the explicit testimony of fellow soldiers who observed accused's condition, actions and attitude at the crucial times and places. In addition there is evidence that on 15 March accused's company commander on the occasion of discovering his second dereliction talked with him and warned him of the results of his misconduct. Accused displayed only a cold-blooded determination not to return to combat. There is therefore testimony in the record of trial of a substantial nature which supports the finding that accused was sane. However this evidence was that of non-expert lay witnesses as to accused's appearance, condition, and conduct, on the relevant occasions from which it may be reasonably inferred that he was sane and mentally responsible for his actions. Is it legally insufficient to support the findings of the court because it was contradicted by the opinion of a professional psychiatrist - an expert witness - that accused was mentally irresponsible?

> "In the case of a conflict between skill and expert testimony and other evidence in the case, the jury, or the court trying a question of fact, is not bound to accept the skilled or expert testimony in preference to the other, but may judge the weight of each and determine the issue of fact as it deems proper" (22 CJ, sec.828, p.738).

See Johnson v. Turnbull, (D.C., ED Penn) 124 F 476, (CCA 3rd, 1904) 130 F 769; Whitlow v. Commissioner of Internal Revenue (CCA 8th, 1936) 82 F (2nd) 569).

> "The jury is entitled to place whatever weight it chooses upon the testimony of witnesses relative to sanity or insanity and may regard such testimony in connection with other testimony or evidence in the case. An opinion as to sanity or insanity is by no means conclusive upon the point. Thus, where the whole evidence does not satisfy the minds of the jury that the accused is insane, or was insane at the time of the commission of the crime with which he is charged, the jury should convict the defendant, notwithstanding the medical witnesses were of the opinion that such person was insane" (20 Am. Jur. sec. 1211, pp.1063,1064).

It is therefore the opinion of the Board of Review that the court's findings of accused's sanity is supported by prosecution's objective evidence notwithstanding the fact that the inference deducible therefrom, to-wit: accused was mentally responsible for his conduct is contradicted and opposed by the opinion of an expert or professional witness - the psychiatrist. By its conclusion the court simply resolved a conflict in the evidence against accused.

It is true that in the administration of military justice extraordinary care and circumspection are required whenever there arises a question as to the mental condition of an accused. The court may call for additional evidence with respect to the accused's mental responsibility (MCM, 1928, par.75, p.58) and it will inquire into his existing mental condition whenever at any time the case is before the court it appears to the court for any reason that such inquiry ought to be made (Ibid, par.63, p.49). The appointing authority may in his discretion suspend action on charges pending the consideration of the report of one or more medical officers, or the report of a board convened under AR 600-500 (Ibid, par.350, p.26). The reviewing authority will take appropriate action where it appears from the record or otherwise that accused was insane at time of commission of the offense or time of trial, regardless of whether such question was raised at the trial or how it was determined if raised (Ibid, par.87b, p.74). The foregoing are proper and practical provisions prompted in the endeavor to insure that the administration of military justice is humane and consonant with the standards of civilized society in the treatment and care of mentally afflicted persons. However, they should not be interpreted as endowing the report or the opinion of a mental specialist or a psychiatric board with the power of ultimate determination of the question of an accused's mental responsibility in a case before a court-martial. That is the duty of the court in the first instance and of the reviewing or confirming authority when they are required to act upon a sentence. The testimony of a specialist or of a member of a psychiatric board before a court is entitled to the respect and consideration of like testimony before a civil court, but it is not binding or conclusive on a court-martial any more than it binds a jury or a civil court sitting without a jury. It is part of the evidence in the case to be weighed and evaluated as any other evidence. It was not the intention of Congress or of the Manual for Courts-Martial to constitute a board convened under AR 600-500 as an independent fact finding agency whose findings must be accepted as final by a court-martial. A fortiori, the opinion of a psychiatrist, although an officer of the Army with recognized professional duties to perform in his command, does not oust the court from its duty to determine the ultimate fact of an accused's mental responsibility for his

acts. Such experts are but witnesses before a judicial body and their evidence is subject to the same tests as to weight, value and sufficiency as the testimony of any other witness (CM ETO 9611, Prairiechief, supra). To consider the testimony of the psychiatrist in the instant case in any other light would be to give him a status not contemplated by the Acts of Congress, the Manual for Courts-Martial or the Army Regulations. The following comment is both cogent and relevant:

> "Our more specialized and complex civilization seems to afford an enlarged occasion for this class of testimony, if indeed it does not actually call it forth. This tendency in its effort to supplant the work of the jury by the more general admission of opinions, inferences and conclusions of expert witnesses justly arouses the serious apprehension of students of trials by the jury and also presents a question of interest generally" (Underhill's Criminal Evidence 4th Ed., sec.232, p.434).

6. The charge sheet shows that accused is 20 years of age. He was inducted on 14 May 1943 to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for violating the 75th Article of War is death or such other punishment as a court-martial may direct. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized.

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 26 MAY 1945

CM ETO 9878

U N I T E D S T A T E S	44TH INFANTRY DIVISION
v.	Trial by GCM, convened at Wittring, France, 16 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOSEPH T. SCHEIER (20224606), Company A, 114th Infantry	

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

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

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

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

Specification 1: In that Private Joseph T. Scheier, Company A, 114th Infantry, then S/Sgt Joseph T. Scheier, Company A, 114th Infantry did, near Leintrey, France on or about 15 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit; combat with the enemy, and did remain absent in desertion until he surrendered himself to Military authorities on or about 7 December 1944.

Specification 2: In that * * * did, at Enchenberg, France on or about 17 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit; combat with the enemy, and did remain absent in desertion until he surrendered himself to Military authorities on or about 18 December 1944.

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

Specification: In that * * * did without proper leave absent himself from his organization at Diemeringen, France, from about 20 December 1944 to about 4 January 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. Evidence was introduced of one previous conviction by summary court for absence without leave for two days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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. Substantial, uncontradicted evidence, corroborated by the testimony of accused, fully established that he was absent without leave from his organization during the periods alleged in the three specifications. It is equally well established that at the time his absences began as alleged in the specifications under Charge I, he had the intent therein alleged. On 15 November 1944, shortly before he first absented himself, he was engaged in an attack against the enemy and was in a shell hole "pinned down" by sniper fire. On 17 December 1944, while a few miles behind the front lines and after receiving an order that his squad was to move up to relieve another outfit, he again absented

himself because, according to his own testimony, he "started hearing the 240 mm artillery going off and I started getting nervous and I wanted to get away from it all". The court properly found accused guilty of desertion as alleged (Cf: CM ETO 4165, Fecica; CM ETO 5293, Killen; CM ETO 6079, Marchetti; CM ETO 7413, Gogol).

4. The charge sheet shows that accused is 26 years and four months of age and enlisted 13 September 1940 at Elizabeth, New Jersey, in the National Guard, which was federalized 16 September 1940. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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BOARD OF REVIEW NO. 2

11 AUG 1945

CM ETO 9886

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v	
Private GEORGE C. BOWENS (34069498), 565th Port Company 397th Port Battalion, Transportation Corps.	Trial by GCM, convened at Marseille, France, 22 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private George C. Bowens, Five Hundred Sixty-Fifth Port Company Transportation Corps, did, at Marseille, France, on or about 20 December 1944, draw a weapon, to wit an automatic pistol against Lt. R. E. O'BRIEN, 564th Port Company Transportation Corps, his superior officer who was then in the execution of his office.

Specification 2: In that * * * did, at Marseille, France, on or about 20 December 1944, draw a weapon, to wit an automatic pistol against Lt. T. G. DESMOND, 565th Port Company Transportation Corps, his superior officer, who was then in the execution of his office.

Specification 3: In that * * * having received a lawful command from Lt. C. J. COOPER, 565th Port Company Transportation Corps, his superior officer, to "give me that pistol", did, at Marseille, France, on or about 28 November 1944, willfully disobey the same.

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

Specification: In that * * * did, without proper leave absent himself from his command at Marseille, France, from about 28 November 1944, to about 25 December 1944.

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

Specification 1: In that * * * did, at Marseille, France, on or about 28 November 1944, unlawfully carry a concealed weapon, viz, an automatic pistol.

Specification 2: In that * * * did, at Marseille, France, on or about 20 December 1944, unlawfully carry a concealed weapon, viz, an automatic pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for disobeying a standing order to remain in his billet after curfew hours and for using disrespectful words towards a superior officer, in violation of Articles of War 63 and 96, 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 when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority

approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 28 November 1944 accused was a member of the 565th Port Company, Transportation Corps, which organization was located at Marseille, France (R8,18,19). At approximately 11:00 o'clock that evening accused was observed by Second Lieutenant Cornelius J. Cooper, of the same organization, in the Kit-Kat Bar in Marseille. The lieutenant informed accused that it was a violation of the curfew not to be in camp at the time and ordered accused to leave and to report at camp immediately (R19). Accused replied that "he had everything under control" and lifted his field jacket exposing a pistol under his belt which appeared to be a P-38 or a Luger (R19,20). The lieutenant ordered accused to hand the weapon over to him and to return to camp. Accused replied that he had purchased the weapon and inquired if it would be returned to him. The lieutenant told him that he was not going to return it to him but that the weapon would be turned in "through proper channels" (R20). Whereupon accused refused to surrender it. As the lieutenant was unarmed, he left in search of a member of the military police but not finding one returned to camp and reported the incident to accused's commanding officer (R20,21).

At approximately 11:45 pm on the evening of 20 December 1945, First Lieutenant Timothy G. Desmond, 565th Port Company, Transportation Corps, observed accused and three other colored soldiers leaving the La Residence Bar in Marseille (R8,9). As it was after curfew hour, the lieutenant told the soldiers to return immediately to their camp, following which he himself entered the bar and joined a friend, First Lieutenant Robert E. O'Brien. Immediately thereafter accused reentered the bar, walked up to Lieutenant Desmond and stood staring at him. Lieutenant Desmond again told accused to immediately return to camp and seized him by the arm and guided him towards the door (R9,12,13). At this time another soldier appeared on the scene and stated that he would see that he went to camp. They started away and then the second soldier turned around and said "Who laughed?" Following a third order for the soldiers to return to camp, accused reached for a pistol that he had concealed under his blouse. Lieutenant Desmond grabbed the pistol and attempted to wrest it from Bowens, the accused (R9-12, 17,18). Lieutenant O'Brien then warned Lieutenant Desmond to let him go as he observed the other soldier was "covering" both officers with another pistol (R10). Upon being released accused drew his pistol, pointed it towards the lieutenants and then backed out of the door. As the door closed behind them, three shots were fired through the door and one shot was discharged through the wall but it does

not appear that either officer was hit. At approximately midnight 25 December 1944, accused was again seen in Marseille where he was apprehended and turned over to the military police (R31).

There was received in evidence certified extract copies of the original morning reports of the 565th Port Company showing accused absent without leave on 28 November 1944 and his return to military control and confinement on 25 December 1944 (R23,24;Pros.Exs.1 and 2). There was also received in evidence copy of memorandum 6th Port Headquarters, Transportation Corps 18 October 1944, prohibiting the carrying of firearms except when authorized to do so on duty (R25; Pros. Ex. 3), which was in effect on the dates accused was seen in possession of and carrying the weapon. Notice and general knowledge of the directive was also established (R11).

4. Accused, after his rights as a witness were explained to him, elected to make an unsworn statement through counsel, in substance as follows: On 18 December 1944 he was accidentally shot by a white paratrooper who immediately took him to St. Raphael, France, where he was treated by a French doctor. He remained there with some friends until 25 December 1944, when he returned to Marseille. He did not recall the name of the soldier who took care of him and as it was night he would be unable to locate the house where he stayed. His defense counsel and the military police had been unable to locate the civilian doctor to verify his story inasmuch as the injury sustained and treatment therefor had not been reported (R29).

5. Competent uncontradicted evidence, both oral and by morning reports, establishes the fact that accused absented himself without authority from his organization on 28 November 1944 and that he remained in unauthorized absence until 25 December 1944 when he was apprehended and returned to military control. The offense of absence without leave as alleged by Charge II hereof is therefore complete.

The evidence also establishes that, while visiting in a public place and not engaged in the performance of any duty, accused without authority carried an automatic pistol, concealed on his person, on 28 November and 20 December 1944 and that a standing order of the command, which prohibited the carrying of arms, except when authorized, was in effect on these dates. He refused to surrender the pistol, after having been ordered to do so by Lieutenant Cooper, on the evening of 28 November. His possession of the weapon and his refusal to surrender it, under the circumstances shown, constituted a violation of both a standing order of his command and a violation of a direct order of a superior officer, as alleged under Articles of War 96 and 64. The offenses under Charge III are thus established (CM ETO 2901, Childrey et al; CM ETO 4193, Green; Dig Ops JAG, 1912-1940, sec 454 (33), p 353).

Concerning Charge I hereof, competent substantial evidence shows that on the evening of 20 December 1944 accused with another soldier was observed in a public bar after curfew by Lieutenant Desmond, his superior officer, and that upon being ordered to return to camp, he refused to do so. The lieutenant thereupon took him by the arm and led him towards the door, which resulted in a struggle ensuing between them. As Lieutenant Desmond withdrew from the affray, accused drew a weapon, an automatic pistol, upon both Lieutenant Desmond and Lieutenant O'Brien, who was standing nearby, and both officers were covered by and within the range of fire of the weapon. After accused and his companion were outside the building several shots were fired through the door through which they made their escape. Article of War 64 provides in part that:

> "Any person subject to military law who, on any pretense whatsoever, * * * draws or lifts up any weapon or offers any violence against /a superior officer/ * * * shall suffer death or such other punishment as a court-martial may direct" (Underscoring supplied).

The phrase "on any pretense whatsoever" does not exclude the use of such protective measures as are necessary for legitimate self-defense (MCM, 1928, sec 134a, p147). However, there is no showing of any justification for the use of the weapon and under the circumstances the court was fully warranted in finding accused guilty of drawing a weapon against each officer as charged (CM 229343, II Bull. JAG 11; CM 257252, III Bull. JAG 379).

6. The charge sheet shows that accused is 23 years, ten months of age and was inducted 24 February 1942 at Fort Benning, Georgia. He had no prior service.

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

8. The penalty for willful disobedience of a lawful order of a superior officer, or for drawing or lifting up a weapon against an officer in the execution of his office, in violation of Article of War 64, is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir 210, WD, 14 Sept 1943, sec VI, as amended).

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 28 MAY 1945

CM ETO 9957

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Duren, Germany, 30 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JAMES E. ROBINSON (35398253), 3442nd Ordnance Medium Automotive Maintenance Company	

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

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

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

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

Specification 1: In that Private James E. Robinson, Three Thousand Four Hundred Forty-Second Ordnance Medium Automotive Maintenance Company, did, in the vicinity of Fosse, Belgium, on or about 18 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military authorities in the vicinity of Montigny, France, on or about 13 October 1944.

Specification 2: In that * * * did, in the vicinity of Le Cateau, France, on or about 13 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military authorities in the vicinity of Cambrai, France, on or about 17 February 1945.

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

Specification: In that * * * did, in the vicinity of Fosse, Belgium, on or about 18 September 1944, knowingly and willfully apply to his own use and benefit one (1) six by six truck of the value of about two thousand nine hundred ninety-five ($2995.00) dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charged and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 55 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge I, as involves a finding that accused did, at the time and place alleged, desert the service of the United States and did remain absent in desertion until he returned to military control in the vicinity of Montigny, France, on about 13 October 1944, 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:

On 18 September 1944, accused was a member of the 3442nd Ordnance Medium Automotive Maintenance Company stationed at Fosse, Belgium (R7,8). At approximately 0530 hours, he was observed leaving the company area in a truck. The guard permitted him to leave because he thought he was enroute to obtain parts for the company which was one of his duties (R7-8). Later in the morning it was discovered that he and a truck which he had out on detail the night before were missing and a search of the area was made. Neither accused nor the truck could be found. He did not return to his organization until 23 February 1945 and the truck was not seen again in the company (R9-11). His absence from the company between the dates described was without authority and he was not authorized to take a vehicle from the motor park on the day of his departure (R9,13). The missing truck was a GMC 2½ ton, six by six (R8,10). It was stipulated between the prosecution, the defense and accused that "the motor vehicle mentioned in the specification to Charge II "was military property belonging to the United States and had a value of about $2995.00 (R13; Pros.Ex.1).

On 13 October 1944, accused was picked up by the military police at Le Cateau in the vicinity of Montigny, France, for not having a pass. He was ordered by a military police officer to return to his organization (R13,14). He did not return, however (R9,12), and on 17 February 1944, he was again picked up by the military police, this time in Cambrai, France. He was asked whether he had a pass, to which he replied in the negative, saying that he was merely going to get something to eat. He said he had his truck just around the corner. When the military policeman said he would escort him to the truck, he replied "Never mind, sergeant, I am AWOL. Take me into the station". He did not at this time have a truck in his possession (R12-13).

4. Accused after being warned of his rights by defense counsel, elected to make an oral unsworn statement. He said that at the time of his absence, "the outfits were moving around so much that I couldn't get located with my outfit", and that he did not intend to desert the service of the United States (R14,15).

5. The evidence shows that accused was continuously absent from his company from 18 September 1944 until 17 February 1945, a period of approximately five months. This absence was without authority but was interrupted momentarily on 13 October 1944 by a return to military control when accused was picked up for being without a pass. There is no indication that he revealed his true status to the military police at this point, nor does the evidence show that he was detained by them for any material length of time. On the contrary he appears to have been immediately released with a direct order to return to his organization. Instead of doing so, he continued his absence without leave for another four months. Because of this brief return to military control, two charges of desertion were brought, one consisting of the first period (Specification 1, Charge I), and the other of the second (Specification 2, Charge I). The finding of guilty of Specification 2 is clearly supported by the evidence, an unexplained absence of four months being sufficient to raise the necessary inference of intent not to return (CM ETO 1629, O'Donnell). As to the first desertion (Specification 1), the duration of the absence (25 days) is not in itself sufficient to raise such inference (CM ETO 8631, Hamilton). However, as far as accused was concerned, it is apparent that the return to military control on 13 October 1944 represented a mere interruption of what he clearly intended as a permanent absence from his company. He had ample opportunity to surrender to military authority throughout the five months comprising the first and second periods of absence and not only failed to do so but actually disobeyed a direct order to return to his own organization on 13 October 1944. Certainly this is sufficient evidence to justify the court's inference that the intent not to return existed during the first absence as well as the

second and hence to support the findings of guilty of desertion in each instance (CM ETO 9333, Odom).

CHARGE II and its Specification allege misapplication of an army truck of the value of approximately $2995.00 in violation of Article of War 94. All elements of this offense are proved by the oral testimony and the stipulation and hence the finding of guilty is supported by the record of trial (CM ETO 5666, Bowles).

6. The charge sheet shows that accused is 24 years and six months of age and was inducted 2 October 1942 at the Reception Center, Fort Hayes, Ohio. He had no prior service.

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

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

Benjamin R Sleeper Judge Advocate

Malcolm A Sherman Judge Advocate

B K Dewey Jr Judge Advocate

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15 MAY 1945

BOARD OF REVIEW NO. 1

CM ETO 9959

UNITED STATES v. Privates JACK H. HAMITER (33579023), LOUIS MASON (32918258), ALBERT WILLIAMS (35828925) and EARL W. BARNES (33851156), all of 793rd Engineer Dump Truck Company	FIRST UNITED STATES ARMY Trial by GCM, convened at Duren, Germany, 21 March 1945. Sentence as to HAMITER, MASON and BARNES: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania. Sentence as to WILLIAMS: Dishonorable discharge, total forfeitures and confinement at hard labor for 5 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences. (CM ETO 895, Fred A. Davis et al; CM ETO 3147, Gayles et al; CM ETO 3803, Gaddis et al).

2. The findings of guilty of accused Williams as to Charge II and Specification are obviously of no effect as he was not named in the Specification.

3. Penitentiary confinement is authorized upon conviction of mutiny (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

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AGPO 2-45/19M/C504ABCD

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BOARD OF REVIEW NO. 1

22 JUN 1945

CM ETO 9972

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS, EUROPEAN THEATER OF OPERATIONS
v.	
Privates ERNEST CHRISTON (34617042) and JOHNNIE R. BALDWIN (34567979), both of 82nd Chemical Smoke Generator Company	Trial by GCM, convened at Antwerp, Belgium, 20 March 1945. BALDWIN: Acquitted. Sentence as to CHRISTON: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: "In that Privates Johnnie R. Baldwin and Ernest Christon, both, 82nd Chemical Smoke Generator Company, did, jointly and in pursuance of a common intent, at Antwerp, Belgium, on or about 14 December 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one T/5 Glenn W. Fernia, 2nd Medical Detachment, 358th Engineer General Service Regiment, a human being by shooting him with a pistol".

Each pleaded not guilty. At the close of prosecution's evidence the court granted a motion by the defense for a finding of not guilty as to

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accused Baldwin (R40-41). At least three-fourths of the members of the court present at the time the vote was taken concurring, accused Christon was found guilty of the Specification, except the words "Privates Johnnie R. Baldwin and ", "both" and "jointly and in pursuance of a common intent", substituting for "Privates" the word "Private", of the excepted words not guilty, of the substituted word guilty, and guilty of the Charge. No evidence of previous convictions was introduced. At least three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence in this case showed that accused Christon stood before the fire place of a cafe - "Seaman's Vriend" - in Antwerp, Belgium, at about six o'clock pm on 14 December 1944. A few moments later his co-accused Baldwin (who was acquitted of the Charge and Specification) opened the door of the cafe but did not enter it. He called to Christon, who immediately left the cafe (R5,6). Accused showed evidence of intoxication a few minutes previous to this time (R15).

A minute or two later accused Christon and the deceased Fernia were engaged in an altercation and a scuffle on the street in front of the "Seaman's Vriend" (R9,17,18,22). Deceased, a white American soldier weighed about 165 pounds and was of height about five feet eight and one-half inches. He was taller than accused (R13). When first seen by witnesses during this struggle, accused held his right hand at his side. Deceased with his right hand held "in the air and his left hand about as high as Christon's neck" advanced toward the latter (R9,12). Deceased did not touch accused who retreated - "broke away". Deceased continued to advance toward accused (R18). Christon was walking backwards and the other soldier was going forward. Accused pulled a gun from his jacket pocket. Baldwin, who was nearby called, "Let him have it, Blackie" (R25). There was a flash which came from accused's right hand (R9,18,26). Deceased exclaimed, "We will have no more of that" (R13). Accused continued to back into the center of the street and deceased pursued him (R26). There was then a second shot (R9,13,18,26). Deceased fell to the ground. He lay on his right side with his right arm extended and "more or less on his stomach". His hands were empty (R10,19). He was unconscious, but still breathing when carried to a neighboring cafe where he died (R10). The autopsy revealed that he

> "had a bullet wound that entered his left chest, lodged in the wall of his right chest, passed through the heart, through the right lung and causing extensive hemorrhage in his haemothorax and his right

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chest cavity.* * * [The bullet] entered the left breast between the sixth and seventh rib at the line of the nipple.* * * It entered the left side and passed diagonally backwards and to the right. * * * We found a bullet lodge just under the skin of the right chest" (R38).

Immediately after the second shot accused ran toward the end of the street (R13,18). He owned a certain 6.35 caliber pistol which he delivered on 17 December 1944 to representatives of the Criminal Investigation Department. Relevant and connected evidence established the fact that the bullet removed from deceased's body was fired from accused's pistol (R29; Pros.Ex.P-1).

4. The accused after his rights were explained to him elected to remain silent (R42). The only evidence submitted by him pertained to the fact that he wore a garrison cap on the night of 14 December 1944 (R28).

5. The record is entirely silent as to the identity of the deceased (except that he was a white American soldier). There is not a scintilla of evidence which will explain the cause or reason of the altercation between accused and deceased at the time and place alleged. There is not even an inference that they knew each other or had met at any previous time. There is not a line of evidence pertaining to the meeting of accused and deceased or how their quarrel commenced. It is impossible to discover who precipitated the disagreement or who was the primary aggressor. When their contact with each other is first revealed they were engaged in a "scuffle" on a public street in Antwerp. Accused had been called from a cafe by his companion, Baldwin, immediately prior thereto, but what passed between Baldwin and accused remains secret. The homicide was connected directly with and arose out of the altercation. The situation thus presented is governed by the following legal principles:

"Manslaughter is distinguished 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 sec.149, p.165).

"If a sudden quarrel arises, the parties to which fight, upon fair terms either immediately or at a place to which they immediately resort for that purpose, and one of them is killed, the person killing the other, provided he took no unfair

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advantage, is guilty of man-slaughter and not murder, which ever of them may have struck the first blow" (9 Halsbury's Laws of England (2nd Ed.) sec.755, p.440; sec.748, p.436).

"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).

"Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. * * * Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of the crime given by U.S. Rev. Statutes, sec. 5341 is substantially the same. 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 facts for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder or manslaughter" (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).

From the moment the curtain arose on the scene deceased is portrayed as the aggressor. He is first seen with his arms raised against accused as the latter retreated. At that moment accused held no weapon in his hand but continued his retreat. He "broke away".

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Deceased followed in pursuit. As accused backed into the street he pulled the pistol from his pocket and fired. The inference is clear that this first shot did not take effect. Deceased exclaimed, "We will have no more of that". A second shot followed from accused's weapon. This was undoubtedly the fatal one because deceased fell to the ground immediately after the report.

It is impossible to view this situation other than as a homicide occurring in mutual combat "ensuing from sudden transport of passion or heat of blood". The prosecution elected to narrow its proof strictly to the factum of the homicide and having done so is bound thereby. The Board of Review cannot speculate on the causes and reasons for the affray or attribute to accused deliberative processes where none is shown. It cannot impute to accused motives where none is proved. It cannot find malice where none can be inferred.

While the law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed. 1932), sec.426, pp.654,655) and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943,944), the presumption is not conclusive. Evidence rebutting it may be found in the evidence introduced by prosecution or defense (Winthrop's Military Law and Precedents (Reprint, 1920), p.673; 29 C.J.1103). Such evidence exists in the instant case. A mutual combat wherein deceased was the agressor was shown. However, the evidence failed to prove such immediate threat by deceased to the life or body of accused as to justify accused in taking deceased's life in self-defense (Cf: CM ETO 9194, Presberry), but it does show a situation wherein it must be supposed in the absence of proof to the contrary that accused's judgment and discretion were unseated and passion and anger guided his actions, and where the evidence fails to show malice the Board of Review will reduce the findings of murder to those of manslaughter (CM ETO 72, Farley and Jacobs; CM ETO 82, McKenzie; CM ETO 3957, Barneclo; CM ETO 6074, Howard; CM ETO 10338, Lamb). He was guilty of manslaughter and not murder.

6. The charge sheet shows that accused Christon is 22 years of age and was inducted 18 January 1943 at Camp Shelby, Mississippi, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused Christon were committed during the trial. For the reasons stated, the Board of Review is of

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the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as involves findings of guilty of voluntary manslaughter in violation of Article of War 93 and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

8. Confinement in a penitentiary is authorized upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). Inasmuch as accused Christon is 22 years of age and the legal sentence includes confinement for not more than ten years, the place of confine ment should be changed to Federal Reformatory, Chillicothe, Ohio (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.25, WD, 22 Jan. 1945).

B. Kent Kite, Judge Advocate

Wm. F. Burrow, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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

26 APR 1945

CM ETO 9975

U N I T E D S T A T E S	106TH INFANTRY DIVISION
v.	Trial by GCM, convened at St. Quentin, France, 4 April 1945.
Privates First Class FRANK ATHENS (36677608), and EMIL M. HABERERN (31408347), both of Company H, 424th Infantry	Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. The charge against each accused, which alleges that he deserted the service of the United States by absenting himself without proper leave with intent to avoid hazardous duty but contains no allegation of termination of his absence, is not defective. The offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent (MCM, 1928, par.67, p.52; par.130a, p. 142), and proof of the duration of the absence is not essential to sustain a conviction of the offense (CM ETO 2473, Cantwell).

3. 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.

4. Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (AW 42; Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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

26 JUN 1945

CM ETO 9978

U N I T E D S T A T E S v. Privates JOHN R. GREEN (33541403), 3384th Quartermaster Truck Company, JOYE GATES (36282892), Detachment 90, 3rd Replacement Depot, FRANK M. COELHO (39132855), Detachment 72, 3rd Replacement Depot, Privates First Class JULIUS L. WARD (35506925), 3698th Quartermaster Truck Company, FRED CARUSO (35922952), Detachment 72, 3rd Replacement Depot, and Technical Sergeant JOHN J. SGRO (33316006), 313th Infantry, 79th Division	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Liege, Belgium, 21,22 March 1945. Sentence as to each accused: Dishonorable discharge (suspended as to Ward only), total forfeitures and confinement at hard labor; Green, Gates and Coelho each for life; Caruso and Sgro each for 30 years; Ward for 10 years. Loire Disciplinary Training Center, Le Mans, France as to Ward; and the United States Penitentiary, Lewisburg, Pennsylvania, as to all the others.

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

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

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

GREEN

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

Specification: In that Private John R. Green, 3384th Quartermaster Truck Company, did, without proper leave, absent himself from

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his station, at or near Banneux, Belgium from about 28 November 1944 to about 1 December 1944.

CHARGE II: Violation of the 96th Article of War.
(Nolle prosequi)
Specification: (Nolle prosequi)

CHARGE III: Violation of the 65th Article of War.
(Nolle prosequi)
Specification: (Nolle prosequi)

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

Specification: In that * * * 3384th Quartermaster Truck Company, did, at or near Verviers, Belgium, on or about 31 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium on or about 10 February 1945.

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

Specification: In that * * * did, at or near Liege, Belgium, on or about 9 February 1945, wrongfully, unlawfully, and knowingly sell to Henri DeVliegher, real name unknown, sixteen (16) jerricans of gasoline, of the value of about $80.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that * * * did, at or near Liege, Belgium, on or about 9 February 1945, wrongfully and unlawfully apply to his own use a cargo truck, value over $50.00, property of the United States.

Specification 2: In that * * * did, at or near Liege, Belgium, on or about 9 February 1945, wrongfully and unlawfully dispose of sixty (60) bottles of oxygen, value about $1200.00, military property of the United States, by abandoning such property in the wooded area thereby diverting such property from military use and operation in a theater of war.

Specification 3: In that * * * did, at or near Liege, Belgium, on or about 10 February 1945, attempt to feloniously take, steal and carry away about two thousand (2000) 10-1 rations, value over $50.00, the property of the United States.

GATES

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

Specification 1: In that Private Joye Gates, Detachment 90, Third Replacement Depot, did, at or near Abee, Belgium, on or about 8 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Seraing, Belgium on or about 15 December 1944.

Specification 2: In that * * * did, at or near Goyer, Belgium, on or about 30 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium on or about 10 February 1945.

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

Specification 1: In that * * * did, at or near Liege, Belgium, on or about 8 February 1945 wrongfully, unlawfully, and knowingly sell to Henri Devliegher, real name unknown, two (2) truck tires, of the value of about $30.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: Identical with the Specification of Additional Charge II against accused Green except for the substitution of the name and organization of accused Gates.

CHARGE III: Violation of the 96th Article of War. Specifications 1 and 2 are identical with Specifications 1 and 2 of Additional Charge III against accused Green except for the substitution of the name and organization of accused Gates.

COELHO

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

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Specification: In that Private Frank M. Coelho, Detachment 72, Third Replacement Depot, did, at or near Chau de Tillesse, Belgium, on or about 19 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium, on or about 13 February 1945.

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

Specifications 1 and 2 are identical with Specifications 1 and 2 of Charge II against accused Gates except for the substitution of the name and organization of accused Coelho.

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

Specifications 1 and 2 are identical with Specifications 1 and 2 of Additional Charge III against accused Green except for the substitution of the name and organization of accused Coelho.

WARD

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

Specification: In that Private First Class Julius L. Ward, 3698th Quartermaster Truck Company, did, without proper leave, absent himself from his station at or near Margraten, Holland, from about 17 February 1945, to about 19 February 1945.

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

Specification: In that * * * did, at or near Liege, Belgium, on or about 10 February 1945, with intent to defraud falsely make in its entirety a certain requisition in the following words and figures, to wit:

REQUISITION
(Extra Sheet)

WAR DEPARTMENT
Q.M.C. Form No. 401
Revised April 6, 1931

No.____
Sheet No.____

STOCK NO.	ARTICLES	ON HAND UNIT AND DUE	CONSUMED	REQUIRED	APPROVED
2000	RATIONS FOR 2000 MEN	10 in 1 None	2000	2000	

THE SAID AMOUNT IS REQUIRED FOR EM MEN FOR ONE DAY RATION
RESUIED BY MAJOR WOFF

/s/ Major Woff,
134 INF DIV
ON THE SECOND MONTH OF 45
FEBRUARY 10 1945

FOR THE 58 QM DP FOR SAID RATIONS BELGIUM

NUMBER ONE DUMP FOR SAID RATIONS

which said requisition was a writing of a public nature, which might operate to the prejudice of another.

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

Specification is identical with Specification 3 of Additional Charge III against accused Green except for the substitution of the name and organization of accused Ward.

CARUSO

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

Specification: In that Private First Class Fred Caruso, Detachment 72, Third Replacement Depot, did, at or near Waramme, Belgium, on or about 2 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium on or about 10 February 1945.

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

Specifications 1 and 2 are identical with Specifications 1 and 2 of Charge II against accused Gates except for the substitution of the name and organization of accused Caruso.

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

Specifications 1 and 2 are identical with Specifications 1 and 2 of Additional Charge III against accused Green except for the substitution of the name and organization of accused Caruso.

Specification 3: (Disapproved by Reviewing Authority).

Specification 4: (Disapproved by Reviewing Authority).

SGRO

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

Specification: In that Technical Sergeant John J. Sgro, 313th Infantry, 79th Division, did, at or near Embermenil, France, on or about 21 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium on or about 10 February 1945.

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

Specification is identical with Specification 1 of Charge II against accused Gates except for the substitution of the name and organization of accused Sgro.

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

Specification: (Disapproved by Reviewing Authority).

Each accused pleaded not guilty, and at least two-thirds of the members of the court present when each vote was taken concurring, each was found guilty of all charges and specifications preferred against him, except that as to the Specification of Additional Charge I preferred against Green, he was found guilty, substituting the word Goyer for the word Verviers. A nolle prosequi was entered as to the Specification of Charge II and Charge II and to the Specification of Charge III and Charge III preferred against Green. No evidence of previous convictions was introduced as to any accused. 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: Green, Gates, Caruso, Coelho, and Sgro each for life and Ward for 15 years.

The reviewing authority disapproved the findings of Specifications 3 and 4 of Charge III as to Caruso and the finding of the Specification of Charge III as to Sgro; approved only so much of the finding of guilty of Specification 2 of Charge II as to Caruso, Gates and Coelho and the Specification of Additional Charge II as to Green as involves a finding that the accused did at the time and place and the person alleged wrongfully, unlawfully, and knowingly sell property of the United States furnished and intended for the military service thereof of a value of not more than $20; approved each of the sentences but reduced the period of confinement to 10 years as to Ward and to 30 years as to Caruso and Sgro; ordered the sentence executed as to Ward 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 his confinement; designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement for Green, Gates, Caruso, Coelho and Sgro and forwarded the record of trial for action pursuant to Article of War 50½.

The order promulgating the result of the trial of accused Ward was published in General Court-Martial Orders No. 290, Headquarters, Advance Section, Communications Zone, European Theater of Operations, dated 8 April 1945.

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

Duly authenticated extract copies of their respective organizations' morning reports were admitted in evidence showing accused Gates from duty to absent without leave on 8 October 1944 (R14; Pros.Ex.1), Green from duty to absent without leave on 28 November 1944 (R14; Pros.Ex.2, Coelho from duty to absent without leave as of 19 October 1944 (R15; Pros.Ex.3), Caruso from duty to absent without leave on 2 January 1945 (R15; Pros.Ex.4), and Sgro from duty to absent without leave on 21 October 1944 (R16; Pros. Ex.5). Gates was returned to his organization on 16 December 1944 by the military police (R17,20) at which time he was placed in confinement (R17), from which he escaped on 31 December (R18,19). Green was confined in the 3rd Replacement Depot stockade on 1 December 1944 (R18) and he escaped from there on 31 December 1944 (R19). Neither Gates nor Green had been ordered released at this time (R18,19).

Corporal Peyton, who was engaged in hauling Air Corps supplies, parked his truck in a parking lot in front of the Red Cross club in Liege, Belgium, on 9 February 1945. This truck contained 61 steel containers of oxygen and bore number 45412406. He went in the Red Cross Club for some coffee and doughnuts and when he came out in about five minutes his truck was missing. He saw

his truck two days later, on Sunday, at a military police parking lot and the oxygen containers were missing. The next day accused Green directed Peyton and some others to a little forest area about four miles from Seraing, Belgium, where the oxygen containers were found right on the edge of the woods (R24,25,26,28).

On 10 February 1945 (R39,48) accused Green presented a requisition for two thousand 10-1 rations to the 58th Quartermaster Depot (R21,22; Pros.Ex.7). Inasmuch as the requisition was irregular and no contact could be established with the 134th Infantry Division, in whose favor it was drawn, Green was questioned by Criminal Investigation Division agents who took him into custody (R22). The requisition was not valid, being signed with the name Major Woff only, omitting his full name, rank and branch of service (R23). There was no 134th Infantry Division or Major Woff in the vicinity at this time (Pros.Ex.18). A form similar to the one presented by Green submitted without apparent errors and made out in favor of a unit stationed in the vicinity of Liege, would be honored in an emergency (R23).

About 8 or 9 February 1945, Henri Devliegher of Seraing, Belgium bought 16 or 18 cans of gasoline from four or five American soldiers for 3600 francs. The gasoline was in American cans holding 10 to 20 liters each and was delivered in a brown color Army truck. Accused Green was one of the American soldiers who sold him the gasoline (R29,30,31,36). At some time (two weeks-the beginning of February) before he bought the gasoline, Monsieur Devliegher bought two American jeep tires from three or four American soldiers for 4000 francs. Accused Coelho and Caruso were identified as two of the sellers (R33,35,36,37). The gasoline and tires were subsequently recovered from Monsieur Devliegher's premises by government agents (R63,70).

Criminal Investigation Division agents went to a coalyard near Liege on the evening of 10 February 1945 looking for a truck that had disappeared from the 58th Quartermaster Depot that morning. They found the truck, bearing number 4541240S, which accused Gates had driven in there. He was apprehended and confined (R39,68,70). On the afternoon of this day, accused Sgro and Caruso were apprehended driving U.S. Army truck number 4475025 in Seraing. They were confined and the truck impounded (R40,52,69). Accused Coelho was found in a private home in Seraing, Belgium, on the afternoon of 13 February 1945. He was arrested and confined and a search of his effects disclosed he did not have a pass (R55).

Pretrial statements, substantially as follows, were made to Criminal Investigation Division agents by each accused:

GREEN. He admitted being absent without leave from the 3rd Replacement Depot stockade for about a month. On 9 February 1945 he with other of accused went to the parking lot across the street from the American Red Cross in Liege, Belgium and took a truck that was parked there. The truck was loaded with containers of oxygen which he and the others dumped in a woods. Earlier that day accused Ward gave him a requisition for 10 in 1 rations, which Ward had signed with the name of Major Woff. On 10 February 1945, he and some others left in a truck for the 58th Quartermaster Depot to pick up two thousand 10 in 1 rations, which they intended to take back to Seraing for disposition. He was detained at the Depot and questioned by Criminal Investigation Division agents. On 9 February 1945 he and some other soldiers sold 16 full cans of gasoline to a man in Seraing and he received 900 francs for his share of the proceeds of the sale (R68,69; Pros.Exs.8,9).

SGRO. He admitted being absent without leave from his organization since about the beginning of November 1944 and that he was picked up by Criminal Investigation Division agents on 10 February 1945 in Seraing. He further admitted that he participated in the sale of two jeep tires to a civilian in Seraing and that he received 500 francs out of the proceeds of the sale (R47; Pros.Ex.10).

GATES. Admitted he went absent without leave from the 3rd Replacement Depot about the middle of October 1944 and that in December 1944 he was apprehended in Seraing. He was confined in the 3rd Replacement Depot stockade, from which he escaped about 16 days later. He returned to Seraing and was apprehended there about 10 February 1945. He further admitted participation in the sale of two jeep tires to a man in Seraing, his share in the proceeds of the sale amounting to 1500 francs. He also received 900 francs from the sale of 18 five-gallon cans of gasoline to the same man, in which transaction he admitted taking part. He was present on the evening of 9 February 1945 when a 6x6 truck was stolen from the Red Cross parking lot in Liege for the purpose of picking up rations at the ration dump on the following morning (R51; Pros.Ex.11).

CARUSO. He admitted going absent without leave from the 3rd Replacement Depot and remained in Seraing, Belgium until he was apprehended on 10 February 1945. While there he lived at different places so that people would not suspect he was absent without leave. He was with the boys when they stole a 6x6 truck from the Red Cross parking lot in Liege on 9 February 1945. The truck was loaded with oxygen tanks so they drove out in the country and dumped the tanks. He realized 2500 francs from the sale of two

jeep tires to a garage man and about 7 or 8 February 1945, he sold 18 cans of gasoline to this same man, receiving 600 francs as his share of this transaction (R55; Pros.Ex.12).

COELHO. He admitted going absent without leave from the 3rd Replacement Depot some time in September 1944 and remaining in Seraing, Belgium ever since. About 9 February 1945, he and some other soldiers sold 18 cans of gasoline to a civilian in Seraing. Prior to this he sold two jeep tires to the same individual and received 500 francs as his share of the proceeds of the sale. On 9 February 1945 he took part in the theft of a 6x6 truck from a parking lot in Liege. The truck contained some kind of tanks, which were dumped in the woods out in the country (R59; Pros.Ex.13).

It was stipulated by the appropriate accused, their counsel and the prosecution that during January and February 1945 an Army truck, 6x6 motor vehicle, was of the value in excess of $50 and was furnished and intended for the military service at that time near Liege, Belgium and that truck tires for use on Army jeeps were at that time of a value of approximately $15 each (R71,73; Pros.Exs.15,16).

4. After their rights as witnesses were fully explained to them (R76), each accused except Ward who elected to remain silent, made an unsworn statement as follows:

GREEN. He is 20 years old and has never been in trouble before. He left because he got tired but he did not intend to stay away. He was gone four days and when he returned was sent to the 3rd Replacement Depot, and went absent without leave from there. He intended to go back but did not and then the MP's picked him up (R78).

SGRO. He is 23 years, two months of age. After being wounded in action, he was sent to a hospital and then to the 3rd Replacement Depot. He rejoined his organization and on 21 October 1944 while it was moving up to occupy a position, he got detached and wound up with the 340th Engineers of his Division. While with this engineer unit he met a friend and remained there for some time. While absent without leave he met many soldiers who were also absent without leave and that induced him to stay longer than he had planned. He went to Seraing and there again met a number of soldiers also absent without leave. He always kept in mind that he was going to return to his organization and kept waiting for the day he would be apprehended. On 10 February 1945, he was apprehended by agents of the Criminal Investigation Division. He always wore his uniform and intended to return to his organization but never got around to doing it (R79).

GATES. He jumped around from one Replacement Depot to another finally arriving at the 3rd Replacement Depot right after St. Lo was taken. He got tired of lying around and went absent without leave. He went to the town of Seraing but did not intend to stay away always. He intended to return to the depot but just kept putting it off (R78).

CARUSO. He fought with the 30th Division from St. Lo to the Siegfried Line. On 4 October 1944 he went to the hospital with acute appendicitis and from there to the 3rd Replacement Depot. After serving a special court-martial sentence for absence without leave, he was returned to the 3rd Replacement Depot. He then went to the town of Seraing, not intending to stay, but he met more soldiers that were also absent without leave and kept putting off his return until he was apprehended by agents of the Criminal Investigation Division. At all times he wore his Army uniform properly (R78,79).

COELHO. He is 24 years old and went to school for about two years. He joined the 9th Division and while acting as a scout was wounded and was sent to the 3rd Replacement Depot from the hospital and there he got tired waiting and went "over the hill". He did not plan on remaining away permanently and finally he was caught. All the time he was absent without leave he wore the Army uniform (R77).

5. The alleged violations of Articles of War 58 and 61 were established by the unimpeached entries in their organizations' morning reports, other competent testimony and the admissions of accused themselves in their pretrial statements and their unsworn statements at the trial. It is not necessary for the Board of Review to consider whether the morning report entry as to accused Coelho, made more than four months after his original absence, was properly received in evidence, since in his pretrial statement he admitted being absent without leave for an even greater period than that alleged. Sufficient proof of the corpus delicti of the offense charged is established by the evidence that accused was apprehended in a private home in Seraing without a pass, and his admissions in his unsworn statement that he went "over the hill" from the 3rd Replacement Depot (CM ETO 10331, Jones). Inasmuch as the unauthorized absences of accused ranged in duration from 39 to 112 days, and in each instance were terminated by apprehension, the findings of guilty of desertion are fully warranted (MCM, 1928, par.130a, pp.143,144; CM ETO 10212, Balsamo).

Concerning the alleged violations of Article of War 94 involving the sale of Army tires and gasoline, each accused involved in his pretrial statement admitted his participation in the transactions as charged against him in the appropriate specification. The corpus delicti for each of these offenses is found in the testimony of the French civilian and his employee that the alleged sales took place, together with their identification of Green, Caruso and

Coelho as participants in the transactions (Jones, supra). The findings of guilty of these charges are supported by the evidence (MCM, 1928, par.150i, p.185; CM ETO 6268, Maddox).

Substantial evidence of all the elements of the offenses of wrongful use of a government vehicle and wrongful disposal of 60 containers of oxygen in violation of Article of War 96 was introduced by the government. The driver testified that his truck containing 60 containers of oxygen was missing less than ten minutes after he left it in a parking lot and several days later accused Green took him to the spot where the oxygen tanks had been dumped. Accused Green, Caruso and Coelho in their pretrial statements admit their participation in both offenses. Accused Gates, in his pretrial statement, admits his part in the theft of the truck and while he does not mention the disposal of the oxygen, the court could reasonably infer that since he took part in the larceny of the loaded truck and the discarded oxygen was discovered a few days later, he also participated in the wrongful disposal of the oxygen containers. The findings of the court with respect to these offenses are supported by the evidence (CM ETO 2966, Fomby).

Accused Green was found guilty of attempted larceny of government rations in violation of Article of War 96. His admissions in his pretrial statement, together with other competent evidence adduced at the trial, supplied the necessary proof of all the elements of this offense (MCM, 1928, pars.149g, 152c, pp.173, 190).

6. The charge sheets show that accused Green is 20 years, two months of age and was inducted 18 October 1943 at Camp Lee, Virginia; Gates is 22 years, eight months of age and was inducted 13 November 1942; Coelho is 29 years, nine months of age and was inducted in 1942 at San Francisco, California; Caruso is 19 years, four months of age and was inducted 1 December 1943 at Cleveland, Ohio; and Sgro is 23 years, 11 months of age and was inducted 3 June 1942 at Fort Meade, Maryland. None of accused had any prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 9986

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Argenteau, Belgium, 8 February 1945.
First Lieutenant HARVEY I. GOLDBERG (O-507151), Medical Detachment, 330th Infantry	Sentence: Dismissal

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

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

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

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

Specification: In that First Lieutenant HARVEY I. GOLDBERG, Medical Detachment, 330th Infantry, did, at or near Angers, France, on or about 12 September 1944, knowingly and willfully misappropriate one pair of Binoculars, USA, M-3, of the value of about $76.00, three towels, M.D., USA, of the value of about $.30, one Shovel, Intrenching, of the value of about $.66, and one Case, Canvas, Dispatch, of the value of about $3.25, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that * * * did, at or near

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Angers, France, on or about 12 September 1944, by affixing his signature to a package deposited in United States Army Postal Channels for shipment through the mail, officially represent that he had complied with military censorship regulations, which representation was known by the said First Lieutenant Harvey I. Goldberg, to be untrue.

Specification 2: In that * * * did, at or near Angers, France, on or about 12 September 1944, violate censorship regulations by inclosing two Maps, U. S. Engineer Corps, France, 1:50,000 CHINON, and 1:50,000 TOURS, in a package, and posting, or causing to be posted, said package, in United States Army Postal Channels for transmission.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence, considered it wholly inadequate punishment for the grave offenses committed, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, although deeming the sentence wholly inadequate punishment for an officer guilty of such grave offenses and describing the punishment awarded as reflecting no credit upon the court's conception of its responsibilities, confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

On 12 and 15 September 1944, the officer in charge of the package section of Base Censor Office #7, APO 350 (R12), examined five packages (R14-15) received from the 17th Base Post Office, U. S. Army (R13). Each bore the name and return address of accused, was addressed to Dr. Harold Goldberg, Bronx, New York, and contained, in the lower left-hand corner, the accused's name in signature form (R13,17-18; Pros. Ex.1-5). Among the items found in the packages were the following of a type owned by the United States Government for military issue: one pair binoculars, M-3, value $76; three face towels, marked "U.S.A. M.D.", value 20 cents each; one officer's dispatch case, value $30; one intrenching shovel, value 68 cents; and two fragments of a map showing the city of Tours, France (where the accused's division was located at that time) apparently used as wrapping paper (R13-21; Pros.Ex.1-5). All items, save the map which was burned, were condemned and ultimately delivered to the service issuing the particular type of item (R12,17,20,21).

Accused voluntarily made a statement to the investigating officer who took notes, prepared a summary and submitted it to accused. After making one correction, the accused said it was correct (R22-23). The corrected summary follows:

"/Accused/ found a pair of USA Field Glasses, M3, in the surgical tent where he was working * * * he rolled the glasses in an article of clothing, placing them in his foot locker for safe keeping. The next day he was transferred from the 308th Medical Battalion to St. Malo, France, where he was assigned to the 1st Bn, 330th Infantry, Medical Section. Due to his being on a temporary assignment with the 1st Bn Medical Section, 330th Inf, and not having sufficient transportation to move his personal effects, he left them with the 308th Medical Battalion.

Approximately a month after joining the 1st Medical Section, his personal effects were delivered to him at Bourgueil, France, the day before his unit was moved to Angers, France. * * * he was not afforded an opportunity to store his foot locker and excess clothing and equipment before he left England. Therefore, he had the following in his possession at the time he was transferred to 1st Bn Medical Section in St. Malo, France: 1 foot locker, 1 bedding roll, 1 duffle bag, 1 barracks bag and a "Val Pak", which was rolled up in his bedding roll.

When the above was delivered to him in Bourgueil, France, he secured five 10-in-1 ration boxes, and packed his excess clothing, books and toilet articles for mailing home. * * * all packing was done by candle light, and * * * he was assisted by a French refugee. All five boxes were carried to Angers, France, the following morning, and delivered by himself to the mail clerk in the mail room of the Service Co, 330th Inf, for mailing to his brother in New York, N.Y.

* * * he had no intention of converting the USA Field Glasses, M3, to his own use. However, * * * he made no attempt to place them back in Government hands. * * * he had no knowledge of towels or maps in question, but * * * he often used Medical Department towels when short of his own; * * * they could have been included in the boxes he prepared for mailing, also the maps could possibly have been used as 'packing' when he prepared boxes for mailing.

> [Accused] was fully aware of the fact that he signed these packages as censorer, and in so doing was, in fact, making a certificate to the effect that packages complied with all existing censorship regulations. * * * if anything in said packages violated censorship or any other regulations, it was due to the fact that packages were prepared in haste, in candle light, and not willfully or maliciously. However, * * * he did not examine his effects for prohibited items.
>
> * * * In the five packages in question, * * * only articles of clothing, toilet articles and books were included" (R23; Pros.Ex.6).

Later, accused made another statement to the investigating officer who prepared a summary thereof. The investigating officer did not recall whether he presented the second summary to accused (R23-24). A portion of the summary follows:

> "[Accused] found in the vicinity of the Battalion Aid Station the US Government Issued Shovel and Dispatch Case. * * * they were not purchased. * * * he was aware of the fact that these items were government property and that they were included in one of his packages" (R24; Pros.Ex.No.7).

The court took judicial notice of paragraphs 1a, 1b, 3a, 3c, 9a, 9b(2) and 9c(4), Circular 33, Hq. ETOUSA, dated 21 March 1944 (R25).

4. Summary of evidence for defense:

Accused's commanding medical officer testified that Cir. #33, Hq ETOUSA, dated 21 Mar 44 was sent to all battalion sections and, after accused joined, "was read to the entire section". He rated accused as a "superior" officer and his character as "excellent" (R26). The chaplain testified that accused's character was "excellent" and that he was "just as devoted to duty as any medical officer we have" (R28). A captain said accused did an "excellent job" and his character was "very good" (R29). To the Battalion S-3 accused "appeared to be a person of excellent character and prior to * * * his present difficulties * * * of undoubted honesty". According to the battalion commander, accused "performed his duties conscientiously and efficiently. * * * [his] character of the best" (R38). Another captain had found accused to be "highly efficient and conscientious * * * a hard and tireless worker * * * [discharging] his duties in a highly meritorious manner. * * *

[His] character and conduct are above reproach * * * it would be a loss to the army if * * * his services were no longer required" (R39).

5. After his rights were explained to him accused elected to be sworn and testify. In the main, his testimony was substanitally the same as his statements to the investigating officer. It will be set out here only insofar as it qualified or supplemented his statements; He entered the army in December 1942. After being attached to a general hospital for nine months, he was sent to John Hopkins. After eight more months of service in the United States, he came overseas and came to France about the middle of July, 1944. Within about ten days he was transferred to the 83rd Division (R31). He thought the maps were German maps and does not recall including them in the package. Apparently the towels got thrown in with his clothing. The dispatch case was lying around and, because of its condition, he thought it of no value to the army so he used it "more or less as a packing facility". The intrenching shovel was one of many lying around, was in "a pretty dilapidated state", so he included it in the packages as a souvenir and nothing more. He did not know the binoculars were in any package. The packing was done by candlelight and primarily by a French refugee who offered his assistance. He had intended to turn over the binoculars to the service sergeant but forgot about them (R30-34). He admitted the items were "regulation G.I. * * * property furnished for the military service" (R32). While he had never read any censorship regulations, he put his name in the lower left hand corner since "signing my name implied that I censored the package. * * * when I signed my signature, to the best of my ability with the knowledge I had, I was complying with the regulations for censorship" (R34).

6. a. The evidence supports the findings of Charge I and Specification. Misappropriation has not the strictly limited application of larceny or embezzlement. It is immaterial whether control of the property was obtained rightfully or wrongfully. The gist of the offense is knowingly and willfully to misappropriate government property furnished or intended for the military service thereof (CM 243287, 3 Bull.JAG 236). Accused's act of mailing these items to his brother was clearly a misappropriation. He admitted to the misappropriation of the shovel and dispatch case. That he considered them of no value was no excuse. As to the binoculars and towels, it was within the province of the court not to accept his explanation that they got into the packages inadvertently. The circumstantial evidence that the items were of the types issued for use in the military service, together with accused's admissions, warranted the inference that they were property of the United States furnished and intended for military service (see MCM, 1928, par.1301, p.185).

b. The evidence likewise supports the findings of Charge II and specifications. It was proper to take judicial notice of Circular

#33, Headquarters ETOUSA, dated 21 March 1944 (see CM ETO 9542, Isenberg). Paragraph 3c thereof provides: "This signature certifies that the officer has read, understood and complied with military censorship regulations" (See CM ETO 1872, Sadlon). There was substantial evidence that the certification was false and the court could infer that its falsity was known to accused. Paragraph 9c thereof provides: "The following items will not be included in personal letters or packages: (4) * * * maps * * *". Fragments of a map were included in two packages.

The two specifications do not constitute an unreasonable multiplication of charges. The false certification was in and of itself an offense as was the act of including and posting the map.

7. a. The original specifications and charges were apparently redrafted on a separate sheet which was pasted over the originals in such a manner as to prevent comparison. There was no reinvestigation or re-execution. When arraigned accused did not object. While the practice here followed was highly irregular and improper (see CM ETO 5406, Aldinger) accused's substantial rights were not injuriously effected (see CM 229477, Floyd, 17 B.R. 149 (1943); CM ETO 5555, Slovik; CM ETO 4570, Hawkins; CM ETO 5155, Carroll; CM ETO 12580, Groin).

b. The charges were originally referred to a general court-martial appointed by paragraph 5, Special Order 22. The court convened at Hamoir, Belgium on 5 February 1945. Before arraignment accused requested and was granted a continuance to secure individual counsel. On 8 February 1945, the charges were referred to a general court-martial appointed by paragraph 1, Special order No. 25, as amended by Paragraph 3, Special Order 32. This court convened at Argenteau, Belgium, 8 February 1945, and the trial proceeded de novo after accused consented to proceeding without individual counsel. It was within the power of the appointing authority to withdraw the charges (MCM, 1928, par.5, p.4). Accused consented to proceeding without individual counsel.

8. The charge sheet shows accused is 34 years eleven months of age and that he was appointed first lieutenant, Medical Corps, 26 December 1942. He had no prior service.

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

10. The penalty for misappropriation, false representation, or violation of standing orders by an officer is such punishment as a court-martial may direct.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

(290)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant HARVEY I. GOLDBERG (O-507151), Medical Detachment, 330th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9986. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9986).

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

(Sentence ordered executed. GCMO 262, ETO, 10 July 1945).

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

BOARD OF REVIEW NO. 1

18 MAY 1945

CM ETO 9987

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	)	
First Lieutenant CECIL L. PIPES (O-1285812), 489th Quartermaster Depot Company	)	Trial by GCM, convened at Paris, France, 30 November 1944. Sentence: Dismissal and total forfeitures.

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 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 96th Article of War.

Specification 1: In that First Lieutenant Cecil L. Pipes, 489th Quartermaster Depot Company, European Theater of Operations, United States Army, did, at Paris, France on or about 8 October 1944, wrongfully, knowingly, and without proper authority dispose of two (2) sixty (60) pound cases of butter, value about sixty dollars ($60.00), property of the United States and intended for the military service thereof, by taking away the same from Q-177 subsistance Warehouse in a civilian car, thereby tending to impede the war effort.

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CONFIDENTIAL

Specification 2: (Motion for finding of not guilty granted)

Specification 3: (Plea in bar of trial sustained)

Specification 4: In that * * * did, at Paris, France on or about 15 October 1944, by his behavior disgrace himself as a gentlemen, and acted in a manner unbecoming an officer and a gentlemen by attempting and partially succeeding in destroying a signed statement made voluntarily by him to Criminal Investigation Department investigators on a previous occasion and in the presence of enlisted men attempted to chew up and destroy part of the statement before he was obliged to give it up.

He pleaded not guilty and was found guilty of the Charge and Specifications 1 and 4 thereunder. The court granted his motion for a finding of not guilty of Specification 2 and sustained his plea in bar of trial as to Specification 3. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The approving authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, expressed the opinion that the sentence, upon conviction of an officer of the serious offenses against discipline and the fighting efficiency of our forces here involved, was grossly inadequate and exhibited a deplorable lack of perspective and sense of responsibility, and in its effect constituted a failure by the court to keep faith with thousands of loyal and disciplined soldiers who daily pay with their lives the obligations of faithful service, but in order that the accused might not entirely escape punishment, 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, declared that the court, in imposing such meager punishment, reflected no credit upon its conception of its own responsibility, approved only so much of the findings of guilty of Specification 1 as involved a finding that the accused did at the time and place alleged wrongfully, knowingly, and without proper authority dispose of two 60-pound cases of butter, of some value, property of the United States and intended for the military service thereof, by taking away same from Q-177 Subsistence Warehouse in a civilian car, thereby tending to impede the war effort, confirmed the sentence notwithstanding its inadequacy as punishment for an officer convicted of such reprehensible conduct, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The ultimate facts established by prosecution's evidence are as follows:

Specification 1: On 8 October 1944 accused was employed at Quartermaster Depot Q-177, otherwise known as DP 177, situate in Paris, France. At approximately 9:30 pm on said date, he drove a French civilian automobile to a platform or ramp which projected before a wide door of said warehouse. Lieutenant Herbert J. Fox of 489th Quartermaster Company was on duty at the warehouse at that time. When accused stopped the automobile, Lieutenant Fox left the warehouse, went to the automobile and conversed with accused. A few minutes later, Lieutenant Fox re-entered the warehouse and placed two boxes of butter, each weighing 60 pounds on a hand truck. As he pushed the loaded truck toward the open door, the automobile was started slowly and was driven away from the door (R19,23-25).

Accused in a pre-trial, voluntary written statement dated 13 October 1944 (R30,31; Pros.Ex.1) declared:

> "On the night of 8 October 1944, we had a double shift due to a labor shortage. Lt. Fox and I were in charge that night. Ordinarily there is only one officer in charge of the detail of each shift.
>
> If I had gotten to the hotel, where we are billeted, in time, I would have gone to work in a government vehicle. I got to the hotel late so I drove a civilian car that belongs to a friend. I drove this car to work. I had taken this car to go to the other warehouses for a check-up.
>
> I returned to Subsistence Warehouse around 2130 hours. When I drove up to the warehouse, I asked Lt. Fox for some butter telling him I was going to give it away. I did not get out of the car. I do not know who put the butter in my car, but I do know that 2 - 60 pound cases of butter was placed in the back-seat of the car. I did not sell the butter. I gave it to a friend of mine. I do know that my friend did not sell the butter.
>
> I have not taken any other merchandise from the warehouse. I have never sold any government property".

Specification 4: Agents Harvey Hillman and Henry Brewer, both of Third Criminal Investigation Section, Paris, France, obtained from accused his written statement (Pros.Ex.1) on 13 October (R29). On 14 October the agents received certain additional information as to accused's activities with respect to Government property, and on the following day, 15 October, they went to Casserne Mortier where accused was confined. He was interviewed by the agents in a small room adjoining the guard room. The agents sought an additional statement from him. He expressed the desire to read his former statement

"because he did not want to implicate Lieutenant Fox" (R30,34). Hillman read the statement to him, but he refused to talk further with respect to the affair. He was then excused and Hillman and Brewer returned to the guard room. A few minutes later, accused appeared and stated he desired to speak with Hillman privately. Hillman and accused returned to the small room. The latter asked Hillman to sit beside him on a cot, but the agent refused and sat on a bench. Accused asked to read his statement. Hillman produced it and again proceeded to read it to accused. When he commenced to read the second page accused arose from the cot and grabbed the page from Hillman's hands. He tore the page in two parts and also tore the bottom part of the page into several pieces. The fragment which contained his signature he placed in his mouth. Hillman called Brewer, and accused was taken into the guard room where the mutilated parts of the second page were obtained from him by the agents. Only the blank part of the page was destroyed. The agents reconstructed and restored the second page of the statement and it formed part of the exhibit when introduced in evidence (R30, 33,34). It appears to be torn and mutilated, and the piece bearing accused's signature evidences the fact that it had been exposed to moisture.

4. Accused, after explanation of his rights, elected to be sworn as a witness on his own behalf. He testified that he served in the regular army as an enlisted man from May 1933 to May 1935. He enlisted in the National Guard of Ohio in January 1940 and was inducted into Federal Service in October 1940. He is a graduate of the Officer Candidate School at Fort Benning, Georgia, where he was commissioned as an infantry officer. He served after his graduation with the staff of the Chemical Warfare School at Edgewood, Maryland. He arrived in France about 18 July 1944, joined the 489th Quartermaster Depot Company in August 1944 and was sent to Quartermaster Depot Q-177 (R37,38).

With respect to the butter transaction he asserted that a few days prior to 8 October, he met a certain lieutenant at the warehouse who complained that in his ration shipment canned meat had been substituted for fresh meat. Accused explained to him that such substitution was necessary because of shortage of fresh meat. On the evening of 8 October this same lieutenant telephoned accused (who was on duty at the depot) and refreshed his memory of the conversation of the previous occasion. The lieutenant then asserted that he had been issued two boxes of preserved butter and he desired two boxes of fresh butter. The accused finally agreed to effect an exchange of fresh butter for the preserved butter and inquired of the lieutenant: "Could you come over to the warehouse and get the butter?" The lieutenant claimed lack of transportation (R38,39). Finally accused informed the lieutenant that he would bring the butter to the lieutenant's bivouac (R39) which was located a distance from the depot requiring 20 or 25 minutes of motor travel. About 30 minutes

later, accused searched for the Government truck in which to haul the butter, but could not find it. He finally decided to take the butter to the lieutenant in a civilian car in which he (accused) had driven to work that evening. He asked Lieutenant Fox for two boxes of fresh butter and the latter secured it from the warehouse stock, placed it on a hand truck and brought it outside of the warehouse. It was placed in the civilian automobile and accused took it to the lieutenant who was at his bivouac in a pyramidal tent. Accused exchanged the two boxes of fresh butter for two boxes of preserved butter (R46). He did not know the lieutenant's name although he had seen him three or four times at the warehouse on previous occasions (R44).

> "That is the truth of the butter. I gave it to this lieutenant. I exchanged the two cases of fresh butter for two cases of preserved butter and brought it back to the warehouse and had it placed inside * * *" (R41).

Subsequently, accused attempted to locate the lieutenant's bivouac for the investigating officer, but was unsuccessful. He had prepared a written memorandum of the route from the depot to the bivouac from oral instructions received by him from the lieutenant over the telephone, but he had lost it. The trip was made in darkness and it was over 30 days after 8 October when he attempted to discover the lieutenant's bivouac (R43). He never learned the identity of the lieutenant's organization (R44).

When he gave the statement (Pros.Ex.1) to Agents Hillman and Brewer, he was very nervous. It contained an untruth which he desired to correct, viz. that he had given the butter to a friend. When the agents called on him on the night of 15 October at Casserne Mortier, he expressed to them the desire to see the statement. His request was refused but the statement was read to him. He stated to them he wanted to change it, but they refused to allow him to do it. After Hillman and Brewer departed, he believed that Hillman would grant his request if he spoke to him alone. He said to Hillman: "Let's read those statements over". When the agent held the statement in his hand, accused reached and took the second sheet and said to Hillman:

> "Listen, this statement here is the one I object to; it's not true. The other statement is right, but this one is not true, especially this one particular part - - it's not true. Lieutenant Fox did not know the full story until my return to the warehouse * * * I don't want to implicate him, and I won't have my name to this statement" (R41).

Accused thereupon tore his signature from the second sheet of the

the statement (R41). Accused further testified:

> "I did not destroy the statement. However, I did tear my signature off there. I did that on an impulse and admit doing it. * * * I had the small bits of paper that I had torn my signature into small bits; I had them in my hand crumpled up. * * * As I went out to the hall, where there is a small corridor and * * * it has no ceiling or roof over it * * * I threw * * * some of the bits of paper out in this place. I don't recall putting bits of paper in my mouth and chewing them. * * * I threw these bits of paper out into the corridor and I do know on that particular date it was raining which could account for the fact that the paper was wet when they picked it up" (R42).

5. The papers accompanying the record of trial show that the original charge sheet, upon which the investigation under the 70th Article of War was based, contained two charges. Charge I was laid under the 94th Article of War and its Specification alleged the wrongful disposition of two boxes of butter. Charge II contained three specifications, each of which alleged the wrongful disposition of Government gasoline on three separate occasions. Evidently as a result of the investigating officer's recommendations, the charge sheet was subsequently altered by pasting over the original charges a sheet of paper upon which were typewritten the charges that were referred to trial. Specification 4 was added after the investigation and was not on the original charge sheet when verified. On the margin of the paper bearing the new charges are undecipherable initials, but it is obvious that they are not those of First Lieutenant Lester B. Lipkind who verified the original charges. The recitals of the affidavit described the original charges, but were not changed to refer to the amended charges.

The alteration of the charge sheet by pasting a sheet of paper over the original charges so that same are obscured is not the proper method to amend the charges (Military Justice Circular No. 1, BOTJAG with ETOUSA, 16 April 1945, sec.II, par.3; Military Justice Circular No. 5, BOTJAG with ETOUSA, 4 Oct.1943, par.3). Specification 4 alleges an offense which was revealed during the course of the investigation. It was added when the other specifications were rewritten and rearranged. There is no evidence that the amended charge sheet was submitted to the accuser for his reverification or to afford him opportunity to withdraw as accuser. The consequence is that Specification 4 was never verified and was referred to trial in that condition.

The foregoing facts reveal pre-trial practices which have been repeatedly disapproved by the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations and the Board of Review in his office. Under the construction and interpretation which has been placed upon the 70th Article of War, the said irregularities do not affect either the jurisdiction of the court or the substantial rights of accused (CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock). Nevertheless, they are subject to criticism. The Board of Review again expresses its disapprobation of such practices which violate the spirit of the 70th Article of War.

6. Specification 1 alleges that accused did, without proper authority

> "dispose of two (2) sixty pound cases of butter, value about sixty dollars ($60.00) property of the United States and intended for the military service thereof, by taking same away from Q-177 subsistance Warehouse in a civilian car, thereby tending to impede the war effort".

It will be assumed that the above Specification, although faulty, states facts constituting an offense under the 96th Article of War of 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 within the principle announced in CM ETO 8234, Young, et al; CM ETO 8236, Fleming, et al; and CM ETO 8599, Hart, et al. There is, however, a total absence of proof in this case of those highly necessary and relevant facts and circumstances which would show that accused "impeded the war effort". Judicial notice cannot be taken of such facts; they must be proved as any other facts. Consequently, the offense involving greater culpability and moral turpitude than the offenses denounced by Congress in the 84th and 94th Articles of War, was not proved and the record is legally insufficient to support the finding of accused's guilt of such offense (CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski).

However, the Specification does charge an offense under the ninth paragraph of the 94th Article of War, an offense of lesser degree than the one assumedly alleged. The gravamen of the lesser crime is the sale or disposition, wrongfully and knowingly, of Government property furnished or intended for the military service. The value of the property is not an element of the offense. The propriety of laying the charge under the 96th Article of War is therefore an immaterial consideration (CM ETO 5539, Hufendick; CM ETO 6268, Maddox). The evidence, including accused's admissions both

in open court and in his pre-trial extrajudicial statement, fully prove the offense under the 94th Article of War. In view of the fact that the confirmed sentence does not include confinement at hard labor, it is not necessary here to consider the question of punishment for the offense proved.

7. The allegations of Specification 4 are awkward and reveal confused thinking on the part of the pleader. Although laying the Specification under the 96th Article of War, he used language which is a paraphrase of a portion of the 95th Article of War:

> "did * * * disgrace himself as a gentleman, and acted in a manner unbecoming an officer and a gentleman".

Further, the Specification does not contain the specific declaration that accused's conduct was "felonious", or "wrongful" or "illegal" or "unlawful" (CM 113535 (1918), CM 130811 (1919), Dig. Ops. JAG, 1912-30, sec.1559, p.771). Considering the Specification as a whole however, the Board of Review believes that it alleges wrongful conduct by accused. It is inconceivable that the attempted destruction of his previous statement could be other than a wrongful act. Under no circumstances is a suspected person entitled to destroy or attempt to destroy a statement given by him in an authorized investigation of a case. The branding of his conduct as "wrongful" or "unlawful" would add nothing either to the quality or quantity of his acts. Facts are therefore alleged constituting an indigenous offense under the 96th Article of War, involving conduct of a nature prejudicial to good order and military discipline. The portion of the Specification quoted above may be disregarded as surplusage (CM ETO 6694, Warnock, and authorities therein cited). The evidence without dispute establishes accused's guilt of the offense charged. His conduct was a form of obstruction of the processes of justice (Cf: CM 240753, Shapiro (1943); 26 B.R. 107).

8. The charge sheet shows that accused is 36 years three months of age. He entered upon extended active duty 20 June 1942. No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors 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 so much of the findings of guilty of Specification 1 as involves a finding that accused did at the time and place alleged wrongfully, knowingly and without proper authority dispose of two 60-pound cases of butter, property of the United States, intended for the military service thereof, in violation of the 94th Article of War, legally sufficient to support the findings of guilty of Specification 4 and of the Charge, and legally sufficient to support the sentence.

10. A sentence of dismissal and total forfeitures is authorized upon conviction of an officer of offenses in violation of Articles of War 94 and 96.

B. Franklin Riter Judge Advocate

Wm. F. Brannan Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(300)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant CECIL L. PIPES (O-1285812), 489th Quartermaster Depot Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support so much of the findings of guilty of Specification 1 as involves a finding that accused did at the time and place alleged willfully, knowingly and without proper authority dispose of two 60-pound cases of butter, property of the United States, intended for the military service thereof, in violation of the 94th Article of War, legally sufficient to support the findings of guilty of Specification 4 and of the Charge, 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 9987. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9987).

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

Findings vacated in part in accordance with reccommendation of The Assistant Judge Advocate General. Sentence ordered executed. GCMO 186, ETO, 28 May 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

29 JUN 1945

CM ETO 9988

UNITED STATES	SIXTH ARMY GROUP
v.	Trial by GCM, convened at Nice, France, 18 January 1945.
First Lieutenant JACOB D. STOUT (O-1171379), 937th Field Artillery Battalion	Sentence: Dismissal.

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

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant JudgeAdvocate 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 95th Article of War.

Specification: In that First Lieutenant Jacob B. Stout, 937th Field Artillery Battalion, did, at Coleman, Texas, on or about 20 July 1943, wrongfully and unlawfully marry Second Lieutenant Hermina M. Brazauskas, Army Nurse Corps, the said Lieutenant Stout then having a living wife, to wit, Angeline Alessi Stout.

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. All members of the court signed a recommendation that "in view of the hitherto excellent combat record of accused, the sentence be suspended, subject to periodic review by the reviewing authority". The reviewing authority, the Commanding General, Sixth Army Group, 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 of the sentence pursuant to Article of War 50½.

3. The evidence presented by the prosecution consisted entirely of copies of writings introduced by way of stipulation that they be "accepted in evidence", the accused in each instance affirmatively waiving all objection which he might have "under the law of evidence to the introduction of this exhibit as evidence". The prosecution evidence may be summarized as follows:

> Copy of "War Department Pay and Allowance Account", (commonly known as "Officers Pay Voucher") for December 1944 including the certificate of the accused to the effect that Angeline I. Stout was his "lawful wife" (R6; Pros.Ex.1).
>
> Copy of an "Application for National Service Life Insurance" signed at Camp Bowie, Texas, by accused showing "Angeline I. Stout, wife" as his desire principal beneficiary (R6; Pros.Ex.2).
>
> Copy of WD form 66-1 indicating that accused was married (R6; Pros.Ex.3).
>
> Copy of a "Report of Investigation Concerning Marital Status of First Lieutenant Jacob D. Stout" including:

(a) Copy of a complaint by Hermina M. Brazauskas Stout (Plaintiff) vs. Jacob D. Stout (Defendant) in the District Court of the Seventh Judicial District of the State of New Mexico, County of Socorro, wherein the plaintiff alleged that a marriage license was issued on 20 July 1943 by the Clerk of Coleman County, Texas, and pursuant thereto she and defendant went through a marriage ceremony on that same day before a Justice of the Peace, Precinct No. 1, Coleman County; further that defendant had another wife then living and plaintiff therefore prayed for a decree declaring her marriage null and void (R7; Pros.Ex.4).

(b) Copy of "questionaire" dated 27 August 1944 in which accused stated that he married Angeline Alessi 12 September 1941 and although never divorced he married Hermina Brazauskas 20 July 1943 (R7; Pros. Ex.4).

4. For the defense, accused's battalion commander testified that accused was assigned as reconnaissance officer to one of the batteries, that he had been with the battalion over two years of which nearly 18 months were spent in combat, that accused had always been a perfect officer and gentleman, exerted a very good influence on the men and was the best officer in the organization, the witness having implicit faith in his judgment (R7,8).

After his rights as a witness were incompletely (see below) explained to him the accused elected to take the stand in his own behalf and testified substantially as follows:

He entered the service 19 June 1940, received his basic training and later graduated from the Officer Candidate School of Fort Sill, Oklahoma (R9). He met Lieutenant Brazauskas, a nurse, at a birthday party given by the nurses about September 1942 and married her about eight months later. In the meantime he told her that he was already married (R10) and he tried to end their

association but she would come to his "organization and make herself conspicuous so I had to see her" (R11). "I didn't want to be talked about" (R12). He gave her flowers and he gave her a ring which "she wanted to show her friends" (R13). He was intimate with her only once, about three nights after he met her (R13). As soon as he realized she was becoming serious he told her he was married and did not want to become attached to her. This was about two weeks after their first meeting (R10). He was stationed at Camp Bowie, Texas, at the time (R10). His lawful wife, and later their child, lived in the vicinity of the camp (R10,12). He lived with her except the four nights a week he was required to remain in camp (R10,14). The nurse was acquainted with his wife (R10) and twice she visited his home. His wife was aware of the affair and knew he married the nurse (R13). He and the nurse were invited to a party which they attended on 19 July 1943 (R10). They had too much to drink (R11). They arrived back in camp about 0330 on 20 July. He went on duty on 20 July at about 0700 (R10,12) and that afternoon about 1330 he met the nurse. She wanted to go for a ride and they drove to Coleman, Texas, about 20 miles from camp (R10,12). At Coleman they "got a license for marriage and got married. This took about twenty minutes" (R10). They then returned to camp. He was 21 at the time. He never lived with the nurse (R12). He did not remember enough to know whether they were sober at the time of the marriage ceremony (R13). The whole thing was done on sudden impulse (R10,13,14). The nurse was not pregnant, never pretended she was and never said it was necessary to marry her (R13). The next morning they talked over the phone about the "crazy thing" they had done and about having the marriage annulled, "but she was leaving and she couldn't do anything about it". His unit was alerted shortly thereafter (R11).

5. Bigamy consists in willfully and knowingly contracting a second marriage when the contracting party knows the first marriage is still subsisting (CM ETO 3456, Neff).

> "Bigamy has long been recognized as an offense under the 95th and 96th Articles of War * * * (CM 245278, III Bull.JAG 150; CM ETO 1729, Reynolds). The elements of the offense may be outlined:

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"(1) A valid marriage entered into by accused prior to and undissolved at the time of the second marriage.

(2) Survival of the first spouse to the knowledge of accused.

(3) His subsequent marriage to a different spouse" (CM ETO 3456, Neff).

It is obvious that adequate and uncontradicted evidence was presented in proof of each element of bigamy and the court's findings of guilty of the Specification is therefore supported by evidence legally sufficient. Its conclusion that the behavior described in the Specification constituted conduct unbecoming an officer and a gentleman is likewise supported by competent substantial evidence and sustained by the precedents. Apparently this act was committed not as a deliberately planned offense to good morals and decent standards, but it resulted from sudden irrational impulse or suggestion which would normally have been resisted. Apparently the offense received no publicity until about a year and a half after its commission. In the meantime the accused has been actively engaged in combat for a long period and is described as one of the best officers in his battalion. (It should be noted here that so far as the recorded evidence goes, this case could not have been proved without the full cooperation volunteered by the accused and through his counsel). Presumably these considerations moved the court to make its recommendation for suspension of the sentence. That matter has already received the consideration of the staff judge advocates who reviewed this case in the Headquarters European Theater of Operations and at Sixth Army Group. In each instance the Commanding General concerned has rejected the recommendation. Their judgment must be respected for the matter is beyond the scope and function of a Board of Review.

In explaining to the accused his rights as a witness the law member advised him, without further explanation, that if he elected to "testify under oath you may be cross-examined by the Trial Judge Advocate and the court on any and only on any matter which is brought forward in your direct testimony" (R9). This explanation was, of course, inadequate for "when the accused testifies in denial or explanation of any offense charged or any fact tending to prove his guilt of that offense, even though it has not been the subject of direct testimony, it is properly the subject of cross-examination" (CM 121980

122259, 122271, Dig. Op. JAG, 1912-40, sec.395(34),p.223). Also, any fact "relevant to his credibility as a witness is properly the subject of cross-examination" (MCM, 1928, par.121b, p.127). However, there is little possibility that accused was misled to any extent by this incomplete explanation of his rights for he was an officer with professional education and experience knowing or capable of discovering his rights; no questions designed to test his credibility were asked of him, the scope of cross-examination was not unusually broad, and fihally, it may be presumed that the defense counsel performed his duty in explaining to accused his rights as a witness (CM ETO 139, McDaniels; CM ETO 531, McLurkin; CM ETO 1786, Hambright; CM ETO 8164, Brunner.

The fact that the lawful wife of accused is sometimes referred to in the evidence as Angeline I and at other times as Angeline Alessi is not regarded as a matter of material consequence. Other circumstances clearly indicate that each name refers to the same person.

6. The charge sheet shows that accused is 23 years of age, that, without prior service, he was inducted 15 October 1940 and discharged 7 October 1942 to accept appointment as second lieutenant. He was appointed second lieutenant, Army of the United States, on 8 October 1942.

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

8. A sentence of dismissal from the service is mandatory upon conviction of conduct unbecoming an officer and a gentleman in violation of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

9988

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant JACOB D. STOUT (O-1171379), 937th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 9988. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9988).

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

(Sentence ordered executed. GCMO 257, ETO, 10 July 1945).

9988

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

BOARD OF REVIEW NO. 1 26 MAY 1945

CM ETO 9989

U N I T E D S T A T E S)	12TH ARMORED DIVISION
)	
v.)	Trial by GCM, convened at Chateau
)	Salins, France, 17 February 1945.
Second Lieutenant GINO A.)	Sentence: Dismissal, total for-
FORCHIELLI (O-1314736),)	feitures and confinement at hard
Company C, 56th Armored)	labor for life. Eastern Branch,
Infantry Battalion)	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 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 75th Article of War.

Specification: In that Second Lieutenant Gino A. Forchielli, Company "C", 56th Armored Infantry Battalion, being present with his company while it was engaged with the enemy, did at Herrlisheim, France, at or about 0100, 10 January 1945, shamefully abandon the said company and did seek safety in the rear.

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 forfeit all pay and allowances due or to become due, to be dismissed from the service and to be confined at hard labor for the term of his natural life. The reviewing authority, the Commanding General, 12th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence, which was undisputed, was in material substance as follows:

Some time around the end of 1944 (R44) accused became platoon leader of the third platoon, Company C, 56th Armored Infantry Battalion, which command he held at all times material herein (R6-7). On the morning of 9 January 1945, the battalion launched an attack from Rohrwiller, Germany, southward upon the town of Herrlisheim (R7-8,21,27-28; Def.Ex.A). Companies A and B led the attack. At about 1230 hours, Company C, commanded by First Lieutenant John E. Trusley, followed with the mission of "mopping up" and reached the town at about 1400 hours. Company A proceeded to take the right (west) side of the town but Company B sustained so many casualties that the commander of Company C was ordered to assume its mission and take the left (east) side. Thereupon the third platoon, commanded by accused, and the first platoon started to move west across a north-south canal. The third platoon, encountering heavy opposition from the enemy on the left flank (R8), took about one-fourth of the town (R28) building by building (R8). The attack continued until dusk, at which time Lieutenant Trusley ordered those of his elements still on the east side of the canal in the four houses they had taken there, to move to the west side so that the entire company might form a defensive position there for the night (R9,21,28). The positions were generally as follows: Company A was on the right of the first platoon and the third platoon was about 125 yards to the left of

the first (R7,9-10,21-22,24,27,29,32,36; Pros.Ex.A). The second platoon was stationed around the command post of Company C about 100 yards left and north of the third platoon's position (R9,15,20,22,32;Pros.Ex.A). The areas between platoons were relatively open without protective cover from the intermittent and varied enemy fire which was being received (R15-16,22-24,36). The platoons rendered each other mutual support (R34,46). Lieutenant Trusley showed accused the houses which his platoon was to occupy and acquainted him with his mission (R13), which was to maintain contact between the units and hold the ground taken by continuing to occupy the houses (R54,66).

Accused's platoon consisted of two rifle squads, a machine gun squad and a mortar squad (R46-47). One house and a barn to its rear were occupied jointly by one rifle squad and the machine gun squad, consisting of about 16 man, under the command of Staff Sergeant Daniel Urbaniak (R38,47). Accused occupied an adjoining house to the east with the mortar squad and two or three members of the other rifle squad, eight or nine in all, including Technical Sergeant Sherman L. Adams, the platoon sergeant (R37,47,48). A barn also adjoined accused's house (R45). The two sections of the platoon made an "all around defense" (R26,38). All platoon leaders, including accused, made a reconnaissance of the company area (R10,21,30), and he reported to the company commander about dark that his platoon was in position, that he had contact with elements on both sides and that he was not having too much trouble in spite of receiving some artillery fire (R10).

From about 2200 hours until just before dawn there was heavy intermittent enemy infiltration into the company's position accompanied by enemy small arms, bazooka, tank and artillery fire and hand grenades (R10,22-23,25-26,30,37). Several buildings were set on fire (R25,33-34,38), the company command post was shelled (R14); and Urbaniak's barn was struck by bazooka fire (R38,39). Small arms and bazooka fire and grenades, but no artillery, were received in accused's building (R39,50), but the Germans did not rush the building (R53), and there were no casualties therein (R50,65). The radio in the company command post was "knocked out", terminating communication with the platoons (R10) and Germans attempted to "rush" the command post door, using hand grenades (R14). Urbaniak's men exchanged fire with groups of Germans who approached their door three times but did not enter, and the group sustained no casualties

until the following day (R39-40,43). Communication by runner between the platoons and between them and the command post was highly impracticable because of the infiltration and enemy fire (R25,33). Moreover, the men were frightened and "trigger happy" and there was danger that they would fire indiscriminately at any one (R26,33).

Some time before midnight, Urbaniak saw a group of men leaving the house occupied by the first platoon (R43). Adams (platoon sergeant of the third platoon) testified that around midnight they aroused all the men in their building (R48). After some discussion, in which accused participated, it was agreed that in view of the insecure nature of their building it would be advisable to join the remainder of the platoon in order to strengthen their force (R51,53-56,60,65). Accordingly, all members of accused's group left the house and proceeded to the barn at the rear (R48,60-61). Adams then left the group for the purpose of establishing contact with the company command post if possible. The machine gun fire which he heard from Urbaniak's house ceased and he doubted if any one was left there (R52,56). He called three times in the direction of Urbaniak's barn loud enough in his opinion to be heard by anyone there, but received no response (R51) and so reported to accused and his group (R56). Thereafter accused and all members of his group left the barn and, when Adams informed him that contact with the company command post was impossible, proceeded with Adams across a field to the creek or canal (R49-50,52,55; Pros.Ex.A). Accused preceded his group, which marched in squad column, by 15 to 20 yards. As they approached a foot bridge across the canal they heard Captain Elmer F. Bright, S-2 of the battalion, calling and crossed the bridge to meet him (R50,56-58). Accused spoke incoherently to Captain Bright and stated that his company was in town, that the Germans were counter-attacking him, that he did not know the location of the company because he was unable to contact it, that he did not think there was much of it left, and that he took the only available means of withdrawal by walking out the back door toward the canal. Captain Bright suggested that they proceed with him to the battalion command post, which they did (R57-58). Within a half hour Colonel Ingram, the battalion commander, directed accused to prepare to return to Herrlisheim with light tanks in order to help evacuate casualties. He was ready and willing to accompany the mission, but stated that his men were not in condition to go. The order was changed, however, and he did not return to the town until the following day at about 1600 hours (R11,19-20,26-27,58-59,67-69).

On the morning of 10 January accused's assigned building in Herrlisheim was vacant, and of the third platoon only Urbaniak's rifle squad and the machine gun squad were still in position (R19,31,40-41,47).

4. The following evidence, in substance, was introduced for the defense:

When the house occupied by some 20 members of the first platoon, Company C, caught on fire as a result of enemy action, they moved to another house which was subsequently also set on fire. Thereupon they left the house, under fire, and proceeded to the canal where they met accused in about 15 minutes (R71-73).

On the evening in question, accused grabbed the automatic weapon of one of a group of three German prisoners and, after a struggle, succeeded in disarming him (R75).

It was duly stipulated that the present commander of Company C would testify that accused was an able officer in his command and that as a result of his previous combat action witness recommended him for a battlefield promotion to first lieutenant (R85).

After an explanation of his rights, accused elected to take the stand as a witness in his own behalf (R75). His testimony was in substantial accord with the prosecution's evidence concerning the tactical situation and events of the night of 9-10 January 1945. He testified additionally in substance as follows: He assumed command of the third platoon around 27 December 1944. He and his men were engaged in the action in question for about four days prior to that night (R86), and were under continuous enemy fire on the preceding night (R87). He selected the buildings for his platoon from the standpoint of the best possible defense for the night (R76). He clearly understood that his mission was to set up an all-around defense for the company (R85). His platoon mutually supported both of the other platoons (R81). The part of the rifle squad which was not with him was to the rear supporting a machine gun near the company command post. The mortar squad with him consisted of four or five men (R77). Around midnight when two buildings in the first platoon area were burning he saw a number of men running toward the main road. Another, two buildings away from his own, was also burning (R78). About one half

to three-quarters of an hour later he gave instructions to awaken the men and to find an opening to the barn as an avenue of escape in case an attack required them to withdraw. Some time after midnight, he attempted to contact the squad in the adjoining house, but from 10 to 15 Germans, who were not fired upon, approached that house and prevented him from doing so. Thereafter he heard explosions next door followed by quiet and he "didn't think there was much left over there". After some discussion accused said "It's time to leave" and the group thereupon left the barn, to which they had moved from their wooden house, and proceeded to the canal (R78-79,82-84). He did not believe it reasonable or possible to establish contact with the other platoons by messenger (R80). He believed Adams' statement that the company command post was not accessible and therefore did not report there. He knew the troops on his right withdrew and assumed from the silence and lack of signs of action that those on his left were "knocked out". There was no need to attempt to contact Company B as it was reduced to a few men and consolidated with his own company. He did not consider contacting Company A. Captain Bright's suggestion to take him back to the battalion command post eliminated any further thought of determining what had happened to the remainder of Company C (R86).

Accused admitted that he did not run out of ammunition, that none of his men became casualties, that it never occurred to him that there was no hope of receiving help, and that he did not receive orders to abandon his position. He did not believe, however, that he abandoned his position. The situation changed materially to such an extent that the abandonment of his mission was warranted (R85).

At the battalion command post Colonel Ingram ordered him to return to Herrlisheim with as many men as possible in order to evacuate casualties, but the expedition was abandoned (R80).

5. In rebuttal, the prosecution recalled the battalion executive officer who testified in substance that up until the time accused came to the command post no battalion order to withdraw from Herrlisheim was issued (R87). The battalion lost communication with Companies B and C about 2200 hours and with Company A about midnight on the night in question. Casualties suffered in the encounter were moderate for the type of action involved therein (R88-89).

6. The Specification charged that accused, being present with his company while it was engaged with the enemy did shamefully abandon the company and seek safety in the rear. It states an offense in violation of Article of War 75 (CM ETO 5475, Wappes, and authorities therein cited). The evidence, including accused's testimony, establishes that he and his company were actively engaged with the enemy at the time and place alleged and that his mission, of which he was fully aware, was to establish an all-around defense for the company, maintain contact between all units, which were in mutual support, and hold ground taken by remaining in occupation of assigned positions. Accused abandoned the position occupied by him and part of his platoon and, without notice to the remainder of the platoon or of the company, led his men away from enemy action, leaving remaining elements to continue the fight without his support. The only question for determination is whether the record contains competent substantial evidence that the abandonment was shameful and unjustified under all the circumstances (Cf: CM ETO 5179, Hamlin).

> "the accused may show in defence that in what he did he * * * was properly exercising the discretion which his rank, command, or duty, or the peculiar circumstances of the case, entitle him to use.
>
> * * * whether or not the abandoning is to be regarded as 'shameful' will depend upon the circumstances of the situation. Generally speaking, a commander is justified in surrendering or abandoning his post to the enemy only at the last extremity, - as where his ammunition or provisions are expended, or so many of his command have been put hors du combat that he can no longer sustain an effectual defence, and, no prospect of relief or succor remaining, it appears quite certain that he must in any event succumb. Every available means of holding the post and repulsing the enemy should have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence indicated by the Article. * * * when the periods of siege which have in many cases been withstood are recalled, it will be appreciated how possible it may be found to protract a defence under circumstances of extreme privation and difficulty.
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> * * *

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> The abandonment of a picket post or line, without using every reasonable endeavor to hold it and to retard as long as practicabe the advance of the enemy, thus enabling the main body to prepare against his approach, would be a marked instance of the offence of abandoning a 'post or guard' specified in the article" (Winthrop's Military Law and Precedents (Reprint, 1920), pp.624-625).

The essence of accused's defense, which was in the nature of confession and avoidance rather than denial, was that because of the insecurity of his position, the lack of possible communication with other elements of the company, the certain defection of elements to his right, the probable collapse of those to his left, and the weight of enemy attacks, his absolute abandonment of his mission was justified. Apart from the fact that later events, including the ultimate withstanding of the attack by the elements of his platoon under Sergeant Urbaniak, proved him quite in error in his judgment, it appears that even from his own point of view at the time of his abandonment, it was not justified, either as a matter of law (Winthrop, supra) or morally. It is clear that accused and the group immediately under his command had not approached their last extremity. They had not run out of ammunition and had sustained no casualties, prospects of relief or succor had not been abandoned, and it did not appear certain that they must in any event presently succumb (Winthrop, supra). Neither accused nor his group had even been made the object of a full-scale direct assault by the enemy, nor was the danger of that event imminent. There was no immediate indication that the group were liable to be sacrificed, needlessly or otherwise. Accused was content to assume the worst, to wit: that other elements of his platoon had been destroyed, and to act upon that assumption without determining the true state of facts by such reconnaissance as the situation would permit. That his abandonment was shameful and that he sought safety in the rear are inescapable conclusions. The Board of Review is of the opinion that the record fully supports the findings of guilty.

7. The record abounds in hearsay, but the convincing nature of the competent evidence upon the matters as to which it was injected prevented it from injuriously affecting accused's rights (CM ETO 5179, Hamlin).

8. The charge sheet shows that accused is 25 years of age and was inducted 8 July 1941 at Camp Wheeler, Georgia, and commissioned a second lieutenant 12 March 1943 at Fort Benning, Georgia.

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. A sentence of dismissal from the service, total forfeitures and confinement at hard labor is authorized upon conviction of a violation of Article of War 75. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B. Franklin Rites, Judge Advocate

Wm. F. Sumrow, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant GINO A.FORCHIELLI (O-1314736), Company C, 56th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. All members of the court, of which five of the seven members were infantry officers, and the staff judge advocate in a considered opinion, recommended clemency. The reviewing authority, the Commanding General, 12th Armored Division, made no recommendation. The accused had been commissioned for about two years and in command of the platoon for two weeks. He had done well in combat and his company commander had recommended him for a battlefield promotion to 1st lieutenant. On the night in question, the situation was confused. The battalion had taken the town of Herrlisheim, France, in the late afternoon and about dusk had withdrawn behind a canal and set up a defensive position in a group of houses. The area was full of infiltrating Germans during the night. Communications with the battalion and company CPs and with adjoining units were cut. Accused's conduct in withdrawing his platoon appears to have been caused by inexperience, faulty evaluation of the military situation and lack of leadership and military spirit. His actions do not appear to have been motivated by personal cowardice. Under the circumstances, it appears to me that the sentence to confinement is excessive.

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 9989. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9989).

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

(Sentence ordered executed. GCMO 199, ETO, 7 June 1945.)

9989

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