E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 17699
CM ETO 19854

VOLS. 33-34

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 34 B.R. (ETO)

CM ETO 18436 - CM ETO 19354

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

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 34 B.R. (ETO)

including

CM ETO 18436 - CM ETO 19354

(1945-1946)

Office of The Judge Advocate General

Washington : 1946

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

BOARD OF REVIEW NO 1

15 DEC 1945

CM ETO 18436

U N I T E D S T A T E S	8TH ARMORED DIVISION
v	Trial by GCM, convened at Rokycany, Czechoslovakia, 21,23 July 1945.
Second Lieutenant ROBERT A. SCHNEEWEIS (O-1017469), Company B, 36th Tank Battalion	Sentence: Dismissal, total forfeitures, and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Second Lieutenant Robert A. Schneeweis, Company "B", 36th Tank Battalion, did, at or near Vorde, Germany, on or about 27 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one male civilian, Heinrich Payenberg Sr, a human being by shooting.

Specification 2: In that * * * did, at or near Vorde, Germany, on or about 27 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one male civilian, Heinrich Payenberg Jr, a human being by shooting.

Specification 3: In that * * * did, at or near Vorde, Germany on or about 27 March 1945, with malice aforethought, willfully deliberately, feloniously, unlawfully and with premeditation kill one female civilian, Therese Hinnemann, a human being by shooting.

Specification 4: In that * * * did, at or near Vorde, Germany, on or about 27 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one female civilian, Frieda Payenberg, a human being by shooting.

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 specifications excepting from each the words "with malice aforethought" and "and with premeditation", and not guilty of the Charge, but guilty of violation of the 93rd Article of War. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority, the Commanding General, 8th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, although stating that it was wholly inadequate punishment for an officer guilty of such a grave offense and that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility; designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement; and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution: On 27 March 1945, the 49th Armored Infantry Battalion, to which B Company, 36th Tank Battalion, was attached, crossed the Rhine at Heikenrath, Germany, after a march from Venlo, Holland. On this march it encountered enemy action only once and that was when it was strafed by a German plane (R34-35). Accused was an officer of Company B, 36th Tank Battalion, which assembled in the town of Vorde after the crossing (R12).

Sometime during the morning accused approached Private William Peppler and told him to go down the road " and get a few krauts" from which Peppler understood that he was to kill Germans. Peppler went down the road, saw two women in a house, and fired a few rounds through the window. He then became frightened, returned and informed accused that he could not kill them. Accused's reply was to go out and kill them, "male or female" (R18).

Accused, Peppler, an enlisted man named Nichols, and another enlisted man, otherwise unidentified, were next seen on a road outside of houses which the company used for billets. A civilian came down the road on a bicycle and accused made a remark about him (R28) which in an extra-judicial statement, properly admitted in evidence, he said was "I would get him on the second bounce" (R30). Accused and his companions started down a road. After walking about 200 yards accused stopped and fired an M-1 rifle at two male civilians who were walking in a field parallel to the road. They dropped to the ground and accused told Peppler "to finish them off" (R19,26,27). Apparently Peppler did nothing, because accused then took one of the enlisted men's M-3, walked up to the bodies and fired a burst into

each. The man, Heinrich Payenberg, junior and senior, died as a result of gunshot wounds (R9, Pros. Ex. B; R11, 36, Pros. Ex. A).

Accused then crossed the road to an enclosure in back of a house (R36; Pros. Ex. A). There were two women lying on the ground, both of them, although alive, were wounded in the legs; it does not appear how or when. Accused approached within 10 feet of both women, took a "45 automatic" and emptied "a clip and a half" into them (R20). These women, Therese Hinnemann and Frieda Payenberg, also died as a result of gunshot wounds (R9, Pros. Ex. B; R10, 36, Pros. Ex. A).

There was considerable evidence as to accused's mental condition. Peppler testified that he acted "unusual" and"a little peculiar". He was "battle happy" or "slightly whacky" (R21). He had"a funny laugh" (R23).

Lieutenant Colonel Harold G. MacAdams, Inspector General of the 8th Armored Division, the investigating officer testified that during the investigation accused seemed "rational" and was emotionally stable until the completion of the investigation when apparently he put on some emotional display in witness' office (R31).

Major Nathan N. Root, Medical Corps, testified that he was a member of a Board of Officers who examined accused and found him at the time of the alleged offenses free from any mental condition that would prevent him from determing right from wrong; that he was sufficiently free from mental defect, disease, or derangement at the time of the alleged offenses to be able to adhere to the right and refrain from the wrong; and that at the time of the examination he was mentally capable of cooperating properly in the preparation and conduct of his defense (R37; Pros. Ex. C).

4. Evidence for the defense:

Technician Fifth Grade Nathan Schumer testified that he talked to accused on the morning in question apparently after the shooting. Accused was excited and nervous and looked like a man afflicted with "battle fatigue" although he admitted that the unit had not been in combat (R39-40).

First Lieutenant William W. Kellner had occasion to see accused on the morning of the 27th before the killing. In his opinion accused was "battle happy", over-excited, and "incapable of withholding his own emotions". Apart from that, however, he was in control of all his mental faculties. The witness had observed two battle fatigue cases before and accused was not in the same condition as they (R41-43).

Major John R. Elting, 8th Armored Division, testified that he placed accused in arrest on the morning of the 27th after investigating the shooting. In his opinion accused was "somewhat unstable" and his behavior was not normal. There was no enemy fire that morning (R45-47).

Accused, after an explanation of his rights, elected to be sworn and testify (R48). A large part of his statement consisted of details of a maladjusted youth:- nightmares, enuresis until the age of seven or eight

with resultant whippings, a drunken father and an irritable mother, difficulties in school, truancy with a consequent short period in a detention home, self-consciousness because of a deformity of his face, and numerous boyhood fights due to the fact that other children laughed at him. He married in 1942 and at the time of trial had one child, a two year old girl, and his wife was expecting another. His married life was not happy for "a few personal reasons" and there were mutual threats of divorce. Both of his brothers were in the service, but both were discharged, one for "combat fatigue" and the other for a "nervous condition". One of his aunts died from a nervous condition. He detailed his own career in the Army, a career apparently without important psychological significance, until his arrival in this theater (R48-53).

In February 1945 he was assigned to the 2nd Armored Division. As a member of that organization he commanded some tanks on a mission near the Rhine. While he was carrying out that mission, his unit was subjected to mortar fire for about three to five hours and was strafed by a German plane. After about a week he was transferred to the 8th Armored Division when on one occasion he commanded a platoon of tanks in conducting "test firing". During this firing the unit was subjected to enemy mortar shells. He learned that prior to his joining the battalion it was badly mauled at Rhineburg (R54).

A few days before the organization crossed the Rhine, the Battalion Commander gave the battalion a "pep talk". He alluded to the incident at Rhineburg and told them that everything on the other side of the Rhine was a "kraut" and that their mission was to kill "krauts". The battalion set out from Venlo at 2000 hours to make the Rhine crossing (on the day in question). He had been up since 0530 hours that day, although he had not gone to bed until after midnight. He travelled all night without sleep and was once attacked by a German plane. He fired at it but after a few rounds the gun jammed (R55-56).

While in the theater he had read about the Hitler youth and heard about the Volksturm. He had heard of civilians attacking soldiers and of their activities in sabotage. The Germans were waging "total war" and by that he understood that all the German people were engaged in it. "A German is a German" and if they were going to wage "total war" we should do the same. He was afraid of all Germans (R58-59).

Major Root was recalled and asked, at the conclusion of a long hypothetical question embodying all the evidence about accused, whether a man who did what accused was charged with would be more emotionally unstable than a normal man. He replied that the person described would be less likely to exercise "good judgement" than a so-called normal man but that there was no reason to conclude, on the basis of the facts posited, that the man was insane. An extended examination of the witness failed to elicit anything more than that the individual described would be more emotionally unstable than the "normal" person and that the pattern of his behavior through life was "slightly exaggerated". Both the man described in the hypothetical question and accused knew the difference between right and wrong and could adhere to the right (R60-67).

5. Accused was charged with murder and convicted, somewhat incomprehensibly, of manslaughter. Since the court's action was more favorable to

accused than that which it could have taken, he, in the circumstances revealed by the record, has no just complaint (CM ETO 3362, Shackleford; CM ETO 17141, Hanegan).

No extended discussion of legal principles not of their application to the evidence in this case is necessary. The four homicides were deliberate and entirely unprovoked. Beyond the evidence as to accused's mental condition, the defense made no effort to palliate or excuse his conduct.

As to the issue of mental responsibility raised by the defense, we assume in accused's favor that the evidence was sufficient to rebut the presumption of sanity and cast upon the prosecution the burden of producing affirmative evidence thereof (CM ETO 13376, Aasen). That burden was fully met by the testimony of the psychiatrist who examined accused that he was sane at the time of the offenses. The fact that accused was emotionally unstable or that his patterns of behavior were exaggerated cannot avail him. Mental defects or deficiency falling short of legal insanity are not a defense (Holloway v United States, (App. DC, 1945) 148 F (2d) 665; CM ETO 6685, Burton; CM ETO 9877, Balfour; CM ETO 18165, Lucero). The record is legally sufficient to sustain the findings of guilty and the sentence (CM ETO 3362, Shackleford; CM ETO 17141, Hanegan).

6. The charge sheet shows that accused is 24 years nine months of age and was commissioned a second Lieutenant 3 April 1943. He had prior enlisted service in the National Guard from 3 February 1939 to 15 October 1940, and in the Army of the United States from 16 October 1940 to 2 April 1943.

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. Dismissal, total forfeitures and confinement at hard labor are authorized punishments of an officer for violation of the 93rd Article of War. Confinement in a penitentiary is authorized upon conviction of manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec II, pars. 1b (4), 3b).

Edward L. Stevens, Jr. Judge Advocate

B. L. Evans, Jr. Judge Advocate

DETACHED SERVICE Judge Advocate

(6)

1st Ind

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

I. In the case of Second Lieutenant ROBERT A. SCHNEEWEIS, (O-1017469), Company B, 36th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18436. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 18436).

OUT 15 DEC 1945 BOTJAG-ET

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

(Sentence ordered executed. GCMO 636, USFET, 26 Dec 1945).

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

BOARD OF REVIEW NO. 1

16 DEC 1945

CM ETO 18443

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Captain WILLIAM P. OLSON (0486694), Company C, 716th Railway Operating Battalion	)	Trial by GCM, convened at Paris, France, 23, 24, 26, 27 February 1945. Sentence (suspended): Dismissal, total forfeitures and confinement at hard labor for one year.

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

---

1. The record of trial in the case of the officer named above has been examined 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 specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

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

Specification 3: In that Captain William P. Olson, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 5 November 1944, wrongfully receive and convert to his own use thirty (30) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing

to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 4: (Finding of guilty disapproved by confirming authority).

Specification 5: (Finding of guilty disapproved by confirming authority).

He pleaded not guilty, and was found not guilty of Specification 1 of the Charge and guilty of the remaining specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 10 years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of Specifications 2, 4 and 5, confirmed the sentence, but, owing to special circumstances in the case, reduced the period of confinement to one year and suspended the execution of the sentence as thus modified. The proceedings were published in General Court-Martial Orders Number 579, Headquarters United States Forces, European Theater, 13 November 1945.

3. We are concerned only with Specification 3 of the Charge, of which alone accused stands convicted. This specification alleges that he wrongfully received and converted to his own use 30 packages of cigarettes, property of the United States intended for use in the military service thereof, thereby contributing to a shortage of cigarettes during a critical period of combat operations (Cf: CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al; CM ETO 12203, Bruce et al; CM ETO 13143, Frew; CM ETO 13155, Busby et al; CM ETO 13403, Challoner et al; CM ETO 18408, Loop; CM ETO 18418, Springer).

Accused in an extra-judicial statement admitted that he received three cartons of cigarettes from an enlisted man of his organization (R52; Pros.Ex.1). He made a similar admission at the trial although he denied that he knew the cigarettes were stolen (R134-135). There is no evidence to establish that the cigarettes he received were ever at any time the property of the United States. There is evidence that accused, who was a company commander and trainmaster in the 716th Railway Operating Battalion, knew in a general way that government supplies were being pilfered by his train crews and that prior to the receipt of the cigarettes a report was made to higher headquarters that certain enlisted men were transmitting abnormally large sums of money home (R101 , Def.Ex.A; R143). Even assuming, however, that he knew of the contents of this report before he received the cigarettes and therefore was

chargeable with knowledge that the donor of these cigarettes was one of the men whose names were listed therein, that still fails to establish that the particular cigarettes involved were property of the United States. It proves merely that he received cigarettes from someone who to his knowledge may have been engaged in illicit activities.

It has been suggested that he had a duty to inquire as to the source of this gift. Possibly, as an officer, he did have such a duty, but his failure to perform it is neither proof that the cigarettes were United States Government property, nor an adequate substitute therefor. As in a specification charging larceny or misappropriation under Article of War 94, so here,

> "proof of ownership of the property in the United States is one of the vital elements of the offense and failure of proof of the same is fatal to the prosecution's case" (CM ETO 6232, Lynch et al).

The record is legally insufficient to sustain the findings of guilty of this specification.

4. The charge sheet shows that accused is 47 years five months of age and that he entered on active duty on 29 October 1943. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and the offenses. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence as confirmed.

Edward L. Stevens, Jr. Judge Advocate

[illegible] Judge Advocate

(DETACHED SERVICE) Judge Advocate

(10)

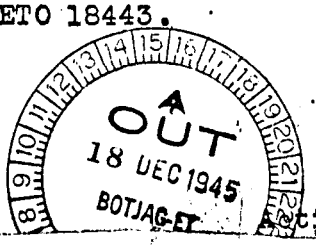
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater, APO 887, U.S. Army. 18 DEC 1945
TO: The Judge Advocate General (for action by the Secretary of War), Washington, DC.

1. Herewith transmitted for action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial and the opinion of the Board of Review in the case of Captain WILLIAM P. OLSON (0486694), Company C, 716th Railway Operating Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty as approved and the sentence as confirmed 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. Inasmuch as the predecessor in command of the Commanding General of this Theater heretofore confirmed the sentence the Secretary of War is the proper authority to take further action in this case.

3. The file number of the record of trial in this office is CM ETO 18443.



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

(Findings of guilty of Specifications 2,4, and 5 of Charge disapproved. Sentence confirmed but confinement reduced to one year, and sentence as thus modified suspended. GCMO 579, USFET, 13 Nov 1945).

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

BOARD OF REVIEW NO. 4 8 DEC 1945

CM ETO 18445

U N I T E D S T A T E S	82ND AIRBORNE DIVISION
v.	Trial by GCM, convened at Division Headquarters, 82nd Airborne Division, APO 469, 31 October 1945. Sentence: Fine of $200.
Second Lieutenant THOMAS V. PARKINSON (O-1177130), Battery A, 456th Parachute Field Artillery Battalion	

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

---

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of guilty disapproved by Reviewing Authority).

Specification 2: In that Second Lieutenant Thomas V. Parkinson, Battery A, 456th Parachute Field Artillery Battalion did, at Berlin, Germany, on or about 1 September 1945, wrongfully drink intoxicating liquor with two enlisted men of his command in his quarters.

Specification 3: (Finding of not guilty).

18445

(12)

he pleaded guilty to all specifications and the Charge, and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 3, and guilty of the remaining specifications and the Charge. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to pay to the United States Government a fine of four hundred dollars ($400). The reviewing authority disapproved the finding of guilty of Specification 1, approved the sentence but remitted two hundred dollars ($200) of the fine, and ordered the sentence, as thus modified, to be duly executed. The proceedings were published in General Court-Martial Orders Number 129, Headquarters 82nd Airborne Division, APO 469, U. S. Army, 13 November 1945.

3. Accused, a second lieutenant, stands convicted only of Specification 2, which alleges that he wrongfully drank intoxicating liquor with enlisted men in his quarters. Two privates testified that accused gave them drinks of cognac in his quarters (R7,9). One of them was asked if accused had anything to drink, and replied "Yes, sir, I think he did, sir, I am not sure" (R7). There is no other testimony as to accused's drinking at this time.

Accused pleaded guilty to the Charge and to all three specifications (R5-6). At the end of the prosecution's case, the defense made a motion for a finding of not guilty of the specifications and Charge on the ground that the prosecution had failed to prove the elements of the offenses (R10). The court overruled this motion (R11), no evidence was offered by the defense (R11), and t e court found accused guilty of Specifications 1 and 2, but not guilty of Specification 3 (R13). The Staff Judge Advocate recommended disapproval of the finding of guilty of Specification 1 on the ground that it was not shown that the woman proved to have been transported in a government vehicle was not a person authorized to be so transported. This recommendation was followed by the reviewing authority.

4. Although accused pleaded guilty to the only specification of which he remains convicted, his motion for findings of not guilty as to the Charge and all specifications manifestly constitutes "a statement to the court, in his testimony or otherwise, inconsistent with the plea", within the meaning of Paragraph 70, Manual for Courts-Martial, 1928. Where such inconsistency arises, it is incumbent upon the court to explain the accused's right to change his plea, and if, after such explanation, the inconsistent statement is not voluntarily withdrawn, to proceed to trial and judgment as if he had pleaded not guilty (AW 21; MCM, 1928, par. 70, p. 54). Here, the court neglected to make an appropriate explanation and formally to remove the variance between the statement and the plea. This is an error, but one which, in and of itself, does not invalidate the proceedings

where the court in fact proceeds to conduct the trial throughout as if on a plea of not guilty (CM 193543, Kazmaier, 2 B.R. 65, 88 (1930)). That the court did so in this instance is evidenced by its finding of not guilty with respect to Specification 3, as to which the same inconsistency between plea and motion existed. The reviewing authority quite properly took the same view and on the basis thereof disapproved the finding of guilty of Specification 1. Under these circumstances, the Board of Review may likewise regard the case as having been tried on a plea of not guilty in determining the propriety of the finding of guilty of the remaining Specification and the Charge (CM 224765, Butler, 14 B.R. 179,181 (1942); CM ETO 2779, Stanley and Shepherd).

5. It becomes necessary, therefore, to consider the sufficiency of the evidence according to the usual standards applied by the Board of Review and without giving effect to the plea of guilty as a means of curing deficiencies of proof (See CM ETO 839, Nelson). On this basis, it is apparent that there is no substantial evidence to support the findings of guilty. Accused was convicted of the military offense of wrongfully drinking intoxicating liquor in his quarters with two enlisted men of his command. Discussion of the evidence upon which the conviction was reached is simplified by the fact that there is only one sentence of testimony relative to the most vital factual element of the offense charged, that is, whether accused actually drank with the men shown to have been with him in his quarters on the occasion complained of. When asked whether accused had anything to drink, one of the enlisted men testified "Yes,sir, I think he did, sir, I am not sure". While this may have been sufficient to raise a strong suspicion of guilt in the court's mind, mere suspicion does not constitute the substantial evidence required to sustain findings of guilty (CM 233683, Filipow, 35 B.R. 65 (1944)). Clearly, nothing more than suspicion can be raised by the testimony of a witness who himself confesses uncertainty and a lack of knowledge as to the matters on which he testifies. Since the testimony in question constitutes the sum total of the evidence on the point, it follows that the record of trial fails legally to support the findings of guilty.

6. The charge sheet shows that accused is 27 years of age and that he enlisted 7 April 1941 at Detroit, Michigan. He had no prior service.

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

[redacted], Judge Advocate

[redacted], Judge Advocate

[redacted], Judge Advocate

18455

(14)

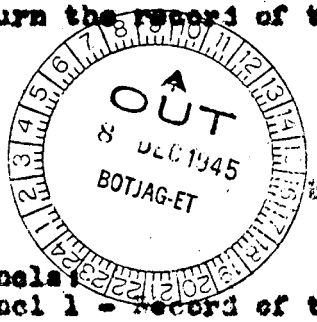
1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Second Lieutenant THOMAS V. PARRISON (O-1177130), Battery A, 456th Parachute Field Artillery Battalion.

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

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



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

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

(Findings and sentence vacated.GCMO 658, USFET, 21 DEC 1945).

18445

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

BOARD OF REVIEW NO. 1

15 DEC 1945

CM ETO 18456

U N I T E D S T A T E S	101ST AIRBORNE DIVISION
v.	Trial by GCM, convened at Auxerre, France, 18 September 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.
Technician Fifth Grade WILSON T. AIREY, JR. (39572727), Headquarters Company, 101st Airborne Division	

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Technician Fifth Grade Wilson T. Airey, Jr., Headquarters 101st Airborne Division, did, at Berchtesgaden, Germany, on or about 4 July, feloniously take, steal, and carry away one pair binoculars No. 586070, value about $75.00, property of Major Leo H. Schweiter, Headquarters 101st Airborne Division.

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

Specification: In that * * *, did, at Lend, Austria, on or about 24 July 1945, deposit in the Army Post Office for transmission through the United States mail two Luger pistols number 4840 and 2759 respectively, three German knives, and two boxes of 7.65 ammunition, in violation of Section I, Circular Number 80, Headquarters European Theater of Operations, 11 June 1945.

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

Specification: In that * * *, did, at Lend, Austria, on or about 24 July 1945, feloniously take, steal, and carry away one jump jacket value about $7.65, one trench knife US M1 with scabbard M8 value about $2.40, of a total value of $10.05, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to all specifications and charges, and was found not guilty of Specification 1 of Charge I and guilty of all other specifications and all charges. Evidence was introduced of one previous conviction by summary court for absence without leave for five and one-half hours in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 151, Headquarters 101st Airborne Division, Auxerre, France, 1 November 1945.

3. While there are many errors in this record which might warrant the reversal in whole or part of this conviction, we deal only with the fundamental one which concerns all the specifications and all the items listed therein. There is no direct evidence that accused stole the property as alleged or that he mailed guns, knives and ammunition as alleged. There is no direct evidence that he was in possession of recently stolen property so as to raise a presumption that he stole it (MCM, 1928, par. 112a, p. 110). The prosecution's case rests wholly on the fact that two parcels (R10; Pros. Exs. A,B), containing the items alleged to have been stolen, were found in an Army post office, addressed substantially as follows:

Mrs. Mollie G. Airey,
31 Sanhican Dr.,
Trenton "8",
New Jersey,

and containing in one or more places a return address, substantially as follows:

From:
Cpl. W. T. Airey
ASN 39572727
Hqs. 101st Abn. Div.
APO 472 c/o P.M.
New York, New York.

We assume that both these packages were deposited in an Army Post Office for mailing. There is, however, no evidence that accused posted them. There is no evidence that he printed the legend found on them. There is no evidence that the handwriting was, or was similar to, his handwriting. There is no evidence that he was related to the addressee or that his home is in New Jersey. Accused's name, - with the exception of the fact that in the record he is described as a junior - his serial number, and his organization are the same as those appearing on the two parcels but the fundamental difficulty is that there is no showing who placed the names on the parcels. With a complete lack of evidence on that point the introduction into evidence of these parcels for the purpose of showing by the return address that they were in accused's possession was improper. Introduced for this purpose they were nothing more than hearsay, until such time as the prosecution could show accused wrote, or caused to be written, the return address. In this connection, they stand no differently than the statement of a third person, not present in court, that accused was the owner or in possession of the parcels. Since this is so, the rule that identity of name raises a presumption of identity of person (MCM, 1928, par. 112a, p. 110) cannot avail the prosecution until it proves accused wrote the name. Nor is the prosecution aided by the fact that the surname of the addressee was similar to the surname of accused. As we have pointed out, the evidence fails to establish any connection between accused and the addressee, and there is no rule of law that raises a presumption of relationship from similarity of surnames.

We may have strong suspicions that accused is guilty-a fact that doubtless moved the reviewing authority to override the advice of his Staff Judge Advocate and to approve the sentence and order it executed, but convictions under our law must rest on something more than suspicion. The rules of evidence were not established to make conviction of the guilty difficult but to protect the innocent, and it takes but little imagination to realize how simple it would be for the malicious to accomplish the conviction of an innocent man if we were to hold that evidence such as that relating to these parcels would warrant a finding of guilty. The record is legally insufficient to sustain the findings of

guilty and the sentence (CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 13090, Brynjolfsson; CM ETO 13416, Wells).

4. The charge sheet shows that accused is 21 years three months of age and was inducted 27 April 1943 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. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

Edward L. Stevens, Jr., Judge Advocate.

B K Gewey Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

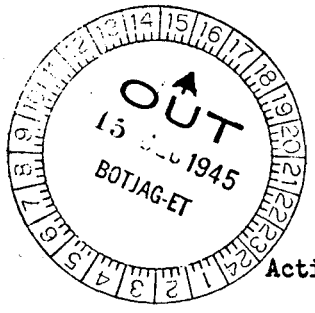
1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522) is the record of trial in the case of Technician Fifth Grade WILSON T. AIREY, JR. (39572727), Headquarters Company, 101st Airborne 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.



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

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

(Findings and sentence vacated. GCMO 9, USFET, 7 Jan 1946).

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

BOARD OF REVIEW NO. 4 17 JAN 1946

CM ETO 18476

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at Bamberg, Germany, 16 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class JOSEPH J. CARBONE (35606498), Company C, 22nd Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Joseph J. Carbone, Company "C" 22nd Infantry, did in the vicinity of Krinkelt, Belgium, on or about 13 October 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Maintaining a thinly held defensive position against the enemy on the Siegfried line, and did remain absent in desertion until he surrendered himself at Charleroi, Belgium on or about 1 February 1945.

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

All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General , 4th Infantry Division, approved only so much of the findings of guilty as involves findings that the accused did, at Heppenbach, Belgium, on or about 13 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit, maintaining a thinly held defensive line against the enemy on the Siegfried Line, and did remain absent in desertion until he surrendered himself at Charleroi, Belgium, on or about 1 February 1945, in violation of the 58th Article of War, approved the sentence, but recommended that if confirmed, it be commuted to dishonorable discharge, forfeitures of all pay and allowances due or to become due. and confined at hard labor for 25 years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority for clemency, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confined at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 10 October 1944, accused, a rifleman, was present with his company, which was in reserve in a defensive position from 1000 to 1800 yards from the Siegfried Line, in the vicinity of Underbreth, ermany, or Murrigen, Belgium (R5, 9, 12). Each day the company was recieving artillery, mortar and small arms fire, suffering casualities, and maintaining contact with the ememy by sending out patrols which were obtaining information in preperation for an attack (R9, 12). The company remainedd "dug in" in the same general vicinity from 5 October until about 20 October 1844, or later (R 8, 9-10).

On 10 October accused's company commander gave his permission to go to the aid station (a10). Although men who returned from the aid station were to report to the first sergeant and company commander for assignment, accused did not report back and did not return to the company prior to 18 Novemebr 1944, when the company commander left the company. He had no permission to be absent other than to go to the aid station (R10).

An exact copy of the morning report of accused's company for 5 November 1944, recieved in evidence without objection, shows him "yDy to AWOL 13 October 44 1300" (R5, Pros. Ex. A). Accused's company clerk testified that on 10 October accused was evacuated to the " medics" and that he never returned to duty. During that period of time, witness and the first sergeant preparted work sheets at thecompany command post from information brought back by runners who were sent out daily,

and the original morning report was made up from such work sheets in the regimental personnel unit located about 50 to 60 miles to the rear of the company. On 5 November, a discrepancy of one man appeared between the number of men shown present for duty on the work sheet abd on the morning report. A " check" was made for accused in the company area on 5 November, and witness took to the personnel office a roster of the men present for duty in the company, and found that the roster in the personnel office showed accused present for duty, whereas wittnes' roster showed him as not present for duty. The personnel office then " picked him up as going to duty from the A and D sheet from the Medics and from duty to AWOL" as of 13 October 1944 (R6-8).

Major Kenneth M. Alford testified as commanding officer of a clearing company located at Heppenbach, Belgium, during October 1944, he recieved casualties and patients and was responsible for all records. Without objection, he read an entry for 10 October 1944 from War Department Form 3244A, the Admission and Disposition Sheets " of his company, showing accused's admission on that date for a slight condition of disease diagnosed as " Possible Urinary Infection", and also: "Disposition Remaining." He also read another entry relating to accused for 13 October 1944, showing his admission on 10 October for a slight condition od disease, and: "Disposition; Duty. Diagnosis: Cystitis" (R13-14). Witness also testified that as a part of the srandard operating procedure of the clearing station, an officer visited all casualties of accused's type each morning and made notations on the emergency medical tag and clearing station report when heh felt a man should be evacuated to the rear or returned to duty. If a man was returned to dutyhe was taken to the evacuation tent where an ambulance returned him to a collecting station and then to his organization. During the particular period, difficulty was encountered in returning men to duty because they often attended movies at another clearing station and missed the regular ambulance and had to be returned by special ambulance. Witness did not recall telling accused to return to duty, but he was " supposed to return" and " he probably was told by one of the officers that he was to return to duty." If he had been evacuated to the rear, such disposition would appear on witness' record. a chech of his record failed to reveal any such disposition as to accused (14-15).

A member of accused'S platoon testified that on 13 or 14 October 1944 he saw accused in a collecting station, at which time accused " was going back further to a hospital" (R12-13).

It was stipulated that on or about 1 February 1945, accused surrendered himself to milutary authority at Charleroi, Belgium (R15).

4. After his rights were explained to him, accused elected to remain silent, and no evidence was offered in his behalf (R15-16).

5. Competent testimony and the stipulation as to surrender of

accused establishes his absence from his organization from 13 Octocer 1944 to 1 February 1945 as alleged . The only serious question presented for determination is whether the evidence sufficiently shows that accused absented himself from his organization without leave on or about 13 October 1944, as alleged. Such proof is esential to establish his guilt of the offense alleged (CM ETO 6951, Rogers; CM ETO8700, Straub). The testimony of his company commander shows that accused originally left his organozation on 10 October with permission to seek medical aid. The testimony of his company clerk shows that, the entry on the morning report showing absence without leave of accused on 13 October was based in part on information acquired by the personnel office from the A and D sheets from the "Medics" 23 days afterthe alleged absence without leave is alleged to have occured. Such entry obviously was not bas ed on personel knowledge of the personmaking it, constituted hearsay, and is not evidence of absence without leave, whether its admission in evidence was objected to or not (CM ETO 5633, Gibson; CM ETO 15719, KENNEDY; I Bull JAG 212-213; Dig. Op. JAG, 1912-40, sec. 395(18), pp 213-214). However, thettestimony of Major Alford, commanding officer of the clearing company through which the accused was processed, shows that on 13 October 1944, accused was officially marked for return to duty, and that under the standard operating procedure of the company accused was prbbably advised that he was to return to duty and that, according to his records, accusedwas not evacuated to the rear. From this uncontradicted evidence, and the established fact of accused's subsequent absence from his organization and surrender to military control, the court was clearly authorized to infer that he actually absented himself without leave on 13 October 1944 as alleged. From the evidence as to the location and activities of his company at the timehe left it to recieve medical aid, and for a number of days thereafter, the court was further authorized to infer that he was fully aware of the situation and that he absented himself at Heppenbach on 13 October with a then existing intent to avoid the hazardous duty alleged (CM ETO 4165, Fecica ; CM ETO4702, Petruso ; CM ETO 6842, Clifton; CM ETO 6637, Pittals).

6. The charge sheet shows that the accuged is 20 years eleven months of age and was inducted 20 March 1943 at Fort Hayes, 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 commited during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence is commuted.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial mat 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 (Dir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

LESTER A. DANIELSON, Judge Advocate.

JOHN R. ANDERSON, Judge Advocate.

JOHN A. BURNS, Judge Advocate.

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

BOARD OF REVIEW No. 2

15 DEC 1945

CM ETO 18528

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v	Trial by GCM convened at Augsburg, Germany, 2 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private EARNEST SHAKESPERE (34909778), 1752nd Engineer Dump Truck Company	

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

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

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

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

Specification 1: In that, Private Earnest Shakespere, 1752nd Engineer Dump Truck Company, then Technician Grade five Earnest Shakespere, 1752nd Engineer Dump Truck Company did, at Eigenzall, Germany, on or about 12 May 1945, unlawfully enter the dwelling of Martin Merz, with intent to commit a criminal offense, to wit, rape, therein.

Specification 2: In that * * * did, at Eigenzall, Germany, on or about 12 May 1945, with intent to commit a felony viz, rape, commit an assault upon Fraulein Marianne Spang.

Specification 3: In that * * * did, at Eigenzall, Germany, on or about 12 May 1945, with intent to commit a felony, viz, murder, commit an assault upon Fraulein Marianne Spang, by willfully and feloniously shooting at her with a carbine.

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

Specification: In that * * * did, at Eigenzall, Germany, on or about 12 May 1945, forcibly and feloniously against her will, have carnal knowledge of Frau Rosa Magg.

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

3. On 12 May 1945 the accused and one Private Dennis J. Williams, both of the 1752nd Engineer Dump Truck Company (R43), were engaged in hauling water in a vehicle driven by Private Williams (R43). At approximately 2200 hours on that date they were in the village of Eigenzall, Germany, accompained by a soldier identified only as a "British Indian" (R43,44). The accused and the Indian procured two bottles of schnapps from a civilian home, one bottle of which they later took to their station (R44,58,59). The accused, who previously had not had anything to drink that day, drank "some" of the schnapps, and Private Williams drank "two swallows" (R44,55,56).

On 12 May 1945 one Herr Martin Merz resided in Eigenzall, Germany. His wife and daughter Ottilie lived with him on the ground floor, and one Frau Rosa Magg and her young daughter lived on the second floor (R7). On that date one Fraulein Marianne Spang, who is 24 years old, (R39) was staying with Frau Magg (R19).

Around 0100 hours on 13 May 1945 the accused stayed at the truck while Private Williams and the Indian went to call on a "fraulein" (R44). Private Williams and the Indian, who could speak German (R8), went to the home of Herr Merz and began pounding on the door and shouting "open up; search of the house" (R7,20,44). Fraulein Ottilie Merz opened the door and the two soldiers entered carrying carbines (R8,19,20,40,41,45). The Indian asked for "schnapps" and was told "we have none" (R39). The two then searched the entire house (R8,20,45), and finally terminated the search in the living room upstairs with Frau Rosa Magg and Fraulein Marianne Spang (R9,20,45). Private Williams sat on a stool with his head resting on a table, and his rifle across his knees, but did not sleep (R45,46). The Indian sat on a sofa and compelled the two ladies to sit next to him (R9,20,45). He tried to kiss them but they resisted his advances (R20,21)

The Indian finally agreed to leave if the two ladies would give him a kiss, and Frau Rosa Magg finally kissed him but "only in order to get rid of him" (R10,20,21,46,67). The Indian suggested that Private Williams have something to do with the women, but Williams replied, "No, no" (R11,21,45,46). The Indian and Williams then left and Frau Merz locked the door behind them (R11, 21,45,46). The time was then "either shortly before three o'clock or shortly after three o'clock". (R11).

All of the people at the Merz house then returned to bed, and the Indian and Private Williams returned to their truck, where the accused was waiting for them (R21,46). The Indian complained to accused that Private Williams "did not like women" (R46). Private Williams got in the truck and insisted on returning to camp, but the accused and the Indian, both of whom were standing outside the truck, stated they were not ready to go (R46). Private Williams started to drive off without them, but stopped the truck after accused had fired a shot at him (R47). Accused and the Indian then got in the truck and compelled Williams to drive them to the Martin Merz home, which the Indian and Williams had left only ten minutes previously (R12). When they stopped there the Indian removed the key from the ignition (R47), and he and accused pointed their rifles at Private Williams and compelled him to accompany them to the house (R47).

Accused pounded on the Merz door with the butt of his rifle while the Indian ran around to the side of the house to see "if the women would run out" (R47). While Herr Merz was unlocking the door Frau Rosa Magg and Fraulein Marianne Spang came downstairs and entered the Merz bedroom, and stood behind the stove (R12,21,41,32,48). The three soldiers entered the house and went to the bedroom. Accused and the Indian were both carrying carbines, but Williams was not armed (R13,22,48). The accused exclaimed "Ooh, la-la, come, come" upon seeing the women, and pointed upstairs and said "You sleep upstairs" (R13, 22,23 33,48,49,66). The women said, "No", but after the third refusal the accused took out his knife and "pointed it at" Frau Rosa Magg (R13,22,66). Fraulein Spang and Frau Magg then grabbed Herr Merz by the arm and pulled him upstairs with them followed by the three soldiers (R13,14,22,49,64). Upon reaching the top of the stairs the Indian gave Herr Merz, who is either 73 or 76 years old (R14), a shove, and told him to go back downstairs (R14,23,49). Accused then threatened Fraulein Spang with his knife (R16). The women either ran into the bedroom (R49) or, with the assistance of the Indian, accusedpushed the two ladies into the bedroom (R14,15), followed by Williams. The accused motioned for Frau Magg to lie down upon the bed, but she acted as if she did not understand what he desired (R15,66). Frau Magg "implored the Indian, because he understood German, that he should let us go" (R16). The Indian replied "you do it and it will be all right; two minutes and it will be all right" (R16). The accused then either fell or "let himself fall" across the bed where Frau Magg's daughter was sleeping (R15,50,66). The child awoke and began to cry, and Frau Magg picked her up and attempted to carry her out of the room. One of the soldiers opened the door and she carried the baby into the living room.

followed by the Indian (R15,16,23,50). The Indian gave the child some candy, and directed Frau Magg to lay her down upon a table (R16). The accused and Private Williams had remained in the bedroom with Fraulein Spang, and they "dragged" her toward the bed. Accused directed her to "schlafen" but she replied she would not do it (R23,24). The fraulein called for the Indian to help her, and he returned to the bed room and said, "No marry" (R24). Thereupon accused left the bedroom and went into the living room (R24), where he "fell" upon the sofa and "ordered" Frau Magg to sit next to him (R17). When she did so accused "bent over her and pressed her down on the sofa" (R17). She pressed him away and resisted successfully for awhile (R18). She "screamed loudly for help" and called "help me" to Fraulein Spang (R16,24). Williams heard her plea and attempted to leave the bedroom, but the Indian prevented him from doing so (R51). Frau Magg was wearing only a slip and the top part of a pair of pajamas. Accused succeeded in raising Frau Magg's slip and inserting his penis into her vagina (R60). She "could feel his penis for a few minutes, and then became unconscious" (R60). Shortly thereafter Frau Magg regained consciousness when the Indian entered the room and turned the lights on. The accused was still lying on top of her engaged in intercourse, and a few seconds later she felt a "very heavy discharge" (R60,61). Accused then got up and returned to the bedroom where Fraulein Spang and Williams were sitting. Fraulein Spang testified that while accused and Frau Magg were in the living room she was in the bedroom and heard the Frau moaning and screaming (R24). When the accused returned to the bedroom he had beads of perspiration running down his face, his eyes were red, "foam" was coming out of his mouth and he was carrying his knife in his hand (R25,52). He stood in front of Fraulein Spang and said "Only two minutes and indicated through motions that she should stretch out on the bed. He also added "Fick-fick" (R25). She always said, "No" (R28). He told Williams that he "had something to do with the woman" in the other room (R52). He then started "messing" with Fraulein Spang and "threatening her with his knife" (R52). Williams asked him to leave her alone, but he did not pay any attention (R52). Accused pushed Fraulein Spang down on the bed two or three times, but she had enough strength to get up and push him away (R26, 27,33,34). Accused placed his open knife against her chest and again forced her on to the bed, but she again was successful in pushing him away (R25,27 33,34,52,53). Accused then picked up his rifle and went around to the other side of the bed. Fraulein Spang "felt uncomfortable because he stood behind my back", so she got up from the bed and walked over to a window some 4 or 5 feet away, where she stood with her hands clasped praying to Maria (R27,28,34,39). The accused stood confronting her about seven feet away, pointing his rifle, which he was holding parallel to the ground at waist level, in the direction of Fraulein Spang. Accused then said something to Fraulein Spang, and when she replied "No" he pointed the rifle at her, still holding it at waist level, and fired (R27, 28,34,53,57). The bullet, went through the window about two inches above Fraulein Spang's left shoulder (R28,29,35). She determined this distance by later assuming the position she was in at the time the shot was fired and from the hole in the window (R35). As a result of the shot she was

deafened for several minutes (R29). At the time the shot was fired Williams was sitting on the bed with his rifle on his lap, but the shot came from accused's gun (R28,37,53,56,68).

In the meantime the Indian who had beenin the living room with Frau Magg, had "dragged" Frau Rosa Magg over his lap and had intercourse with her although she "wept bitterly" and with "folded hands" pleaded for him to let her go. She could not resist further as she was too exhausted (R62). When the shot was fired the Indian got up immediately and ran into the bedroom, followed by Frau Magg (R62). The Indian remarked to accused "Come on, it's five o'clock" (R29,54,63). Accused looked at his pocket watch, and the three soldiers then departed. Shortly after the soldiers left Frau Magg reported to Fraulein Ottilie Merz that one of the negroes had raped her (R41), and two days later she reported the offense to the proper authorities (R30).

Fraulein Spang testified accused was in a "drunken condition". She stated, however, that she had never seen a drunken man and that she assumed accused was drunk because he smelled strongly of schnapps. He was unsteady on his feet and "perhaps" so drunk that he did not have much strength, but was able to walk into the living room and upstairs without help (R33,34,38,39). Frau Rosa Magg testified accused was drunk (R64) but not "dead drunk" and that "apparently he must have known what he was doing" (R65). Private Williams testified that accused "wasn't too drunk", although he was"pretty high" (R55, 56). All of the witnesses testified that accused was able to walk without assistance (R38,59,65).

4. The accused after a proper explanation of his rights as a witness, elected to remain silent (R69). Defense counsel, however, made the following statement: "Regardless of the finding of the court, whether it is innocent or guilty, the accused wishes to express his wish to go into combat in the Pacific" (R69).

5. The accused has been convicted of (1) Housebreaking; (2) Assault with intent to rape; (3) Assault with intent to murder; and (4) Rape. Each offense will be discussed separately.

(1). Housebreaking. (Specification 1 of Charge 1). Housebreaking is defined as unlawfully entering another's building with intent to commit a criminal offense therein (MCM, 1928, sec. 149e, p. 169). The evidence clearly established that the accused by threats of force and violence entered the home of Martin Merz at the time and place alleged in the Specification and almost immediately thereafter committed the crimes hereinafter discussed including that of rape. The entry was unlawful and the intent to commit rape, as alleged, was properly and legally inferred by the court from the fact that he did commit rape shortly after his entry. This conclusion is also supported by the fact that the subject of women was discussed immediately before the entry. The evidence showed no other purpose for entering the house at that time of the night

but to have sexual intercourse (CM ETO 78, Watts; 1BR (ETO) 45; CM ETO 3679, Roehrborn; CM ETO 13255 Gonzales; CM ETO 15090, Duval et al CM ETO 16340, Damaso).

(2). Assault with intent to rape. (Specification 2 of Charge I).

An assault with intent to rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. The intent to ravish must exist and concur with the assault. It must appear that accused intended to overcome any resistence by force and penetrate the woman's person. It is no defense that he subsequently desisted (MCM, 1928. par. 149l, p. 179). The evidence adduced established a clear case of assault with intent to rape Fraulein Marianne Spang at the time and place alleged in the Specification. The accused, entered the building with intent to have intercourse. His next unlawful act was to rape Frau Magg. Almost immediately thereafter he advanced upon Fraulein Spang and made it clear by word and action that he demanded to have intercourse with her and would inflict death or great bodily harm upon her if she resisted. He committed andassault upon her when he pushed her down upon the bed two or three times, when he pointed his gun at her, and when he brandished his knife in a threatening manner. His intentions were clear. His purpose was to obtain intercourse. The findings of guilty of this offense is clearly supported by substantial evidence (CM ETO 78, Watts, supra; CM ETO 4386, Green et al; CM ETO 10728, Keenan; CM ETO 10445, Keffer).

(3). Assault with intent to murder. (Specification 3 of Charge I). This offense is defined as an assault aggravated by the concurrence of a specific intent to murder. It is tantamount to an attempt to murder (MCM, 1928. par. 149l, p. 178). The evidence clearly establishes that the accused committed and assault on Fraulein Marianne Spang at the time and place alleged in the Specification by shooting at her with his carbine. In view of the nature of the weapon used, the direction in which the accused pointed the weapon, the proximity of the fired bullet to a vital part of the woman's body, and the other surrounding circumstances, the court properly and legally inferred the intent to kill. The requisite element of malice may be inferred from the accused's threats to inflict death or great bodily harm upon the woman in his effort to force her to accede to his demands of sexual intercourse. When she continually refused and repulsed his physical efforts toward that end he showed, by firing his carbine at her, that he intended to put into effect his implied threat to kill. The courts' findings of guilty of this Specification is supported by substantial testimony (CM ETO 78 Watts, supra; CM ETO 2899, Reeves; CM ETO 16887 Chaddock; CM ETO 18200, Davis and cases cited therein).

(4). Rape. (Charge II and its Specification). Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p. 165). The uncontradicted evidence clearly shows that the accused did

at the time and place in the Specification engage in sexual intercourse with Frau Rosa Magg, by effecting penetration of her genitals after forcing her to recline and threatening her with death or great bodily harm by means of a carbine and knife if she resisted. While the inference may be drawn that a woman who fails to take such measures to frustrate the execution of a man's design as she is able to under the circumstances did in fact consent to intercourse, nevertheless if her failure to resist is induced by fear of death or great bodily harm, it is not necessary to prove resistence in order to establish the commission of the crime of rape. The evidence clearly showed that the sexual intercourse that occurred between the accused and his victim was without her consent and that her failure to resist to a greater extent was due to her fear of death or great bodily harm induced by the accused's implied threats with brandished knife and gun. All of the elements of the crime are sustained by competent substantial evidence and the findings of guilty will not be disturbed (CM ETO 3933, Fergerson et al; CM ETO 5584, Yancy; CM ETO 10742, Boyd; CM ETO 13897, Cuffee).

5. The evidence also showed that the accused had been drinking prior to the occurrences discussed above and was drunk at the time. Voluntary drunkenness is no excuse for crime committed while in that condition, but may be considered as affecting mental capacity to entertain a specific intent (MCM, 1928. par. 126a, p. 136). Accused's possible drunkenness to the extent that it affected his mental capacity to entertain the specific intent involved in each of the offenses is refuted by the testimony of the witnesses that (1) he was able to force Williams to take him into the house where the women were, (2) to "bang" on the door and demand admittance, (3) to walk in and comment on the prospects when he observed the two women in scant clothing, (4) to walk upstairs, and make known his desires to both women, (5) to rape one, (6) to attempt to rape the other, and (7) finally to fire his gun at the one who refused to comply with his demands. Under such circumstances the question whether he was too drunk to consciously entertain and execute the specific intents involved in the offenses was one of fact for the court's determination. The record reveals substantial evidence to support the court's findings. (CM ETO 9611, Prairiechief; CM ETO 10780, Olsen; CM ETO 14745 Rowell; CM ETO 15862, McDaniel; CM ETO 16887, Chaddock).

6. The Charge sheet shows that the accused is 25 years of age and, without prior service, was inducted at Fort Benning, Georgia, 28 December 1943.

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

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

(ON LEAVE) Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

(35)

1st Ind.

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

1. In the case of Private EARNEST SHAKESPEARE (34909778), 1752nd Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18528. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18528).

OUT 17 DEC 1945 BOTJAG-ET

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

(Sentence as commuted ordered executed. GCMO 10, USFET, 12 Jan 1946).

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

BOARD OF REVIEW No. 5

29 DEC 1945

CM ETO 18531

UNITED STATES	)	3RD INFANTRY DIVISION
v.	)	
Private First Class EDWARD R. BLACKBURN (44031338), Company A, 7th Infantry.	)	Trial by GCM, convened at Reinhardshausen, Germany, 24 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 5
HILL, VOLLERTSEN 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 92nd Article of War.

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Private First Class Edward R. Blackburn, Company "A", Seventh Infantry, did, near Phillipsthal, Germany, on or about 5 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Arnold Lenzenhofer, a human being, by shooting him inthe back with a rifle and in the chest with a pistol.

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

Specification: In that * * * did, near Phillipsthal, Germany, on or about 5 September 1945, desecrate the dead body of Elfriede Jahnig by having sexual intercourse with the dead body of the said Elfriede Jahnig.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 1 and 2 of Charge I, guilty of Specification 3 of Charge I and guilty of Charge I, and guilty of the Specification of Charge II and of Charge II. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution in pertinent part shows that on 5 September 1945 the accused, Private First Class Roy E. Huffman, and Corporal Floyd D. Rhein, all of Company A, 7th Infantry (R6-7, Def. Ex. 6), were on guard duty from 0600 to 1200 hours at a bridge near Phillipstahl, Germany (R7,10). Accused was armed with an M-1 rifle (R96,116). It was the duty of the guards to stop all civilians and, if they had no pass, to send them back in the direction from which they had come (R11). Between 0900 and 1000 hours six persons approached the bridge (R7) from the direction of Phillipstahl (R10) beyond which was Russian occupied territory (R10). This group, which included two German soldiers in uniform and one girl (R116,117), was halted by accused (R7,9) and marched back toward Phillipstahl (R10,11,13) accompanied by accused (R7,10). Accused returned to his post an hour or more later (R8,13). During the absence of accused neither Huffman nor Rhein heard any shots fired (R8,11), Def. Ex. 6). Accused upon his return did not indicate by his actions or mention to Huffman that anything unusual had occurred (R8,11). A German civilian returning on the road from Harnrode to his home in Phillipstahl at approximately 2 o'clock in the afternoon of 5 September 1945 (R14,15) saw two German soldiers lying in the road (R15) one of whom requested help for his wounds (R15). After assuring the wounded soldier that he would return with help (R16) the civilian proceeded to his home, had his noon meal and returned with a nurse (R16) at approximately 4 o'clock (R17,24,112). As they neared the scene they heard a shot and an American soldier appeared (R16,18,21) whom the nurse subsequently identified as the accused (R18,22,82). He permitted the

nurse to bandage the wounded soldier (R19) and told her "that German soldiers came across the border and I told them to halt, and they didn't halt, so I shot them" (R20). The nurse bandaged the wounded soldier (R21) who had a "bullet stuck in" his left chest and a "bullet wound clear through" his right shoulder (R20). She noted the other soldier and believed him to be dead (R20,23) although she made no examination of his body at that time (R23,24). The accused left the scene and the nurse departed shortly thereafter and reported the matter to the police and burgomeister (R20). She returned to the scene with a German policeman and several officers (R23,25,26) at approximately 1700 hours (R31,112,113). The soldier who had not been bandaged was examined and found to be dead (R23,27,44). At this time the body of a woman was discovered in the woods three to six meters from the dead soldier (R24,27,28,34,44). This woman had been shot through the head and was lying on her back with her legs spread apart and her clothing cut away exposing her private parts (R24,28,44,48). There was a pool of blood about two feet from her head and it appeared that her body had been dragged away from the pool of blood (R45). A .32 caliber cartridge case was found near the body (R44). A pocketbook near her body contained identification booklet of "Elfriede Jahnig" to which was affixed a photograph of the deceased (R32,33). Identification booklet of "Friedrich Botsch" with photograph affixed was found near the body of the dead soldier (R29,33). Both booklets were received in evidence, without objection by defense, as Pros. Ex. "A" and "B" respectively (R33).

The wounded German soldier was taken by cart to a house in Hanrode between 1700 and 1730 hours (R31,111) where he was interviewed by an American officer (R44-46). It also appears that his wounds were examined by a Dr. Sommer (R36). At approximately 1930 hours he was removed in a German ambulance (R113) to a hospital in Herschfeld (R47), fifteen or twenty miles from Phillipstahl (R69). At 2200 hours (R114) on 5 September 1945 a wounded man by the name of Arnold Lenzenhofer, referred at the request of a Dr. Sommer (R52), was admitted to Kreis Hospital in Herschfeld (R50,51) suffering from a lung shot in the left chest "with the projectile still in, and a lung shot on the righthand side going clear through" (R52,56,58). The patient died in the hospital at 8:30 o'clock the following morning as a result of said wounds (R52,53,55).

A written statement made by accused to the Regimental Investigating Officer on 6 September 1945 was received in evidence, over objection of defense and after interrogation of investigating officer and accused (R60-78), as Pros. Ex. "C" (R78). In said statement the accused related the following:

> "I was on guard duty on Post No. 2, Co. A, 7th Inf, from 0600 to 1200, on 5 September 1945 with Pfc Huffman and Cpl Rhein. At about 0930 three civilian men and a woman came by the bridge where I was on duty and I

halted them. I took them back up the river, the way they had come from. On the way up the river two German soldiers came by and I halted them too and took all six of them on up the river. About 100 yards from the post I searched them and took a fountain pen from one of them. I asked them in German where they came from and they said from the Russian side. I told Corporal Rhein I was going to take them up on the hill and send them back to the Russians. You can see where the Russian border is from the top of the mountain and I took them up on top of the mountain and showed them where it was. Then I told then to go back there. They refused to go, but started in a different direction. Then I halted them but they didn't stop. Then I fired once in the air and they still didn't stop. Then I fired to kill. I hit the two that had the German uniforms on. One fell in the road and the other fell across the ditch. The rest of them went into the pine thicket and the girl was the only one I could see. I fired at her from the hip and she fell but still kept moving, trying to get away. Then I fired again from the hip and that shot went through her head. I went to see the two soldiers I had hit and it looked like they were dying fast. Then I went in the thicket to where the girl was. She was stone dead. I cut her clothes off and had sexual intercourse with her. Then I went back to my post. I told the other two guards on the post that I had killed the two German soldiers and the woman. I stayed on post after that till noon when we were relieved. That afternoon I gave the clothes I was wearing to the wash lady to be washed, then I took a nap until about 1600. Then I went back to where I had shot these 3 people to see if anything had been done to them or for them. I hadn't reported the incident to anybody else than the two men on post with me. I don't know why I didn't report the shooting. When I went back up there I found one of the soldiers was still alive but he was suffering very badly. The other one was dead. I always carry a pistol because I don't believe you can trust the people here. I shot the man who was still living with the pistol twice in the chest. Then a Red Cross nurse came down there and the nurse asked me if she could give the man first aid and I told her to go ahead

and give him first aid. The number of the pistol I used was a Walther No. 977699 what they call a .32. Then I told the nurse I was going back to my barracks and I went back. During that day I was not under the influence of liquor and knew what I was doing. The pistol I used was actually a 7.65 Walther but it's the one we call .32" (Pros. Ex. "C").

A map of the area was received in evidence, without objection by defense, as Pros. Ex. "D" (R90). The accused was not present at a bed check of his organization held at 2300 hours on 5 September 1945 (R82) but returned shortly after midnight (R92). At this time a search of his clothing revealed a .32 caliber pistol (R92) which was received in evidence, without objection by the defense, as Pros. Ex. "E" (R92). Photographs of the bodies of the deceased soldier and of the girl taken at the scene of the shooting on 6 August (apparently typographical error) R102,104,105) were received in evidence, without objection by defense, as Pros. Ex. "F", "G", "H", "I" and "J" (R104).

4. The defense introduced five statements of stipulated testimony from officers and men of accused's organization testifying as to his previous good conduct both in garrison and in combat, which statements were received in evidence without objection by prosecution, as Def. Ex. "1", "2", "3", "4" and "5" (R1-5-107). A statement of stipulated testimony of Corporal Rhein was received as Def. Ex. "6" to the effect that if present he would testify that on 5 September 1945 between 0600 and 1200 hours he was on sentry duty with accused and another soldier at the Rehrigschof bridge. That at approximately 0900 hours two German soldiers, two civilians and one girl were halted by accused who informed Corporal Rhein that he was going to escort them back to the Russian side; that accused was absent from the post about one hour and that during his absence witness did not hear any shooting. (Def. Ex. "6").

The accused after being advised of his rights as a witness (R108) elected to submit through counsel the following unsworn statement (109):

"I was born in Huntsville, Alabama, a very small rural community. I am now nineteen years old. I have been in the Army one year and one month. I have seen combat. I have eight sisters and two brothers and have no mother. I completed the seventh grade in a country school. I grew

up in a sparsely inhabited community. For the past eighteen years my life has been moulded and influenced by these quiet surroundings. I have always lead a very simple life. I met my own kind of people there, adjusted comfortably to an atmosphere and environment I could cope with. Here life was so lonely that I often heard voices and saw people that actually did not exist. Hallucinations and daydreams were my only conduct with the outside world. Suddenly I am torn away from this little world and inducted into the Army. I saw many new places and met many men from all parts of the United States. I learned soldiering and many other things new to me. This was a drastic, violent change for me. The newness of all this aroused my interest. I was too busy to stop and think and analyze the sudden changes. I was on the go all the time, training as a soldier, maneuvers, weapons and then moved suddenly overseas as a rifleman at a very tender age.

I saw new countries, had many doings and was kept very busy and didn't have time to have these changes bother me. In my teaching and training I have been taught to hate the Germans. I have seen them wage a terrible bloody and unrelenting war. I have seen many of my buddies die. I have never been able to get used to the sudden and drastic changes. It has been more than I could cope with. I have never been able to adjust myself to Army life because it was so different from anything I have ever experienced or seen at home. I have never been in any trouble before. My Class F allotment goes to the support of my father, and what I draw on payday I also send home for his support" (R109), (Underscoring supplied).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which caused the death will probably cause death or grievous bodily harm (MCM 1928, par.148a, pp.162-164). The law presumes malice when 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). The evidence in the present case, exclusive of the statements of the accused to the Regimental Investigating Officer, definitely established the corpus delicti for three homicides. Coupled with the statement of

accused it is the opinion of the Board of Review that sufficient evidence was presented to sustain the finding of guilty of Specification 3 of Charge I, since the evidence clearly established that this victim was not killed while allegedly attempting to escape at 1000 hours on 5 September 1945 but, although seriously wounded at that time, was in fact still alive at 1600 hours of that day at which time the accused returned to the scene of the original shooting, ascertained that he was still alive and thereupon deliberately shot him twice in the chest with a .32 caliber pistol. This certainly was not in the performance of his duties and was clearly a felonious and malicious act sufficient to sustain a charge of murder in the event of resultant death of the victim (CM ETO 8630, Williams; CM ETO 10714, Turner; CM ETO 16851, Moore). The subsequent death and identification of the deceased was poorly presented and somewhat involved but was sufficient to justify the finding of the court. The record establishes that the victim, whom accused admitted shooting twice in the chest, was bandaged at the scene of the shooting by a nurse who noted and described his two chest wounds including the fact that the bullet on his left side was still in his chest and that the bullet on his right side had passed through the body. It was then shown that the victim was removed by cart to a house in a nearby village where his wounds were examined by a Dr. Sommer and where he was interviewed by an American officer who witnessed his removal in a German ambulance at approximately 1930 hours. At 2200 hours on 5 September Arnold Lenzenhofer was admitted to a hospital in Herschfeld, approximately 20 miles from the scene of the shooting, at the request of a Dr. Sommer. At the time of his admission he was suffering from a lung shot in the left chest "with the projectile still in, and a lung shot on the right hand side going clear through", and it is further shown by competent medical tesimony that he died in the hospital at 0830 hours the following morning as a result of said wounds. It is the opinion of the Board of Review that the conbined coincidence of time, locality, nature of wounds, examination and reference by the same doctor fully justified the court in finding that deceased was one and the same person as the victim previously shot by accused.

6. With respect to the offense charged in the Specification of Charge II, it is the opinion of the Board of Review that the finding of guilty was sustained by the evidence. The position of the body and the condition of the clothing were sufficient evidence of the corpus delicti to permit consideration of the written statement of accused in which he expressly admitted having had sexual intercourse with the body of the girl after ascertaining that she was dead. Indecency in the treatment of a dead human body including wantonly or illegally disturbing it, is a recognized offense at common law as an insult to public decency (2 Wharton's Criminal Law (12th Ed., 1932), sec. 1704, p.1990). This act of accused, although not expressly

denounced by the Articles of War, obviously constituted conduct of a nature discreditable to the military service and was properly charged as an offense under Article of War 96.

7. The signed statement made by the accused to the Regimental Investigating officer on 6 September 1945 was admitted into evidence over the objection of the defense. The defense stressed the fact that no formal charges and specifications had been prepared at the time the statement was made. Since charges prepared prior to the statement could have been changed after the statement was made without the consent of accused, it is not believed that the absence of formal charges operated in any way to the prejudice of accused. (cf: CM ETO 106, Orbon, 1 BR(ETO)95; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock). The statement was admitted into evidence only after lengthy interrogogation which revealed that prior to making the statement the accused was advised of his rights under Article of War 24 and that he signed the same of his own accord. The voluntary character of the statement was a question of fact, and in view of the evidence presented the Board of Review is of the opinion that it was properly admitted (CM ETO 4701, Minnetto; CM ETO 15843, Dickerson).

8. There is some indication that accused indirectly attempted to raise the issue of insanity by way of defense in that a portion of his unsworn statement to the court was to the effect that prior to induction in the army he lived a very lonely life which included having hallucinations and hearing and seeing people who actually did not exist. An unsworn statement is not actual evidence and is entitled only to such consideration as the court deems warranted (MCM, 1928, par.76, p.61). The court accordingly was justified in replying on a presumption of the sanity of the accused until evidence the the contrary was introduced (CM ETO 739, Maxwell, 2 BR(ETO)251; CM ETO 13376, Aasen).

9. The charge sheet shows that accused is 19 years five months of age and that he was inducted 30 August 1944 at Ft. McClellan, Alabama. He had no prior service.

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

11. 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

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW No. 2

15 DEC 1945

CM ETO 18539

U N I T E D S T A T E S	ARMY AIR FORCES SERVICE COMMAND MEDITERRANEAN THEATER OF OPERATIONS
v.	
Major CLIFFORD W. LORD (O-885548), AC, 2618th Hq & Hq. Sq. (AF Ovhd) Mediterranean Air Transport Service	Trial by GCM, convened at Naples, Italy. 15-16 October 1945. Sentence: Dismissal and total forfeitures.

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, HALL and COLLINS, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Clifford W. Lord, Headquarters Mediterranean Air Transport Service, did, at Rome, Italy, on or about 5 January 1945, with intent to deceive a finance officer of the United States Army, officially state on a pay voucher presented to said finance officer that during the month of November, 1944, the accused's wife resided in New York City, which statement was known by the said accused to be untrue, in that during the said period the accused's wife resided with him in Rome, Italy.

Specification 2: In that * * *, did, at Rome, Italy, on or about 5 January 1945, with intent to deceive a finance officer of the United States Army, officially state on a pay voucher presented to said finance officer that during the month of December 1944, the accused's wife resided in New York City, which statement was know by the said accused to be untrue, in that during the said period the accused's wife resided with him in Rome, Italy.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Army Air Forces Service Command, Mediterranean 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, Mediterranean Theater of Operations, confirmed the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

It was stipulated that during November and December 1944 accused was (1) in the military service of the United States (R6), (2) stationed in Rome, Italy (R8), (3) legally married (R7), and (4) during that time his wife lived with him in Rome (R8). By deposition it was shown that on 3 January 1945 accused signed and presented for payment to the United States finance officer at Rome, Italy, two pay and allowance vouchers. One was for November 1944; the other for December 1944. On line (3) of each voucher, which contained a blank space for the insertion of the full name and address of the lawful wife of the claimant under the heading "Dependents", appeared the correct name in full of the accused's wife and "755 5th Ave, New York City" (R12,13,15, Pros. Ex. B and C). Over defense counsel's objection it was shown that accused was at that time paid in accordance with the vouchers (R10-11) and that the vouchers show that included in the payment for each of the two months was the sum of $105 as rental allowance (R13). Defense counsel objected to admitting in evidence the lower portion of the

vouchers below line (3), particularly line (10) under "Credits", which read in pertinent part, as follows:

> "(10) For rental allowance from 1 November (December)1944 to 30 November (December)1944 during which period I did not occupy with them (dependents) any public quarters assigned to me without charge at any station * * *, or receive monetary allowance in liue thereof. ____ $105.00"

The defense contended that the fact of payment and paragraph (10) of the vouchers had no bearing upon the issue (R15) and that the defense was not prepared to meet any issue except that of the "intent to deceive the finance officer by giving a wrong address" (R16-17). Notwithstanding the objection the evidence was admitted by ruling of the law member (R19). Defense counsel's motion for findings of not guilty was denied by the law member (R21).

4. In defense six witnesses testified that the accused lived openly with his wife during November and December 1944 at 74 Via Panama, Rome, Italy, and made no effort to conceal that fact (R24,27,29,32,35,39). It was shown that the accused obtained permission and was married in Rome on 3 October 1944 (R24,35). The marriage and a brief history of the bride was published in the local military publication (Def. Ex. 1, R42). His wife visited the accused at his office which was located in the same building and next to the finance office (R38). Copies of the accused's pay and allowance vouchers for January, February, March and April 1945, were introduced in evidence. In them the accused showed his wife's address to be "74 Via Panama, Rome Italy" on line (3) and was, nevertheless, paid $105 each month for rental allowance (R50, Def. Ex. 2,3 and 4). In his pay and allowance vouchers for July 1945 his wife's address appeared as "744 5th Ave New York, NY" and again he was paid $105 as rental allowance for the month (R53 Def. Ex 5). Although pay vouchers are actually prepared by personnel in the finance office the information contained in them is obtained from the officer himself (R55).

Staff Sergeant Z.F. Kemper testified that he was Chief Clerk of the Officers' Pay Section and had been in the finance department for 3 years (R49) and that the address shown on line (3) of an officer's pay and allowance voucher is not used in ascertaining the pay allowances (R57). Even if the address 74 Via Panama, Rome, appeared on accused's vouchers such information would be of no value unless it also appeared that 74 Via

Panama was government quarters (R58).

Having been advised concerning his rights as a witness the accused elected to testify. He related that he married on 3 October 1944 (R62) and a few days before the wedding informed military personnel in charge of the finance office of his fiancee's "regular New York address" and told them that they intended to live in Rome (R63). After the marriage and during December 1944 his wife was in the finance office to cash some checks and was introduced to the finance officer (R64). The vouchers he signed were prepared for him by the finance office and the finance officer had been told that accused's wife had been living with him in Rome (R64,76). His pay data card from which the vouchers were made up contained both his wife's New York address and her Rome address (R90; Def. Ex 6). The New York address on the voucher was his wife's address and the address which he and his wife used on all their documents (R76,80). The quarters his wife occupied with him in Rome were inadequate and he understood that he was entitled to rental allowances unless adequate quarters were furnished (R79,96). As soon as he got a ruling from the fiscal director in July or August and learned that he was not entitled to rental allowances, he refunded all the overpayments which he had collected over a period of about seven months (R84, 85). He asked for a ruling from the fiscal director before he knew that the charges dated 27 July were being preferred against him (R86). He wrote a letter to the fiscal director about the matter about 29 July 1945 (R92,93).

5. The prosecution in rebuttal presented evidence to the effect that the accused was advised of the charges against him on 27 July 1945 (R101) and was told in May or June that his wife's occupancy of the apartment in Rome was being investigated (R106-107).

A finance officer testified that a voucher showing the w ife's address to be government requisitioned quarters would be questioned (R112). The witness when questioned about accused's reputation for veracity stated: "Well, it has all been a negative reputation in the sense that people would not necessarily believe the opposite of what Major Lord said was true but would not necessarily believe what he said was true actually was" (R108).

6. The accused has been found guilty under two specifications of making false official statements with intent to deceive in violation of Article of War 95. The making of a false official statement with such an intent has long been recognized as a violation of Article of War 95. (CM 275353, Garris; CM 277595 Rackin). "Knowingly making a false official statement" is

cited as an instance of a violation of this article in MCM, 1928, par.151, p.186.

Before discussing the legal sufficiency of the evidence to support findings that accused made the alleged false statements with the intent to deceive, the following observations are deemed pertinent... The specifications, although dealing with pay and allowance vouchers, do not aver fraud as is usually found in such cases (CM ETO 2506, Gibney; CM ETO 12451, Kaplan; CM ETO 15154, Sohn). Nor do the specifications allege that the vouchers contained false claims for rental allowance under paragraph (10) thereof for the period of time during which he and his wife were jointly occupying free government quarters. The record shows that such allegations were readily provable. Even if the record were legally sufficient to support findings that the accused, with intent to defraud, presented and collected false claims for rental allowances by means of the two vouchers, it does not necessarily follow that the record is also legally sufficient to support the findings of guilty of the specifications under which he was arraigned and tried. It should be particularly noted that the specifications, of which the court has found accused guilty, alleged the offenses to be that he did

> "with intent to deceive a finance officer of the United States Army officially state on a pay voucher presented to said finance officer that during the month of November (and December) 1944 the accused's wife resided in New York City, which statement was known by the accused to be untrue, in that during said period the accused's wife resided with him in Rome, Italy."

The accused admitted that he signed the vouchers prepared for him by military personnel in the finance office; that the vouchers contained the statements that his wife's address was in New York City; that he presented the vouchers for payment to the finance officer at the time and place alleged in the specifications; and that his wife lived with him in Rome, Italy, during the period of time covered by the vouchers. He denied, however, that the statements regarding his wife's address were false and denied that he intended to deceive.

The burden of proving the allegation in the specifications regarding falsity and the intent to deceive fell upon the prosecution. The record therefore presents three issues:

(1) Did the accused represent that his wife resided in New York? (2) Was the address appearing on line (3) of the vouchers false? (3)Did he intend to deceive? There is a material difference between one's address and one's residence. It is not uncommon for a person to reside at one place and to provide an address for many purposes at another. A distinction is also recognized between legal and actual residence. A person may be a legal resident of one place and an actual resident of another. It is clear that the allegation "resided" contained in the specification meant actual residence. In other words, the accused was charged with falsely representing that his wife actually lived or resided in New York when in fact she lived and actually resided in Rome. The only evidence offered by the prosecution to support these allegations was the address contained in line (3) of the vouchers which called only for "address" and made no mention of residence, legal or actual. The voucher form is prepared and provided by the government and, if ambiguous, it should not be construed against the accused. The evidence adduced by the defense showed that he received his rental allowance even when his wife's Rome address was inserted in line (3). This indicates that the word "address" in line (3) did not mean actual residence as affecting the determination of rental allowances in line (10). For the purposes of this case the Board is of the opinion that the word "address" in line (3) did not mean actual "residence" as alleged. --The prosecution has therefore failed to prove that accused represented that his wife actually resided in New York. The accused has also shown that his wife's usual address was New York. The prosecution has introduced no evidence to the contrary other than the fact that she actually resided in Rome during that time. As pointed out above her address could truthfully be one place and her actual residence another. Therefore the address given was not proved to be false. It is not necessary to consider the question of the accused's alleged intent to deceive. The Board, however, was impressed by the absence of any evidence of intent to deceive. Accused's uncontradicted testimony showed that he provided the finance office with the actual residence of his wife before the vouchers in question were prepared and that he was given the usual pay data card supplied officers showing both the New York and Rome addresses of his wife.

Intent is usually a question of fact for the court to determine by inference from the facts and circumstances shown by the evidence. Its determination must not only be supported by substantial evidence but also the court may not impute a guilty construction or inference to the facts when a construction or inference compatible with innocence arises thereupon with equal force or fairness (Wharton's Criminal Evidence, 11 Ed., 1935, sec. 72, p.87; (CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 13416, Wells; CM ETO 13090, Duval et al and

cases cited therein). The evidence with equal force and fairness supported the conclusion that the address inserted, if intended to be the actual residence of the accused's wife, was an error made on the part of the military personnel employed in the finance office and adopted by the accused as his error when he signed the vouchers. It follows that the intent to deceive could not properly be inferred under the circumstances.

7. The charge sheet shows that the accused is 34 years, five months of age. He entered on active duty in the United Kingdom 24 November 1942. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. 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.

(ON LEAVE) Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

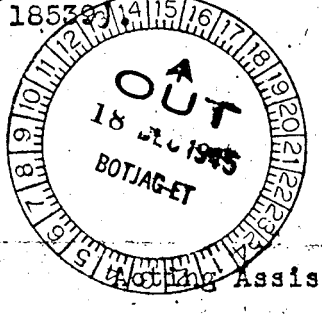
(54)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 DEC 1945 TO: Commanding General, Mediterranean Theater of Operations, APO 512, U.S. Army.

1. In the case of Major CLIFFORD W. LORD (O-885548), AC, 2618th Hq & Hq Sq. (AF Ovhd) Mediterranean Air Transport Service, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18539. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18539).



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

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

BOARD OF REVIEW NO. 4

15 DEC 1945

CM ETO 18543

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Orb, Germany, 16 November 1945.
Private MERLE L. HALL (36071276), Company B, 76th Armored Medical Battalion	)	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Loire Disciplinary Training Center, Le Mans, France.

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

1. The record of trial in the case of the soldier named above has been examined 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 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. The proceedings were published in General Court-Martial Orders Number 60, Headquarters 2nd Armored Division, 26 November 1945.

3. The record of trial is legally insufficient to support the findings of guilty and the sentence. Accused is alleged to have wrongfully sold certain "property of the United States" (Specifications 3 and 4), whereas the proof shows that the property described was that of the Army Exchange Service. The variance thus established is fatal (CM ETO 1538, Rhodes, 4 B.R. (ETO) 391; CM ETO 6659, Maze; CM ETO 7248, Street). It is not cured by the plea of guilty since it was the court's duty, in view of the obvious improvidence of the plea as demonstrated by the

evidence, to explain accused's right to change the plea and to proceed to trial as if he had pleaded not guilty (AW 21, MCM, 1928, par. 70, p. 54). The court having failed to observe this requirement, the Board of Review will regard the case as having been tried on a plea of not guilty (CM ETO 9779, Stanley and Shepherd; CM ETO 18455, Parkinson).

Judge Advocate

Judge Advocate

Judge Advocate

(57)

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private MERLE L. HALL (36071276), Company B, 76th Armored Medical Battalion,

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

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

15 DEC 1945 BOTJAG-ET

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

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

(Findings and sentence vacated. GCMO 11, USFET, 7 Jan 1946).

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

BOARD OF REVIEW NO. 2

15 DEC 1945

CM ETO 18572

U N I T E D S T A T E S	92ND INFANTRY DIVISION
v.	
Second Lieutenant WILLIAM E. HOBSON (O-2039448), 598th Field Artillery Battalion	Trial by GCM, convened at Rear Echelon, 92nd Infantry Division, 17 October 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 5 years. Place of confinement not designated.

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

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

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

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

Specification: In that Second Lieutenant William E. Hobson, 598th Field Artillery Battalion, did, at Viareggio, Italy, on or about 26 September 1945, feloniously embezzle by fraudently converting to his own use one hundred (100) pairs of shoes, low quarter, valued at Seven Dollars and Fifty Cents ($7.50) per pair, of a total value of Seven Hundred Fifty Dollars ($750.00), the property of 92d Infantry Division Exchange entrusted to him by the said Exchange.

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

Specification: In that * * *, did, at Viareggio, Italy, on or about 26 September 1945, with intent to defraud the 92d Infantry Division Exchange, falsely alter a certain "Tally-Out" in the following words:

Number Sheets.....1..... Voucher No.....

T A L L Y O U T

Sheet Number.....1..... Approved.....

Issued To:.....782-51.....Date:.....26 September 1945

Issued by:.....782-23.....Section:.....

Whse	Qty	Unit	Item
	5	ea	Overcoat,field,trench style.
	39	pr	Trousers,w/t.OD,(Spec.)
	69	pr	Trousers,wool,elast.,dark green.
	300	ea	Undershirts,cotton, OD.
	300	pr,D	Drawers, cotton, OD.
	150	pr	Shoes, low-quarters. (Wright).
	10	yd	Ribbon, campaign & service european,African Middle Eastern.
	10	yd	Decoration, Purple Heart.
	300	pr	Insigniek 1st Lt.Metal
	576	pr	Pajamas,winter,man's.

////////////////////////////////////LAST ITEM////////////

Received the above articles checked in apparent good order and condition (except as noted) this date.26.Sept.1945

S/William E. Hobson,2nd Lt.F.A.
.....Signature

.....92d PX 782-51.....Unit Designation

by wrongfully striking out the words "150 pr Shoes low-quarters. (Wright)" and inserting the words "50 pr Shoes (Wright)".

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority

may direct, for five years. The reviewing authority, the Commanding General of the 92nd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, Mediterranean 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 was substantially as follows:

Accused was, on 26 September 1945, the officer in charge of the 92nd Infantry Division Post Exchange officers clothing store No.782-51 located at Viareggio, Italy, and was authorized to requisition clothing from the main post exchange store No. 782-23 at Leghorn, Italy, for the store at Viareggio (R6,7,9,18,23,28). On 26 September 1945 he, with a truck and driver, went to the Leghorn Post Exchange to draw clothing for the officers'clothing store at Viareggio. The clothing was not drawn that day because an inventory was being taken at the Leghorn Post Exchange but the next day accused's requisition was filled and he drew from the Leghorn store various items of clothing, including 150 pairs of low-quarter shoes (R7). He signed a tally-out sheet for the items drawn, the original and one copy of which was retained by the Leghorn store and two copies thereof retained by accused (R8, 9; Pros.Ex.A). The clothing was loaded on accused's truck and he left Leghorn with the truck and clothing (R11).

On the way back to Viareggio accused ordered his driver to stop the truck and back it up to a building on the outskirts of Viareggio where accused engaged in conversation with some Italians. The Italians asked accused what goods he had to sell, boarded the truck, started moving boxes and took "something" off the truck (R11,12). Accused and his driver then drove on to the Viareggio store where accused immediately delivered to Lieutenant Harris, Assistant Post Exchange Officer of the 92nd Division, $1700.00 to cover some shortages in the July and August inventories of the Viareggio store (R13,15,21,22,25). The clothing which accused then had on the truck included only 50 pairs of low-quarter shoes and the tally-out which he delivered to Lieutenant Harris had been altered by lining out the item of "150 pr Shoes,low-quarters (Wright)" and adding "50 pr shoes (Wright)" (R16,21,25; Pros.Ex.B). Accused had no authority to alter the tally-out sheet nor to sell or dispose of any of the merchandise to other than military personnel (R16,23,28).

After being advised of his rights under the 24th Article of War and told that he did not have to make a statement and that anything he said might be used against him (R17,28) accused voluntarily made a pre-trial statement, dated 26 September 1945, in which appears, among other things, the following:

"Yesterday, 25th September 1945, was inventory day. While going through the inventory the base officer in Leghorn called Lt. Harris, the asst. Div. PX officer, and called to his attention an error in bookkeeping concerning the officers clothing store, number 782-51 (our store number). The error was neglecting on my part to include a nineteen hundred($1900.00) dollar debit voucher. As a result the inventory was approximately seventeen hundred ($1700.00) dollars short. Lt. Harris called this to my attention and after rechecking the records I was unable to find any deficiency equivalent to the seventeen hundred ($1700.00) shortage. After not finding any deficiency I came to the conclusion that the error had to be made up some way or other. I first made an attempt to borrow the money. I asked a civilian who works in the bar at the Teatro Puccini Stadia to loan me the money. I was told that he could not loan me the money. Rather than to come up on the inventory with a shortage I felt I would cover the shortage myself. I knew that I was to pick up a requisition today, the 26th, and I knew that I would be able to get the money for the shortage by selling some of the clothing and shoes. So I talked with a few civilians and I was told to go to the place where the Military Police picked up the shoes in the vicinity of the water point in Viareggio. I let the civilian have one hundred (100) pair of shoes which I had picked up on the requisition. I received two thousand ($2000.00) dollars for the shoes. Before returning to the store I rearranged the tally-out sheet which I received when picking up requisitions. After returning to the store with the remainder of the clothes and the tally-out sheet I told Lt. Harris that I received money to cover the shortage. I told him that I had picked up two bolts of cloth in addition to what the requisition originally called for

and received enough to cover the shortages and gave him seventeen hundred ($1700.00) dollars. He, Lt. Harris, being suspicious of an adjustment on the tally-out reported to Major Griffin, PX officer, I believe, his suspicions. After Lt. Harris had told me to turn over my records to Lt. Connor, cashier at the PX, and being tired from all the mornings work I went over to Puccini's bar to get a drink and it was there that Major Griffin and Lt. Harris drove up. Major Griffin told me that Lt. Harris was going to the warehouse in Leghorn to check the tally outs. I told him it wasn't necessary and confessed the whole thing to him. After which I was told by Major Griffin that I was under house arrest. I accompanied him to the Hotel Astor. He called the Provost Marshal who came with Military Police. We all went to the building where the shoes were and the Military Police got them and took them back to the Warehouse" (Pros. Ex. E).

It was stipulated that the total value of the 100 pairs of shoes alleged was $750.00 (Pros. Ex.D).

4. The accused after his rights as a witness were fully explained to him, elected to remain silent (R41,42).

On behalf of accused evidence was presented to the effect that his reputation for honesty and integrity was good, that he was a very able soldier, an outstanding field artilleryman, dependable and courageous in combat and that he had done very good work (R36,37). He was formerly an enlisted man and was a staff sergeant in April 1945 when he was discharged to accept a commission (R37). A chaplain testified that he had known accused for approximately twenty-two months and that he would give him the highest recommendation that it was possible to give an officer (R41).

5. a. Charge I. (Embezzlement).

Accused was convicted of embezzling 100 pairs of shoes of a total value of $750.00, property of the 92nd Infantry Division Exchange. The proof required to establish the offense of embezzlement is as follows:

"(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent" (MCM 1928, par. 149h, p. 174).

The undisputed evidence shows that at the time and place alleged accused was the officer in charge of the officers' clothing store of the 92nd Infantry Division Exchange, was authorized to draw clothing for that store and did draw therefor certain clothing, including 150 pairs of shoes. This property was under accused's care and control and was intrusted to him for delivery to the 92nd Infantry Division Exchange store and for sale at that store in the regular course of business. He was not authorized to sell or dispose of the property to other than military personnel. He fraudulently converted to his own use 100 pairs of the shoes so intrusted to him by selling them to an Italian civilian and attempting to use the proceeds from the sale to cover previous shortages in his store accounts. The alleged value of the shoes was established by stipulation. The evidence, including accused's pre-trial statement, clearly established every element of the offense alleged. The court's findings of guilty are supported by the evidence (CM ETO 1302, Splain, 4 BR (ETO) 197, III Bull, JAG 189; CM ETO 1588, Moseff; CM ETO 3454, Thurber Jr).

b. Charge II. (Fraudulent alteration of tally-out sheet)

It was clearly established that accused at the time and place alleged, after accepting for delivery to the 92nd Infantry Division Exchange 150 pairs of shoes and a tally-out sheet evidencing that fact, altered the tally-out sheet before delivering the shoes by striking therefrom the item showing 150 pairs of shoes and inserting thereon the words "50 pr shoes (Wright)". He had no authority to make such alteration. Having embezzled 100 pairs of the shoes, as stated above, accused delivered only 50 pairs, together with the altered tally-out sheet, to the 92nd Infantry Division Exchange. The evidence clearly warranted an inference that accused intended to defraud the 92nd Infantry Division Exchange by falsely representing to it by means of the altered tally-out sheet that only 50 pairs of shoes had been drawn when actually 150 pairs had been drawn. Had the fraud succeeded, the 92nd Infantry Division Exchange would have been accountable for 100 more pairs of shoes than it actually received. Under the circumstances the act of altering the tally-out sheet was itself wrongful and the offense was properly chargeable under the 96th Article of War.

The findings of guilty are supported by the evidence (CM 280840 Fischer).

6. The charge sheet shows that the accused is 24 years of age. He was appointed a second lieutenant on 19 April 1945. 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. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violations of the 93rd and 96th Articles of War. Confinement in a penitentiary is authorized upon conviction of an officer of embezzlement where the amount involved exceeds $35.00 by Article of War 42 and section 22-1202 (6:76), District of Columbia Code.

_____ Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

29 DEC 1945

CM ETO 18623

UNITED STATES	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Heidelberg,
	)	Germany, 23 October, 1945. Sentence:
Private IVO B. BAILEY (34716409)	)	Dishonorable discharge, forfeiture of
3416th Quartermaster Truck Company.	)	allowances and confinement at hard
	)	labor for life. United States
	)	Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Ivo B. Bailey, 3416th Quartermaster Truck Company, did, at Rheydt, Germany, on or about 2 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Francis Beaudoin a human being by shooting him with a carbine.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty 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 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 as involved a finding that accused did, at the time and place alleged, with malice aforethought, wilfully, deliberately, feloniously and unlawfully kill one Private Francis Beaudoin, a human being by shoot-

ing him with a carbine, in violation of the 92nd Article of War, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. On 20 May 1945, accused was arraigned and brought to trial on a charge and specification identical with those set forth above. He was convicted and sentenced to be dishonorably discharged the service, to forfeit all allowances due or to become due, and to be confined at hard labor for the term of his natural life. In his review and recommendation to the reviewing authority, the staff judge advocate noted that under the evidence as developed at that trial there was some suggestion, not clearly brought out, that in shooting the deceased accused might have acted in self defense. He also pointed out that, under the circumstances surrounding the homicide, accused was the only witness who was in a position to testify clearly with respect to this issue. Inquiry disclosed that accused had expressed a desire to take the stand as a witness on his own behalf but later had decided not to do so upon the advice of his defense counsel. For these reasons the staff judge advocate recommended that the sentence be disapproved and a rehearing ordered so that accused might have an opportunity fully to present and develpp his only possible line of defense, should he so choose upon a second trial. The reviewing authority followed this recommendation and ordered the rehearing with which we are presently concerned. However, when the case came on for a rehearing, the witnesses who testified at the prior trial were unavailable. With the express consent of the accused, it was stipulated that the testimony of certain witnesses "as it appears in the record of the first trial will be read before this court and will be received by this court as evidence in this case" (R6). The portions of the prior record of trial so read to the court were incorporated by reference into the record of the instant trial. Certain further stipulations also were entered into, these too with the express consent of the accused (R6; Pros. Ex. A). The prosecution's evidence, as thus introduced and constituted, was substantially as follows:

On 2 April 1945, accused's company was stationed in Rheydt, Germany, and certain of its personnel, including accused, were billeted in a building which also apparently housed the company orderly room, mess hall and kitchen (Original Record 7,13,19,26). At about 2000 hours on that date, Technician Fifth Grade Harold K. Herd, while in his room on the third floor of this building, heard the sound of voices emanating from the room directly beneath him on the floor below (OR 7, 26). He was unable to identify the speakers from the sound of the voices and it did not seem to him that they were angry in tone (OR27). A moment later, he heard the sound of two shots and, when he immediately went out of his room in an attempt to learn their source, he saw accused, who had a carbine in his hand, going down the stairs leading from the second to the first floor. (OR7,27,28). After asking accused "what was going on", to which he received no response, he rushed to the second floor, entered a room the door of which was standing open and there saw Private Francis Beaudoin (the deceased) lying on his back on the floor (OR8). Thinking that there might be some possibility of

rendering first aid, he felt Beaudoin's pulse and, when he found none, immediately rushed downstairs to the first floor. There he saw accused handling a carbine to First Lieutenant John W. Cosens and heard him inform the lieutenant that he (accused) had shot Beaudoin (OR9).

Lieutenant Cosens testified that on the evening of 2 April, while he was standing in front of the company orderly room, he heard two shots fired in rapid succession and immediately started toward the direction from which the sound had come. As he approached the mess hall, accused came out of the entrance holding a carbine at port arms. Cosens held out his hand in a manner to indicate that accused was to give him the carbine and at the same time asked him if he had fired it. Accused surrendered the carbine with the statements, "Yes, sir, I shot him. * * * I shot Beaudoin" (OR13). He also stated that he and Beaudoin had been quarreling but the officer could not discover what the argument had been about - "They didn't seem to have a good reason to have an argument, calling one another names and that's all I could get out of him at that time" (OR20). After this conversation, Cosens went upstairs and there found Beaudoin lying on the floor. He placed accused under arrest, put a guard over the room, and sent for a medical officer (OR13-14).

The medical officer who was called to examine Beaudoin pronounced him dead as of 2030 hours, 2 April 1945, as the result of "two penetrating /bullet/ wounds located about 2 inches below the base of the skull and also a wound located in the midline at the superior level of the shoulder blades" (R6; Pros. Ex.A).

The room in which Beaudoin was found was rectangular in shape, approximately seven by fourteen feet, and when Beaudoin's body was discovered it was lying at the opposite end of the room from the door by which accused left to go downstairs (OR9-10,14). Cosens testified that at the time the shots were fired, "visability should have been * * * rather good" in the room since it was not yet quite dark when he first entered and it did not become necessary to turn on the lights until "later on" (OR14). Neither Herd nor Cosens noted any weapons on or near deceased's body when they examined it immediately after the homicide occurred, nor did they note any weapons elsewhere in the room (OR8,10,11,13,14). Cosens made a more careful search for weapons some ten minutes later but again none were found (OR14). The room was not in disorder when the body was discovered and there was nothing about its appearance to indicate that a scuffle or fight had taken place. However, both Herd and Cosens noticed the presence of glasses and a bottle (OR20,27). When Herd saw accused on his way downstairs immediately after hearing the shots, he was unable to determine from his brief observation of him whether he had been drinking but he did note that when accused was talking to Lieutenant Cosens his voice was "a trifle unnatural" (OR27). Cosens testified that when accused approached him with the carbine after the homicide occurred his gait was that of a man who had been drinking and his speach was rambling and incoherent. It was Cosens' opinion that "the man was intoxicated" (OR21). Deceased's body smelled of alchohol when found (OR20).

Neither Herd nor Cosens knew of any previous difference of opinion or ill-will between deceased and accused (OR16,20,26) Private Johnnie Coley, of the same company as both accused and deceased, testified similarly (OR29). He also testified that he saw deceased enter the mess hall at about 1900 hours on 2 April and that deceased was not armed at the time (OR28-29). Cosens testified that deceased was a "high tempered individual - quick to lose control", that as a soldier he was "not one to be highly recommended" and that before the organization left the United States he had been hospitalized on one occasion as the result of a beating he had received in an affray. He was avoided by most of the men in the company (OR15-16). Herd testified that deceased was "a dangerous character in my consideration" (OR26).

On 3 April, accused was interrogated by an agent of the Criminal Investigation Division and voluntarily made a statement which was introduced into evidence by the prosecution (R7; Pros. Ex. B; OR 30-33). In his statement, accused recited that on the afternoon of 2 April he and a member of his company named Sims secured a bottle of whiskey and were taking it back to their billet. En route they passed Beaudoin in front of his billet and Beaudoin "laughingly pulled out a pistol * * * and he invited Sims and I into his billet to sample the whiskey". They went into Beaudoin's room but left without giving him a drink and went to a room in the building in which the company kitchen was located. There they drank some of the whiskey and when Beaudoin later came to this room accused told him

> "to get out in a joking manner and he appeared to be angry and even though I called after him, he left in a huff".

Beaudoin returned some time later and began arguing with accused because of accused's previous remarks that he (Beaudoin) was not welcome. At about this time, accused, because he felt that the group had been drinking too much, took the bottle of whiskey to his own room and then returned to the room where Beaudoin was. He stated

> "When I came back I had the carbine on my right shoulder, and Beaudoin flew off the handle and started cussing at me and made a break for his left side. I believed he was going to pull out the pistol he had shown me on the street and I was afraid to take chances with him, so I just pulled my carbine and fired two shots at him. He dropped to the floor and I stood there a few seconds and went downstairs where I gave the carbine to Lt Cosens of my organization"(Pros.Ex.B).

4. The defense also read into the record of the instant trial certain testimony given at the prior hearing. This testimony was

was substantially as follows:

Accused's company commander testified that accused had never been a disciplinary problem and that he had always given the impression of being a very even-tempered man, having worked in the kitchen for eighteen months and "never gotten into any trouble even with the mess sergeant". Beaudoin, on the other hand, often had been in altercations and in one instance had been seriously injured in a "knife fight". He had few friends, was usually alone, and did not get along with the other men in the company (OR22-23). An enlisted man of the company testified that he had seen deceased with a knife on many occasions and that he was very high-tempered and "seemed to think everyone was against him". On one occasion, deceased had approached witness in the barracks, threatened him, and later was disarmed of a knife. Witness stated that deceased was regarded as a dangerous man - "We all watched him and he was very much watched and the other fellows were afraid of him" (OR24-25).

Accused, after having been advised of his rights as a witness, elected to testify on his own behalf. He stated that he had known Beaudoin for some time prior to the homicide but had never had any trouble with him. None the less, Beaudoin "went around as sort of a bully and I would say he was a mean sort of a fellow"(R9-10). At about 1500 hours on the afternoon of the day the homicide occurred, he encountered a fellow soldier named Sims and, when Sims asked him what he was doing, he replied that he was looking for a drink. Sims said that he knew of a bombed-out building in which he had located some whiskey and suggested that they get some of it. After reaching this building, accused was afraid to enter and did so only upon Sims' urging and after he had "fixed" his carbine. They secured a bottle of some unknown beverage from the abandoned building and started to return to their quarters. As they were doing so they encountered Beaudoin who urged them to come into his billet and drink there. They refused and Beaudoin angrily started to go into his billet alone. However, after walking only a short distance, he stopped and "He was still trying to get us to come in and then he pulled a gun" (R10). Accused did not remember whether Beaudoin pulled the gun from a holster, his belt or his pocket but he did recall that he pulled the gun from his left side. In pulling the gun, however, Beaudoin was "just joking" (R11). It was then decided to take the liquor to the room of a man named Perry and Beaudoin was invited to join accused and Sims there. Accused and Sims then proceeded to Perry's room, where they later were joined by the first sergeant, and all of the men had a few drinks. Beaudoin later came to the room but accused told him, "Go away man, no one wants to be bothered with you" (R12). Beaudoin became angry and left, but returned to the room some thirty or forty minutes later. At this time accused explained to him that he had been joking when he previously had told him to leave, and the two men then drank together. After a time, accused felt that Beaudoin was drinking too much and so took the bottle to his own room, leaving Beaudoin in Perry's room (R12-13). He then decided to go to mess and, discovering he had left his helmet in Perry's room, stopped there to get it on his way to the mess hall (R12-13). When he entered the room, Beaudoin alone was still there.

Accused expressed surprise at this and Beaudoin remarked, "what you want to do, run me away?" Accused then started to leave the room and, as he was doing so, Beaudoin said, "You all alike and want to be smart with these Sergeants" to which accused replied, "Boy, you shouldn't feel like that". Beaudoin then said, "You son of a bitch, I'll tear your ass out", and accused replied, "No, you won't." Beaudoin then"reached for his gun." Accused, who was carrying his carbine slung, with the muzzle pointing downward, "pulled it and fired". He did this because he thought Beaudoin was "reaching for his gun to shoot me" (R13-14). However, from the position in which he was standing at the time, he was unable to see whether Beaudoin had a gun or not (R13). The room was about 25 feet long and accused was about two-thirds the length of the room distant from Beaudoin at the time the shots were fired. He had about four or five drinks on the afternoon in question (R14).

On cross-examination, accused testified that he shot Beaudoin

> "Because he was going to shoot me. He reached for something and I thought it was a pistol and I just beat him to it" (R20).

On examination by the court, accused expressly admitted that he intended to shoot Beaudoin. He stated that he "wouldn't say /he/ was drunk" when he fired his carbine and again asserted that he pulled the trigger "to keep him from shooting me" (R22). His carbine was ready to fire when he entered the room because he had put it off safety when he went into the bombed-out building to get the whiskey and he did not thereafter put it back on safety. At the time he fired, he thought that it was necessary to do so to protect himself. He did not think at the time, he "just shot" (R23).

5. Although the reviewing authority did not approve that portion of the finding which involved a finding that accused killed Beaudoin "with premeditation", under the finding as approved the accused none the less stands convicted of murder and the question is whether the record of trial is legally sufficient to support a murder conviction (CM ETO 6074, Howard; cf. CM ETO 6262, Wesley). That accused killed Private Francis Beaudoin at the time and place and in the manner alleged does not, under the evidence of this case, admit of doubt. It is also abundantly clear that the killing was intentional. Even if accused's version of the killing is accepted at its full value, it cannot be said that the homicide was committed under circumstances giving rise to a sudden passion caused by adequate provocation. Hence, the homicide constituted murder unless it was excusable on the ground that accused was acting in self-defense. The burden of proof on this issue was on the accused (CM ETO 18051, Sharpton). It was here shown that deceased had the reputation of being a hot-tempered and violent man. Accused testified that,

immediately prior to the homicide, deceased threatened him and made a gesture as if reaching for a pistol. He further testified that he believed deceased was going to shoot, feared to "take chances" with a man of his temperment, and for these reasons "beat him to it". On the other hand, other evidence of record indicates that deceased was unarmed at the time and that accused probably knew this fact. When last seen about an hour prior to the homicide, deceased was without a weapon and no weapons were found on his body or in the room where he met his death. Accused had been drinking with deceased for at least a short time prior to the fatal shooting and during this time presumedly had an opportunity to observe whether deceased was armed. Accused himself admitted that he did not know whether deceased had a weapon at the time he fired upon him. Even if it is assumed that deceased was armed, it is not at all clear that the extreme steps taken by the accused were necessary for his own protection, it should be noted in this connection, among other things, that accused had a ready means of exit from the room had he chosen to employ it when deceased became abusive and made the gesture which accused found so suspicious. Accused was, at this time, some distance from deceased and only a few feet from the door leading from the room. 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" (MCM, 1928, par. 148a, p. 163).

The resolution of these issues was primarily for the court and, under the evidence here, we cannot say that it abused its discretion in resolving them against the accused. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the court's finding that accused was guilty of murder, as alleged (cf. CM ETO 16250, Green; CM ETO 18051, Sharpton).

6. The charge sheet shows that accused is 34 years two months of age and was inducted 5 June 1943 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 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

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designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Edward L. Stevens Jr. Judge Advocate

B. L. Avery Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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

BOARD OF REVIEW No. 1

22 DEC 1945

CM ETO 18625

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	
Private First Class ARTHUR VAN RIPER (20124947), and Privates BUDWIN PLACIDE, JR. (38375208), and GEORGE DODSON (35767234), all of 591st Medical Ambulance Company, Motor	Trial by GCM, convened at Heidelberg, Germany, 31 October and 1 November 1945. Sentence as to VAN RIPER and PLACIDE: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. DODSON: Acquitted.

HOLDING by BOARD OF REVIEW No. 1
STEVENS, DEWEY and CARROLL, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private George Dodson, Private Budwin Placide, Jr, and Private First Class Arthur Van Riper, all of 591st Medical Ambulance Company, Motor, acting jointly and in pursuance of a common intent, did, at or near Waldaschaff, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Herta Heeg.

Specification 2: In that * * *, did, at Waldaschaff, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Johanna Heeg.

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

3. Before we proceed to the merits it is necessary to dispose of one procedural matter.

On 2 October 1945, by 1st indorsement to the charge sheet, the Commanding General, Seventh Army, Western Military District, referred this case for trial to the trial judge advocate appointed by paragraph 4, Special Orders Number 268, 25 September 1945. Accused were tried on 31 October and 1 November 1945 by a court appointed by paragraph 23, Special Orders Number 281, 8 October 1945, issued by the Commanding General, Seventh Army, Western Military District. These orders did not contain the usual clause withdrawing unarraigned cases previously assigned to another court and referring them to the court thereby appointed, but an order dated 10 November 1945, ten days after the conclusion of the trial, does expressly refer this case to that court. The Commanding General who appointed the court approved the sentence as to both accused who were convicted. Inasmuch as it has been held that the reference to trial is not jurisdictional, the reviewing authority in his action thus cured the irregularity by his action in approving the sentence, an action that was tantamount to a ratification (CM 198108 (1932), Dig. Op. JAG, 1912-40, sec.397 (5), p.243; CM ETO 393, Caton and Fikes, 1 B.R. (ETO) 325, (1943), III Bull. JAG 54; CM ETO 13319, Beets and Nanney).

4. Evidence for the prosecution:

About 1900 hours on 21 April 1945 three colored soldiers came to the house of Frau Rosa Heeg in Waldaschaff, Bavaria, Germany. Apparently they were travelling in an United States Army Ambulance. They made it known that they wanted eggs and when Frau Heeg gave them some they left (R20-21). A few minutes later they entered the house of Frau Maria Friedrichs, a sister-in-law of Herr Josef Kunkel, who was also present. They asked Frau Friedrichs "to sleep" with them but she refused, telling them she was married and that there were

plenty of other girls in the community. The trio then forced Kunkel to accompany them and assist them in their search for women. Eventually around 2030 hours they returned to the Heeg home. Two of the soldiers went in but came out in about five minutes with the announcement that there were no girls there, but the driver of the auto, who had remained at the wheel, picked up a loaded carbine and all three entered the house again (R6-11).

In the meantime when Frau Heeg observed the soldiers returning to her home she told her two daughters, Herta, 22 years of age, and Johanna, 20 years of age, to hide. She informed the two soldiers that her daughters were not there and they left. Soon, however, they returned with their companion, who was armed, and searched the house. They found the two girls and herded them at gunpoint into the ambulance, with Frau Heeg and her 17-year-old son, Josef, following. When Frau Heeg attempted to get in she was pushed out, although, on the other hand, Josef was forced to accompany his sisters. During all this time the girls were crying and calling to their mother (R21, 23-29).

They then drove Kunkel home, told him to get out, and proceeded to a woods on the edge of the town (R14-15,44). Blankets were spread on the floor and one of the soldiers took Josef out of the auto. Another seized Herta, threw her on the floor, tore off her panties, and had sexual intercourse with her. She screamed, rolled around, and tried to hold her legs together, but the soldier overpowered her (R45,46). In the meantime another one of the soldiers seized Johanna and, despite her struggles, pushed her to the floor and had sexual intercourse with her (R65-66). After the first soldier had finished with Herta, the one who had taken Josef outside climbed into the ambulance and had sexual intercourse with her, overcoming what resistance she could offer (R47-48). Josef was then taken back into the auto and the trio were driven home (R49). As a result of this intercourse Herta became pregnant and it was necessary to abort the foetus (R51, 93; Pros. Ex. B).

Accused Placide was identified by Frau Heeg as the driver of the automobile and as the soldier who was armed. In addition she made a rather uncertain identification of Van Riper (R26,34). Placide was identified by Herta as the armed soldier who made her brother get out of the ambulance and as the second one who had sexual intercourse with her (R41). Johanna also identified him as one of the three soldiers who was present (R62). Frau Margarete Staab, who lived with the Heegs, identified Placide and Van Riper as two of the three soldiers who came to the Heeg home and took the two Heeg sisters away (R76). Placide and Van Riper were further identified by Josef Heeg (R84-85).

In addition, there was considerable evidence as to a pretrial identification of accused. Frau Heeg testified that she attended an identification parade at Augsburg on 8 June 1945 and picked out Placide

as one of the soldiers who had been in her house on 21 April 1945. Herta testified to the same effect although she stated that the date was 17 or 18 June and the place Steinburg (R50-51). Frau Staab stated that she definitely selected Van Riper at Steinburg on 8 June as one of the men who entered the Heeg home and that she was then a "little" doubtful about Placide (R77). Josef testified that he twice identified both Placide and Van Riper, once on 8 June at Steinburg and once on 9 June at Augsburg (R89).

5. Evidence for the defense:

Accused Placide, after being advised of his rights, elected to make an unsworn statement (R104). He admitted that two agents of the Criminal Investigation Division held a "formation" of 23 men on 8 June and that a "German boy" picked him out of the group. He was then taken some distance in a jeep to a crossroad where they stopped and some "ladies and mens" looked at him.

Accused Van Riper, after similar advice, also elected to make an unsworn statement (R104). The statement was long and rambling, and somewhat difficult to follow and his counsel made an explanation of it for the court (R108). The gist of it seems to be that he was in the hospital until the end of April, but there are no records showing that because he was a member of an ambulance platoon attached to the hospital. Around 9 June he missed a formation and for that reason was taken to Augsburg and placed in a line-up of seven soldiers. He was wearing "ODs" while the other soldiers were wearing fatigues and two "frauleins" picked him out (R104-106).

Two enlisted members of the Corps of Military Police who were guarding accused at the trial testified that at the conclusion of the proceedings on the first day they were taking accused from the courtroom and passed within four yards of Frau Staab and Josef Heeg, both of whom had an excellent opportunity to observe accused (R95,99-100). Called as witness for the defense Josef denied seeing accused (R96) and Frau Staab stated that she saw only the backs of three negro soldiers and that she did not get a look at their faces (R98).

6. Accused were charged with jointly raping each of the prosecutrices. This has been considered defective pleading on the ground that two or more persons cannot jointly commit a single rape, but it also has been held that when the evidence shows concerted action the joinder is not prejudicial (CM ETO 10857, Welch and Dollar; CM ETO 10871, Stevenson and Stuart; CM ETO 13824, Johnson and Young; CM ETO 14596, Bradford et al; CM NATO 643 (1943), CM NATO 1121 (1944), III Bull, JAG 61-62). Particularly is this true in view of the Federal Statutes abolishing the distinctions between principals and aiders and abettors (sec.332, Federal Criminal Code, 18 USCA 550; CM ETO 5068, Rape and Holthus).

There can be little doubt on this record that the two prosecutrices were raped. The forcible abduction of these two young women at gunpoint from their mother's home, despite their and her protests, the driving to a lonely spot, and the consummation of intercourse over their protests and after quelling what little resistance they dared offer are all utterly inconsistant with voluntary intercourse (CM ETO 4444, Hudson, et al), and no reasonable person in the position of accused could believe that there was consent. Neither of these two young women was required to risk death by offering more resistance in view of accused's willingness to enforce their sexual demands at gunpoint (cf. CM ETO 10799, Glover; CM ETO 16617, Haynes and Young).

Likewise, there can be little doubt that both accused were properly convicted of rape of each prosecutrix. They were engaged in a joint venture the object of which was to obtain women. Both participated in the search and subsequent abduction of these girls and both were principals --whether in the first or second degree is immaterial -- as to both rapes (CM ETO 16970, Veilleux et al).

The issue as to the identity of the rapists presented a question of fact which was for the court to resolve (CM ETO 3200, Price; CM ETO 3833, Smith). This is likewise true of the defense's contention that there was a previous display of accused to two of the identifying witnesses, a contention which the latter contradicted (CM ETO 10799, Glover). Moreover, in this connection it is to be noted that there was considerable evidence as to a pretrial identification of accused, evidence which here was properly admitted (CM ETO 3833, Smith, supra; CM ETO 6554, Hill; CM ETO 7209, Williams; CM ETO 16971, Brinley). The record is legally sufficient to sustain the findings of guilty as to each accused.

7. The charge sheet shows that accused Van Riper is 25 years eight months of age and was a member of the National Guard which was federalized 10 March 1940 for the duration of the war plus six months. He enlisted in the National Guard on 22 October 1939 to serve for three years. The charge sheet shows that accused Placide is 24 years of age and was inducted 5 December 1942 to serve for the duration of the war plus six months. No prior service is shown as to either accused.

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

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

Edward L. Stevens Jr. Judge Advocate

B K Ulmer Jr Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 1

28 DEC 1945

CM ETO 18626

U N I T E D S T A T E S	UNITED STATES AIR FORCES IN EUROPE
v.	Trial by GCM, convened at Paris, France, 9, 10 November 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for three years, and fine of $5,000. United States Penitentiary, Lewisburg, Pennsylvania.
Warrant Officer Junior Grade ARTHUR R. SMITH (W-2115441), Headquarters and Base Services Squadron, 370th Air Service Group	

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

1. The record of trial in the case of the warrant officer 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 94th Article of War.

Specification: In that Warrant Officer Junior Grade Arthur R. Smith, Headquarters and Base Services Squadron, 370th Air Service Group, being at the time Class "B" Agent Finance Officer to Major George R. Clark, Finance Department, a disbursing officer, did, at or near Villacoublay, France, on or about 14 September 1945, feloniously embezzle by fraudulently converting to his own use £1,000, British currency, of the value of approximately $4,035.00, the property of the United States, furnished and intended for the military service thereof, entrusted to him, the said Warrant Officer Junior Grade Arthur R. Smith, by the said Major George R. Clark, in his said capacity of disbursing officer.

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

Specification 1: In that * * * did, at or near Paris, France, on or about 14 September 1945, wrongfully and in violation of letter, Headquarters, European Theater of Operations, dated 23 September 1944, file AG 121, OpGA, Subject: "Prohibition Against Circulating, Importing, and Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels", exchange British currency for French francs other than through official channels.

Specification 2: In that * * * did, at or near Chateau Montebelo, Jouy-en-Josas, France, on or about 15 September 1945, wrongfully and in violation of letter, Headquarters, European Theater of Operations, dated 23 September 1944, file AG 121, OpGA, Subject: "Prohibition Against Circulating, Importing, and Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels", hold and possess United States currency of the value of about $13,500.00, in a liberated territory, to wit: France.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its specifications, and was found guilty of both charges and all 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, to be confined at hard labor, at such place as the reviewing authority may direct, for three years, and to pay to the United States a fine of $5,000. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, directed that accused be confined in the Loire Disciplinary Training Center, Le Mans, Sarthe, France, pending further orders, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution is substantially as follows:

About 10 August 1945, accused was temporarily in charge of the Army finance section at Le Bourget, France (R56). On 5 September, he was duly appointed "Class B Agent" finance officer* to Major George R. Clark, Finance Department, Accounting Finance Disbursing Officer with the 331st Station Complement, Station AAF-392, Paris (R34-35; Pros.Ex.3). Pursuant to his appointment, accused performed his duties as such agent, which consisted of the operation of an exchange booth in the air transportation station terminal at Villacoublay, France, for the exchanging of various foreign currencies, property of the United States Treasury, for "transient personnel" (R35,37). Prior to this time he performed virtually the same functions as assistant to an officer at the terminal finance office, but on 6 September the exchange section was separated from the remainder of the office (R44).

Major Clark testified that as finance officer he had control over

*See paragraph 3a(2), Army Regulations 35-320, WD, 5 February 1945.

accused as his agent (R34), who in turn had several enlisted men working under his supervision as cashiers (R44). It was the practice for witness to deliver to accused from time to time currencies required by him in the operation of the exchange booth and for accused to return to witness from time to time currencies of various types which were surplus in his exchange operations (R35). Accused was not required to pay witness money on any certain date and, regardless of the type of currency he had received, his accountability to witness was measured solely in French francs. Accused might receive currencies not exceeding the authorized limit from witness and return currencies to him at such times and in such amounts as he (accused) in his judgment deemed appropriate (R45-46). It was the practice, in accordance with "regulations", when money from a safe was in official transit to leave in the safe a written notation of the amount in transit (R50-51,53). Warrant officers assigned to the Finance Department were supposed to be familiar with finance regulations and operations. The agent officer was permitted to deliver to his cashiers each day certain amounts of money, for which they accounted to him at the close of business on that day. A written receipt was used for each transfer (R52-54).

During the period from 6 to 14 September 1945, the following transfers of currency occurred between Major Clark and accused (R36-37; Pros.Exs. 4-7, incl.):

a. From Major Clark to accused, represented by War Department, Finance Department Forms No. 45, "Funds Intrusted to Agent", signed by Major Clark (Pros.Ex.4), and No. 45-A, "Receipt for Trust Funds", signed by accused (Pros.Ex.5):

Exhibit No.	Date (1945)			Amount
(Pros.Exs.4d,5d)	6 September	£5,000 +	3,568,700 francs	or 4,568,700 francs
(Pros.Exs.4c,5c)	9 September	£5,000		or 1,000,000 francs
(Pros.Exs.4b,5b))	12 September	£10,000		or 2,000,000 francs
(Pros.Exs.4a,5a)	14 September	£5,000		or 1,000,000 francs
			Total	8,568,700 francs;

b. From accused back to Major Clark, represented by War Department, Office Chief of Finance Forms No. 45-B, "Return of Funds and Statement of Balance", signed by accused (Pros.Ex.6), and No. 45-C, "Acknowledgment of Return of Funds and Statement of Balance", signed by Major Clark (Pros.Ex.7):

Exhibit No.	Date (1945)		Amount
(Pros.Exs.6c,7c)	11 September		1,393,794 francs
(Pros.Exs.6b,7b)	12 September		762,924 francs
(Pros.Exs.6a,7a)	14 September		802,172 francs
		Total	2,958,890 francs.

This left the balance on hand with accused on 14 September as follows:

Amount received	8,568,700 francs
Less amount returned	2,958,890 francs
Balance	5,609,810 francs.

During this period, no other money was delivered by Major Clark to accused as Class B agent (R36) or by him to Major Clark (R37).

On 14 September, accused telephoned Staff Sergeant Chester Franz, one of his cashiers, to whom he had two or three weeks previously mentioned exchanging English pounds, that he wished to meet him at the Opera in Paris (R56,61-62). The cashier reported the call to superior authority and was directed by an agent of the Criminal Investigation Division to keep the appointment in spite of Franz' reluctance (R31,59,62) and to introduce accused to a certain Frenchman. The agent then arranged with another agent and a French police inspector to be on hand for the meeting (R31). When accused met Franz near the Opera he stated he had in his pocket 1,000 English pounds, which he wished to exchange for (French) francs (R57). They thereupon proceeded to the San Sebastian Cafe, where Franz introduced accused to a Monsieur Thune (R58), who offered 330 francs per pound to accused through Franz (R60). The three went to a washroom in the rear of the building (R11,14,61). Thune left the room (R61) and when accused emerged from a telephone booth in the room one of the agents identified himself to him (R12,17), whereupon accused turned pale, "became upset" and said he would "tell everything" (R13,27). Subsequently at Seine Section Headquarters a packet of English pounds serially numbered with a paper on top thereof stating "British pounds sterling and Bank of England" and some French francs were found upon accused's person (R20). After being warned as to his rights, accused signed a statement showing the agent's receipt from him of 500 one-pound British Sterling notes, serially numbered (this portion of the statement was typed by accused), and 120,000 francs (this portion was written in ink by the agent) (R20-22,23,25; Pros.Ex.1). The court took judicial notice of Circular 364, WD, 8 September 1944, Sec. V, par. 14, showing the rate of exchange of the British pound as $4.035.

On 19 September, the agent telephoned Major Clark that accused was in arrest (R52) and advised him to take such action as was necessary to protect his interests (R48). Accordingly, the officer went to accused's station at Villacoublay and made an audit or physical inventory of the various currencies in accused's safe (R38,42-43), entrance to which he gained by means of keys turned over to him by the agent (R50). He found an amount of cash equivalent to 5,412,556 francs (R44) which, subtracted from the balance between the amount accused had received and the amount he had returned, or 5,609,810 francs, left a physical shortage of currency equivalent to 197,254 francs (R42-44). The addition of a normal gain from currency conversions of 2,500 francs would bring the shortage to 199,754 francs (R42-43). Accused was the only person who had access to the safe (R47,53). Major Clark never made a demand upon him to pay the amount due, but received 1,000 pounds in English currency, "reputed to be taken from "accused's person, from the commanding officer of accused's squadron. Major Clark did not know whether this was the money which had been in the safe (R49).

On 15 September at his billet at Villacoublay, accused, in the presence of the agents, removed from his foot locker 135 100-dollar bills in United States currency, which he surrendered to them (R14-15,24-25), together with a written statement of surrender, signed by himself (R24-25; Pros.Ex.2).

4. Evidence for the defense is substantially as follows:

A finance officer familiar with operations in accused's office at Villacoublay and who succeeded to his functions there (R64), testified that irrespective of the nature of the currencies received by the Class B agent from Major Clark, the agent's accountability to him was only in francs and no certain type of currency was required to be returned to Major Clark (R66-67). To witness' knowledge, it was the agent's responsibility how and where he kept the money, but he was under duty to pay Major Clark upon his demand the balance due (R68). The cash book showing transactions in the Villacoublay office (R66) showed that Smith owed Major Clark on 14 September, 5,411,982 francs, and on 15 September, 5,609,810 francs. The last figure represented the exact difference between the amounts received from and returned to Major Clark from 6-14 September and hence accused's exact accountability (see supra) (R69). Agents were not permitted to use such funds personally but otherwise could do as they wished with them (R70). When witness returned money to Major Clark he left no record in the safe to indicate the location of such money (R71).

Testimony was stipulated to the effect that accused's reputation, in his home community and in his military organization, for honesty, truth and veracity was excellent (R74).

After an explanation of his rights, accused elected to be sworn as a witness on his own behalf (R75-76). He testified concerning his civilian background and history and that he was in the military service for five years and one month. Most of his work in the Army was in the finance department (R77-78), but he never attended an Army finance school (R79). His classification was "Fiscal Administrative" and he was familiar only with those regulations he had occasion to use - those which finance officers usually have (R79-80). He never before had legal difficulties either in civilian life or in the Army (R79).

5. Charge II and specifications:

Accused's pleas of guilty to this Charge and its specifications (wrongfully and in violation of the pertinent theater directive exchanging British currency for French francs other than through official channels, Specification 1; and wrongfully and in violation of the pertinent theater directive holding and possessing $13,500 in United States currency in France, Specification 2) were adequately corroborated by the evidence, and the findings of guilty are supported by the record (Specification 1: Cf. CM ETO 7553, Besdine and Schnurr; CM ETO 10418, Blacker; Specification 2: Cf. CM ETO 18339, Shermer).

6. Charge I and Specification:

The Specification of Charge I, to which he pleaded not guilty, alleges in effect that accused, a Class B Agent Finance Officer to a disbursing officer, embezzled 1,000 British pounds, property of the United States, furnished and intended for the military service thereof, intrusted to him by said disbursing

officer in his capacity as such, in violation of Article of War 94.

The evidence establishes that accused was intrusted with 25,000 British pounds from 6-14 September 1945, 5,000 of which were intrusted to him on the latter date, by the disbursing finance officer to whom he was responsible as a Class B Agent officer. This currency wasso intrusted for the purpose of converting other types of currencies for transient personnel at an Army finance office and the conclusion is inescapable that this property of the United States was furnished and intended for the military service thereof (Cf. CM ETO 1538, Rhodes). The physical shortage in the cash intrusted to accused, discovered by his principal on examining accused's safe to which he alone had access, on 19 September after notification that accused was in arrest, in the absence of circumstances indicating a legitimate explanation of such shortage, and particularly in view of the requirement of Army Regulations 35-320, WD, 5 February 1945, par. 8a, that public funds in the possession of an agent officer while in his possession must be kept in an office safe whenever practicable, raised a presumption that accused had converted an amount approximately equivalent to 1,000 British pounds (CM ETO 1302, Splain; and authorities therein cited). His admission to Franz on 14 September that he had on his person 1,000 English pounds which he wished to exchange for francs, his plea of guilty to the charge of wrongfully exchanging pounds for francs (Specification 1, Charge II) and the evidence corroborative thereof, and the discovery upon his person shortly after such exchange of 500 British pounds, denominated as such on an attached slip of paper and serially numbered together with 120,000 francs, corroborated this presumption. Moreover, they fully justified the inference that what he converted was 1,000 of the British pounds intrusted to him for official military purposes and that the conversion was to his own use for the purpose of private gain. The fact that accused's books on 15 September correctly reflected his full accountability to his principal and the facts, if they be such, that he intended merely to borrow the British currency and later repay it and did cause it to be repaid constitute no defense (CM ETO 1302, Splain, and authorities therein cited). Furthermore, the court was warranted in inferring a wrongful intent from the evidence of his hysterical announcement to the agents when apprehended after the wrongful exchange that he would "tell everything". The court properly took judicial notice of the dollar value of the British pound (Cf. CM ETO 12543, Marshall; CM ETO 11546, Clarke). His guilt of embezzlement as alleged was adequately established by substantial evidence (CM ETO 1302, Splain; CM ETO 1538, Rhodes; CM ETO 2535, Utermoehlen, and authorities therein cited).

7. In addition to dishonorable discharge, total forfeitures and confinement at hard labor for three years, accused was sentenced to pay to the United States a fine of $5,000. Such punishment properly may be attributed to his conviction of a violation of Article of War 94 (Cf. CM ETO 11072, Copperman) and need not be attributed to his other convictions as would be required in the case of an enlisted man in a similar situation (see CM ETO 11936, Tharpe et al), because the table of maximum punishments (MCM, 1928, par. 104c, pp. 97-101) does not apply to a warrant officer (Ibid., par. 104a, p. 95; CM ETO 1302,Splain).

8. The charge sheet shows that accused is 26 years seven months of age, enlisted 11 October 1940, and was appointed warrant officer 22 January 1943. 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 accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

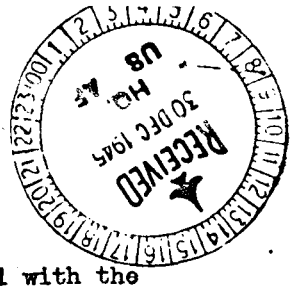
10. Confinement in a penitentiary is authorized upon conviction of embezzlement of property of the United States furnished or to be used for the military service by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87)(See CM ETO 1764, Jones and Mundy). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Edward L. Stevens, Jr. Judge Advocate

E. L. Levy Jr. Judge Advocate

(TEMPORARY DUTY) Judge Advocate

(88)



1st Ind. BK Jag

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 DEC 1945 TO: Commanding General, United States Air Forces in Europe, APO 633, U.S. Army.

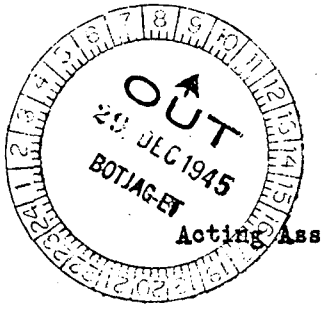
1. In the case of Warrant Officer Junior Grade ARTHUR R. SMITH (W-2115441), Headquarters and Base Services Squadron, 370th Air Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 imposition of a fine in the instant case is legally sustainable. However, the form of the sentence exhibits proof that the court did not understand the function of a fine as part of a court-martial sentence. A court-martial has no civil jurisdiction. It is therefore not authorized to pass upon civil liability of an accused. A fine is a form of punishment and is not intended to effect restitution. There should always be included in a sentence which imposes a fine a provision for further imprisonment in event of failure to pay the fine. The sentence in the instant case does not provide for such additional imprisonment. As a consequence the fine can only be collected (in the absence of voluntary payment by an accused) by an action in the civil courts prosecuted by the Department of Justice. When a fine is paid it must be covered into theFederal Treasury as it is the property of the United States. There is no authority to use it to cover a deficit in the fund from which money was stolen or embezzled by an accused. Serious complications may well result from such practice.

In the instant case the funds discovered on accused's person (500 British pounds and 120,000 francs) were probably property of the United States. The British currency had probably been taken directly from the "exchange" funds; the French francs were probably the proceeds of other British currency taken from the "exchange" funds. If such facts be established the return of this money to the "exchange" fund would be proper, and accused could not use these funds to pay his fine as they were not his property. The record shows that £1,000 British currency were returned to the "exchange" fund and that it was "reputed to be taken from the person of Mr. Smith" (R49). However, there is no evidence as to the re-conversion of the 120,000 francs to British pounds and the record is therefore obscure in this respect. Suffice it to state that if the £1,000 returned to the "exchange" fund represented the stolen property, its return did not constitute payment of the fine.

Insofar as shown by the present record the sum of $13,500 American currency was property of accused. He is entitled to its return and may use it to pay his fine if he elects. However, courts-martial have no authority to issue writs of execution and thereby effect a levy on these funds for the payment of the fine.

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 18626. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18626).



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

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

BOARD OF REVIEW NO. 5

21 DEC 1945

CM ETO 18629

U N I T E D S T A T E S	102ND INFANTRY DIVISION
v.	Trial by GCM, convened at Bayreuth, Bayreuth, Bavaria, Germany, 19 November 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. Loire Disciplinary Training Center, Le Mans, France.
Private MIKE FEDORNAK (33014359), Battery B, 895th Antiaircraft Artillery Automatic Weapons Battalion	

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

1. The record of trial in the case of the soldier named above has been examined 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 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 61st Article of War.

Specification: In that Private Mike Fedornak, Battery "B", Eight Hundred and Ninety Fifth Antiaircraft Artillery Automatic Weapons Battalion, did, without proper leave, absent himself from his organization at Ulm, Germany, from about 1900 hours 27 April 1945, to about 9 July 1945.

He pleaded not guilty and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, one by summary court for absence without leave for about 98 days, another by special court-martial for a similar absence for about 16 days, both in violation of Article of War

61, and the third by summary court for entering an off-limits area and being drunk in uniform in a public place in Algeria 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 two years. The reviewing authority approved the sentence, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 79, Headquarters 102nd Infantry Division, dated 30 November 1945.

3. In this case there was complete failure of proof as to the fact that accused absented himself as alleged. The date of initial absence alleged in the Specification is 27 April 1945. The only proof offered by the prosecution to show accused's unauthorized absence from his organization was the Battery B morning report (extract copy) (R8, Pros.Ex.A). This morning report was undated, except that it describes the absence "as of the 27th" thereby indicating that the report itself was made on a later date. It does not show the month or the year of the occurrence of the act which it purports to record, nor does it show the place of the absence. The date of authentification is 28 April 1945. The location of the reporting unit on the unknown date when the morning report was submitted is shown by the exhibit to have been Ulm, Germany. All that can be said with certainty, therefore, is that accused absented himself on the 27th day of some month, prior to 28 April. In CM ETO 9204, Simmers, accused was charged with desertion, predicated upon an initial absence alleged to have occurred on 3 October 1944. An undated morning report was held by the Board of Review in that case to have no probative value, although the extract copy thereof was authenticated on 3 October 1944. In CM ETO 9839, Wells, a case similar to the foregoing, the Board of Review reached the same conclusion. The fact that in the present case the date of a month is given in the morning report entry does not strengthen the proof and establish the date of accused's absence. There is a difference between "speculating" evidence into a reconciliation with a specification, and finding in the record definite evidence which immaterially varies from a specification. It can only be said that the evidence in this case does not show the date of accused's initial absence, which was the characteristic and fatal defect in the cited authorities.

The instant case is in no wise similar to CM ETO 16936, Kempain, where the morning report showed the absence to have occurred at Metz on a given date in December 1945. Since December 1945 had not arrived by the time of the trial and since December 1944 was coincident with the presence of American troops in Metz, and further since "the parties apparently attempted to correct the error by stipulation", the Board of Review held 1945 to be a typographical error which when corrected gave specific proof as to the day of the month, the month, and the year of the offense. As stated, in the present case the morning report fails to show the date or place of accused's alleged initial absence, which according to cited authorities

is a fatal defect.

Nor is there any competent evidence to show accused's unauthorized absence at any time during the period alleged in the Specification. Prosecution's Exhibit C (R10) is obviously hearsay and incompetent. It is an entry in the morning report of accused's battery which is based on information received from another organization. The only other evidence is a stipulation (R8; Pros.Ex.B) that accused entered the clearing station of another organization on 9 July 1945. While this showed an absence by accused from Battery B on that day, there is involved therein no admission that accused was absent from his proper organization without authority on that day.

4. It does not appear either from the charge sheet or the record that the Charge was ever served on the accused. It is unnecessary to discuss the question of due process raised by this irregularity in view of the opinion herein expressed that the evidence adduced by the prosecution was legally insufficient to support the findings of guilty.

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

Judge Advocate

Judge Advocate

Judge Advocate

(94)

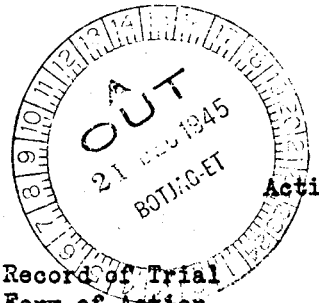
1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private MIKE FEDORNAK (33014359), Battery B, 895th Antiaircraft Artillery, Automatic Weapons Battalion.

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

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



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

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

(Findings and sentence vacated. GCMO 41, USFET, 18 Jan 1946).

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

BOARD OF REVIEW NO. 5

21 DEC 1945

CM ETO 18630

U N I T E D S T A T E S	1ST ARMORED DIVISION
v.	Trial by GCM, convened at APO 251, U. S. Army, 21 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RAYMOND G. ADAMCZYK (33036976), Battery C, 68th Armored Field Artillery Battalion	

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

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

2. The accused, a member of Battery C, 68th Armored Field Artillery Battalion, was charged with being absent without leave from his station at Bishopsheim, Germany, from about 1 September to about 26 September 1945. The evidence introduced by the prosecution insofar as pertinent to this discussion includes a special order (Pros.Ex.1) of the 3rd Armored Division dated 25 August 1945, transferring accused to the 68th Armored Field Artillery Battalion of the 1st Armored Division, a special order (Pros.Ex.2) of the 68th Armored Field Artillery Battalion dated 1 September 1945 stating that accused had reported at Battalion headquarters and assigning him to Battery C, and an extract copy (Pros.Ex.3) of a morning report of Battery C dated 23 October 1945, correcting a morning report entry of that organization of 7 September 1945, showing accused as assigned, not yet joined "(AWOL)" from the 3rd Armored Division. Oral testimony introduced by the prosecution showed that accused had never joined Battery C at any time during the alleged absence.

3. The evidence introduced fails to satisfy the requirement of proof in this case. There is nothing to show that accused had left the Battalion headquarters to join Battery C or that he had knowledge of the order assigning

him to Battery C. The documentary evidence presented was not sufficient proof of the offense that accused was absent without leave from an organization where he had a known duty to be. The failure to prove that accused knew he must report to Battery C was fatal error (CM ETO 11356, Crebessa; CM ETO 11518, Rosati; CM ETO 13565, Slominski).

This case is distinguished from CM ETO 11306, Pouche, wherein a shipment order was received in evidence showing accused to be a member of the shipment packet that arrived at a Replacement Depot. The Board of Review considered the shipment order an official record, kept in due course of business, and oral testimony showed that if accused had not departed from his original station a line would have been drawn through his name. The Board of Review held this to be sufficient evidence to show that accused had departed from his original station to his new organization. There is no evidence whatsoever, in the instant case, to show that accused departed from Battalion headquarters to Battery C or that he knew he should join Battery C.

The evidence in this case fails to sustain the findings of guilty on still another ground. Although the extract copy of the morning report received in evidence indicates that the original morning report was signed by the company commander, the testimony of the company commander (R9-10) clearly negatives that fact. When the officer admitted that the original was not signed the President erroneously admitted the extract in evidence with the statement that "It is not necessary that all three copies of the morning report be signed by the company commander".

Morning report forms are prepared in sets, each set containing an original, duplicate original and triplicate original (AR 345-400, par. 1d).

> "Morning reports will be signed by the commanding officer of the reporting unit, or by an officer designated by the commanding officer. The name, grade, and arm of service will be typed or otherwise printed in the boxes provided. The full name of authenticating officer, first name, middle initial, and last name will be signed in ink or indelible pencil in the proper box. If more than one set of forms are required, only the first set of forms will bear a signature or carbon impression thereof.
>
> **Extract copies of the morning report may be prepared from the first original, duplicate original, or triplicate original of the morning report * * *" (AR 345-400 pars. 43a and 43b, 3 January 1945).

It is apparent from the foregoing that the original morning report must be signed and an extract copy prepared from an unsigned original is of no evidentiary value.

Judge Advocate

Judge Advocate

Judge Advocate

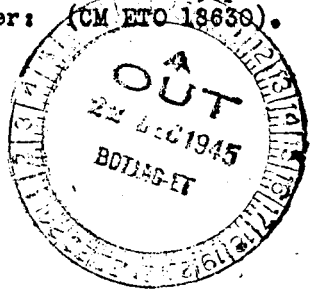
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 21 DEC 1945 TO: Commanding General, 1st Armored Division, APO 251, U. S. Army.

1. In the case of Private RAYMOND G. ADAMCZYK (33036976), Battery C, 68th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and sentence, which holding is hereby approved.

2. The findings and sentence are therefore vacated and the record is transmitted herewith under the provisions of Article of War 50½ for rehearing or such other action as may be deemed proper.

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 18630. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18630).



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

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

BOARD OF REVIEW NO. 1

5 JAN 1946

CM ETO 18635

UNITED STATES	) DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v	)
Private First Class L. E. BRANDY (38522439), 4134th Quartermaster Service Company (formerly of 3113th Quartermaster Service Company	) Trial by GCM, convened at Marseille, France, 30 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pfc. L. E. Brandy 38522439, 4134th Quartermaster Service Company, then a member of the 3113th Quartermaster Service Company, did, at or near Marseille, France, on or about 6 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Pfc Robert J. Larson and Pfc Earl Pichette, both human beings, by shooting them with a weapon, to wit, a carbine.

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

Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On the evening of 6 July 1945, personnel of various units stationed near Marseille, France, were present at the Delta Base Section parking lot in that city awaiting the departure of transportation to their respective units after having been in Marseille on pass. Certain of the men were loitering near the "pass trucks" which were to take them to their organizations while others already had mounted the vehicles (R8,10,17,18; Pros. Ex.1). At about 2330 hours, shortly before the trucks were scheduled to depart, a scuffle or "free-for-all" flared up between certain white and colored soldiers presumably as the result of the refusal of the former to give a colored soldier a ride to his unit (R8,9,18,52). The colored soldiers apparently were outnumbered and either retired or were driven back to the far end of the parking lot (R9,28, 31,32). Privates First Class Robert J. Larson and Earl Pichette (the two deceased), who previously had mounted the truck from their organization to await its departure, took no part in this affray (R13,29,41). Shortly after the colored soldiers retreated to the far end of the parking lot, rocks were thrown, and the men from the unit of which the deceased were members decided to leave before further trouble developed. The men who had not previously mounted the truck did so and the driver started to pull away from the area (R10,19,40). As he was doing so, some four to six shots were heard "from somewheres in the back where the trucks had been" (R53). Almost immediately thereafter it was discovered that both of the deceased, as well as certain others in the departing truck, had been wounded (R11,43,44). Certain of the men who had been wounded, including Pichette and Larson, were placed in a passing military police truck and taken to a hospital (R43). Pichette was dead upon arrival as the result of a gunshot wound of the left chest which produced a massive hemorrhage in both pleural cavities and Larson died shortly after arrival at the hospital as the result of a gunshot wound perforating his head (R75-76; Pros. Ex. 2,3).

Private Edwin Alexander, of accused's former company, testified that on the evening of 6 July he was acting as guard of the pass truck from that unit and as such was armed with a carbine which had seven rounds of ammunition in the magazine (R55-56). Although on guard, he left the parking lot at about 2200 hours when another member of the company volunteered to take over his duties. When he departed, he left his carbine, which was still loaded, in the cab of the truck under the care of the substitute guard (R57-58). When he returned at bout 2400 hours, he asked for his carbine but it was then apparently in the possession of a man named Bell who was at that time in the back of the truck. He did not see the weapon again until some time later just before it was delivered to the military police. At this time some rounds were still

in the magazine but the witness did not know their exact number (R58-60).

Private First Class Lawrence Jeter, also of accused's former company, testified that he was on pass in Marseille on 6 July and returned to the parking lot that evening where he mounted his unit's pass truck to await its departure. After he had been there for some time, it was reported to him that a fight was in progress and upon learning this he dismounted from the truck. When he did so, he saw accused standing in the middle of the parking lot near an electric light pole firing a carbine in the general direction of a truck which was pulling out of the parking area (R62-64; Pros. Ex. 1). A few moments later, he saw accused walk over and place the weapon in his unit's pass truck (R69-70). Jeter then went over and stood by the truck but, upon receiving a report that a colored soldier was lying in the street, went to the location specified to see if he could render assistance. He found the soldier to be a friend of his named Cannon and, as the latter was injured, helped him up and a few minutes later accompanied him to a dispensary (R65-66, 73).

On cross-examination, defense counsel attempted to impeach Jeter by showing that, during questioning prior to trial, he first had said that Cannon was the man who had fired the shots and changed his story to identify accused as the man in question only after his interrogators had pointed out to him that Cannon was lying on the ground injured at the time the shots were fired. The defense also brought out that at the time this questioning took place Jeter himself was under suspicion as the result of information given by accused that it was he (Jeter) who had fired the shots. Jeter admitted this but also stated that he had not meant that Cannon had fired the shots by the answer to which defense counsel referred and explained that his answer had been misunderstood by his interrogators (R60-69).

Jeter's statement that accused put a carbine in the back of his unit's pass truck shortly after the firing of the shots was corroborated by the testimony of two additional witnesses from that unit. One of these witnesses testified that he had been asleep in the back of the vehicle, that he was awakened by the sound of shots and that about four or five minutes later something "landed in the truck" (R80). When this happened he looked up to see accused going around the left side of the vehicle. He saw no one else near by at the time. He then saw a carbine on the floor of the truck and, upon picking it up, found that the barrel was still warm (R79-82). The other witness testified that he actually saw accused place a carbine in the truck shortly after the shooting took place (R86-88).

There was received in evidence, as an admission against interest, a pretrial statement made by accused dated 30 September 1945. In this statement, he recited that he came to Marseille on pass on the afternoon of 6 July 1945 and thereafter engaged in certain recreational activities until about 2330 hours when he returned to the parking lot to await transportation back to his unit. When he returned it was reported to him that there had been a fight

in which one of the members of his company had been injured. Shortly thereafter, a man who was apparently injured was seen lying on the ground in the middle of the parking lot. At about this time Jeter came around the truck with a carbine in his hand with the statement that he was going to find out who the injured man was. He then went over to him and upon reaching the prone figure announced that it was Cannon. At this time a truck started to pull out of the parking lot and Jeter fired on it. Accused was about 35 feet from Jeter at this time and, after Jeter fired, went with another member of his company to assist Cannon. While they were doing so he saw Jeter walk toward their unit's truck. Jeter reappeared a few minutes later with the statement that he would take Cannon to the hospital. Accused thereupon left Cannon with Jeter and returned to the truck. On 8 July, Jeter came to him and warned him not to say anything about the incident (R92; Pros. Ex. 4).

4. Accused, after being advised of his rights, elected to testify on his own behalf (R93-95). His testimony added little to the recitals set forth in his pretrial statement and need not be extensively summarized here. He repeated his statement that it was Jeter, not he, who fired on the departing truck and intimated that Jeter had testified falsely because he was "probably trying to save himself" (R98). He further stated that, after members of his organization were questioned by agents of the Criminal Investigation Division, Jeter and the two witnesses who had testified that he (accused) had placed a carbine on the truck shortly after the shots were fired all were placed under arrest and that he (accused) had been one of the men detailed to guard them (R100-102). He denied having a carbine in his hand the evening the shooting took place (R98,100).

Certain other witnesses were called on behalf of the defense but their testimony brought out few significant facts and added little to the case. Virtually the only relevant fact brought out by these witnesses was a statement by one of them in response to questioning by the court that he saw Jeter coming around a truck with Cannon, who was injured, "a split second - I would say less than a minute" after the shots were fired (R116,117). Jeter was not armed at the time (R118).

5. While there is no conflict in the evidence with respect to the facts and circumstances giving rise to the instant killings, there is a sharp conflict as to who fired the fatal shots. Accused denied that it was he and asserted that the perpetrator was Jeter. On the other hand, Jeter testified flatly that accused was the man who fired at the departing truck. Further, his testimony, unlike that of accused, was partially corroborated. The testimony of two additional witnesses indicated that accused placed a carbine in the pass truck shortly after the shooting took place, and that of a third showed that, at about the same time or very shorly thereafter Jeter was rendering assistance to Cannon. On this state of the evidence a question of fact for resolution of the court arose. There is substantial evidence which justified the court in inferring that it was accused rather than Jeter who fired the fatal shots. The findings of the court on this issue therefore will not be disturbed by the Board of Review on appellate review (CM ETO 3200, Price; CM ETO 3837, Bernard Smith; CM ETO 12656, Tibbs; CM ETO

17826, Barthelemy et al).

The question then becomes whether accused's act in firing into the departing truck, causing the death of two of its occupants, constituted murder. There can be no suggestion in the instant case that the killings were either justifiable or excusable. Further, while an affray preceded the shooting, the evidence affords no substantial basis for the conclusion that accused's acts were committed in the heat of a sudden passion caused by adequate provocation, which would render his offense that of voluntary manslaughter. Rather, the evidence fairly tends to show that accused coldly and deliberately fired at the truck with a lethal weapon intending to cause death of, or grievous bodily harm to its occupants or, at the very least, with the knowledge that his acts probably would cause their death or subject them to grievous bodily harm. Hence, there was substantial evidence to show that accused acted with malice aforethought and the record of trial thus supports the court's findings that he was guilty of murder, as alleged (MCM, 1928, par. 148a, p. 163; CM ETO 4292 Hendricks; CM ETO 7015, Gutierrez; Cf CM ETO 2899, Reeves).

6. The charge sheets shows that accused is 20 years one month of age and was inducted 4 November 1943 at Camp Beauregard, Louisianna, 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).

Edward C. Stevens, Judge Advocate

B L Avery Jr Judge Advocate

Donald K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 5

5 JAN 1946

CM ETO 18667

U N I T E D S T A T E S	) 3RD INFANTRY DIVISION
	)
v.	) Trial by GCM convened at Bad
	) Wildungen, Germany, 4 September 1945.
Private First Class H. L. HODGES (34824662), Anti-tank Company, 7th Infantry	) Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class H. L. Hodges, Anti-Tank Company, Seventh Infantry, did, at Hersfeld, Germany, on or about 7 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Corporal Leslie Edwards, Anti-Tank company, Seventh Infantry, a human being, by shooting him with a pistol.

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

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3. On 6 August 1945 the Anti-tank Company, 7th Infantry, of which accused was a member, was billeted on the outskirts of Hersfeld, Germany (R10,21). The Kaiser Hof Hotel in Hersfeld, Germany, twelve to fifteen blocks from the billets (R33,47) was used as sleeping quarters for men detailed as guards at the "V.D." clinic (R10). Between 2:00 and 5:15 o'clock in the afternoon of 6 August 1945 (R11,14) the accused who had been drinking (R18,97) engaged in a fight or scuffle with Corporal Leslie Edwards in a room on the third floor of the Kaiser Hof Hotel (R11, 95-99). Corporal Edwards, although larger than the accused, sought only to defend himself and to depart (R19,99,100). Others present sought to hold the accused. Corporal Edwards ran from the room and down the stairs followed by accused who jumped from the third floor landing to the second floor where he laid stunned and moaning but not unconscious (R12,16,100). He was taken into a room on the second floor and his head bathed with cold water (R12). As he gained consciousness he appeared to be belligerent and struggled to arise just as three military police arrived who took him downstairs and put him in a jeep (R 13). A witness present during the incident at the hotel testified that he had known the accused for over a year and had seen him drunk on previous occasions and that when in such condition accused had always before been "happy-go-lucky" (R15,19); and that at the time of the above incident the accused had been drinking, wanted to cause trouble and fight but wasn't really drunk and talked coherently and was able to walk without support or without staggering (R17, 18,96).

Accused's first sergeant testified that a little before 4:00 o'clock in the afternoon of 6 August 1945 accused was brought in a jeep to the company billets on the outskirts of Hersfeld, Germany, by several military police (R21). He was "kicking the M.P's" and when brought into the house had to be restrained from leaving but was later given permission to go upstairs. The first sergeant heard a "window go out on the second floor" and went upstairs and pulled accused in as he was about to jump from the window. (R21,22). At this time accused struck at him with a piece of glass (R22). The first sergeant then took accused back downstairs to his office where accused kicked out the bottom window of the door (R22) and where, before he was removed by an MP at about 4:30, he stated that he was going to kill Corporal Edwards, the first sergeant and some third individual (R22, 25). The first sergeant testified that at the time of this incident it was apparent that accused had been drinking but that he was not extremely drunk (R25); that he looked violent and seemed to be a little bit out of his mind (R24).

Staff Sergeant Henry Wyland, platoon sergeant of accused, heard some commotion in accused's room at approximately 1600 hours that afternoon and entering found accused "kicking in his foot locker" (R33,34). Accused said he was going to get his pistol and "was going to get the people that beat him up". Sergeant Wyland took accused's pistol and left for the CP (R34). Between "four-fifteen and four-thirty" that afternoon accused entered the supply room with an M-1 rifle and asked for ammunition saying "he had four men he wanted to get" (R29). When the supply sergeant refused to give him any ammunition the accused tried to break down the door to the weapons room. The supply sergeant took the rifle away from accused and turned him over to his platoon sergeant, Sergeant Wyland, at about "four-thirty" (R30,34). In the opinion of the supply sergeant the accused was not "dead drunk" but could not talk coherently or walk very straight.

this time (R30).

Sergeant Wyland returned to the billets with accused and secured some sedatives from the company commander which he administered to the accused (R35). As a result of the sedatives accused slept for approximately six hours and at 11:15 PM came to the room of Sergeant Wyland fully dressed looking for a needle and some thread (R36). At this time accused appeared to be sober and Sergeant Wyland returned to accused's room where he remained with him until shortly before midnight (R37). During this time accused drank nothing and made no threats in reference to Corporal Edwards (R42,43). The accused went back to bed clothed and it was the belief of Sergeant Wyland that he was asleep when Sergeant Wyland turned out the lights and left the room shortly before midnight (R44, 45). Shortly after midnight Private First Class Siperstein of accused's organization was returning to the billets and when he was half way up the hill to the barracks met the accused coming from the direction of the billets (R46,47). Accused stated that he was going back to the Kaiser Hof Hotel and that he was sorry that he had caused so much trouble that day. Siperstein explained that someone else had been put on guard for accused who then returned to the company billets with Siperstein where they went to Siperstein's room on the second floor (R48). Siperstein testified that accused was staggering when he met him and complained of a headache, but did not appear to be intoxicated (R49,50). After talking with Siperstein for fifteen or twenty minutes accused departed saying that he was going downstairs to get some air (R49). While in the room Siperstein noted that accused had "a pistol cover" and asked him if it were loaded and accused said that "it wasn't" (R49). Private First Class Lewis of accused's organization was relieved as guard at 12:35 in the morning of 7 August 1945 and returned to his room on the third floor of the Kaiser Hof Hotel which he shared with Corporal Edwards, who was then in bed asleep (R53,54). At approximately a quarters to one, Lewis heard steps in the hallway and accused opened the door, said "Where's Edwards?" and unbuttoned his pistol holster as he stepped past Lewis (R54). Lewis seized the pistol holster to prevent accused from drawing the pistol but accused managed to withdraw the pistol from the holster, cocking it in the process (R54,55). He pointed the pistol at Lewis saying "Get the hell out of here" and as Lewis left the room he saw accused reaching to awaken Edwards with his left hand and with the pistol hanging in his right hand (R55). Lewis went to a room on the second floor to get help and about "one and a quarter minutes" after leaving the room on the third floor heard one single shot and then a series of shots and heard someone coming down the stairs from the third floor (R55,56). Private First Class Pryor to whose room Lewis had come for help had immediately gone up towards Edwards' room and had just reached the top of the stairs when Edwards came out of his room at a "pretty fast gait", "kind of bent over" and the accused was "shooting at the same time" (R65). As Edwards ran down the stairs the accused followed him out of the room where Pryor grabbed him and secured his pistol, a 45 caliber. Pryor heard four or five shots just before accused came out of the room and upon entering the room found four empty 45 caliber

cartridges (R65,66,68,78). Corporal Edwards reached a landing between the second and third floors where he fell bleeding and died before the arrival of the medical officers who were summoned from across the street (R71). The body was removed by an officer of Graves Registration who testified that there were four shots in the body, "one in the back through the lung and came out the heart, one through the kidney, one on the left wrist and one in the left thigh" (R26,27). Accused, immediately after the shooting, did not appear to be drunk and appeared to be calm and normal (R68,69,73, 74), but very tired (R82,83). Accused had a fresh cut across his forehead which he explained by saying that he had tried to shoot himself (R72,74,80). Staff Sergeant Crabtree of accused's organization was detailed to guard accused shortly after the shooting (R79) and accused told him "what he had done wasn't any worse than the fight in the afternoon had made him" (R77). Accused also told him that "he was sitting on the foot of Lewis' bed with his foot against the top of a night stand at the foot of the bed when Edwards got up off his own bed he pulled on his pants and started to come toward him to take the gun away from him and he jerked the gun out of Edward's reach and Edwards turned to run out of the door and he pivoted on his left foot and fired as Edwards went out of the door" (R81).

The Division Neuropsychiatrist testified that the sedative given the accused on the afternoon preceding the shooting was a normal dose to produce sleep for six or seven hours; that upon awakening the person might be "somewhat dull", but that such dulling of his mentality would not result in the person's being unable to distinguish right from wrong, or in his being unable to adhere to the right (R107).

The defense called as witnesses, accused's first sergeant, his platoon sergeant and two other members of his organization, who testified to the effect that accused had joined the organization at Anzio and had participated in about 384 days of active combat, that he had never shown fear before the enemy, had been a very good combat soldier and had always obeyed orders and instructions from superior authority (R84-90). The defense also called the investigating officer as a witness to establish the fact that accused was not given a psychiatric examination until about five days after the shooting (R90,91).

The accused after being fully advised of his rights as a witness elected to remain silent (R94).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The evidence presented clearly establishes a case of cold blooded murder. The proof is clear and definite that several hours elapsed between the altercation between accused and deceased in the afternoon and the homicide during which time accused slept as a result of the administration of a sedative. Although accused and deceased met in Sergeant Wyland's room after the administration of the sedative the evidence shows no resumption of hostilities. The question as to whether a sufficient "cooling period" elapsed so as to allow accused's deliberative processes to function normally was one of fact for the court

and inasmuch as there is substantial evidence supporting the court's findings that accused acted with premeditation and malice at the time he shot deceased, the findings will be accepted as final by the Board of Review on appellate review (CM ETO 292, Mickles, 1 BR (ETO) 231; CM ETO 4497, De Keyser).

The accused raised no defense of his conduct other than his plea of mental irresponsibility at the time of the offense by reason of a combination of liquor imbibed by him and sleeping tablets administered to him six or seven hours prior to the shooting. There was competent medical testimony before the court on this point. The determination of mental irresponsibility or intoxication of accused at the time of the offense was a matter of fact to be determined by the court (CM ETO 3812, Harshner; CM ETO 6265 Thurman et al; CM ETO 5747 Harrison; CM ETO 9877, Balfour). The denial of his special plea in bar of trial on the ground of temporary insanity at the time of the shooting resulted in no prejudice to the accused. He did not claim to be insane at time of the trial. Accused desired no further mental examination and was permitted to introduce any and all available evidence of insanity by way of defense during the trial. (MCM 1928, par. 75a, pp.58, 59, CM ETO 4219 Price). It is the opinion of the Board of Review that there is ample evidence in the record to sustain the findings of the court that accused was neither drunk nor temporarily insane at the time of the shooting.

6.The charge sheet shows that accused is 20 years three months of age and was inducted 9 July 1943 at Fort McPherson, Georgia. 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, 457). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 1

20 DEC 1945

CM ETO 18686

U N I T E D S T A T E S	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Privates MACEDONIA BACA (39919561), Company F, 8th Infantry, LEON C. CREASON (36963248), Company G, 4th Infantry, NORMAN L. DYETTE (12099231), Company L, 60th Infantry, and LEONARD C. ROCKEY (33315262), Company E, 26th Infantry	Trial by GCM, convened at Brussels, Belgium, 3, 5 November 1945. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor, BACA, DYETTE and ROCKEY for 30 years, CREASON for ten years. Places of confinement: BACA, DYETTE and ROCKEY, United States Penitentiary, Lewisburg, Pennsylvania; CREASON, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. The record of trial is legally sufficient to sustain only so much of the finding of guilty of Specification 2 of Charge III as involves a finding of guilty of robbery by accused Baca and Rockey, acting jointly and in pursuance of a common intent, at the time and place alleged from the person of Gaston Verhasselt, of one wallet of some value, 10,000 francs, lawful money of Belgium, of an exchange value of $228.45, one wrist watch, one fountain pen, and a cigarette case, all of some value, all the property of said Gaston Verhasselt, of a total value of more than $50.00; from the person of Anne-Marie Verhasselt of the property as alleged,

of a value and ownership as alleged; and from the person of Roger Verhaustraten of a wallet of some value and 8,000 francs, lawful money of Belgium, of an exchange value of about $172.76, all the property of the said Roger Verhaustraten, of a total value of more that $50.00. The record of trial is legally sufficient to support the remaining findings of guilty and the sentences.

Edward L. Stevens Jr. Judge Advocate

B K Stevens Jr Judge Advocate

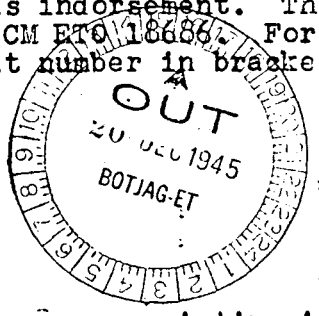
(TEMPORARY DUTY) Judge Advocate

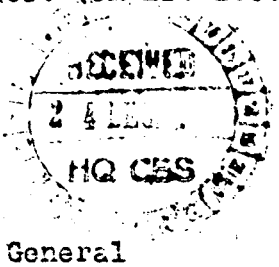
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 20 DEC 1945 TO: Commanding General, Chanor Base Section, Theater Service Forces, European Theater, APO 562, U.S. Army.

1. In the case of Privates MACEDONIA BACA (39919561), Company F, 8th Infantry, LEON C. CREASON (36963248), Company G, 4th Infantry, NORMAN L. DYETTE (12099231), Company L, 60th Infantry, and LEONARD C. ROCKEY (33315262), Company E, 26th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to sustain only so much of the finding of guilty of Specification 2 of Charge III as involves a finding of guilty of robbery by accused Baca and Rockey, acting jointly and in pursuance of a common intent, at the time and place alleged from the person of Gaston Verhasselt, of one wallet of some value, 10,000 francs, lawful money of Belgium, of an exchange value of $228.45, one wrist watch, one fountain pen, and a cigarette case, all of some value, all the property of said Gaston Verhasselt, of a total value of more than $50.00; from the person of Anne-Marie Verhasselt of the property as alleged, of a value and ownership as alleged; and from the person of Roger Verhaustraten of a wallet of some value and 8,000 francs, lawful money of Belgium, of an exchange value of about $172.76, all the property of the said Roger Verhaustraten, of a total value of more than $50.00. The record of trial is legally sufficient to support the remaining findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. 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 18686. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18686).





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

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

BOARD OF REVIEW No. 4. 27 DEC 1945

CM ETO 18703

U N I T E D S T A T E S	SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private CLEVELAND C. COVER, (33556385), Attached - Unassigned, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot	Trial by GCM, convened at Paris, France, 29 October 1945 and 10 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON AND BURNS, Judge Advocates

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

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

CHARGE : Violation of the 58th Article of War.

Specification : In that Private Cleveland C. Cover, attached unassigned, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, United States Forces European Theater, United States Army (then of 11th Infantry Regiment, 5th Infantry Division) did, at or near 11th Infantry Regiment, 5th Infantry Division, APO 5, U.S. Army, on or about 7 February 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at or about Fersehweiler, Germany, on or about 2 July 1945.

He interposed a special plea in bar of trial, alleging that the

offense charged had been condoned by competent authority, and, this plea being sustained by the court, the Specification was amended by excepting therefrom the words "desert" and"in desertion", substituting therefor respectively the words "absent himself without leave" and "without leave", and the Charge was amended to allege a violation of Article of War 61. He pleaded not guilty to the Charge and Specification as amended, and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty thereof. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The Plea in Bar and the amendment of the Charge and Specification.

When arraigned accused pleaded specially (R5; MCM, 1928, par. 69b, p. 54), averring that the offense had been condoned by competent authority, and in support thereof introduced the following evidence: (a) a carbon copy of the charge sheet involved herein (R5; Def. Ex. 1); (b) the appointment of the Investigating Officer and the first indorsement thereto evidencing the transmittal of the Report of Investigation (Def. Ex. 2); (c) the second indorsement thereto, addressed to the Commanding General, Seine Section, Theater Service Forces, European Theater (the appointing and reviewing authority), forwarding the charges and recommending trial by General Court-Martial (Def. Ex.3); and (d) a letter from the Commanding General, Seine Section, Theater Service Forces, European Theater, to the forwarding officer, dated 2 October 1945, reciting that the charges against accused, evidenced by Defendant's Exhibit 1, had been dismissed, and directing that he be released from confinement and restored to duty (Def. Ex. 4). The plea in bar was sustained (R8), and, over objection by the defense, the Charge and Specification were, by appropriate exceptions and substitutions, amended to allege absence without leave in violation of Article of War 61 (R8-10).

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

It was stipulated that accused at the time of trial and at all times mentioned in the Specification was a member of the United States Army (R11), and that he returned to military control on 2 July 1945 (R20-21).

An extract copy of the morning report of accused's organization for 18 February 1945 (Pros. Ex. A) reciting "Fr dy to AWOL in Germany 7th", and authenticated on 26 September 1945 by an officer described as the official custodian of the morning reports of The Adjutant General's Office, was offered in evidence (R11). The defense objected to its admission because (a) it did not disclose the date of the initial absence without leave, (b) it was not authenticated by an official custodian, and (c) it was inconsistent with a report from the authenticating officer dated 15 September 1945 stating that there were no remarks on the morning reports of accused's organization for February 1945 pertaining to him (R11-13;Def.Exs.

5 and 6). The objection was sustained, and the court, in giving the reason for its ruling, said (R13):

> "* * * the entry * * * is defective and does not show the month or year and while it might be sufficient to stand alone, it is the view of the law member that defense' Exhibit 5 * * * signed by the same officer who signed the extract copy of the morning report, places the matter in considerable doubt in my mind; makes it of such doubtful validity that it should be excluded and is excluded * * *"

The prosecution thereupon requested a continuance of the case to enable it to procure other evidence, and the defense counsel then said (R14):

> "The defense counsel does not object, but also in connection with this request I have one other request which I would like to make of the court. That it be directed that the record of this trial be typed up and a ruling of the Review be obtained relative to the ruling of the court on the first two motions which were made". (Underlining supplied).

The court granted these requests and the case was continued (R14).

When the court reconvened the prosecution submitted to the court an "opinion" of the convening authority which, it was said, had been obtained pursuant "to the request of the defense counsel" (R15; Pros. Ex. B). This "opinion" recited that the evidence did not disclose condonation, urged the court to reconsider its ruling on the plea in bar, and observed that in any event condonation would not be a bar to a prosecution for absence without leave. The convening authority also commented on the admissibility of the morning report (Pros. Ex. A), as is shown by paragraph 3 thereof, which reads as follows:

> "The convening authority ordinarily has no power to rule upon the admissibility of testimony (4 Bull. JAG 88). In this case, however, the Defense Counsel, in behalf of the accused, requested such a ruling. The following is in reply to such request. It appears that, in the absence of evidence to the contrary, the extract copy of the morning report which was offered as Prosecution's Exhibit A, is prima facie evidence of the accused's absence without leave on 18 February 1945. It is my opinion that the evidence offered by the Defense does not render the Exhibit inadmissible even though the court may consider such evidence in passing upon the credibility of the evidence. It is called to your attention that the evidence introduced by the Defense (Defense' Exhibit 5) merely shows that there was no entry on the morning report of the 11th Infantry Regiment during February 1945 relative to the accused being

absent without leave, on 15 September 1945. It should be noted, however, that the authentication of the extract copy of the morning report is dated 26 September 1945. The court may take judicial notice of the fact that the 5th Infantry Division, the parent organization of the accused's unit, did not depart from the European Theater of Operations until 11 July 1945. There is no showing that the morning report, of which Prosecution's Exhibit A is an extract copy, was not received in the Adjutant General's Office between 15 September and 26 September 1945." (Underscoring Supplied)

After reconsideration of its ruling on the plea in bar the court persisted in holding that the evidence disclosed condonation of desertion, and trial continued on the Charge and Specification as amended (R18-20). The court did, however, reverse its former ruling on the admissibility of the morning report (Pros. Ex. A), and it was received in evidence to show an initial absence without leave on 7 February 1945 (R20).

5. After his rights as a witness were explained to him by the court, accused elected to remain silent (R21-22). No witnesses were called in his behalf.

6. The record of trial discloses that when the court ruled adversely to the prosecution on the admissibility of the morning report a continuance was granted to enable the prosecution to obtain other evidence; and that prior to adjournment the defense counsel requested that a ruling of the convening authority be obtained with reference to the "ruling of the court on the first two motions which were made." A fair reading of the record of trial shows clearly that the "first two motions" were the plea in bar and the motion to amend the Charge and Specification and that the defense counsel requested a ruling thereon because of his contention that condonation of desertion necessarily precluded trial for the lesser included offense of absence without leave. It was not until after the court had ruled thereon, and accused had been arraigned on the amended Charge and Specification, that the morning report was offered in evidence and objection was made thereto by the defense. Moreover, the prosecution, the defense and the court all referred to the plea in bar and the motion to amend as "motions" during the proceedings prior to adjournment (R6,7,8,10). An objection to the admission of evidence is not a "motion" as that word is used in the procedure of courts-martial (cf. CM 272457, Smith, 46 BR 281,287, (1945)) and the record of trial does not show that the objection to the admission of the morning report was so considered here. It does, however, disclose that two "motions", the plea in bar and the motion to amend, were made prior to the objection to the morning report, and we are persuaded that the request of the defense counsel for a ruling thereon cannot be construed to embrace a request for a ruling on the admissibility of the morning report - a question which had already been determined in favor of accused. A different conclusion would be at variance with the facts disclosed by the record of trial, would do violence to the ordinary meaning of legal language, would suggest action

by the defense counsel at varience with the interests of accused, and, as is shown hereinafter, would invite unauthorized action by the convening authority. Such a conclusion is not permitted here. We conclude, therefore, that the request of the defense counsel for a ruling on the "first two motions" pertained solely to the plea in bar and the motion to amend, and did not relate to the exclusion from evidence of the morning report.

The ruling of the convening authority (Pros. Ex. B), while recognizing his lack of power to rule on the admissibility of evidence, discloses that in his opinion the morning report is admissible, and justifies his comments thereon by the statement that in "this case * * * the Defense Counsel, in behalf of the accused, requested such a ruling". The record of trial disclosing no such request, the opinion of the convening authority was wholly voluntary and without invitation or sanction.

The theory of our military jurisprudence is that a trial by court-martial is a judicial proceeding in which the functions of the court and the convening authority are separate and independent. Courts-martial "pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law" (Runkle v. United States, 122 U.S. 543,558, 30 L. Ed. 1167,1171 (1887)). The Boards of Review have recognized repeatedly that it is the function of the court alone (with certain authorized exceptions) to pass upon questions arising during trial, and that the complete independence and freedom of its members from all improper external influence, particularly that of the commanding general, must be beyond all doubt and suspicion. (CM ETO 14349, McCormick; CM 216707, Hester, 11 BR 145 (1941); CM 253209, Davis, 34 BR 297 (1944); CM 272457, Smith, 46 BR 281 (1945)). Although Manual for Courts-Martial, 1928, par. 64, p. 50 and par. 74, p.57, provide respectively that the convening authority may rule during the course of trial on "special pleas or other similar objections" where as a result of the court's action thereon the trial cannot proceed further, and that he may also during the course of trial advise the court on the procedure to be taken when the evidence is not responsive to the charges but indicates the commission of an offense not alleged, these provisions have been held not to confer power on him to rule on the acceptance or rejection of evidence (CM 272457, Smith, 46 BR 281 (1945); cf. CM ETO 15212, Hovis; CM ETO 15216, Miller).

It has heretofore been held that unauthorized intrusion by the convening authority into the exclusive province of the court constitutes error prejudicial to the substantial rights of the accused (CM ETO 14349, McCormick; CM 216707, Hester, 11 BR 145 (1941); CM 253209, Davis, 34 BR 297 (1944); CM 272457, Smith, 46 BR 281 (1945)). In the Smith case, supra, for example the Board of Review held that the action of the convening authority in instructing the court to admit certain documentary evidence was prejudicial error, and said:

> "The Board is compelled to conclude that there was an unauthorized interference on the part of

> the appointing and reviewing authority with the functions of the court, which in itself constituted prejudicial error.* * *
>
> * * *
>
> * * * it is only when the court has completed its labors that the case is presented for approval to the reviewing authority, who is then vested with authority to act. Any instruction theretofore given by the appointing or reviewing authority on the admissibility of evidence has the effect of being a mandate which is not merely not authorized but at least inferentially prohibited."

Our conclusion that the comments of the convening authority on the admissibility of the morning report constituted error prejudicial to the substantial rights of the accused, has not required us to determine the correctness or the incorrectness of the ruling of the court admitting it into evidence. The record of trial shows that it was the only evidence tending to establish the initial absence without leave, and its materiality is not open to doubt. Whether the same conclusion would be demanded in the event there were compelling evidence on the subject, or if his comments touched upon an immaterial matter, is not before us for decision at this time. Likewise we need not determine whether comments of the reviewing authority on the admissibility of evidence would constitute prejudicial error when solicited by accused - that question too is not before us now. What we do hold is that every "accused has a right to be tried by a court-martial which is completely free from force and effect of improper considerations" (CM ETO 14349, McCormick), and that the uninvited and unauthorized comment by the reviewing authority on the admissibility of material evidence in this case does not meet that test.

7. The charge sheet shows that accused is 22 years of age and was inducted 10 February 1943. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously effecting the substantial rights of accused, except as noted herein, were committed during the trial. The Board of Review, for the reasons stated, is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

(TEMPORARY DUTY) Judge Advocate

John R. Anderson Judge Advocate

John A. Burns Judge Advocate

1st Ind.

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

1. In the case of Private CLEVELAND C. COVER (33556385), Attached - Unassigned, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. In the event accused is retried for the offense involved herein proper proof of the absence without leave should be obtained. The morning report (Pros. Ex. A), not disclosing with sufficient definitness the date of the initial absence without leave, is of no probative value (CM ETO 18629, Fedornak).

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 18703. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18703).

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

(Findings and sentence vacated. GCMO 3, ETO, 21 Jan 1946).

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

BOARD OF REVIEW NO. 5 21 DEC 1945

CM ETO 18705

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	
Private ELMER N. McGUCKIN (19012695), Headquarters Company, 2nd Battalion, 7th Infantry	Trial by GCM, convened at Reinhardshausen, Germany, 11 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Elmer N. McGuckin, Headquarters Company, 2nd Battalion, 7th Infantry, did, near Eloyes, France, on or about 15 October 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at Hersfeld, Germany, on or about 23 September 1945.

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

was introduced of one previous conviction by summary court for being drunk and disorderly in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution showed by the introduction of a duly authenticated extract copy of the morning report that accused absented himself without leave from his organization, Headquarters Company, 2nd Battalion, 7th Infantry, 15 October 1944, while the company was stationed at Eloyes, France and that his status changed from absent without leave to confinement in the 7th Infantry Stockade on 23 September 1945 (R7, Pros. Ex.A).

Lieutenant Colonel Clayton C. Thobro testified that on 15 October 1944 he was commanding officer of the 2nd Battalion, 7th Infantry. On that date his jeep was stolen so he ordered the Headquarters company commander to make a check of the men and on the morning of 16 October "I fell the entire company out and made another check". At that time accused was not present (R8,9). The entire regiment was then doing intensive training for special deep woods fighting (R9). Accused was a member of the wire section and had been considered an excellent soldier (R11).

Private Baxter, a member of the military police platoon, 7th Infantry, testified that on 23 September 1945 he was on duty at the regimental stockade at Hersfeld, Germany (R12, 13). On that date accused was brought to the stockade by a military policeman (R13). He did not know whether accused had given himself up or been arrested (R14).

4. Accused, after his rights were fully explained to him, elected to make an unsworn statement (R15). He enlisted in September 1940 at Fort McDowell, California, landed with the 3rd Division at Fedala, and fought all its campaigns up to Germany. When the 3rd Division was pulled off the line in Africa, he volunteered for extra combat with the 34th Division. He was wounded once and out of action for only two months. He gave himself up to a replacement depot but was turned down because they did not have transportation to return him to his outfit. After realizing he had made a mistake by absenting

himself without leave, he turned himself in to the military police. At no time did he intend to desert but was confused and afraid of what might happen to him (R15).

5. Desertion is absence without leave accompanied by an intention not to return. If the condition of absence without leave is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent (MCM, 1928, par. 130 pp. 142-143). The accused's absence of over eleven months in an active theater of operations was not satisfactorily explained and was sufficient evidence for the court to find him guilty as charged (CM ETO 1629, O'Donnell; CM ETO 3963, Nelson; CM ETO 16343, Cucolo).

6. The charge sheet shows that accused is 28 years seven months of age and enlisted 5 September 1940 at Fort McDowell, California. He had no prior service.

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

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

John Bowmaker Judge Advocate

Jack B. Wollerstein Judge Advocate

Anthony J. Julian Judge Advocate

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

BOARD OF REVIEW NO. 1

27 DEC 1945

CM ETO 18708

U N I T E D S T A T E S	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Privates First Class RICHARD L. EVANS (34568864), and SAM EVANS (34628160), both of Detachment A, 461st Quartermaster Laundry Company	Trial by GCM, convened at Camp Lucky Strike, France, 12 November 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, RICHARD L. EVANS for five years and SAM EVANS for three years. Places of confinement: RICHARD L. EVANS, Federal Reformatory, Chillicothe, Ohio; SAM EVANS, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. Accused were jointly tried upon the identical Charge and specifications on 25 September and 2 October 1945. At such proceedings accused Richard Evans was convicted of the Charge and both specifications and accused Sam Evans was convicted of the Charge and Specification 2 thereof and acquitted of Specification 1 thereof. An examination of the record of the former proceedings

shows that Captain Lawrence H. Jackson was detailed as a member of the court by a special order dated 19 September 1945 and sat as a member thereof at its first session on 25 September, at which the prosecution offered evidence in support of the charges. He was relieved as a member of the court by a special order dated 1 October 1945 but was also present throughout the second session of the court on 2 October. Because his presence at this session of the trial was unauthorized, the proceedings at least from this time forward, were invalid (CM ETO 16886, Robinson, and cases therein cited). By his actions dated 22 October 1945, the reviewing authority, the Commanding General, Chanor Base Section, disapproved the sentence of each accused,

> "the court not having been properly constituted and its proceedings, therefore, being null and void and of no effect".

Subsequently, by revised first indorsement to the charge sheet, dated 29 October 1945, the same authority referred the charges for trial to a general court-martial, from which the order appointing the court in the instant trial withdrew the charges and referred them to the latter court for trial. In the instant proceedings after each accused pleaded to the general issue, defense counsel stated as follows:

> "Under the provisions of Article of War 50½, the accused Sam Evans requests that so much of Specification 1 of the charge as relates to him be stricken from the record and that he not be tried upon such specification, the reason being that in a former trial the accused Sam Evans was found not guilty of Specification 1 of the Charge" (R5).

The court took judicial notice of the general court-martial order, dated 22 October 1945, publishing the result of the first proceedings (R6). After an argument by the prosecution in opposition to the defense motion (R6-7), defense counsel stated that he was "not actually pleading former jeopardy" but was claiming for accused protection under that portion of Article of War 50½ providing that upon a rehearing

> "the accused shall not be tried for any offense of which he was found not guilty by the first court".

The defense motion was denied (R7).

In view of the invalidity of the prior findings and sentence, the instant proceedings may not be regarded as a rehearing within Article of War 50½. As no motion or objection based upon the former proceedings was made on behalf of accused Richard L. Evans, the same may be regarded as waived (CM ETO 17696, Horvath). Assuming in favor of accused Sam Evans that there was sufficient action by his defense counsel to obviate the presumption of waiver of the defense of former jeopardy (see CM ETO 15320, Wade and Cooper; CM ETO 17696, Horvath, supra), and that the record of the former proceedings is properly before the Board of Review, we are nonetheless of the opinion that as a matter of law the plea of former jeopardy could not successfully be urged in bar of the instant proceedings. Had the jurisdictional defect in the court in the first proceedings existed at its first session as well as at its second session, with its consequent invalidating effect upon the entire former proceedings (CM ETO 16886, Robinson, and cases therein cited), such proceedings would clearly not constitute former jeopardy under the Fifth Amendment (or within the meaning of Article of War 40 (MCM, 1928, par. 68, p. 53)). The reason for such result is the well settled doctrine that a judgment and sentence which are invalid and a nullity cannot constitute jeopardy. Examples of the many cases to this effect are McCleary v. Hudspeth, Warden (CCA 10th, 1941), 124 F. (2nd) 445, 447; Levine v. Hudspeth, Warden (CCA 10th, 1942), 127 F. (2nd) 982, 984; Mitchell v. Youell, Sup't. (CCA 4th, 1942), 130 F. (2nd) 880, 882; and Robinson v. United States (CCA 6th, 1944), 144F. (2nd) 392, 397; affirmed on different ground in 65 S.Ct.666 (1945). The only question before us is whether accused was in jeopardy by virtue of the fact that he was arraigned and evidence offered against him at a session of the former proceedings at which a legally constituted court was present. In our opinion this question must be answered in the negative. Under the foregoing cited authorities the test of former jeopardy, where the former proceedings have reached the stage of judgment and sentence, is whether the judgment and sentence are valid. If the court which imposed them was without legal power so to do the accused has not been in jeopardy (See Winthrop's Military Law and Precedents (Reprint, 1920), pp. 261-262). As stated in Freeman v. United States (CCA 2nd 1916), 237 Fed. 815:

> "As we have already held that all proceedings before the judge substituted for the trial judge were nullities, the defendant has not been in jeopardy because of the verdict, judgment, or sentence. No doubt he was in jeopardy down to the time the trial judge withdrew from the case, but the jury in a criminal case may be discharged because of the judge's inability to proceed with the trial on account of illness, and in such event the defendant is not in jeopardy and may be tried again".

The court there held that by consenting to the continuation of the proceedings before the substituted judge, the defendant waived his right to have the jury discharged and hence could not claim to have been in jeopardy because they were not discharged. So here the appointing authority in the former proceedings could properly have terminated the proceedings as soon as the illegality of the court's constitution came to his attention, and accused could have demanded such termination as soon as he learned of the defect and no jeopardy would have attached, under cases cited in CM ETO 15320, Wade and Cooper. It is difficult to perceive how jeopardy could attach simply because the proceedings were not terminated. It is clear that the invalidating factor, in order to render unavailable the plea of former jeopardy, need not exist at the inception of the proceedings. For example it may arise when the jury is unable to agree or where a juror becomes incapacitated during trial (cases cited in CM ETO 15320, Wade and Cooper). Accused was no more in jeopardy by virtue of the fact that the proceedings continued on to invalid findings and sentence, than he would have been if the proceedings had been terminated prior thereto because of the illegal constitution of the court. The Board of Review is of the opinion that the finding of accused Sam Evans not guilty of Specification 1 of the Charge on the former proceedings as well as the whole proceedings were null and void because the court was illegally constituted and that they cannot avail him as a bar to the instant proceedings.

3. Confinement in a penitentiary is authorized upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55), District of Columbia Code, and upon conviction of assault with intent to do bodily harm with a dangerous weapon by the same Article and section 276, Federal Criminal Code (18 USCA 455). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Richard L. Evans (Cir.229, WD, 8 June 1944, sec.II, par. 3a, as amended by Cir. 25, WD, 22 Jan. 1945) and of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Sam Evans (Cir.210, WD, 14 Sept, 1943, sec.VI as amended) is proper.

Edward L. Stevens, Judge Advocate

B. L. Avery Jr., Judge Advocate

(TEMPORARY DUTY) Judge Advocate

18708

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

BOARD OF REVIEW NO. 5

CM ETO 18724

5 JAN 1946

U N I T E D S T A T E S	)	XVI CORPS
	)	
v.	)	Trial by GCM, convened at Rouen, France, 5,6, July 1945.
	)	
Colonel DAVID C. WALLACE (019715), 1153d Engineer Combat Group	)	Sentence: Dismissal.
	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Stricken on motion of defense).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of guilty disapproved by Reviewing Authority).

Specification 4: In that Colonel David C. Wallace, Corps of Engineers, then commanding officer of 1153d Engineer Combat Group, having received a lawful order from Major General John B. Anderson to report to headquarters XVI Corps immediately for temporary duty, the said Major General John B. Anderson being in the execution of his office, did, at Arnsberg, Germany, on or about 21 May 1945 fail to obey the same.

Specification 5: (Finding of not guilty).

Specification 6: In that Colonel David C. Wallace, Corps of Engineers, then commanding officer of 1153d Engineer Combat Group, did, at Conquer Debo Rest Camp in Germany, on or about 20 May 1945 violate the directives of the commanding General 12th United States Army Group and the commanding General 9th United States Army pertaining to relations with civilian residents of Germany by entering into friendly social relations with Else Hangen, a permanent civilian resident of Germany.

Specification 7: In that Colonel David C. Wallace, Corps of Engineers, then commanding officer of 1153d Engineer Combat Group, did, at Conquer Debo Rest Camp in Germany, on or about 21 May 1945 violate the directives of the commanding General 12th United States Army Group and the commanding General 9th United States Army pertaining to relations with civilian residents of Germany by entering into friendly social relations with Else Hangen, a permanent civilian resident of Germany.

Specification 8: In that Colonle David C. Wallace, Corps of Engineers, then commanding officer of 1153d Engineer Combat Group, did, at Arnsberg, Germany, on or about 21 May 1945 wrongfully introduce into his quarters, a female, not his wife.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specifications 2 and 5, and guilty of the remaining specifications and the Charge. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed from the service. The reviewing authority, the Commanding General, XVI Corps, disapproved the findings of guilty of Specification 3, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. One of the specifications against accused alleges that he failed to obey a lawful order which he received from Major General John B. Anderson. This latter officer was the Commanding General, XVI Corps, and was also the appointing authority of the court which tried accused and later the reviewing authority. An examination of the allied papers discloses that on 1 June 1945 the charge sheets were forwarded by indorsement signed by General Anderson to the Commanding General, Ninth United States Army, with a request that, as the 1153 Engineer Combat Group (accused's organization) was being transferred from the jurisdiction of the headquarters of the XVI Corps, the case be forwarded to appropriate authority for disposition. The indorsement

also stated -

> "This officer was previously absent from his command at a critical time and the circumstances indicated the probability that he was at that time drunk on duty, although the evidence did not warrant his trial for that offense. Because of this officer's previous superior record, I considered it to the best interests of the service that he not be tried and imposed punishment under Article of War 104 with the hope that my clemency, would bear fruit. I am now of the opinion that he is unreliable and, therefore, recommend his trial by general court-martial." (Underscoring supplied)

The status of the XVI Corps changed and the papers were therefore returned for trial by said Corps.

In this indorsement prepared before trial by General Anderson who was already the real accuser in the case (CM 280656, IV Bull. JAG 272), and who subsequently became the appointing and the reviewing authority, we find clear evidence that he had formed an unequivocal pre-trial opinion as to the ultimate disposition to be made of this accused. The charges were to be a means to this end. This opinion is further reflected by the language employed by him in his action sheet signed as reviewing authority recommending to higher authority that the sentence of the court be not disturbed.

In the opinion of the Board of Review the instant case falls squarely within the rule announced by the Board of Review in CM 280656 (supra) when the record of trial was held legally insufficient and when the following principal was announced:

> "The purpose of A.W. 8 is not only to protect the accused from trial by a court appointed by a person actually prejudiced against him, but also to make certain that the appointing authority is so entirely unconnected with the transactions giving rise to the charges that reasonable persons will not impute to him any personal feeling or interest in the matter, but may rely with confidence upon an impartial trial by an unprejudiced court." (See also: CM ETO 14349, McCormick).

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

4. The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

John Thornhill, Judge Advocate.

Jack R. Vollertsen, Judge Advocate.

(TEMPORARY DUTY), Judge Advocate.

(134)

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War Department, Branch Office of The Judge Advocate General with the European Theater. 5 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Colonel DAVID C. WALLACE (019715), 1153d Engineer Combat Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18724. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18724).

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

(Findings and sentence disapproved. GCMO 103, W.D. 1 May 1946).

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

BOARD OF REVIEW NO. 1

5 JAN 1946

CM ETO 18725

U N I T E D S T A T E S	) 30TH INFANTRY DIVISION
v.	) Trial by GCM, convened at Oschersleben, Germany, 20 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Second Lieutenant William T. Juett Jr. (O-1032532), 30th Reconnaissance Troop, Mechanized.	)

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

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

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

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

Specification: In that Second Lieutenant William T. Juett Jr., 30th Reconnaissance Troop, Mechanized, did, in the vicinity of Ligneuville, Belgium, on or about 16 January 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Besancon, France, on or about 11 February 1945.

CHARGE II: Violation of the 94th Article of War.
(Finding of guilty disapproved by confirming authority)

Specification:(Finding of guilty disapproved by confirming authority)

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)

ADDITIONAL CHARGES: Violation of the 96th Article of War. (Nolle Prosequi)

Specification 1 : (Nolle Prosequi)

Specification 2 : (Nolle Prosequi)

Specification 3 : (Nolle Prosequi)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Charge III and its specifications and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence with the recommendation that, in the light of accused's youth, his previous good combat record, and the mitigating circumstances surrounding the offenses, the period of confinement adjudged be reduced to 35 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of the Specification of Charge II and Charge II, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

On 16 January 1945, accused was platoon leader of the first platoon, 30th Reconnaissance Troop, Mechanized, then engaged in the mission of patrolling a sector near Ligneuville, Belgium. The situation was tactical at the time but the enemy was "pretty well dispersed and in no great strength * * * just scattered individuals throughout the area" (R7). Accused was ordered by radio to report to the troop command post at Ligneuville to draw rations and, at about 1600 hours, he and two enlisted men of his platoon, Corporal William Slappey and Private Leonard Caplan, did in fact leave their platoon area to go to Ligneuville for that purpose. When they reached Ligneuville, they were unable to locate the troop command post and it was decided to proceed on to Sart, Belgium, since it was thought that rations could be obtained there. However, they were again unable to accomplish their mission, and, after some discussion, it was decided to spend the night in Sart. During this discussion, accused made the suggestion that the group go on to Paris but Slappey, at least, did not regard this suggestion as having been seriously made. The next morning, the men arose,

and again set out, proceeding toward Eupen. After they had travelled some distance, Slappey became apprehensive that they were not going back to the troop and, upon questioning accused, found that he had been serious in his suggestion of the previous evening that they go to Paris. When Slappey discovered this, he refused to go farther, abandoned the group and hitch-hiked back to the unit. Caplan accompanied accused to Paris and stayed there with him for a few days, but eventually also left and went back to the troop (R13; Pros. Exs. 2, 3).

Accused's troop commander testified that he did not see accused from 16 January to 11 February 1945 and that he gave him no permission to be absent during this period (R8). A duly authenticated copy of the morning report of accused's organization for 16 January 1945 shows him from duty to absent without leave as of 1630 hours on that date (R13; Pros. Ex. 4). It was stipulated that accused "surrendered himself to the hands of the military authorities" at Besancon, France, on or about 11 February 1945 (R14; Pros. Ex. 5).

On cross-examination, accused's troop commander testified that accused's reputation within the organization was good, that on "quite a few" occasions he volunteered for missions which he "really did not have to do", and that, until 16 January, his service had been of the highest type (R9).

Major Vivion F. Lowell, Division Neuropsychiatrist, 30th Infantry Division, testified that he interviewed accused on 23 April 1945 and stated that he prepared and signed a "certificate" at that time. The defense affirmatively stating that it had no objection, this "certificate" was introduced into evidence (R10; Pros. Ex.1). Major Lowell's findings, as expressed in t is document (dated 23 April 1945) were that "this officer [accused] knows right from wrong and is able to adhere to the right". He found no evidence of mental disease (Pros. Ex. 1). On cross-examination, Major Lowell testified that, in giving accused the psychiatric examination, he had

> "tried to determine what the events were and what he [accused] had done and if he had been sick and what his feelings were * * * [and] * * * As far as I could determine, he was normal during the period he was gone" (R11).

He conceded that the examination had taken place on 23 April although accused left the troop on 16 January and that "It is more desirable to make the examination as soon as possible after the incident occurred" (R12). He also conceded that psychiatrists sometimes disagree among themselves in their diagnosis of a given patient (R13).

4. Accused, after having been advised of his rights, elected to testify on his own behalf (R14). He stated that he first joined the 30th

Reconnaissance Troop in November 1943 and thereafter served with it continuously except for a period of about ten weeks in the fall of 1944 when he was hospitalized for wounds received near Saint Lo during the Normandy campaign (R14-15). On 16 January 1945, while his unit was engaged in patrolling certain roads near Ligneuville, Belgium, he left his platoon and wandered about the area "to see what was up". In so doing he encountered an American soldier with whom he became involved in an argument. The argument became so violent that accused "was under the impression that he /the soldier/ was going to shoot me and I beat him to it and shot him first". He then looked around to see if he had been observed and, seeing two soldiers approaching, went back to his platoon to try to determine what his course of action should be. He stated that he

> "remained there some two hours thinking the situation over and decided that I had done something that I could not possibly get out of and before the real unpleasant part of it began I was going some place and have a little fun. I knew I would sooner or later get picked up. From there on the events took place as described earlier in the day" (R15).

At the time he left the platoon with Slappey and Caplan, the enlisted men thought that the purpose of the trip was to get rations. He himself was still somewhat undecided as to what his course of action would be and

> "the time for desertion did not arrive until the next morning on the road from Eupen to Malmedy. If you turned left you hit a highway from the platoon and if you turned right you hit one to the platoon" (R20).

He turned left and, when he did so, Slappey stated that he was going back to the troop and left. Caplan decided to accompany him to Paris (R15,20). When he reached Paris he did not have a good time because it was cold, he could get little to eat, and he feared apprehension. Toward the end of his stay in Paris, he was approached by military police who asked to see his pass. When he showed them a forged pass they became suspicious and attempted to place him under arrest. He resisted and managed to escape, although dazed from a blow he received on the back of his neck when one of the military policemen struck him with a carbine. The blow he received troubled him later. He stated that, while in Paris, he

> "knew I was in more trouble than I had ever been in my life. I could not think of anything worse than going back and facing it" (R16).

When he later surrendered himself at Besancon he was very ill, probably as the result of exposure and insufficient food. Accordingly, he was sent to the 180th Station Hospital at Dijon (R16). When admitted to the hospital, he informed the Surgical Officer of the Day that he had been taken prisoner and had escaped, and that he had been knocked unconscious by a shell burst on 15 January 1945 near Saint Vith, Belgium (R18; Def. Ex. A). Two days later, he was transferred to the 36th General Hospital, with a diagnosis of "concussion, cerebral, mild(based on history)" (Def.

Ex. B). While he was in this hospital, certain personnel from his unit arrived to take him back, among whom was an officer acting as an investigating officer. He was released from the hospital into the custody of the investigating officer who then turned him over to the military police at Nancy. While in the 36th General Hospital he did not take certain sleeping tablets which had been given him but retained them until he had fifteen in all and, after he was turned over to the military police, he realized he was in "a mess that was going to get worse and worse as it went along" so he took all of the sleeping tablets at one time (R17). He became unconscious and when he regained consciousness he was again in a hospital. On 25 February he was transferred to the 173rd General Hospital and while there was examined by a psychiatrist to whom he truthfully disclosed all the facts and circumstances surrounding his case (R17, 20,22). On 7 March he was transferred to the 21st General Hospital for further observation and treatment with the diagnosis

> "1. Psychoneurosis, reactive depression, sv, with suicidal tendencies. 2. Barbitrate intoxication (suicidal attempt)" (Def. Ex. C).

He was given another psychiatric examination after being transferred to the latter hospital and again truthfully disclosed all the facts and circumstances of his case to the examining physician (R19; Def. Ex. D). This physician found him to be "a narcissistic, egocentric, schizoid individual who is not psychotic" and further found that he was, on 15 March 1945, able to understand the nature of a court-martial proceeding and to assist his defense counsel in the preparation and trial of his case. Medical treatment or disposition under Section II, AR 615-360, was not recommended (Def. Ex. D).

One of the officers of accused's troop testified that one or two days prior to 16 January accused had difficulty in accomplishing a mission and was forced to remain out in the snow for four hours. The following night he was up the entire night. When witness next saw him on or about 16 January with four of his men, he was "by far the jumpiest of the group" (R22-23). Another troop officer testified (on cross-examination) that he had seen accused around the troop command post on the "days immediately preceeding the 16th of January" and that accused appeared to be acting normally at that time (R25). A third troop officer testified, also on cross-examination, that he saw accused on 16 January and that he seemed normal then and to be "pretty satisfied with what he was doing" (R26). The troop commander testified that he saw accused on 16 January and on each day of the previous two weeks and that during that time accused acted normally --"The same as always" (R26-27).

Character witnesses for the defense testified that accused was a hard worker and one of the best-liked officers of the troop. One officer testified that he had heard the men in his platoon say that they would "go to hell for him" and witness stated that he knew it to be a fact "that they would have" (R22). An enlisted man who had served with

accused during the Normandy campaign and who later received a battlefield commission testified that accused had always performed his duties in an excellent manner (R26).

5. Little difficulty is presented by the instant record of trial. It was clearly shown that accused absented himself from his organization without authority for the period alleged and there is ample evidence to support the court's inference that, at the time of absenting himself, he entertained the requisite intent to constitute his offense that of desertion. The evidence as to his mental condition introduced by the defense, while perhaps relevant in mitigation, shows at most only that he was psychoneurotic, not psychotic, and fails to show that he was unable to distinguish right from wrong and to adhere to the right. Other competent evidence of record tends to prove that accused was in fact legally sane. Hence, the court was justified in holding the accused mentally responsible for his acts (CM ETO 13376, Aasen; CM ETO 4219, Price; Holloway v. United States (App. D.C., 1945), 148 F(2nd)665). In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence (CM ETO 13303, Sweezy).

6. Accused was sentenced to confinement at hard labor for life "at such place as the reviewing authority may direct". When the case came before the Commanding General of the 30th Infantry Division for his action, he not only approved the sentence but designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. When the case was forwarded for action under Article of War 48, the Commanding General, United States Forces, European Theater, confirmed the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement.

In the digest of Opinions of the Judge Advocate General of the Army, 1912, p.567, XIV H1, the following is found:

> "In cases * * * of sentences of dismissal and death, imposed in time of peace, and of some death sentences adjudged in time of war, as also of all sentences 'respecting general officers', while the convening officer (or his successor) is the original reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is provided by Articles 105, 106, 108, and 109 that the sentence shall not be executed without the confirmation of the President, the latter becomes in these cases the final reviewing officer when --- the sentence having been approved by the commander (for, if disapproved by him, there is nothing left to be acted upon by the superior)--- the record is transmitted to him for his action."

And in CM 203869, Lienhard, 7 BR 289 at 305 (1935) it was said:

"The reviewing authority in his action which is appended to the record of trial not only approved the sentence but forwarded the record of trial for action under the 48th Article of War but also designated the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. So much of this action as designated the place of confinement is surplusage. The reviewing authority is authorized to designate the place of confinement only when he has the authority to order the execution of the sentence. Par. 81b, p.78, MCM, 1928. In this case confirmation by the President is necessary before the sentence can be ordered executed AW 48".

The considerations mentioned in the quotations set forth above are equally applicable here and, for the reasons there suggested, the designation made by the confirming authority (or "final reviewing authority"), rather than that made by the "original reviewing authority", governs. Hence, under the action taken by the confirming authority, the place of confinement for this accused is the United States Penitentiary, Lewisburg, Pennsylvania.

7. The charge sheet shows that accused is 24 years 11 months of age with data as to service as follows: "Enlisted status, 15 months, First Cavalry School Detachment. Entered on Active Duty on 1 July 1943. Assigned and joined 30th Reconnaisance Troop, Mechanized on 1 October 1943". No prior service is shown.

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

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Penitentiary confinement is authorized upon conviction of 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).

Edward L. Stevens, Jr. Judge Advocate

B H Dewey Jr Judge Advocate

David P. Carroll Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 5 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Second Lieutenant WILLIAM T. JUETT Jr. (O-1032532), 30th Reconnaissance Troop, Mechanized, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as confirmed 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 18725. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18725).

OUT 5 JAN 1946 BOTJAG-ET

IN 7 JAN 1946 AG

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

(Sentence ordered executed. GCMO 44, USFET, 15 Feb 1946).

18728

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

BOARD OF REVIEW No. 1

28 DEC 1945

CM ETO 18726

U N I T E D S T A T E S	)	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)	
First Lieutenant WILLIAM H. JONES, JR. (O-1004484), Adjutant General's Department, Headquarters, 4th Port (formerly of 208th Army Postal Unit).	)	Trial by GCM, convened at Cherbourg, Manche, France, 1 August 1945. Sentence: Dismissal and total forfeitures.

HOLDING by BOARD OF REVIEW No. 1
STEVENS, DEWEY and CARROLL, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant William H. Jones, Jr., Headquarters, 4th Port, then of the 208th Army Postal Unit, did, at or near Cherbourg, France, on or about 22 June 1945, during an official audit of the stamp stocks and funds on

hand at the 208th Army Postal Unit, wrongfully and knowingly attempt to conceal a shortage in postal funds under his control, by borrowing about 250 25-franc denomination Expeditionary Force Message stamps and attempting to mingle such borrowed stamps with the stamp stock for which he was responsible at the 208th Army Postal Unit, without disclosing to the said auditing officers the circumstances surrounding the borrowing of such stamps.

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

Specification 1: In that * * * did, at or near Cherbourg, France, on or about 15 May 1945, wrongfully borrow about 1,000 francs, lawful money of France, of an exchange value of about $20, from Technician Fourth Grade Francis E. Ulrey, a member of his command.

Specification 2: In that * * * did, at or near Rennes, France, on or about 14 June 1945, wrongfully borrow about 200 francs, lawful money of France, of an exchange value of about $4, from Technician Fourth Grade Francis E. Ulrey, a member of his command.

Specification 3: In that * * * did, at or near Rennes, France, on or about 12 June 1945, wrongfully borrow about 325 francs, lawful money of France, of an exchange value of about $6.50, from Technician Fourth Grade Louis E. Willett, a member of his command.

Specification 4: (Finding of not guilty).

Specification 5: In that * * * did, at or near Deauville, France, on or about 23 May 1945, wrongfully borrow about 500 francs, lawful money of France, of an exchange value of about $10, from Technician Sergeant Freeman Fitch, a member of his command.

He pleaded guilty to Specifications 1, 2, 3 and 5 of Charge III and Charge III, and not guilty to the remaining charges and specifications. He was found not guilty of Specification 1 of Charge I and Charge I, and of Specification 4 of Charge III, and guilty of the remaining 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, Chanor Base Section, Theater Service Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Since accused pleaded guilty to all specifications and to the Charge of which he was found guilty, with the exception of the Specification of Charge II, we are concerned primarily with that. The meagre evidence bearing upon the specifications which were the subject of guilty pleas is fully consistent therewith (cf. CM ETO 18176, Powell).

The evidence in support of Charge II and its Specification shows that in June 1945 accused was the commanding officer of the 208th Army Postal Unit which supplied postal facilities for about 5,000 troops (R8-9). Army Postal Units are ordinarily audited on the 20th of each month, but in this particular case the audit was not held until 22 June (R11,12). On that day the auditors were already at work when accused arrived at the post office. He immediately approached one of the clerks and asked him if he had any money order funds, stating that he was short 5,960 francs. The clerk replied that his accounts had already been audited and were locked in the safe (R13). Accused then went over to the registry window, out of sight of the auditors and held up six fingers to another clerk who was sitting at his desk. The clerk shook his head and accused looked "puzzled". He walked over to the clerk and asked him how much money was in the "money order business" but was again told that it had been audited and was locked in the safe (R47). He also approached another clerk and attempted to borrow 5,000 francs stating that he was "short" (R53). Finally, he wrote on a slip of paper that he was short "5800 francs" (R31) or "5960 francs" (R14) - the evidence is in dispute - and placed it in front of another clerk who also was unable to help him (R31). Thereupon accused left the office and went to Army Postal Unit 114 at Cherbourg where he borrowed 250 Expeditionary Force Message Stamps in 25-franc denominations, valued at about $126, for which he gave a receipt in his own name reciting that he had received from "APO 114" 250 stamps (R25, 39). The officer in charge of Army Postal Unit 114 considered it a loan made on Army Postal Unit credit and not upon personal credit, since it is a practice among such units to borrow stamps in cases of necessity (R27-28). Accused then returned to his office, opened the safe, put in "a folder", and removed his "stamp stock" which he placed in front of the auditors (R14). When accused's accounts were audited they were found to be $.15 "over" but there was no

indication among them that he owed approximately $126 for the stamps he had borrowed that morning. When the auditors, who had been informed of accused's action in borrowing the stamps, pointed this out, accused stated that he had known all the time that his accounts were short that much (R36). About 1600 hours on that day, accused returned to Army Postal Unit 114 and paid in cash for the stamps he had borrowed (R25).

4. After being advised of his rights, accused elected to be sworn and testify (R66).

He stated that he discovered a shortage in his accounts on 19 June (R69). Aware that he was responsible for the shortage, he borrowed the stamps "through a case of excitement". He regarded the transaction in the same light as if he had gone to a friend and borrowed money to make up the shortage (R70). He conceded, however, that he did not regard government property as property which could be borrowed and used in the same way that he could borrow and use the property or money of a friend (R76). The shortage was made up on 26 June (R80).

5. The Specification of Charge II alleged, in effect, that during an official audit of his Army Postal accounts, accused wrongfully and knowingly attempted to conceal a shortage therein by borrowing 250 Expeditionary Force Message Stamps and attempting to mingle them with his stock, without disclosing the circumstances of the borrowing to the auditors, in violation of Article of War 95. Since he was acquitted of embezzlement, and the shortage in his accounts is not alleged to have been created by his own peculation we must [illegible] assume that it arose through negligence or mistake. With this for a premise, accused in substance contended that he was at liberty to make up shortages from his own funds, whether derived from loans by friends or otherwise, and that if the shortage was covered in this fashion, it was no concern of the auditors and that he was under no duty to disclose the fact. The evidence in this case, however, presents an entirely different picture. It reveals that accused discovered a shortage on 19 June and that this shortage existed on 22 June, the day of the audit; that accused made frantic efforts to conceal the shortage through replacing it either by loans from his clerks or by transferring money from their account to his, a fact which is significient in showing his fraudulent intent. Frustrated in his efforts, he borrowed stamps - United States Government property - from another Army Postal unit, taking advantage of an official practice which had grown up among such units when they needed stamps to sell, without bothering to disclose the real purpose of the loan. He then placed the borrowed stamps with his official stamp stock, which he exhibited to the auditors without disclosing to them anything with

reference to the borrowing.

His actions were thus nothing less than a fraud on the Government. What the transaction amounted to was the transfer of Government property from one Army Postal unit to another in advance of the auditors' examination and without their knowledge with the result that even after a thorough audit the Government was still short funds and the shortage remained undetected - a result deliberately intended by accused. This is the fundamental difference between what he contended he did and what he actually did. If he had made up the shortage from his own funds, the Government would have the money and there might be no necessity for disclosing that the shortage once existed. Here, however, the Government was still actually short funds and the whole purpose of the audit was defeated through accused's intentional manipulation and nondisclosure.

Viewed in this light his conduct was obviously deceitful and fraudulent. When he stood by and watched the auditors check his accounts without disclosing that they did not correctly state his actual indebtedness to the Government, his conduct was not a whit different, so far as his culpability under Article of War 95 is concerned, than if he deliberately misrepresented the status of his accounts. His actions were dishonest and deceitful and fall below that standard required of an officer and gentleman. The record is legally sufficient to sustain the findings of guilty of this Specification (CM ETO 765, Claros; 2 BR (ETO) 299; CM ETO 1786, Hambright 5 BR (ETO) 287; CM ETO 2777, Woodson; CM ETO 7246, Walker; CM ETO 8457, Porter).

6. The charge sheet shows that accused is 31 years one month of age and was commissioned a second lieutenant on 3 November 1943. He had prior service as an enlisted man from 22 July 1942 to 3 November 1943.

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

8. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and a sentence of dismissal and total forfeitures are authorized upon conviction of a violation of Article of War 96.

Edward L. Stevens Jr. Judge Advocate

B. L. Avery Jr. Judge Advocate

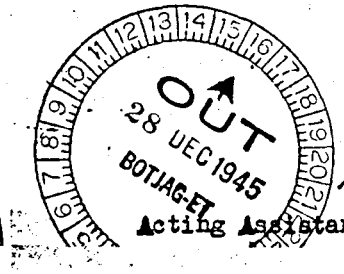
(TEMPORARY DUTY) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U.S. Army.

1. In the case of First Lieutenant WILLIAM H. JONES, JR. (O-1004484), Adjutant General's Department, Headquarters, 4th Port (formerly of 208th Army Postal Unit), 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 18726. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18726).



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

(Sentence ordered executed. GCMO 7, USFET, 12 Jan 1946).

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

BOARD OF REVIEW NO. 5

20 DEC 1945

CM ETO 18730

U N I T E D S T A T E S v. Private First Class HENRY NEELEY (38290401), Company B, 390th Engineer Regiment (General Service)	OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM, convened at Rheims, France, 19 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. In this case there was substantial evidence on which the question of intent, malice, self-defense, provocation and the so-called "cooling period" could properly be determined by the court adversely to accused (CM ETO 292, Mickles 1 BR (ETO) 231; CM ETO 1941, Battles; CM ETO 11059, Tanner). Such questions were those of fact and were for determination by the court (CM ETO 3042, Guy, Jr.) and since there was substantial evidence to support the court's findings, they will not be disturbed by the Board of Review (CM ETO 1953, Lewis).

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3. 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. 1 b (4), 3b).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 1

11 JAN 1946

CM ETO 18734

U N I T E D S T A T E S	)	8TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Rokycany, Czechoslovakia, 12 July 1945.
Captain ROBERT F. HOGUE (O-307097), Military Government Detachment TA-10, Twelfth Army Group	)	Sentence: Dismissal, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Captain Robert F. Hogue, Military Government Detachment TA-10, Twelfth Army Group did, at or near Rokycany, Czechoslovakia, on or about 26 May 1945, wrongfully and unlawfully accept for his own use and benefit thirty-thousand (30,000) Czechoslovakian Kronen, value of about three hundred dollars ($300.00) in United States money, from Jacob Count Condenhove Kaleryi, a prisoner under the custody and control of United States Army forces.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Nolle Prosequi).

Specification 5: In that * * * did, at or near Rokycany, Czechoslovakia, on or about 11 June 1945, wrongfully and unlawfully charge, accept and receive from Jacob Count Condenhove Kaleryi, a prisoner under the custody and control of United States Army forces, twenty-thousand (20,000) kronen, value of about two-hundred dollars ($200.00) in United States money, in exchange for identification papers for the said Jacob Count Condenhove Kaleryi.

CHARGE II: Violation of the 94th Article of War. (Finding of not guilty.

Specification: (Finding of not guilty).

He pleaded not guilty to both charges and all specifications thereof and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and of Specifications 1 and 5 substituting in each the word "person" for the word "prisoner" and not guilty of the remaining specifications of Charge I and of Charge II and its Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, 8th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and 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 instant case is a companion to CM ETO 17914, Hardwick, wherein the Board of Review held the record of trial legally sufficient to support the findings of guilty (and sentence of dismissal) of Major James C. Hardwick, the superior officer of accused, of wrongful acceptance for his own benefit of 30,000 Czechoslovakian kronen from Jacob Count Condenhove Kaleryi, then a prisoner under his custody and control, in violation of Article of War 95.

The prosecution's evidence adduced in the instant case with respect to Specification 1 of Charge I is essentially the same as in the Hardwick case. In view of the findings of not guilty and nolle prosequi above set forth, we are here concerned with the evidence respecting only Specifications 1 and 5 of Charge I, which is in material substance as follows:

Specification 1 (Wrongful acceptance of 30,000 krenen): On 25 May 1945, Count Kaleryi, a displaced person working as an interpreter at the medical detachment in a Displaced Persons Camp at Rokycany, Czechoslovakia, requested accused (who was in command of the camp (R28,43)) to take him to Prague (R6,20-21). He told accused among other things that he, Kaleryi, wished to obtain some money and plates from a Czech friend (R10-11). Pursuant to accused's direction, Kaleryi met him the next morning (26 May) and with Major Hardwick they proceeded in the latter's jeep and with his driver to Prague (R7,11-12), where they visited among other places the Czech friend's house. There Kaleryi in the presence of the two officers received from his friend 400,000 kronen and some silver plates (R7,13). On the way back to the jeep, accused told Kaleryi he liked the plates and because "it was very kind that he took me to Prague" he presented them to accused (R7,13-14).

Following the return to Rokycany, Major Hardwick in accused's presence and with his verbal concurrence informed Kaleryi that each officer wished to have 10% of the money. After an argument during which Kaleryi remonstrated on the grounds that the money belonged to his father and the plates given to accused were enough for the trip, he agreed to pay the desired percentage, informed them, when asked that he had obtained 300,000 krenen, and delivered 30,000 krenen each to Major Hardwick and accused (R8-9,14-16). On 11 June, accused delivered to First Lieutenant Paul D. McDermott, Assistant Provost Marshal, V Corps, 30,000 krenen which he stated he received "as a present from the Count at one time when he had taken him to Prague" (R24-25).

Specification 5 (Wrongful charge and acceptance of 20,000 krenen): About 8 June 1945, Kaleryi asked accused at the Displaced Persons Camp at Stary Plsenec, Czechoslovakia (of which accused was the officer in charge (R39)) whether accused would give him identification papers, which Kaleryi believed he was to receive from him "because I have nothing". Accused replied "yes, but that would cost you money" (R9-10,19). At this time no one had directed Kaleryi to make such request (R16), but he then informed a Major Roberts and a Lieutenant McMorrow of the matter. Kaleryi was not willing, and felt that his father, who owned the money, would not be willing to pay as much as 20,000 krenen for the papers, but the two last named officers directed him to pay, as much apparently as accused demanded, "because they were sure I would get the money back" (R17,19). One or two days later, Kaleryi made a similar request to accused who made the same response as before. Kaleryi inquired "how much", rejected an offer by accused to accept 25,000 krenen and then agreed with him upon the figure of 20,000 krenen. Accused stated the papers would be ready the following evening (11 June) (R10).

On that day, serial numbers of Kaleryi's father's notes totaling 20,000 krenen were recorded in the presence of Kaleryi and several officers including Major Roberts, Lieutenant McMorrow and Lieutenant McDermott (R17, 25-26). In the evening, Kaleryi went to accused's office, requested of him the identification paper and supplied him with the information therefor. Accused typed the paper, signed and stamped the same and delivered it to Kaleryi. They then proceeded to an office where they were alone and Kaleryi put into accused's hand a roll containing the 20,000 krenen whose numbers were

recorded. Accused immediately placed the roll in his pocket and Kaleryi went to Lieutenant McMorrow, to whom he delivered the paper and who then entered "the office" with Major Roberts and two other officers (R10,17-18). Lieutenant McMorrow delivered the paper to Lieutenant McDermott (R24,26), who warned accused of his rights, asked him if he had given the Count an identity document, and showed it to him. Accused identified the paper and stated he had given it to the Count about 15 minutes earlier. Asked if he had received any money for it, accused deliberated for a few moments and then said he had received a gift in the sum of 20,000 kronen. He delivered to the Lieutenant the 20,000 kronen whose numbers were previously taken. He also made the statement concerning the 30,000 kronen and delivery thereof above set forth. Nine silver plates were found in his quarters (R25-26).

4. Evidence for the defense with the respect to Specifications 1 and 5 of Charge I is substantially as follows:

Doctor Victor Haner, Doctor-Jurist of Prague, testified that Kaleryi told him several times that in Kaleryi's sworn statement "everything was not so as he made it out to be" and, although he did not state directly that the statement was not as it should be, witness could see "he had something on his mind" (R27).

Major Hardwick testified that on the morning of 26 May, Kaleryi stated "he wished to go to Prague to get some clothing" but mentioned nothing else to witness. Kaleryi brought from what witness assumed to be his home in Prague a package which witness assumed to be clothing (R28). Up to the time of their return from Prague, witness did not see accused accept anything from Kaleryi. Accused operated his camp under witness' supervision. Displaced persons in camps in the area were kept there pursuant to orders from the 2nd Division to house, feed and transport them to their home country. Neither witness nor accused had any command functions over such persons, who/[illegible]ly kept in a central place for safe keeping until they could be transported (R30). During 11 months, witness had occasions to carry displaced persons all over five countries for their clothing; it was a common custom to help them secure the same. Final permission to go to Prague had to be granted by witness (R32).

After an explanation of his rights, accused elected to be sworn and take the stand in his own behalf (R32). He testified that Kaleryi gave as a reason for wishing to go to Prague his desire to obtain clothes at his former home and to see a friend. Accused stated to Major Hardwick that although he, accused, first refused Kaleryi permission to accompany them, he later changed his mind for "as long as we kept him in our custody nothing would happen to him" (R33). Accused testified regarding their activities at Prague and that he could not tell what the package of plates contained when it was delivered to Kaleryi, who informed them of its contents when they reached the jeep and stated,

> "that he would not have any further use for them and that either of us could have them".

Accused did not accept them but let them lie on the floor of the jeep (R34). Nothing was ever said about money until the return trip when Kaleryi mentioned receiving it (R37-38). Accused never asked him for 10% of the money Kaleryi received. He did not tell accused how much there was (R34). Asked whether he considered the 30,000 kronen merely as a gift, accused testified:

> "Well, I felt that he was just flush and he had this money, they were kronen and he couldn't spend it when he went into Germany anyway and he wanted to give me something" (R38).

He testified later that he considered the money as a gift (R39). It was not unusual to take displaced persons to Prague (R43).

With respect to the 20,000 kronen, "this so-called Count" had requested on several occasions that accused furnish him with an identification paper, which he desired to have when transported to Germany. Accused refused these requests. About 11 June, Kaleryi repeated his request. At this time there had been no mention of any money for the papers. "To get rid of the pest", accused typed a paper, leaving its composition "as loose as possible", stamped it and signed it. Kaleryi suddenly grabbed the paper with one hand and with the other left a pack of money on the table. This aroused accused's suspicion and when Kaleryi ran out of the room accused ran after him. Since some Italian displaced persons were entering the office, he ran back, grabbed the money and while pursuing Kaleryi placed it in his pocket. At the door he lost Kaleryi and four officers entered the office and questioned him regarding the paper. Accused explained the situation thus:

> "He apparently went to get Lieutenant McMorrow and the M.P. with whom he had made previous arrangements to stick me with some marked money because they had no knowledge of whether or not I had this thirty-thousand kronen, so-called gift from the Count in reference to the previous charge there. So it looked to me as though since that wasn't marked money the Count had no way of recovering it and didn't know whether I spent it or had it in my posession" (R35).

Accused knew that the usual registration paper for a displaced person was as adequate as a pass to permit him to go to his home as any accused could furnish him. However, what Kaleryi desired was not so much a pass as a means of identification when in Germany. Accused informed him this was not necessary, but he kept "nagging and bothering" accused. The issuance of the paper was unusual, but no one else even bothered accused for anything of that nature (R40). Accused had no authority to "get rid of" the man (R40-41).

Kaleryi worked as an interpreter for the medical detachment and was not under accused's jurisdiction. The detachment was sent by the 2nd Division and was not under accused's control or command. He could take no disciplinary action against displaced persons and his jurisdiction

over them was limited to

> "housing them, feeding them and transporting them out of the D.P. camp into their respective countries" (R36,44).

Accused was in charge of the camp at Stary Piscenec (R39). He received training as a Military Government officer for a period of seven or eight days and functioned as such for approximately two months prior to 10 June (1945), during which time his duties were "confined to the camp". Although he had no summary court power or control over displaced persons, he did to a certain degree have power over them for he rather than the guard officer from the 2nd Division, had the function as camp commander of maintaining law and order in the camp (R43-44).

5. Accused was convicted of wrongfully and unlawfully accepting for his own use and benefit 30,000 kronen (about $300) from Kaleryi, a person under the custody and control of United States Army forces (Specification 1, Charge I); and of wrongfully and unlawfully charging, accepting and receiving from Kaleryi, similarly designated, 20,000 kronen (about $200) in exchange for identification papers for Kaleryi (Specification 5, Charge I). The substitution in the court's findings of the word "person" for the word "prisoner" in each specification was justified by the evidence and the variance was not fatal within the contemplation of Article of War 37. The substitution did not change the essential nature or identity of the offense charged (MCM, 1928, par. 78g, pp. 64-65; cf. CM ETO 1663, Ison, Jr., 5 B.R.(ETO) 185(1944)) because the exact technical status of Kaleryi was not an essential element of such offense: to wit, the wrongful acceptance and charge and acceptance of money by a Military Government officer from an individual under the custody and control of the Army (see infra). As in the Ison, Jr. case, accused was adequately informed by the specifications of the offenses of which he was convicted and could not reasonably have been misled by the designation of Kaleryi as a prisoner rather than a person.

6. a. Specification 1: With respect to the transaction involving the 30,000 kronen, the case is governed in principle by CM ETO 17914, Hardwick (supra). The chief differences in that case were that the specification alleged that the accused, Major Hardwick, was in command of the Displaced Persons Camp and that Kaleryi was a prisoner under the accused's custody and control and such designation was not disturbed by the court in its findings. As stated above, Major Hardwick was found guilty of a violation of Article of War 95, which of course included a violation of Article of War 96 (CM ETO 5465, McBride, Jr.). In the instant case the Specification alleged accused's membership in a Military Government unit and, as above indicated, while it designated Kaleryi as a "prisoner", the evidence warranted the findings that he was merely a "person", under the custody and control of United States Army forces. The evidence shows that accused on 26 May 1945 was in command of the Displaced Persons Camp at Rokycany, Czechoslovakia and he testified that although Kaleryi worked as an interpreter for the medical detachment which was under the command of the 2nd Division, nevertheless accused, as camp commander directly

responsible for housing, feeding and transporting him as well as for the maintenance of law and order in the camp where he was obliged to sojourn, had a certain amount of power over Kaleryi. In other words, under the Specification and the evidence accused was in a position of advantage and superiority, albeit more practical than legal or military, over him. This position accused clearly abused when, as substantial evidence shows, he accepted 30,000 kronen, apparently of an exchange value of $300, from Kaleryi, (which was in addition to nine silver plates) having reason to believe the money belonged to the payor's father, as compensation or as a "gift" for transporting him to Prague. His acceptance of the money, particularly under the circumstances shown, tended to stultify his "sense of singleminded obligation to the Government", "tended to belittle" him (CM 230011, Goodman, 21 B.R. 243(1943)) was an abuse of his position, and was clearly prejudicial to good order and military discipline and service discrediting (CM ETO 17914, Hardwick, and cases therein cited; cf. CM ETO 9345, Haug et al).

b. Specification 5: With respect to the transaction involving the 20,000 kronen, apparently of an exchange value of $ .00, the prejudicial and discrediting nature of accused's conduct is clearer. The relationship between Kaleryi and accused has already been discussed. He abused his position as camp commander and as a Military Government officer to exact and accept the mentioned amount from Kaleryi in return for preparing and authenticating a so-called identification paper desired by Kaleryi for use in Germany. The only question for consideration is that of entrapment. The evidence shows that some three days prior to the date of commission of the alleged offense, Kaleryi without instructions from anyone, asked accused if he would furnish him with identification papers, to which he replied in the affirmative but stated that it would cost Kaleryi money. The latter reported the matter to Major Roberts and Lieutenant McKerrow, who directed him to pay what accused demanded, because Kaleryi would recover it. Then followed the conversation wherein Kaleryi repeated his request, accused repeated his reply and, after the rejection of accused's demand of 25,000 kronen, the two "agreed" upon the price of 20,000 kronen and accused fixed 11 June as the time for delivery of the paper. On that day the notes totaling 20,000/kronen were marked, payment thereof made to accused by Kaleryi, and the transaction completed with the full collaboration of the other officers and the putative victim. In the opinion of the Board of Review these facts do not establish the defense of entrapment. The wrongful design and intent originated not with Government officials, or for that matter with Kaleryi, but with accused who was the first to mention money. The court was not obliged to accept as true accused's testimony that money was not mentioned until 11 June or his version of the affair that he never accepted it. Moreover, accused at this time admitted to Lieutenant McDermott that he received it as a gift. The officers did not suggest the wrongful conduct, but merely afforded opportunity for its commission and means of obtaining evidence thereof. Their conduct thus did not constitute entrapment (CM ETO 8619, Lipsio et al; CM ETO 11681, Henning; CM ETO 12453, Marshall; CM ETO 13406, Reisherff; CM ETO 15197, Blackburn). The fact that Kaleryi agreed to and made the payment to accused with the knowledge that he would recover the money and with the intention not of consummating an agreement but of collaborating with officers in the detection of the wrongful transaction, does not operate

as a defense either on the theory of entrapment or as depriving the transaction of its wrongful character (CM ETO 8619, Lippie et al; CM ETO 15197, Blackburn, supra). In the last cited cases it is demonstrated that where a vendee of Government property collaborates with officials in detection of wrongful disposition thereof, such disposition is no less a sale because the "vendee" intends collaboration rather than sale. The wrongful intent and action of the wrongdoer are the vital consideration. Such cases are here controlling. Accused's conduct was grossly prejudicial to good order and military discipline as well as service discrediting (cf. CM ETO 10016, Henry and Kinas; CM ETO 10361, Schinhan; CM ETO 17914, Hardwick). The facts of the instant case sharply distinguish it from CM ETO 9643, Harmer where no mens rea was shown by the evidence and the acts alleged to constitute the offense were performed by decoys of the military police at the latter's instigation and under their direction.

7. a. The charge sheet does not bear the usual statement by the trial judge advocate that he served a copy thereof upon accused, nor does the record state that such service was made. No motion or objection based upon non-service of charges or lack of notice thereof or for more time in which to prepare defense was made by or on behalf of accused at the trial and in accused's exhaustive statements and brief of irregularities in the case (see b infra) no mention is made of such non-service or inadequate time to prepare. In view of the fact that the 8th Armored Division has been redeployed, the impracticality of attempting to secure a certificate of service from the trial judge advocate is obvious. The lack of indication of non-service and the failure to move for a continuance, or request further time for preparation of the defense, however, warrants the conclusion that service was in fact effected and ample time to protect the substantial rights of accused (cf. CM ETO 8083, Cubley).

b. The points urged by accused in his brief attached to the review of the staff judge advocate of the reviewing authority and in letters attached to the record of trial are either covered herein or obviously without merit with the exception of the following:

(1) Just prior to the cross-examination of accused, the court requested advice from the staff judge advocate of the reviewing authority who was called and asked by a member of the court what the maximum sentence could be if accused were convicted. Accused contended that this request indicated the court member had decided upon accused's guilt at this point in the proceedings and definitely influenced the other members in their subsequent vote upon the findings. In the opinion of the Board of Review, the possibility of such influence under the circumstances here shown is too conjectural and remote to give concern. The member's request may well have indicated a mere desire for the information in the event he decided to vote for conviction rather than that he had already so decided.

(2) Accused expressed the belief that some members of the court had prior knowledge of the case, which was a topic of general discussion among officers and enlisted men of the 8th Armored Division

prior to trial. If his belief were justified, he should have exercised his privilege of challenge for cause (MCM, 1928, par. 58e, p. 45) and his failure to do so may be deemed a waiver thereof (CM ETO 2471, McDermett; CM ETO 3828, Carpenter; CM ETO 3948, Paulercio).

8. The charge sheet shows that accused is 36 years of age and was commissioned in the Reserve Officers Training Corps 6 June 1933, entered reserve status 30 July 1940 and was called to active duty 31 July 1940.

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

10. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violation of the 96th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sept. 1943, Sec. VI, as amended).

EDWARD L. STEVENS, JR., Judge Advocate.

B. H. DEWEY, JR., Judge Advocate.

DONALD K. CARROLL, Judge Advocate.

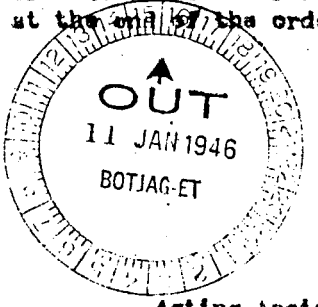
(160)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 JAN 1946 TO: Commanding General, United States Force, European Theater (Main), APO 757, U. S. Army.

1. In the case of Captain ROBERT F. HOTUE (O-307097), Military Government Detachment T-10, Twelfth Army Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18734. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18734).



E. FRANKLIN WHITE,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 27, USFET, 21 Jan 1946).

18734

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

BOARD OF REVIEW NO. 1

4 JAN 1946

CM ETO 18735

UNITED STATES	)	FIRST AIRBORNE ARMY
v.	)	
Major JOHN N. WASHAM (O-292533), Air Corps, Headquarters Berlin District	)	Trial by GCM, convened at Halle, Germany 28 June 1945. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Major John N. Washam, Air Corps, was, at Namur, Belgium, on or about 18 May, 1945, found drunk while on duty as Acting Headquarters Commandant, Headquarters Berlin District.

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. The reviewing authority, the Commanding General, First Airborne Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and

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withheld the order directing execution thereof pursuant to Article of War 50½.

3. Accused on 17 and 18 May 1945 was on duty at Headquarters Command, Berlin District, at Flawinne Barracks, Namur, Belgium (R7-8,20; Pros. Ex. A). Colonel Zellars, commanding officer of Headquarters Command, was not present at Namur on 18 May 1945 but was at Bielefeld, Germany, at the advance headquarters (R13,26). Accused, the Executive Officer of Headquarters Command, was the senior officer present for duty at Headquarters Command on that day (R8-9,12). In an extra-judicial statement, properly admitted in evidence accused stated that he was

> "Acting Headquarters Commandant, Headquarters Berlin District, Flawinne Barracks, Namur, Belgium, on the days of the 17th and 18th of May 1945 in the absence of Col. Zellars who was at that time on duty in Bielefeld, Germany" (R26).

The Company Commander of Headquarters Company A testified that accused was the senior officer present for duty but admitted that a Lieutenant Colonel Smith was the Provost Marshal of Headquarters Command, on 18 May (R14,16). The adjutant stated that it was his "understanding" that Lieutenant Colonel Smith was

> "Provost Marshal for the post and not specifically either for Headquarters Command or Headquarters Berlin District" (R10).

On 18 May accused was drunk in his quarters at about 0945 hours (R9). He was in bed in a condition of "stupefication (sic), intoxication, or what appeared to be that" (R11). Sometime between 1400 and 1530 hours he was examined by Colonel John G. Knauer, Medical Corps, and was found to be intoxicated (R17,18). On that day an inspection of the command was scheduled (R15).

4. Accused after being advised of his rights elected to be sworn and testify (R32).

He stated that he had never received orders transferring him to Headquarters, Berlin District, or Headquarters Command, Berlin District, but that he had been transferred to "Plans Group 'G'" where Colonel Zellars was his immediate superior. On 16 or 17 May when Colonel Zellars left for Bielefeld he told accused

> "to carry on as I had in the past, and in case any question came up it was to be carried to the Acting Chief of Staff for decision."

There was a "Lt. Col. Smith" assigned to Headquarters Command, Berlin District who was present at Flawinne Barracks on 17 and 18 May (R32-33). Headquarters Command was operated according to the provisions of a document labelled "Plans Group 'G'" and entitled "Justification for Table of Organization of the Headquarters Command of the Berlin District." The accused read into the record a statement

from this document (it was not introduced into evidence) under the subtitle "Deputy Headquarters Commandant and Commanding Officer, Special Troops" to the effect that "The Commanding Officer represents the headquarters commandant in the event of his absence" (R34-35).

In addition the defense read into the record several testimonials as to accused's good character, his efficiency, and his sobriety, including one from Colonel John T. Zellars, Headquarters Commandant, Berlin District (R30-31).

5. There can be no doubt that on 18 May 1945 accused was drunk between 0900 hours and 1400 hours. There is equally no doubt that on that day he remained in quarters and did not report for, nor attempt to perform military duty. He cannot, therefore, be convicted of having been found drunk on duty unless, despite the foregoing, he was on duty by virtue of the position he held (MCM, 1928, par. 145, p. 159; CM ETO 5453, Day; CM . 122373 (1918), Dig. Op. JAG, 1912-40, sec.443 (1), p.307,308; Winthrop's Military Law Precedents (Reprint 1920), p.613,614).

The theory of the prosecution's case was based first on the statement in the Manual (MCM,1928, par.145,p.159) that,

> "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty"

and secondly, on the fact that by virtue of par.6a, AR 600 - 20, 1 June 1942, command of the Headquarters Command had devolved upon accused. The cited paragraph provides that,

> "6. Death, disability, or absence of head.-a. General.- In the event of the death, disability, or temporary absence of the head or the person in command or in charge of any element of the War Department or of the Army, the next senior present and on duty therein or therewith and not ineligible under the provisions of paragraphs 3 and 4, wherever he may be stationed, will except as otherwise ordered or required, exercise the functions of such head, or person in command or in charge, until relieved by proper authority".

It was incumbent on the prosecution, therefore, to prove that there was a "temporary absence" of the commanding officer and that accused was "the next senior present and on duty."

Whether the absence of a commanding officer is of such a nature that command devolves is primarily a question of fact which can be decided only after examining all the surrounding circumstances (SPJGJ CM 252101, 252223, 29 January 1945; IV Bull. JAG 52). While the record contains little evidence as to the circumstances surrounding the commanding officer's absence, accused admitted in his extra-judicial

statement that he was the "Acting Headquarters Commandant", Headquarters, Berlin District. He admitted in his testimony that he had a conference with Colonel Zellars before the latter departed and that he told accused "to carry on as I had in the past" although any "question" was to be referred to the Acting Chief of Staff for "decision". As executive officer of the command, accused, after his conference with the commanding officer, was certainly in a position to know whether the latter intended to relinquish his command, the most important element in deciding whether there has been a devolution (IV Bull. JAG,52, supra) and, read in this light, his extra-judicial admission to the effect that he had suceeded to command constitutes substantial evidence that Colonel Zellars was, by reason of his absence, not the Commanding Officer, Headquarters Command, Berlin District, on 18 May, but that command had devolved on accused.

That accused was "the next senior present and on duty" is established by the testimony of the adjutant and of one of the company commanders, and by accused's admission. To be sure, there is some evidence that a "Lt. Col. Smith" was attached to Headquarters Command. It is to be noted, however, that, apart from accused's testimony, which the court was at liberty to disbelieve (CM ETO 895, Davis et al), the only evidence to the effect that Lieutenant Colonel Smith was assigned to Headquarters Command came from a witness who insisted at the same time that accused was the senior officer present for duty on the day in question.

We have quoted the provision of the Manual to the effect that a commanding officer of a post or command is constantly on duty within the meaning of Article of War 85, but it is unnecessary for the purpose of deciding this case to apply that rule literally. We can take judicial notice that 18 May 1945 was a Friday, an ordinary working day in this Theater. The evidence shows that an inspection of command was scheduled on that day and that accused was in an intoxicated condition during ordinary working hours on that day. He was, therefore, properly found by the court to have been on duty even though he was in quarters. The record is legally sufficient to support the findings of guilty (CM ETO 1065, Stratton; CM ETO 1267, Bailes; CM ETO 3577, Teufel; CM ETO 5010, Glover; CM ETO 5453, Day).

In view of the foregoing it is unnecessary to determine the applicability to the instant case of the provision of the Manual that

> "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).

6. The law member after advising accused accurately of his rights, added the following (R32): "Do you understand that you are not required, even though a witness in your own behalf, to give any testimony which would tend to incriminate or degrade you? You can't be forced to do it".

While perhaps a literal reading of Article of War 24 would

justify such an instruction, it of course is not applicable to an accused who voluntarily takes the stand and gives testimony on the merits of the charges preferred against him (MCM, 1928, par. 121b, p. 127). In some circumstances such an erroneous instruction might possibly mislead an accused into taking the stand on the mistaken belief that if cross-examination became embarrassing he could take refuge behind his privilege. In this case, however, cross-examination elicited but one thing, namely, that at the time accused made the extra-judicial statement he had not been warned of his rights under Article of War 24 "as I was warned in this court," (R36) A fact which is not surprising. The error, therefore did not prejudice his substantial rights (AW37).

7. The charge sheet shows that accused is 35 years of age and that he entered on active duty on 8 July 1941. He was appointed a second lieutenant in the Officers' Reserve Corps on 1 June 1932. No prior service is shown.

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

9. A sentence of dismissal is mandatory upon conviction of a violation in time of war of Article of War 85.

Edward L. Stevens, Jr. Judge Advocate

B. L. Lewis Jr. Judge Advocate

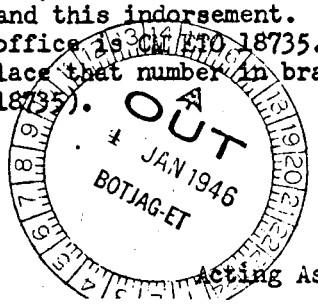
Donald R. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 4 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Major JOHN N. WASHAM (O-292533), Air Corps, Headquarters Berlin District, attention is invited 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 18735. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18735).



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

(Sentence ordered executed. GCMO 14, USFET, 15 Jan 1946).

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

BOARD OF REVIEW NO. 4

15 FEB 1946

CM ETO 18741

U N I T E D S T A T E S	80TH INFANTRY DIVISION
v.	
Private FREDERICK C. LUNGER (33948199), Company A, 317th Infantry	Trial by GCM, convened at APO 80, U.S. Army, 5 November 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 15 years. Loire Disciplinary Training Center, Le Mans, France.

OPINION by BOARD OF REVIEW NO.4
DANIELSON, ANDERSON and MAYS, 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 on the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Frederick C. Lunger, Company A, 317th Infantry, did, in the vicinity of Halsdorf, Rhine Province, Germany on or about 21 February 1945 desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Hohenschwangau, Bayern State, Germany, on or about 1 August 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 214, Headquarters 80th Infantry Division, APO 80, U.S. Army, 4 December 1945.

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

A duly authenticated extract copy of the morning report of accused's organization, introduced in evidence without objection, contains entries for 24 February 1945, showing accused from duty to "MIA" as of 21 February 1945, a record of events for 21 February 1945 showing that on that date the company attacked a hill near Halsdorf, Germany, and had to withdraw after meeting furious enemy fire, and another entry dated 2 August 1945, correcting the entry of 24 February 1945, to show accused from duty to "AWOL" as of 21 February 1945, and also showing accused from "AWOL" to confinement in the regimental stockade as of 1August 1945 (R7, Pros. Ex. 1). Each of such entries is signed by the unit personnel officer (Pros. Ex. 1).

Corporal George A. Harvey testified that after he became clerk of accused's company in March 1945, he had a card, made out by the previous company clerk, and that accused was not present for duty from March to August 1945 (R7-8). He testified:

> "Since I took over the company I had no information on him, only he was in the company and in confinement for awhile, all I had was a card on him whether he was present I don't know. * * * He was considered AWOL or confinement and they also thought he was in the hospital" (R7-8).

A motion by defense counsel to strike such testimony because it constituted hearsay was overruled (R8).

4. Evidence for the defense consisted of testimony of a staff sergeant, a sergeant and a private first class, each of whom had known and served with accused. Collectively, their testimony shows that accused had a good record with the company, but that he was extremely nervous and lost control of himself a "lot of times" and did not appear to know what he was doing (R9,10-11,12). On one occasion he

was returned from a demolition experiment because of nervousness. His condition bothered the other men to such extent that they arranged for his transfer to the headquarters platoon (R9,10). During January 1945 he had some family trouble which apparently aggravated his condition (R9). He was "wild" and had no control of himself on 21 February 1945 when the company attacked a hill (R11,12). He was not present for duty with the company from 21 February 1945 to 1 August 1945 (R9,11,12).

With consent of the prosecution, defense counsel read to the court a letter from a Home Service Director of the American Red Cross in Erie, Pennsylvania, which indicated that accused's wife had neglected their three children, had given custody of the children to accused's sister, and had been unfaithful to accused (R13-14).

After his rights as a witness were explained to him, accused elected to remain silent (R12-13).

5. Competent testimony shows that accused was absent from his organization from 21 February 1945 to 1 August 1945. The morning report entry for 24 February 1945, showing accused as missing in action on 21 February 1945, was properly admitted in evidence as an official writing because at the time it was made the unit personnel officer had express authority from the theater commander to sign original morning reports (sec. IV, Cir. 119, Hq. ETOUSA, 12 Dec. 1944). However, on 2 August 1945, at the time the correcting entry showing accused from duty to "AWOL" was made, the authority or official duty of the personnel officer to sign morning reports had been ended by the express recission of section IV, Circular 119, supra (sec. VI, Cir. 92, Hq. USFET, 8 July 1945). After 8 July 1945, the signing of morning reports in this theater is governed by current Army Regulations, which state they will be signed by "the commanding officer of the reporting unit, or by an officer designated by the commanding officer" (par. 43, AR 345-400, 3 Jan. 1945). Since the personnel officer had no official duty to sign the morning report on 2 August 1945, and since the record of trial contains no affirmative proof that the entry of that date was made in the regular course of business, which might serve as a basis for its admission under the Federal "shop book rule" (see CM ETO 13263, Kelley; CM ETO 14165, Pacifici; CM ETO 15433, Burns), such entry is incompetent to show that accused's absence on 21 February 1945 was without leave.

The ambiguous and hearsay testimony of the company clerk was clearly incompetent to show more than does the evidence for the defense, namely, the accused was not present for duty with his company during the period of time alleged. But showing that his absence was without leave, or without authority from anyone competent to give him leave, is essential for a legal conviction of the offense charged (MCM, 1928, pars. 130a,132, pp. 142-143,146). While absence without leave may be established by circumstantial evidence (CM ETO 527, Astrella, 2 BR (ETO) 79 (1943)), such proof must be sufficiently persuasive to exclude all reasonable hypotheses of innocence (CM ETO 7867, Westfield). From the morning report entry listing accused as

missing in action, it might reasonably be inferred that accused was either a prisoner or a battle casualty, in which event his absence would have been excused. Proof that he was not present for duty with his company during a period of five months fails to contradict the reasonable hypothesis of innocence arising from the "MIA" entry. Indeed, the proof fails to show that accused ever left his company at all on 21 February 1945, or that any search was made for him; and proof that his company encountered furious enemy opposition on that date, and that accused was nervous or "wild", also fails to contradict the reasonable inference of innocence, but is consistent with it. There is no showing that he was apprehended, that he surrendered himself at any time, that he was confined, or any other evidence negativing the inference of innocence arising from the mere showing that he was listed as missing in action during five months of absence from his organization. This case is therefore readily distinguishable from cases like CM ETO 527, Astrella, CM ETO 12726, Dye, and CM ETO 18747, Dolberry. In the Astrella case, in which no "MIA" entry was involved, the Board of Review relied strongly on evidence showing that accused terminated his absence by surrender, and that he was taken into custody and confined. In the Dye case, the presumption of innocence arising from the "MIA" entry was rebutted by accused's pre-trial statement that "after approximately 8 months absence from my company I turned myself in" to military police, and by his unsworn statement at the trial in which he in effect claimed that his company left him while he was asleep. In the Dolberry case, the subsequent morning report entry correcting the original "MIA" entry was not wholly incompetent, as here, and the evidence showed that a search was conducted for accused at the time he disappeared, and that he was apprehended and returned to military control more than nine months after his disappearance. There being here a total absence of any circumstances negativing the inference of innocence arising from the "MIA" entry, the findings of guilty cannot stand.

6. The charge sheet shows that accused is 21 years eleven months of age and was inducted 10 January 1944 at New Cumberland, Pennsylvania. He had no prior service.

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

Lester A. Danielson, Judge Advocate

John R. Anderson, Judge Advocate

Thomas Jr. Mays, Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 FEB 1946 TO: The Judge Advocate General (for action by the Secretary of War), Washington, 25, D.C.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private FREDERICK C. LUNGER (33948199), Company A, 317th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and the 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.

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

(Findings and sentence vacated. GCMO 139, W.D. 24 May 1946).

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

BOARD OF REVIEW NO. 5

CM ETO 18746

4 JAN 1946

U N I T E D S T A T E S	)	70TH INFANTRY DIVISION
	)	
V.	)	Trial by GCM convened at WEILBURG GERMANY, 15 August 1945. Sentence: Shot to death with musketry.
	)	
Private First Class MARVIN THURSTON, JR., (36794262), 4404th Quartermaster Service Company.	)	
	)	
	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Marvin Thurston, Junior, 4404th Quartermaster Service Company, did at Urmitz, Germany on or about 11 June 1945, with malice aforethought, willfully, deliberately, feloniously and unlawfully kill one Sargeant Gurnie W. Lindsey, Company "C" 740th Railway Operation Battalion, a human being, by shooting him with a carbine.

He pleaded not guilty and, all of the members of the court present at the the vote was taken concurring, was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 70th Infantry Division, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence

but withhold the order directing execution thereof pursuant to Article of War 50½.

3. On 11 June 1945 a train piloted by one Private First Class Maldonado of the 740th Railway Operation Battalion, and on which were riding Private Suddick and Sergeant Gurnie W. Lindsay of the same organization, proceeded from Coblenz, Germany to Bonn, Germany (R6, 7, 10, 11). The train arrived at Urmitz, Germany between 11:30 and 12:00 o'clock PM (R10,11) where it stopped to pick up some cars (R7,11). During this stop Maldonado and Sergeant Lindsay walked from the rear of the train towards the engine, passing and speaking to Private Suddick who was riding in a gondola car five or six cars from the engine (R7,11). Maldonado who was preceding Sergeant Lindsay stopped to talk with a woman and glancing back saw some colored soldiers in a group and saw Sergeant Lindsay shaking hands with one of the colored soldiers (R11,14). After talking with the woman for several minutes Maldonado continued towards the engine when he heard some shots fired (R11,13) and running back he found Sergeant Lindsay lying beside the track (R11,12,14). He noted several bullet holes in Sergeant Lindsay and fired his own pistol at some colored soldiers whom he saw running toward some buildings 75 to 100 feet away (R14,15). Suddick, who had heard five or six shots, but had paid little attention to them, then came to the scene of the shooting which was about three car lengths from the gondola car in which he was riding (R7,8,10,12). A helmet liner was noted lying near Sergeant Lindsay who was unconscious and bleeding (R13). Suddick removed the sergeant's pistol belt and holster, handed it to Maldonado and told him to call an ambulance (R8,10,12).

Both Suddick and Maldonado testified that when Suddick removed the pistol and belt the holster flap was buttoned (R8,9,14) and a bullet hole through the top of the holster was also noted (R13). The belt, holster and pistol were identified and received in evidence without objection by the defense as Prosecution's Exhibit A (R17). Shortly after Maldonado had left to secure an ambulance some colored soldiers arrived (R8,10), presumably from the 4404th Quartermaster Service Company which was then stationed at Urmitz and billeted in houses about 40 yards from the scene of the shooting (R18,22, 24), and with their assistance Suddick removed Sergeant Lindsay to the 124th Evacuation Hospital where he was pronounced dead upon arrival (R8,9). A stipulation and agreement by and between the trial judge advocate and the defense was received in evidence with the consent of accused as Prosecution's Exhibit B (R17) to the effect that First Lieutenant Steddard, Medical Corps, of the 124th Evacuation Hospital, United States Army would testify, if present, that the body of Sergeant Gurnie W. Lindsay was delivered to said hospital on 12 June 1945 at 0100 hours, and that an autopsy performed by him revealed that death had been caused by six penetrating gunshot wounds, several of which perforated the left shoulder and chest with one bullet found in the body to the right of the spinal cord (Pros. Ex. B).

Private First Class Clover testified that on the evening of 11 June 1945 he and the accused, both of whom were members of the 4404th Quartermaster Service Company then stationed at Urmitz, Germany, went for a walk together, starting out at about 7 o'clock and returning at about 10:30 or 11:00 o'clock (R17-19). When they returned to Urmitz a train

stood on the track on which there were quite a few civilians (R20). Clover approached a white soldier standing near the track and asked him where the train was going and if they had to take the civilians to their homes. The white soldier replied that the civilians just got on by themselves and that once they got on,it was necessary to watch them. He then inquired if Clover intended to ride the train and Clover replied that he didn't and explained that he was billeted there. The white soldier replied that he just wanted to know as he had five or six cars of "niggers" on the train (R20, 32). The accused who had been standing about 15 feet away and had not (R32) previously engaged in this conversation thereupon walked up and asked the white soldier what he had said and the soldier repeated that he had five or six cars of "niggers" on the train (R20,22,24). Accused then asked him how he spelled it and when the white soldier spelled it "some kind of way" (R20,32) the accused told him "Get out of my face, or I'll blow your brains out", grabbed his carbine and pointed it at the white soldier's stomach (R20). The white soldier grabbed the barrel of the gun and the accused struggled to pull it loose and when he succeeded fired one shot. The white soldier bent over and said "Don't do that any more" (R21). At this point Clover ran toward his billets and after he had gone 25 or 35 yards he heard "a burst of three or four more shots" (R22). Clover did not notice whether or not the white soldier was armed and saw him make no movement other than grabbing the barrel of accused's gun (R22,25,33). Clover did not see accused again until the next morning when accused asked Clover if he thought "they could find out who did it" (R22)

A statement made and signed by the accused on 13 June 1945 in the presence of two CID agents after first being duly advised of his rights, was received in evidence without objection by the defense as Prosecution's Exhibit C (R27). Accused therein stated that on the evening of 11 June 1945 he went for a walk with two other men of his company, Clover and another whose name he did not remember. That upon their return to Ermitz a train that seemed to be filled with civilians stood on the track in front of their billets. They walked past the engine and down a path along the road bed.

> "As we were walking down the path, we met a white soldier who was walking towards us. I can't describe what form of uniform he was wearing and I don't recall if he had a cap or helmet liner on. I remember he was wearing a U.S. Army .45 cal. pistol. He was just slightly shorter than myself but rather heavy. He didn't appear to be very old.
>
> "One of the fellows asked him where he was going and I believe he said "Hamburg". He asked us the name of the town, and I told him I didn't know the name of it as we had just moved in. He then said "Do you niggers live in these buildings?" pointing towards our buildings. The little fat

soldier who was with us asked him what he had said. He said, "Niggers". I asked him what he meant by calling us that, and he said that was what he was taught. Glover asked him how did he spell it, and he said, "N-i-g-g-e-r."

"I was very angry and asked him whose he had been taught to call us niggers. He said, "In Indiana". I then told him to go on and get out of my face before I broke his neck. He then asked me what were we if we weren't niggers. I told him we were American soldiers, and I pulled my carbine off my shoulder where it was slung. I pointed it at him and told him to get going - "To get out of my face". He grabbed the end of the barrel with one hand and reached for his pistol with the other. I fired at him then. I am not positive just how many times but I believe about five times. He fell to the ground, and I turned and ran toward our billets. Glover and the other short soldier ran with me. Someone yelled, "Come back, you black sons of bitches", and I heard more firing. I went to my room and stayed there a little while. Then I got up and went and got my helmet liner which had fallen near the place where I shot the white soldier. That same night,I cleaned my carbine with a wire and oily rag. They were carrying the soldier across the tracks to our billets at the time I went after my helmet liner. Capt. Adams took my carbine and clips from me the next morning.

"While the three of us were talking to the white soldier I shot, another white soldier had passed us walking towards the engine. I had not had anything to drink that night." (Pros. Ex. C)

4. The defense called as a witness Private Robert I. Campbell of the 4404th Quartermaster Service Company who testified that on the evening of 11 June 1945 he walked alone along a train that had stopped in front of their billets (R28). From a distance of two or three car lengths he heard somebody say "black son of a bitch" and then "three carloads of niggers" and when he "got up there" he saw the accused, Glover and "a white guy". They didn't seem to be arguing or anything and witness walked on. Six or seven steps away he heard a shot fired and ran towards his billet (R29,30). He then heard more shots which were rapid fire (R30). He later returned and a group had assembled

around the man who had been shot and they were talking and taking him to a hospital. Accused was not there at this time and witness remained only a few minutes (R30).

Private First Class Glover was called as a witness by the defense and testified essentially the same as he had previously testified for the prosecution (R31,- 34).

The accused after being advised of his rights as a witness elected to be sworn and to testify in his own behalf (R 34,35). Accused testified that he was born and raised in Chicago, Illinois, where he completed grammer school and then worked in a restaurant as a cooks helper from 1937 to 1940 (R35). That he was married in 1943 and had one chil d and was drafted into the army. That at the time of trial and on 11 June 1945 he was a member of the 4404th Quartermaster Service Company(R36). That on the evening of the 11 June 1945 he went for a walk with Glover and when they returned a train had just pulled in and was standing on the tracks in front of their billets (R37). As he and Glover walked down the track they passed a white soldier and afterthat they saw " this other sergeant"(R38). Accused stopped to talk with a corporal from his outfit and Glover engaged in conversation with " that white soldier" ten or fifteen feet from where accused was standing. (R 38, 39). Accused heard the soldier ask Glover if he wanted to ride the train and " then the mentioned about the niggers, two or three carload of niggers back there". Accused"just didn't appreciate it" and came over and asked the white soldier what he had said and the white soldier repeated it again and asked accused "Do you niggers live over there in those billets?" Accused asked him how he spelled that word and he spelled it some way or other and said " I just hate niggers". Accused then told him "You dont want to talk to us like that. We are American soldiers and want to be treated like that" and the white soldier replied that he had been taught that way (R39), that when he spelled the word accused told him " to get out of my face before I break your neck" and when he refused to go accused who was then very angry (R43, 45, 48) took his rifle from under his arm and pushed him with it (R39). That he only pushed the side of the soldier with the side of his barrel and the white soldier then grabbed the end of the barrel with with his left hand and reached for his .45 with his right hand (R40). He got the flap of the holster open and his hand on the pistol (R48) and accused knew that the white soldier would shoot him because any body that would use that word to him would just as soon shoot him as not (R47). The white soldier pushed accused's gun down between them. I snatched the gun right back; that brought it back in front of the white soldier, and that is when I started shooting" R47). Accused expressed the belief that the first shot struck the white soldier because he hollered and was backing up when accused " just started pulling the trigger" (R46) and the white soldier then fell to the ground (R48). Accused then ran to his billet following Glover who had said nothing after accused had walked up and who had started running toward the billets when the first shot had been fired (R41, 43, 46). After arriving at his billet the accused took a piece of rag on a wire and ran it through the bore of his rifle, pulled off his clothes and got in bed. A few minutes later he got up, put on his pants and shoes " and went back out for my helmet, which was lying a few feet away from this sargeant" (41).

5. Although the Specification does not allege that the act of accused was done "with premeditation" it has previously been held that a specification sufficiently alleges the crime of murder in spite of such omission if it alleges, as does the instant Specification, that the act was committed "with malice aforethought" (CM ETO 6262, Wesley). The malice may exist at the time the act is committed and may consist of knowledge that the act which caused the 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).

The deceased is not identified by direct testimony as being one and the same person whom accused admits having shot but the record reviewed as a whole leaves no room for reasonable doubt as to the issue of identification. The accused both in his pre-trial statement and in his testimony before the court clearly admitted the homicide charged and raised by way of defense two issues, first that he was very angry at the time of the shooting and secondly that he feared that the deceased would shoot him. With respect to the anger of accused at the time of the shooting it is the opinion of the Board of Review that the evidence fails to disclose the existence of such provocation as would have displaced the accused's powers of reasoning, judgment and discretion with anger, passion, fright or other mental and emotional derangement so as to reduce the homicide from murder to manslaughter (CM ETO 422, Green 1 BR (ETO) 422; CM ETO 3957, Barneclo). Mere anger, in and of itself, is not sufficient but must be of such a character as to prevent the individual from cool reflection and the control of his actions and must be produced by due and adequate provocation (1 Wharton's Criminal Law (12th Ed., 1932), sec. 426, p.647). It is well established that insulting or abusive words are not adequate provocation to justify taking life (MCM, 1928, par. 149a, p.166; Winthrop's Military Law and Precedents (Reprint, 1920), p. 675). (CM ETO 9467, Roby; CM ETO 8533, Batiste). It affirmatively appears that the accused merely heard the word "nigger" from a distance of ten or fifteen feet and thereupon in a belligerent manner approached and entered into a conversation to which he had not previously been a party and which had not apparently been of such nature as to offend or arouse the anger of his colored companion, Glover, who had been a party to the conversation.

All evidence, including his own testimony, reveals that he continued as the aggresser throughout the incident and he attempted to justify the shooting on the basis that he saw deceased reach for his pistol and that he knew that anyone who would call him a "nigger" would just as soon shoot him as not. The eye witness, companion and friend of accused, testified that he saw the deceased make no movement other than to attempt to divert the gun of accused. Other testimony was received to the effect that after the shooting the holster flap of deceased was buttoned. Well grounded belief of danger may reduce a homicide from murder to manslaughter, but in order to accomplish this, the fear must be such as a reasonable man would entertain under circumstances of homicide.

> "Mere fear, apprehension or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent" (1 Wharton's Criminal Law (12th Ed., 1932) sec. 426, p.655).

It is the opinion of the Board of Review that even viewed in a light most favorable for accused the evidence presented clearly sustained the charge of murder (CM ETO 1941, Battles; CM ETO 2007, Harris Jr.; CM ETO 3932, Kluxdal).

6. The charge sheet shows that accused is 24 years five months of age and that he was inducted 21 June 1943 at Chicago, Illinois. He had no prior service.

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

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

JOHN WARREN HILL _____ Judge Advocate

JACK R. VOLLERTSEN _____ Judge Advocate

(TEMPORARY DUTY) _____ Judge Advocate

(Sentence ordered executed. GCMO 25, USFET, 19 Jan 1946).

(Sentence stayed. GCMO 32, USFET, 23 Jan 1946).

(Sentence conformed but commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 212, W.D., 8 July 1946).

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 4

5 JAN 1946

CM ETO 18747

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Orb, Germany, 10 October 1945.
Private First Class ABSALOM W. DOLBERRY (14011386), Company C, 41st Armored Infantry Regiment	)	Sentence: Dishonorable discharge, total forefeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Absalom W. Dolberry, Company C, 41st Armored Infantry Regiment, did, at Barmen, Germany, on or about 2 December, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Schaesberg, Holland, on or about 8 September 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. All the members of the court present at the time the vote was taken concurring, he was sentencted to be shot to death with musketry. The review-

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ing authority, the Commanding General, 2nd Armored Division, approved the sentence, recommended commutation, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the reviewing authority for clemency, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 2 December 1944, Company C, 41st Armored Infantry Regiment, the organization to which accused belonged, was outposting the town of Barmen, Germany (R5,7). The outpost consisted of a series of two-man fox holes and machine gun posts fronting on the Roer river on the outskirts of the town. The soldiers on duty were subjected to constant artillery and small arms fire from the enemy (R5). Staff Sergeant Robert M. Gillespie, who was on outpost duty from 7:00 to 11:00 o'clock that day, went in search of his relief at 11:30, and was informed that accused had left at 10:30 to relieve him (R7). A search of the area was made under the direction of the company executive officer but accused could not be found (R5,7-8) and was not seen in his unit after that time (R7). Because of the battle conditions then exisiting accused was carried on the company morning report as "missing in action", as he could have been captured by the enemy or buried by the explosion of a shell (R6). An extract copy (Pros. Ex. 1) of the morning report of Company C, dated 7 December 1944, shows accused from duty to missing in action as of 2 December 1944. The same extract shows an entry of 1 September 1945 correcting the entry of 7 December 1944 to read duty to "AWOL" as of 2 December 1944 (R8). It was stipulated between the prosecution, defense counsel and accused that accused was apprehended and returned to military control on 8 September 1945 (R8; Pros. Ex. 3).

4. The accused after being advised of his rights to testify as a witness made an unsworn statement to the effect that he entered the army on 15 October 1940, was assigned to the 2nd Armored Division and arrived overseas on 8 November 1942; that he was with that organization continuously except for a month in 1944 when he was in the hospital; and that as a member of the rifle squadron he had been awarded the purple heart and the good conduct medal (R9).

5. It is established by the evidence that accused was absent from his organization on 2 December 1944. There is no direct evidence to show that his absence was without proper authority outside of the morning report which was received in evidence without objection. The morning report entry showing accused missing in action on 2 December 1944, was corrected nearly nine months later to show him from duty to absent without leave on that date. Delayed entries and corrections in morning reports made a considerable time after the occurence of the events reported therein, should be carefully scrutinized, but the effect to be given them goes to their weight and credibility and not their admissibility (CM ETO 7686, Haggie and

Iwandowski; CM ETO 9843, McClain; CM ETO 12951, Quintus; CM ETO 14362, Campise). The court could therefore, properly consider the corrected entry to show that accused did not have permission to be absent on 2 December.

It is not necessary, however, to rely on the corrected entry in the morning report in this case to show that the absence of accused was without authority, as the lack of such consent may be inferred from the evidence presented showing the tactical situation then exisiting, the search for accused, the length of absence and his apprehension (CM ETO 9257, Schewe). The original entry in the morning report showing accused from duty to missing in action was in itself evidence that the initial absence was without permission, but was entered as missing in action because of the possibility that accused had been captured or killed in combat and because of his status was otherwise unknown. In CM ETO 12726, Dye, under similar facts, the Board of Review stated:

> "* * * His subsequent return to military control, after an admitted absence of over eight months, from an active theater of war, in view of the lack of contrary evidence, negatived the possibility of legal excuse for the unauthorized absence and to that extent in effect contradicted the entry of missing in action. So much of that entry, however, as indicated an absence without authority was corroborated rather than contradicted"
>
> "* * * The possibilities that accused was wounded and hospitalized or even captured or that there were other excusing or mitigating factors involved in his absence, were matters of defense, * * * and the prosecution was not obliged to negative any or all of them in its prima facie proof of guilt * * *".

The unexplained absence of accused for a period of over nine months under the conditions shown and terminated by apprehension sustains the findings of guilty of desertion (CM ETO 3963, Nelson; CM ETO 17551, Yanofsky; CM ETO 17723, Seballos). Furthermore the court could properly conclude from the combat conditions shown to be existing at the time of the initial absence, that accused deserted with the intention of avoiding hazardous duty (CM ETO 5196, Ford; CM ETO 9257, Schewe).

6. The charge sheet shows that accused is 23 years of age, and enlisted 15 October 1940 at Fort McClelland, Alabama. He had no prior service.

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

8. The penalty for 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).

Lester A Parmelee, Judge Advocate.

John R. Anderson, Judge Advocate.

John A. Burns, Judge Advocate.

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War Department, Branch Office of The Judge Advocate General with the European Theater. 5 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class ABSALOM W. DOLBERRY (14011386), Company C, 41st Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. 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 18747. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18747).

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

(Sentence as commuted ordered executed. GCMO 26, USFET, 21 Jan 1946).

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 5

15 JAN 1946

CM ETO 18758

U N I T E D S T A T E S	)	VI CORPS
	)	
v.	)	Trial by GCM, convened at Backnang, Germany, 16 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary Lewisburg, Pennsylvania.
Technician Fifth Grade ERNEST E. POSEY (35104390), Headquarters Battery, 350th Field Artillery Battalion	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Ernest E. Posey, Headquarters Battery 350th Field Artillery Battalion, did, at Unter Gailnau, Germany on or about 23 July 1945 forcibly and feloniously, against her will, have carnal knowledge of Mrs. Babete Wiegner.

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

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3. On 22 July 1945 at approximately 2:00 o'clock in the afternoon two American negro soldiers in a jeep drove into the yard of house No. 17 Unter Gailnau, Germany, occupied by Wilhelm Wiegner and his wife, Babete (R6,7,12; Pros. Exs. B,C,D). The soldiers talked with Wiegner in the yard for several minutes who invited them into the house and gave them a glass of schnapps (R8,12). The taller of the two soldiers noticed that Wiegner's son had an injured foot and stated that he was a doctor and offered to bandage the foot (R12). When unable to find any bandage in the jeep the soldiers left stating that they would return with bandage at 6:00 o'clock (R12). They returned at or shortly after 6:00 o'clock and the taller soldier bandaged the boy's foot (R8,12). Wiegner gave them a glass of whiskey and offered them a second which they refused (R12). The soldiers departed in approximately half/an hour (R12) leaving two small cans of food with the Wiegners (R13; Pros. Ex. B). As they left, the taller soldier talked in the yard for several minutes with Mrs. Kern (R12) a neighbor of the Wiegners (R8). That night the Wiegners were awakened when two negro soldiers entered their bedroom and shined a flashlight on them (R8,12,13). At that time Mrs. Wiegner saw the soldiers in "a flash of light" and thought that they were the same two soldiers that had been there that afternoon because of "their stature and general build" and "everything that they did and how they acted" (R8,9). One of the soldiers had a pistol which he pressed against Mrs. Wiegner's chest (R8,9,13). The other had a "rifle of some kind" and when Mr. Wiegner attempted to get up and go for help he was grabbed by the throat, thrown back in bed, choked and the rifle pointed at him (R10,13). One soldier then got on top of Mrs. Wiegner and performed a sexual act while the other soldier held her arms. After the first soldier got off the other soldier repeated the act (R9,15). During the acts Mrs. Wiegner screamed and struggled (R10,13). Mr. Wiegner made no further effort to assist his wife because they "had their pistols and everything else" and he "was terribly excited and afraid" (R15). Mr. Wiegner took his wife to a doctor and officially reported the incident at 6:00 o'clock the next morning (R14). An American medical officer went to the Wiegner home on the evening of 25 July 1945 but Mrs. Wiegner refused to submit to a complete examination. His partial examination "revealed several large and recent bruises of both thighs and upper left arm" (R17; Pros. Ex. C). At the time of trial Mrs. Wiegner, when called upon to identify the accused as one of the men in her room that night, stated, "I think that it was the man but I'm not sure. I have never seen a black soldier, a negro soldier before so I can't be certain of it" (R9). Mr. Wiegner testified that both he and his wife had previously identified one of the men from six or seven soldiers but at the time of trial he was not sure whether or not accused was the man he had identified (R7,14,15). A statement signed by the accused on 4 August 1945 in the presence of a CID agent was admitted in evidence without objection by the defense as Prosecution's Exhibit B (R16). No threats were made toward the accused at the time the statement was made and he was advised that same might be used against him in case of trial and that it was his right to refuse to make any statement (R16). In this statement accused said that after talking to Betty Kern in the afternoon of 22 July 1945 he and "Williams" returned to Wettringen where accused had several glasses of beer and a few drinks of schnapps.

"At about 0030 hours 23 July 1945 I left my room and went to the Wettringen roadblock where I saw a boy whose name

I do not know. I asked him to go with me to Unter Gailnau. He asked me if I had a date and I said that I thought so as Williams and I had given a woman some rations during the afternoon. This boy had a carbine and I had my Luger pistol stuck in my belt. This Luger was not loaded as I have never had any ammunition for it. We followed the road for a while and then cut across the field. We arrived in Unter Gailnau about 0100 hours 23 July 1945. We walked down the street and went into the yard where Williams and I had parked the jeep the afternoon before. We went into the house by the rear door which was unlocked. We walked through the first room and entered the second room, and saw a man and woman in bed. This other boy turned his flashlight off and on. He broke the electric light bulb. I do not know if this was accidental or not. The woman got up and I took her by the arm. She pulled away and I made no further attempt to take a hold of her. This lady's husband was sitting up in bed, he said something which I did not understand. However, through his motions, I understood that he wanted his wife to lay back down so that I could have intercourse with her. She laid down on the bed beside her husband and made no attempt to fight me. She did not cross her legs or hold them together. I inserted my penis into her vagina and she offered no resistance. Then she pushed me and I got off her but I did not have a discharge. I then asked for my two cans of rations which Williams and I had given to these people. She said nothing about my rations but told me to go. The boy that was with me said that he would try the woman. I saw the other boy get on top of the woman. I waited at the bedroom door for a few minutes and the lady started talking aloud. The other boy came with me and we both went out the front door together. Both of us then returned to Wettringen.

"At no time did I or the boy that was with me point our guns at these people. I took my pistol out of my belt when I unbuttoned my pants, and laid the pistol on the floor. The other boy stood his carbine against the wall, as I remember hearing it fall to the floor.

"I do not remember the name of the other boy who was with me, but I would recognize him on sight." (Pros. Ex. B).

At the request of a member of the court the CID agent was recalled as a witness and testified that at an identification parade held on 29 July 1945 the accused was identified by Mr. and Mrs. Wiegner and by Mr. and Mrs. Kern as being one of the soldiers who visited the Wiegner home on the afternoon 22 July 1945 (R19).

4. The accused after being duly advised of his rights as a witness elected to remain silent (R18).

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5. Rape is the unlawful carnal knowledge of a woman by force and with-

out her consent (MCM, 1928, par. 148b, p. 165). The record of trial clearly contains competent substantial evidence to sustain the finding of the court that the admitted acts of intercourse committed at the Wiegner home on the night in question were of an unlawful nature and were accomplished by force and without the consent of the prosecutrix. The identity of the accused as one of the perpetrators of the acts as well as the element of penetration were adequately established by the accused's own statement in which he admitted that he entered the Wiegner home on the night in question and that while there "I inserted my penis into her vagina". In this statement he denied that any force was used or that any threats were made against either prosecutrix or her husband and stated that he believed from the husband's motions that he wanted his wife to lay back in bed so that accused could have intercourse with her and that she herself offered no resistance. In view of this denial that any force was used the statement does not constitute a confession of the offense of rape, but is merely an admission against interest. Such statement was properly received in evidence since it was shown to have been voluntarily made by accused after an explanation of his rights and the defense stated that it had no objection to its introduction (MCM, 1928, par. 114b, p. 117; CM ETO 611, Porter, 2 B.R.(ETO) 189 and CM ETO 3933, Ferguson). It is not necessary for the Board of Review to determine whether or not the court erred in receiving extra-judicial identification testimony from the CID agent with respect to identification of the accused at a previous identification parade by persons who were not present in court as witnesses or who, although present, did not testify that they made a previous identification. The identity of the accused and his presence at the scene of the offense is expressly and amply established by his admission thereof in his own statement and accordingly any error that may have been thereby involved was clearly not prejudicial to the substantial rights of the accused.

6. The charge sheets shows that accused is 36 years two months of age and that he was inducted 2 June 1941. He had no prior service.

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

8. The penalty for 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 section 278 and 330, Federal Criminal Code (18 USCA, 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Jack R. Wollerton, Judge Advocate.

Anthony Dubaine, Judge Advocate.

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Wilbur J. Ingalsbe, Judge Advocate.

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BOARD OF REVIEW NO. 1

26 DEC 1945

CM ETO 18786

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Bamberg, Germany, 11 October 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Final place of confinement not designated.
Private RAYMOND A. GILLIS (32689818), Attached-Unassigned, Detachment 93, Ground Force Reinforcement Command, 224th Reinforcement Company, 93rd Reinforcement Battalion	)	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as involves a finding that accused did absent himself without leave from his organization on 27 December 1944 and did remain absent without leave until 6 August 1945, and legally sufficient to support the sentence.

2. The prosecution introduced in evidence an extract copy of a morning report of accused's organization with an entry carrying accused in an absent without leave status as of 12 November 1944. This entry was dated 12 November 1944 and was signed by the Personnel Officer. On that date Unit Personnel Officers were not empowered to prepare and sign morning reports in this theater (CM ETO 6951, Rogers; CM ETO 12271, Cuomo; CM ETO 14362, Campise). Neither can the admission of this extract copy be justified on the ground that it was an entry made in the regular course of business (CM ETO 4691, Knorr; CM ETO 10199, Kaminski; CM ETO 14165, Pacifici), since there is no evidence in the record establishing the necessary foundation, viz., that it was so made.

The prosecution also introduced into evidence an extract copy of a morning report of accused's organization, dated 27 December 1944, and signed by the Unit Personnel Officer, which contained after accused's name the notation,

"EM AWOL 'Dropped fr rolls' of the Army as absentee pursuant to AR 615-300 & 1st Ind. Hqs. European T. of Opns, file AG 251.2, dtd. 17 Dec. 44". On 12 December 1944 Unit Personnel Officers were authorized to sign morning reports in this theater and accordingly the entry showing accused "AWOL" on 27 December 1944 was competent evidence of that fact (Sec. IV, Cir. 119, Hq. ETOUSA, 12 Dec. 1944; CM ETO 14362, Campise).

There is nothing inconsistent with the foregoing in CM ETO 16646, Lee, cited in the review of the Staff Judge Advocate. That case was decided without opinion, but an examination of the records of the Board of Review reveals that the signature of the Personnel Officer was considered by them to relate only to the entry of 27 December 1944 and not to the entry of 29 October 1944. Since it was not shown who made the entry of 29 October 1944, the presumption of regularity obtained (CM ETO 5234, Stubinski) and the entry was held competent evidence of the facts recited.

3. The final place of confinement was not designated. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is the proper place of confinement (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

Edward L. Stevens Jr. Judge Advocate

B K Stevens Jr. Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

28 DEC 1945

CM ETO 18796

U N I T E D S T A T E S	)	UNITED KINGDOM BASE, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)	
Technician Fourth Grade ARNOLD D. GREEN (31068692), 51st Anti-Aircraft Artillery Brigade	)	Trial by GCM, convened at London, England, 28 November 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for one year, fine of $3000, and further confinement at hard labor until payment of fine not to exceed one additional year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. Accused was found guilty of offering $2000 to a cashier in a United States Finance Office with intent to induce the cashier to accept French francs for exchange into pounds sterling in an amount in excess of that permitted by existing regulations, in violation of Article of War 96. He was sentenced to confinement for one year and, as modified by the reviewing authority, to pay a fine of $3000, with an additional period of confinement, not to exceed one year, until the fine is paid.

The Table of Maximum Punishments (MCM, 1928, par. 104 c, pp. 97-101) contains no limitation on the punishment for the offense of which accused was convicted. In such a case it is provided, with exceptions not here material, that the punishment may be that which is authorized by statute or by the custom of the service. (Ibid, p.96).

The specification of which accused was convicted purports to state a violation of section 39, Federal Criminal Code (18 USCA 91). That

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statute provides as a penalty for violation thereof a fine of not more than three times the amount of the bribe offered or given and imprisonment for not more than three years. Since, under the provisions of the Manual referred to above, it furnishes the standard of punishment in this case, and since accused was convicted of offering a bribe of $2000, the sentence is clearly legal, unless some provision of the Articles of War or the Manual specifically renders void the imposition of the fine. Not only is there no such provision but it has been specifically held that a fine is an appropriate form of punishment under Article of War 96 (CM ETO 11936, Tharpe et al; SPJGJ 1944/4452, 17 July 1944, III Bull.JAG, p. 281).

Obviously, the addition of a year of confinement contingent on payment of the fine was proper where, as here, the total confinement to be served in any event does not exceed the total properly imposable.

Edward L. Stevens, Judge Advocate

B. H. Stevens Jr., Judge Advocate

Daniel K. Carroll, Judge Advocate

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

BOARD OF REVIEW NO.4

5 JAN 1946

CM ETO 18815

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private WILLIAM H. FERBY (33723194), 19th Reinforcement Depot, formerly of Company A, 44th Signal Heavy Construction Battalion	Trial by GCM, convened at Marseille, France, 9 Novemver 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD of REVIEW NO. 4
DANIELSON, ANDERSON and BURNS, Judge Advocates

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

2. Under the specification of Charge I, the accused was charged with and found guilty of desertion with intent to shirk important service, to wit: overseas shipment to the Pacific Theater of Operations. The reviewing authority approved only so much of the finding of the Specification of Charge I as involved a finding that the accused did, at the time and place alleged, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until apprehended at the time and place alleged. By his action, the reviewing authority eliminated the specific intent accused was charged with entertaining at the time of the initial absence, viz, to shirk important service. It is well established that the principles governing the elements

of the offense of desertion under Article of War 28 require that the alleged requisite intent must be entertained by the absentee at the time he quits his organization. Accused therefore stands not guilty of desertion committed under Article of War 28 circumstances. As desertion charged generally under Article of War 58 is not a lesser included offense of that provided under Article of War 28, the approved findings will support only a finding of guilty of absence without leave in violation of the 61st Article of War (CM ETO 5958, Perry and Allen; CM ETO 7397, De Carlo Jr; CM ETO 7532, Ramirez; CM 224765, Butler, 14 BR 179 (1942)).

3. Confinement in a penitentiary is authorized upon conviction of assault to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars.1b (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 5

CM ETO 18816

U N I T E D S T A T E S	OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private LEROY STEEN (34742616), 865th Quartermaster Fumigation and Bath Company (Mobile)	Trial by GCM, convened at Nancy, France, 23, 24 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Leroy Steen, 865th Quartermaster Fumigation and Bath Company (Mobile) did, at Baccarat, France, on or about 24 January 1945, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class Edward J. Bartol, a human being by shooting him with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, two by summary court for absence without leave for six and two days respectively, both in violation of Article of War 61, and one by special

court-martial for wrongfully using an automobile and for wrongfully wearing staff sergeant's stripes in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Oise Intermediate Section, Theater Service Forces, European Theater, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

On Sunday evening, 21 January 1945, accused and five other colored soldiers entered a house of prostitution at 5 Rue Capelot, Baccarat, France, and asked Belier, the male attendant, for tickets. He informed them that tickets were not sold to colored troops (R14,15). The house was crowded with about 40 white soldiers at that time. The colored soldiers used some abusive language at Belier and after a few minutes left the place (R22). The next day, 22 January, accused and another colored soldier, both armed with guns, returned to the brothel. Accused asked Belier for tickets and upon being refused placed a magazine into the carbine and began to fire into the (light) bulbs (R15). Belier fled outside into the garden. About a dozen shots were fired. He saw accused fire three shots, but as he escaped into the garden he heard other shots (R16). Before he left he saw the other colored soldier aiming his rifle but did not see him fire (R15). As a result of this incident the house was opened to colored soldiers (R22). On Tuesday evening, 23 January, accused, armed with a carbine, returned to the house and was sold three tickets (R17). He had sexual intercourse with Madame Falentin, one of three prostitutes who plied their trade in that house. He stayed with her in her room for about three-quarters of an hour (R31, 36,37). Belier testified that from the time it was decided to accept the patronage of colored troops until Wednesday evening, 24 January, about 200 colored "customers" entered the brothel (R23). He further testified that accused returned again on Wednesday, 24 January, between 1800 and 1830 hours. He was armed with a carbine. He walked directly into the narrow corridor leading to rooms occupied by the prostitutes (R18, 19). About this time the deceased, Private First Class Edward J. Bartol, who was a white soldier, came out of the kitchen and went to the

ticket counter where Belier sold him a ticket (R18, 19). He had a carbine slung over his shoulder (R30). While talking to Belier, the deceased, who had drunk a little, said "Not good negro", referring to negroes generally. He then went into the same corridor (R19, 24). The premises occupied by the brothel were situated on the ground floor of the building and Madame Falentin's room was located at the further end of the corridor (R25,26,35). There were lights in the room and in the corridor (R33). About 20 men were standing in the corridor awaiting their turn. Some were white, the rest colored. Besides the accused another colored soldier was armed (R24). Accused stood at the head of the line and in front of the door to Madame Falentin's room, although she was not receiving colored soldiers that night (R34). Over a period of about 45 minutes before the shooting she saw him standing there each time she opened the door at intervals of about 10 or 15 minutes to let a soldier out (R31,32). She did not know why he made no attempt to enter the room (R34). He was kicking at the doors and telling the soldiers into which room to go (R35). When she let the deceased into the room she saw accused still standing at the door (R32). He was the only one in the corridor she saw armed (R34). As deceased entered the room accused made a brusque movement with his elbow (R37, 38). After entering the room deceased placed his rifle near the night table and then proceeded toward the other table at the far end of the room to lay his helmet down. As he made a movement to turn around a shot was fired (Pros. Ex.G; R32,105). The shooting occurred almost immediately after he entered the room (R38). Deceased put his hand to his chest, advanced a few steps, collapsed, and then died (R19,33-34,38). According to medical testimony, death "ensued at approximately 1900 hours" that day and was caused by a gunshot wound of the chest and left arm followed by severe hemorrhage (R66,67). Madame Falentin was standing in the room near the door facing the deceased when the shot was fired and did not see who did the firing. From the time deceased entered the room to the time of the shooting the door remained open (R38). Immediately after the shot, all the soldiers, including accused, ran out of the corridor. The shot was fired between 1845 and 1855 hours (R25,26).

Private First Class Gwynn, who belonged to the same unit and occupied the same quarters as accused, entered the house of prostitution at about 1800 hours on the evening of the homicide (R39). He found a long waiting line in the corridor. He saw accused at the head of the line and called out to him, "What do you say Slim" (Slim was accused's nickname). Accused responded (R40,49). Accused and Gwynn are both tall and although there was a crowd present Gwynn could see accused's head and shoulders (R41). Accused was generally armed with a carbine, but Gwynn saw no weapon on his shoulder and did not know whether he was armed that evening (R41,51). About 30 to 35 minutes after his arrival, Gwynn heard a shot (R41). At the sound of the shot he fled from the house and everyone scattered. He went to a tavern nearby where he remained for 20 or 25 minutes and then returned to his billet. There he found accused sitting on his (Gwynn's) bed. Accused usually kept his gun on the floor leaning against the wall (R42). That same night, some

time after 2300 hours, Lieutenant Marz awakened the accused and a military police lieutenant came and picked up accused's rifle. It was in the place where accused usually kept it (R43). Some of the men kept their carbines at the head of the bed, others on nails or hanging on the side of the bed. Rifles were not kept under lock and key and there was no rifle rack (R50,54).

Private First Class Hill, of the same organization and occupying the same billet, saw accused in the billet after supper sometime between 1900 and 1930 hours (R52,54). Hill was sitting on the bed playing cards. Accused came up in back of him and asked him if he had a rifle rod and Hill told him to look in his duffle bag and to take it if he wanted it. Hill did not know if accused got it (R51-52). Accused did not appear to be nervous when he asked for the cleaning rod. About a half-hour after he had asked for the rod, accused returned to where Hill was playing cards and stood there (R53). After the card game ended accused and Hill went out for beer. They returned after a few minutes. Accused did not act as if he were nervous or excited (R55). The men by accident could and sometimes did take another's rifle (R54).

Lieutenant Walter L. Stephenson, Corps of Military Police, went to accused's billet about 2400 hours, 24 January, and found a carbine (Pros. Ex. A) near the head of the bed in which accused slept. The gun was shown to accused who after examining it admitted that it was his and called attention to the fact that his name was on the stock (R57, 58, 63,69). Accused did not appear to be nervous (R65). Lieutenant Stephenson testified that the carbine had no magazine in it and no dust covering over the muzzle. The barrel appeared to be freshly oiled (R64). In the officer's opinion the rifle was oiled within the preceding 12 hours (R65). When asked about the missing magazine accused stated he had left it on the table in his quarters when he finished cleaning the gun two or three days previously (R64). Exhibit A (the carbine) had been issued to accused (Pros. Ex. E; R14).

John R. Brown, CID agent, received the carbine (Pros. Ex.A) from Lieutenant Stephenson at about 0100 hours 25 January. Accused examined it very carefully and acknowledged it was his. The carbine had accused's name pressed into the stock as in Exhibit A (R77,87). Agent Brown, who had 20 years of experience with firearms and was familiar with them, examined the carbine and found the bore "surprisingly clean and shiny" (R77-78). In his opinion it was cleaned within the preceding 24 hours (R78).

Captain Joseph G. Rothenberg, Medical Corps, performed an autopsy on the body of the deceased and recovered the bullet which caused the death (R67, Pros. Ex. C).

Soon after the deceased was shot, Madame Endeline, one of the women in the house of prostitution, found an expended cartridge shell (Pros. Ex. B) near the door of the room in which the killing occurred (R28,30,31).

The carbine, the expended cartridge, and the fatal bullet (Pros. Ex. A,B,C) were delivered to the 27th Criminal Investigation Detachment, Military Police, in Paris for ballistic tests (R7,8,96,97). The chain of possession of these three exhibits from the time they were found to the time of their reception at the trial was shown by the evidence (R7,8,28,30,58,64,68,73,74,79,80,95-97). Captain Claud I. Nichols, commanding officer of the 27th Military Police Criminal Investigation Detachment, after being qualified as an expert in ballistics (R6,7), testified that he made a physical, microscopic, and microphotographic examination of Prosecution Exhibit C (the bullet removed from the body of deceased), Prosexution Exhibit B (the expended cartridge found in the room after the killing), and of the sample cartridge and bullet known to have been fired by Prosecution Exhibit A (accused's carbine). Upon comparing the evidence bullet (Pros. Ex. C) with the known sample bullet, and the evidence cartridge shell (Pros. Ex. B) with the known sample cartridge, he found that Prosecution Exhibit A "beyond any shadow of a doubt" fired Prosecution Exhibit C, and that there was "very strong evidence" and a "very strong probability" that it also fired Prosecution Exhibit B (R9).

Soon after the homicide a freshly made bullet hole was found through the door jamb of the room in which Bartol was killed (Pros. Exs. G, H; R88, 103). It was made by a projectile about the size of a .30 caliber bullet. It was 4½ feet above the floor and nearly horizontal (R88,95,99). The jamb was of soft wood and its thickness of about 3/4 of an inch was not sufficient to stop a carbine bullet which, at muzzle velocity, should penetrate eight inches of the same kind of wood (R99, 100,102). The nature and concentration of the powder burns present on the corridor-side of the jamb indicated that the muzzle of the gun that caused them was held within six inches from the wood (R90,104). The door, which opened inside the room (Pros. Ex.G) was undamaged (R92). Had the door been closed, it would have been penetrated by the bullet (R94). On 25 January accused was searched and eight unexpended carbine cartridges were found in his pocket (Pros.Ex.F; R80,90,91). Three of these were of the same manufacture as the spent cartridge shell (Pros. Ex.B) found near the door of the room after the killing (R100,102).

Belier identified accused at the trial (R14) as the same man he had seen in the house of prostitution on Sunday, 21 January, when he and other colored soldiers were refused access to the prostitutes (R15), on Monday, 22 January, when he fired at the lights (R15), on Tuesday, 23 January, when he was sold three tickets (R17), and Wednesday, 24 January, between 1800 and 1830 hours, shortly before the killing (R18). Belier further testified that he recognized the accused Wednesday night after the killing (R20).

Madame Falentin identified accused at the trial (R31) as the same colored soldier who had sexual intercourse with her in the house of prostitution on 23 January (R31), and who was standing in front of the door of her room immediately before the shot was fired (R31-32). She further testified that she identified accused as that same man at a line-up of eight men on 25 January (R33,34).

Lieutenant Joseph J. Gabriel testified he saw Belier "recognize" accused after the killing (R57,58). Agent Brown testified that he witnessed the identification of accused by Madame Falentin at the line-up (R84). After the identification by Madame Falentin, all the soldiers except accused and Hill were excused. These two were told they were being held, whereupon accused volunteered the remark, "Well, you'll have to prove it" (R79,88,91). Though surly, accused was neither upset nor confused (R84,91). He denied to Agent Brown that he was present in the house of prostitution on the night of the killing. When Brown later showed him enlarged ballistic photographs, informed him they indicated his presence there, and asked him if he wished to change his story, accused replied, "I am not going to talk to you any more" (R86).

First Lieutenant Robert W. Marz, Quartermaster Corps, testified that he was an officer in the unit to which accused belonged, and the only person who could issue passes to the men of that unit. He issued no pass to accused for the afternoon of Wednesday, 24 January, but did issue him a pass for the evening of that day (R69,71). He further testified that the men kept their carbines with them. Since the roof of the unit's quarters was leaky there was no designated way of keeping them or putting them away. They were placed wherever it was most convenient. They were not kept under lock (R71).

4. Evidence introduced for the defense showed that Private First Class Gwynn, when in Baccarat, had 15 rounds of ammunition (R106,107). The non-commissioned officer in charge of supplies for the company to which accused belonged testified that before part of the company (including accused and Gwynn) left Luneville for Baccarat, the men were ordered to turn in their ammunition. The witness had two clips of ammunition which Gwynn took for the purpose of turning them in. The witness did not know if all the ammunition issued to the company was accounted for. He did not see those two clips again (R110,111). When the men were issued carbines from time to time in connection with details, they were not always given their own carbines because "there wasn't any name on the rifle". An attempt was made to give the men their own rifles when they asked for them. The witness did not know if accused was given his own rifle when he left Luneville for Baccarat (R108,109).

Accused, after his rights as a witness were explained to him (R111), elected to make the following unsworn statement through counsel:

> "On Saturday, January 21st, 1945, I arrived with my company in Baccarat. It was snowing at the time. On Sunday, January 22nd, 1945, an engineer outfit came to our barracks and in the immediate vicinity of the barracks proceeded to blow up and destroy some mines. During that time I and many of the other members of the company were watching the work of mine removal and destruction. During that time while the engineers were working, I fired the carbine. I fired it high up into the air. I did it just for amusement. I aimed at nothing. I entered the house at 5 Rue Capelot

in Baccarat for the first time on Monday, January 22nd, about 5.30 PM. I bought a ticket that night and laid with a blonde woman. I then returned to my company. I returned to the house on Tuesday, January 23rd, 1945 about 8:00 PM. I bought a ticket and laid with the same woman I had laid with on Monday night. I then returned to my company area. I went to the house by myself both times. There were many other colored boys there but I didn't know who they were. Some were from my company; others were not. On Wednesday afternoon, January 24th, 1945, I got a pass and five of us went to town to have our pictures taken. We left the company area about one or two o'clock in the afternoon. I don't know the exact time. We went to Jallais Michel, 37 Rue de Fruo, Baccarat where I had my picture taken. It was about 3 o'clock when I had my picture taken. After the pictures were taken, we went and had some schnaps in a place across the bridge. I don't know the address. We arrived at this place about a half hour after the pictures were taken. We stayed there until five o'clock and went back to the company area, arriving there about 5:30. I then ate chow and finished about six o'clock. I didn't go any place after chow. I played dice with some of the men in the company until about eight o'clock when Hill asked me to go out with him. We went out and had some beer and returned about 8:30. I stopped about three doors from our billets where a lady washes our clothes lives. I stayed there a short time and then went to my billet and went to bed. I didn't borrow a cleaning rod off Hill on Wednesday night. I think the last time I cleaned my rifle was on Sunday afternoon. As a matter of fact, I am sure of that because I had fired my carbine on Sunday while they were looking for mines. There are about three men in my company who are tall. Private Hill is about as tall as I am and is about the same complexion - maybe a little bit lighter. The same is true of Private Gwynn. I didn't carry my carbine with me on Wednesday afternoon. During the evening I didn't notice whether my carbine was in the stack in the corner where everybody in the building kept their carbines. I did not shoot Private Bartol. I didn't know Private Bartol. I have never met him. I have never spoken a word with him. I have never had a quarrel with him nor has there been any word passed between us" (R111-112).

6. The main issue in this case was the identity of the person who killed Bartol. No witness saw accused or any other person fire the bullet which caused his death. The conviction of accused, therefore, depends upon the sufficiency of the circumstantial evidence introduced against him to prove that he was the killer.

It was established by uncontroverted expert testimony that the bullet which caused the death of Bartol was fired by the carbine belonging to accused. Only one shot was fired. Immediately before it was fired, accused, armed with a carbine, was standing in front of the open door of the room in which deceased was struck by the bullet. There were about 20 men lined up in the corridor, but no other person near the door was seen to be armed. The location and direction of the bullet hole in the inner moulding of the door frame and the powder burns on the wood surrounding the point of entry showed that the fatal bullet was fired by a person standing approximately on the very spot where accused was standing immediately before the shooting occurred. Between 1900 and 1930 hours, within an hour after the shot was fired, accused, having returned to his quarters, asked another soldier for a rifle cleaning rod and was told where he could find it. At about 2400 hours that same night the carbine which fired the bullet was found next to accused's bed where he usually kept it. He was awakened and identified the weapon as his. The barrel was freshly oiled and in the opinion of the officer who examined it the oiling was done within the preceding 12 hours. The carbine was also examined about an hour later by an investigator with many years of experience with firearms. He found the bore of the barrel surprisingly clean and shiny. In his opinion the rifle had been cleaned within the preceding 24 hours. The expended cartridge shell found near the door of Madame Falentin's room following the shooting, and very probably fired by the death weapon, was of the same manufacture as some of the unexpended carbine cartridges found in accused's pocket when he was searched on the day after the homicide. Each of the foregoing facts was proved by competent evidence.

In his unsworn statement to the court accused claimed that at the time of the killing he was in his quarters playing dice. This claim was wholly uncorroborated. His contention that he was not out on pass that evening was not only uncorroborated but contradicted by the officer who issued the pass. The fact that he asked Hill for the cleaning rod about an hour after the shooting and was told where he could find it, considered in the light of the additional fact that the rifle was clean when examined about six hours after it was fired on Wednesday evening, refutes the assertion of accused that he had last cleaned the carbine on the preceding Sunday. His denial to the investigator that he had visited the house of prostitution on the evening Bartol was killed was directly contradicted by Belier, Madame Falentin, and Gwynn, all of whom saw him there. Belier had seen him in that house on three previous occasions and had sold him three tickets the day before the fatal shooting. Madame Falentin saw him several times in front of the door of her room at the head of the line over a period of about 45 minutes before the shot was fired. She also saw him making a brusque movement with his elbow as Bartol passed him to enter her room. The day before, he was in her room for about 45 minutes and had sexual intercourse with her. Private First Class Gwynn, who was well acquainted with accused, saw him in the house of prostitution standing in the corridor at the head of the line shortly before the shooting, called him by his nickname and received a response. In view of the testimony of these witnesses, accused'd denial could reasonably be construed by the court as an attempt on his part to conceal the fact that he was present at the time and place the

shooting occurred.

In the opinion of the Board of Review the circumstantial evidence adduced against the accused warranted the court in finding that he was the person who fired the fatal shot. The evidence excludes any other fair and rational hypothesis. The rule that a conviction may be based upon circumstantial evidence alone is well established (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; CM ETO 6397, Butler). The present case is clearly different from CM ETO 7867, Westfield, and CM ETO 13416, Wells. In each of those cases the circumstantial evidence relied upon to prove the identity of accused as the killer contained such gaps as to be consistent with either the hypothesis of innocence or that of guilt.

Belier and Madame Falentin, who identified accused at the trial as the person present in the house of prostitution at the time of the homicide, were also permitted to testify that they had previously made extrajudicial identifications of accused. Witnesses who saw Belier and Madame Falentin make the extrajudicial identifications were allowed to testify to that effect. The reception of such testimony to corroborate the identifications made at the trial was proper (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams).

There was no legal justification or excuse for the killing. The requisite malice aforethought was inferable from the act of accused in firing a deadly bullet into a small room in which he knew Bartol was present (CM ETO 7815, Gutierrez; CM ETO 8691, Heard; CM ETO 14047, Lancaster). The court's finding that accused was guilty of murder was sustained by the evidence.

6. The charge sheet shows that accused is 22 years four months of age and that he was inducted 27 February 1943 at Fort Benning, Georgia. He had no prior service.

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

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

(206)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 8 FEB 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private LEROY STEEN (34742616), 865th Quartermaster Fumigation and Bath Company (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 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 18816. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18816).

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

(Sentence modified to remit confinement in excess of twenty years, and ordered executed. GCMO 184, W.D., 17 June 1946).

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

BOARD OF REVIEW NO. 1

12 JAN 1946

CM ETO 18834

U N I T E D S T A T E S	)	SPECIAL TROOPS, 12TH ARMY GROUP
	)	
v.	)	Trial by GCM, convened at Wiesbaden,
	)	Germany, 5 June 1945. Sentence as
Privates FRANK SCOTT	)	to each accused: Dishonorable dis-
(34934741) and CHARLES	)	charge, total forfeitures and con-
H. SHARP (35840566),	)	finement at hard labor for life.
both of Company B, 25th Signal	)	United States Penitentiary, Lewis-
Heavy Construction Battalion	)	burg, Pennsylvania.

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

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

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

Scott

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Frank Scott, Company B 25th Signal Heavy Construction Battalion, did, at or near Waldgrehweiler, Germany, on or about 16 April 1945 forcibly and feloniously against her will, have carnal knowledge of Irmgard Frenger.

Sharp

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charles H Sharp, Company B 25th Signal Heavy Construction Battalion, did, at or near Waldgrehweiler, Germany, on or about 16 April

1945 forcibly and feloniously against her will, have carnal knowledge of Irmgard Frenger.

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against accused Scott. Evidence was introduced of one previous conviction against accused Sharp by summary court for absence without leave for 18 hours in violation of Article of War 61. All of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Special Troops, 12th Army Group, as to each accused, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, as to each accused, approved the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

The prosecutrix, a 16-year-old German girl, testified that on 16 April 1945 at Waldgrehweiler, Germany, the two accused assaulted her in a field, dragged her off into a woods, and pointed their rifles at her. Each accused then forcibly had sexual intercourse with her (R8-11). Later they threw her on the ground and each again forcibly had intercourse with her (R13). Other German witnesses corroborated her testimony, testifying to the presence of accused in the field (R60,66), the seizing of the prosecutrix (R61,71), the pointing of their rifles at the witnesses, and the firing of shots (R61,71-72). One of the witnesses went to a neighboring town to notify the American authorities and rode back to the scene with an American officer. When they reached the field they saw the prosecutrix and the two accused, the latter jumping into a ditch (R79).

This officer testified that when he and several enlisted men arrived at the field, he saw accused run across a road and jump into a ditch, while the prosecutrix ran toward him. Accused lay in the ditch with their rifles pointed at the officer. He called for them to come out and leveled his carbine at them, whereupon accused raised their hands and came out of the ditch. Before the officer said a word to them, they "kept insisting they hadn't done anything" (R48-49,53).

Medical testimony of both German and American witnesses was produced that an examination of the prosecutrix later the same day showed two lacerations and a bloody condition in the vaginal region (R40-41,76), indicating that a penetration through sexual intercourse had occurred (R76).

4. After his rights as a witness were explained to him (R83), accused Scott elected to make a sworn statement and testified that on 16 April 1945

he and accused Sharp went to the woods for the purpose of hunting. They met two German "fellows" coming up the road with a bottle of wine, and then two colored soldiers came by (R84,91), with whom accused talked for about 15 minutes (R91). About five minutes after those soldiers left, the prosecutrix (R84,93) came by with her hand around her face (R84). Then a truck appeared, and he and Sharp took cover in a ditch, while the girl ran toward the truck "hollering" (R85). He did not rape any woman that day (R86). The other two colored soldiers were about as tall as accused (R93-94).

After his rights as a witness were explained to him, Sharp elected to remain silent (R83-84,100). No other evidence was introduced on behalf of the defense.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p. 165). Ample evidence in the record sustains the findings of guilty against each accused. The testimony of the prosecutrix as corroborated by the testimony of other witnesses, both German and American, and the medical evidence, established every element of the crime of rape. The sole evidence to the contrary lay in the uncorroborated testimony of Scott, who admitted his and Sharp's presence at or near the scene of the alleged crimes, but denied that he had raped any woman. This raised a question of fact, which was for the sole determination of the court, whose findings that both accused committed the offenses alleged were supported by competent, convincing evidence, and such findings therefore will not be disturbed by the Board of Review upon appellate review (CM ETO 14338, Reed; CM ETO 18225, Davis; CM ETO 18625, Van Riper et al).

6. The charge sheets show that Scott is 24 years three months of age and was inducted 1 August 1944 at Fort Benning, Georgia, to serve for the duration of the war plus six months, and that Sharp is 19 years three months of age and was inducted 27 May 1944 at Fort Benjamin Harrison, Indiana, to serve for the duration of the war plus six months. Neither 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 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 as commuted.

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

Edward L. Stevens Jr., Judge Advocate.

B. K. Harvey Jr., Judge Advocate.

Donald R. Carroll, Judge Advocate.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 January 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Privates FRANK SCOTT (34934741) and CHARLES H. SHARP (35840566), both of Company B, 25th Signal Heavy Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentences as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18834. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 18834).

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

(Sentence as commuted ordered executed. GCMO 166, W.D. (Scott) 11 Je 1946).

(Sentence as commuted ordered executed. GCMO 167, W.D. (Sharpe) 11 Je 1946).

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

BOARD OF REVIEW NO. 5

26 JAN 1946

CM ETO 18838

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Heidelberg, Germany, 28 September, 3, 4 October 1945. Sentence as to each: (Disapproved as to Mathews) Dishonorable discharge, total forfeitures and confinement at hard labor Jefferies and Williams for life, McDaniel for eight years. United States Penitentiary, Lewisburg, Pennsylvania.
Sergeant RICHARD S. MATHEWS (12150367), Technician Fifth Grade EPHRIAM B. McDANIEL (34221249), Private First Class CHARLES W. JEFFERIES (38097155) and Private LINWOOD E. WILLIAMS (32440518), all of 645th Quartermaster Truck Company except WILLIAMS, of 3499th Quartermaster Truck Company	

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

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

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

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

Specification 1: In that Sergeant Richard S. Mathews, Technician Fifth Grade Ephriam B. McDaniel and Private First Class Charles W. Jefferies, all of 645th Quartermaster Truck Company, and Private Linwood E. Williams, 3499th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Brucken, Kreis, Birkenfeld, Germany, on or about 11 April 1945, forcibly and feloniously, against her will have carnal knowledge of Frau Emma Faust.
(Findings of not guilty as to Mathews, McDaniel and Jefferies)

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Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at Brucken, Kreis Birkenfeld, Germany, on or about 11 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Scholastika Finsterle. (Findings of not guilty as to Mathews, McDaniel and Williams)

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

Specification 1: (Findings of not guilty)

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Brucken, Kreis Birkenfeld, Germany, on or about 11 April 1945, wrongfully and unlawfully enter the dwelling of Frau Scholastika Finsterle with intent to commit a criminal offense, to wit: - rape therein. (Disapproved as to Mathews)

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring as to each, Mathews and McDaniel were found guilty of Specification 2 of Charge II and of Charge II and not guilty of the other specifications and of Charge I; Jefferies was found guilty of Specification 2 of Charges I and II and of Charges I and II and not guilty of Specification 1 of Charges I and II; and Williams was found guilty of Specification 1 of Charge I and of Charge I and not guilty of Specification 2 of Charge I, and guilty of Specification 2 of Charge II and of Charge II and not guilty of Specification 1 of Charge II. No evidence of previous convictions was introduced as to any of the accused. Each accused was sentenced by separate vote, two-thirds as to Mathews and McDaniel, and three-fourths as to Jefferies and Williams, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years as to Mathews, for eight years as to McDaniel and for the term of his natural life as to Jefferies and Williams. The reviewing authority disapproved the sentence as to Mathews, approved the sentences as to Jefferies, Williams and McDaniel, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. On 11 April 1945 all four of the accused were members of the 645th Quartermaster Truck Company which was then located at Birkenfeld, Germany (R36,38,77). Late in the afternoon of 11 April 1945 a group including the four accused went out to hunt deer in the vicinity of their unit (R38) accompanied by a medium sized "plain black dog" (R40). The accused Mathews was armed with a "folding type of carbine" and the other accused were armed with pistols (R41,105). A member of the group, but not one of the accused herein, testified that they approached a house and asked for schnapps; that they were here given some cider; and that some of the men entered the house and came

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out shortly thereafter. One remarked that a girl there "had the rag on" (R38). This witness said that the group, including the four accused, then went toward another house about 50 yards away at which time the witness returned to the organization (R38,39,41).

At about 8:30 o'clock in the evening of 11 April 1945 seven or eight colored soldiers dressed in American uniforms and accompanied by a small black dog came to a house four kilometers from Birkenfeld then occupied by Adolf Fischer, his wife and their landlord and his wife (R7,8,10,11). They asked for cognac and were given cider (R8,13). One forced Mr. Fischer with a drawn pistol to go downstairs and three others remained upstairs with his wife (R9). Ten minutes later they came downstairs and the group of seven or eight colored soldiers left for the next house, thirty or forty meters away, occupied by Frau Faust and the Finsterle family (R8,9,10). Frau Emma Faust occupied the downstairs and Herr Finsterle, his wife and their three children lived upstairs (R14,24,25). On the evening of 11 April 1945 Frau Faust was upstairs in the kitchen of the Finsterle apartment with Herr and Frau Scholastika Finsterle and two of their children (R14,24). Four colored soldiers came up the stairs and entered the room at approximately 9:00 o'clock. The soldiers were armed with pistols and directed that the electricity be turned off (R14,25). Herr Finsterle and the children were forced with a pistol to leave the room and four colored soldiers remained in the kitchen (R14,26). One seized Frau Faust and pointed a pistol at her breast (R15). She screamed and he hit her five or six times in the breast with the pistol, placed his hand over her mouth and led her over to a chaise lounge in the kitchen (R15,26). He pressed her down on the lounge, removed her pants and had sexual intercourse with her (R15,19). He finished in about five minutes and another of the soldiers who had been standing nearby pressed her back on the lounge as she attempted to raise herself up and he also had sexual intercourse with her (R16,111). After being pressed down on the lounge by the first soldier Frau Faust offered no further resistance because she was "afraid of death by the pistol" and also had the feeling that he might strangle her (R16,21). At the same time that the first soldier seized Frau Faust one of the other soldiers grabbed Frau Finsterle and held a pistol against her breast (R27,28). While in a standing position he struggled with her in an attempt to insert his sexual organ, which was exposed, into her sexual organ but was not successful (R27,31,110). He then forced her down on the floor, kneed her legs apart with force and inserted his sexual organ into hers after tearing away her menstrual bandage (R27). When he finished the act of intercourse a second soldier who had been standing near the door and who also had a pistol placed her on the floor, forced her legs apart and placed his sexual organ into hers (R28). During the ten minutes or longer that the second soldier had intercourse with her his pistol was on the floor near him (R28). Frau Finsterle made no further move to resist because she was afraid that she would be shot (R29) and she had seen how Frau Faust had been beaten with a pistol by the other soldier (R26). When the second soldier completed the act of intercourse with Frau Finsterle the four soldiers left the room together (R29). At the trial none of the German witnesses were able to identify any of the accused.

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Pre-trial statements made by the accused to CID agents and to the investigating officer were received in evidence over objection by the defense. Considerable testimony as to the circumstances surrounding the taking of each statement was heard by the court prior to the admission of each statement. Each accused testified that his statement was secured by undue pressure or through a misunderstanding of his rights (R51,52,71,72,95-98). This was in direct conflict with the testimony of the CID agent and the investigating officer who testified that prior to taking the statements each accused was fully advised of his rights under Article of War 24 and informed that he did not have to make a statement; that any statement made could be used against him in the event the investigation resulted in a trial and that no force, threat or promise of benefit was employed or made to secure the statements from accused (R44,47,49,59,60,66,78-80). As each statement was received in evidence the court was instructed that it could be considered as evidence only against the accused making the statement (R58,77,88,102).

Two statements made by the accused McDaniel were received in evidence as Prosecution Exhibits A and C (R58,87). He stated therein that on the afternoon of 11 April 1945 he was out of camp near Birkenfeld, Germany, with the other three accused and four other soldiers. Accused was armed with a Luger pistol. About sundown they approached a house and asked for cognac and received apple cider. They then went to another house where he knocked on the door but no one answered. Two other soldiers went through a window and opened the door for McDaniel and Mathews who entered and went upstairs where they found Williams and Jefferies already there. Williams was having intercourse with a woman on a couch. Jefferies was "talking to another girl over by the window and then Jefferies had intercourse with her on the floor". McDaniel "walked by Mathews and went into the room and stood there until Jefferies finished and then had intercourse with his girl". When McDaniel "had intercourse with her she just laid there, she didn't resist or help any". Shortly after he finished with the girl the group left and returned to the company. The group was accompanied all of that afternoon and evening by a medium-sized black dog (Pros.Exs.A and C).

Two statements made by the accused Jefferies were received in evidence as Prosecution Exhibits B and E (R77,87). He stated therein that on the afternoon of the 10th or 11th of April 1945 he and some other soldiers, including the other three accused, left their camps at Birkenfeld and shot at some deer. He was armed with a Luger pistol. About "dusk-dark" they went to a house where Jefferies asked for "schnapps". Jefferies and Williams entered the house and went upstairs where they found a girl but she refused to have sexual intercourse with them and "showed us some cotton on her pussy and we knew she was sick". They then went to a house across the street which he and several others entered through a window. He went upstairs to a bedroom where he saw Williams talking to a man. He then followed Williams into the kitchen. McDaniels was already in the kitchen and Mathews was standing in the doorway. There were two girls in the kitchen and Jefferies asked one "for a zig-zig, she said yes and asked me for a 'gummy'. I didn't have any rubbers. I fucked her standing up against a table". "I did not use my gun,

and it was in my pocket. I came, and then I went out of the house. When the rest came out we all went back to camp together" (Pros.Exs.B and E).

A statement made by the accused Mathews was received in evidence as Prosecution Exhibit D (R87) in which he admitted his presence with the group on the day in question but denied that he had intercourse with any woman or helped any of the others have intercourse.

A statement made by the accused Williams was received in evidence as Prosecution Exhibit F (R101). He stated that on the 10th or 11th of April 1945 he and six other soldiers, including the other three accused, tracked deer near the company area. They stopped at a house and asked for schnapps but the man there said that he didn't have any. He and several of the other soldiers entered the house and went upstairs to look for "frauleins". He opened a door and saw a young lady and asked her for some "zig-zig". She showed him that "she had the monthlies" and in response to his question as to the whereabouts of other "frauleins" took him to the window and pointed to the house across the street. The group then went across the street to this house where Williams knocked on the door but no one answered. He and several others then entered the house through a window and went upstairs. An old man came out of a room that two girls were in and asked for cigarettes "and I told him no 'zig-zig' no cigarettes * * * and told him that he'd get cigarettes and coffee for 'fig-fig'. He said 'Ya' and motioned me into the room. I went into the room where the two girls were but the lights were out and I could just about see. I saw two women, one kind of stout and one kind of small. I took the small one by the arm and went over to the couch. She laid down, then started to get back up and I pushed her back down. The two women exchanged words at that moment. I didn't use hardly any force when I pushed her down. She took off her own underwear. I opened my pants and took out my penis but it wouldn't get hard so I got on top of her and started messing around with her. She started moving around, groaning, like she was in heat, and I put my penis in her. I came pretty fast and I don't think I was in her more than a minute. I got up, buttoned my pants and went out of the room. She just laid there. One of the other boys was with the stout woman on the floor of the same room I was in having intercourse with the small girl". As he left the room he passed one of the boys standing at the door but couldn't see which of the boys it was. He then went downstairs where he gave some cigarettes to the old man and then went out to the road where two of the group had remained. The others came out not very long after and they all returned to camp (Pros.Ex.F).

4. After a full explanation of his rights as a witness each accused elected to remain silent (R106,107).

5. The record of trial clearly contains substantial evidence that on 11 April 1945 a group of seven or eight colored American soldiers which included the accused came to the home of Adolph Fischer near Birkenfeld, Germany, where at least several of the group made an effort to secure a girl for purposes of sexual intercourse. There is further substantial evidence that the same group

thereafter proceeded to a nearby dwelling occupied by Frau Faust and the Finsterles where at least several of the group effected an unlawful entry into the house and had sexual intercourse with Frau Faust and Frau Finsterle by force and without their consent. The vital issue in the case was the matter of the identity of the perpetrators of the offenses charged, which was established solely upon the basis of admissions containedin pre-trial statements made by the various accused, since the German witnesses failed to identify any of the accused and their testimony indicated that they would not be able to identify the soldiers who were involved even though confronted by them.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM 1928,par.148b,p.165). The record of trial contains ample competent evidence to sustain the finding by the court that the first acts of intercourse committed at the Finsterle apartment on the night of 11 April 1945 by several of a group of armed colored soldiers were of an unlawful nature and were accomplished by force and without the consent of the women involved (CM ETO 18224, Dunson; CM ETO 18625, Van Riper et al).

Housebreaking is the unlawful entry of another's building with intent to commit a criminal offense therein (MCM,1928,par.149e,p.169). The actual commission of a criminal offense in the building has been recognized as sufficient evidence to sustain the inference that the intent to commit such act existed at the time of the unlawful entry (CM ETO 3679, Roehrborn; CM ETO 3707, Manning and CM ETO 4071, Marks).

Up to this point it is clear that the corpus delicti was established for the offenses of rape and housebreaking as against at least a portion of the group of seven or eight colored soldiers. A member of this group identified all of the accused in the case as having been members of the group on the day and at the time and place in question. Beyond that point the identity of the perpetrators of the acts charged depended entirely upon admissions contained in pre-trial statements made by the various accused (CM ETO 8234, Young et al). Accordingly, the admission of the statements, to which the defense objected, is the vital issue in the present case. It is well established that a confession not voluntarily made is inadmissible and that facts indicating that a confession wasinduced by hope of benefit or fear of punishment or injury is evidence that such confession was involuntary (MCM,1928, par.114a,p.115-116).

Confessions or admissions of joint offenders can be considered only as against the person who made it and it is evident that the court was aware of this principle and adhered thereto. Since the Board of Review has nothing before it with respect to the accused Mathews it is necessary only to consider the statements of the other accused. Before admitting said statements in evidence the court heard considerable testimony with respect to the circumstances under which each was made, the bulk of which was in direct conflict. By thereafter admitting them in evidence the court resolved the conflict in the testimony as to the circumstances under which they were made against the accused. The voluntary character of the statements was a

question of fact for the court and its decision that they were voluntarily made will not be disturbed by the Board of Review since there is competent substantial evidence to support such findings (CM ETO 82, 1 B.R. (ETO) 69 (1942), McKenzie; CM ETO 422, 1 B.R. (ETO) 345 (1943), Green; CM ETO 804, 2 B.R. (ETO) 337 (1943), Ogletree et al; CM ETO 5584, Yancy and CM ETO 4701, Minnetto; CM ETO 9877, Balfour; CM ETO 15843, Dickerson).

The statements of the accused Williams and Jefferies, considered in connection with the testimony of prosecution witnesses lead inescapably to the conclusion that the accused Williams was the first of the soldiers who had intercourse with Frau Faust on the lounge in the Finsterle kitchen and that accused Jefferies was the first soldier who had intercourse with Frau Finsterle on the kitchen floor after first trying to consummate the act in a standing position. That such acts of intercourse were accomplished by force and without consent of the women involved was a matter of fact to be determined by the court after weighing the credibility of the testimony of all the witnesses in the light of the circumstances under which the acts occurred. Since there is substantial competent evidence to sustain the finding of the court that these acts of intercourse constituted rape such finding will not be disturbed upon appellate review(CM ETO 10799, Glover;CM ETO 18834, Scott and Sharp).

6. The finding of guilty with respect to the offense of housebreaking as to the accused Williams and Jefferies has previously been covered herein. The accused McDaniels was acquitted by the court of the charge of rape but was found guilty of the charge of housebreaking. In view of his acquittal of the charge of rape it is apparent that the court found that the act of intercourse admitted by accused did not constitute rape. Such a conclusion could be reached only on the basis that no force or violence was used by said accused and that he was unaware of the fact that force or violence had been or was being used by the other two accused in securing the intercourse to which he admittedly was a witness (CM ETO 17522, Lewis and Tomlin). Nor is there any evidence that this accused was a party to the incident involving Mrs. Fischer at the house previously visited or had, in any other way, previously indicated any interest in securing or having sexual intercourse. It is the opinion of the Board of Review that with respect to the accused McDaniel the evidence is not sufficient to sustain the findings of guilty of Specification 2 of Charge II and of Charge II, since his intent to commit rape at the time of his entry into the dwelling is not established. However, there is competent evidence to sustain the finding of the court as to the unlawful nature of the entry effected and in the opinion of the Board of Reviewthe record of trial is legally sufficient to sustain a finding of guilty of unlawful entry of a dwelling in violation of Article of War 96 as a lesser included offense of the housebreaking as alleged (CM 202846, Dig.Op. JAG, 1912-40, sec.451 (33), p.322; CM 220805, Peavy, 8 B.R. 73 (1942).

7. The charge sheet shows that accused Jefferies is 23 years three months of age and was inducted 28 February 1942 at Camp Wolters, Texas;

that accused Williams is 26 years three months of age and was inducted 29 August 1942 and Port Jay, New York; that accused Mathews is 29 years one month of age and enlisted 6 October 1942, at New York City, New York; that accused McDaniel is 26 years four months of age and was inducted 4 May 1942 at Fort Benning, Georgia. None of accused had prior service.

8. The court was legally constituted and had jurisdiction of each accused and the offenses. No errors injuriously affecting the substantial rights of accused Jefferies or Williams were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to accused Jefferies and Williams to support the findings of guilty and the sentences as approved. For reasons noted above, the Board of Review is of the opinion that the record of trial is legally sufficient as to accused McDaniel to support only so much of the findings of guilty of Specification 2 of Charge II and of Charge II as involves findings of guilty of unlawful entry of a dwelling in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, confinement at hard labor for six months and total forfeitures (CM 188356, Dig. Op. JAG, 1912-40, sec.454 (93), p.365 and CM 220805, Peavy, supra).

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape and housebreaking by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and section 22-1801 6:55 District of Columbia Code. The designation of United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for the accused Jefferies and Williams is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

Penitentiary confinement is not authorized for violation of Article of War 96 and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is the proper place of confinement to be designated for the accused McDaniel (AW 42 and Cir. 210, WD, 14 September 1943, sec.VI, as amended).

John Thomas Hill Judge Advocate

Jack K. Vollertsen Judge Advocate

Gaetano Julian Judge Advocate

CORRECTED

1st Ind.

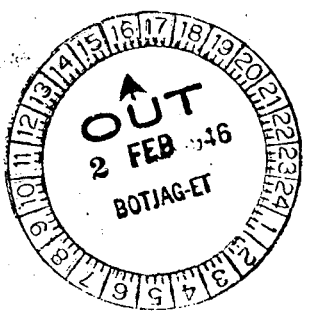
War Department, Branch Office of The Judge Advocate General with the European Theater. 30 JAN 1946 TO: Commanding General, Seventh United States Army, APO 758, U.S. Army.

1. In the case of Sergeant RICHARD S. MATHEWS (12150367), Technician Fifth Grade EPHRIAM B. McDANIEL (34221249), Private First Class CHARLES W. JEFFERIES (38097155), and Private LINWOOD E. WILLIAMS (32440518), all of 645th Quartermaster Truck Company except WILLIAMS, of 3499th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to accused Jefferies and Williams to support the findings of guilty and the sentences as approved and as to accused McDaniel legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge II and of Charge II as involves findings of guilty of unlawful entry of a dwelling in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, confinement at hard labor for six months and total forfeitures, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences as modified by the Board of Review.

2. Attention is invited to the fact that accused McDaniel is involved in CM ETO 18972, McDaniel et al, now under consideration by the Board of Review, which involves a sentence of penitentiary confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18838. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18838).

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



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

BOARD OF REVIEW NO. 4

11 JAN 1946

CM ETO 18839

U N I T E D S T A T E S	) SEVENTH UNITED STATES ARMY
v.	) Trial by GCM, convened at Marburg, Germany, 23 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WARREN E. BENDER (33587011), Attached-Unassigned, 480th Reinforcement Company, 72nd Reinforcement Battalion, formerly Detachment 97, Ground Force Reinforcement Command	)

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

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

2. The accused, a member of the 480th Reinforcement Company, 72nd Reinforcement Battalion (then Detachment 97, Ground Force Reinforcement Command), was charged with being absent without leave from his organization at Marburg, Germany, from about 3 August to about 23 October 1945. The evidence introduced by the prosecution, insofar as pertinent to this discussion, included a stipulation showing the regular course of business and the standard operating procedure in the preparation of morning reports with respect to absentees without leave as followed in Detachment 97, the organization to which accused was attached unassigned on 3 August 1945. It was further stipulated that the procedure outlined was supposed to have been followed, but not that it was, in fact, followed with respect to the morning report of Detachment 97 on the date in question or with respect to any specific morning report that might be introduced (R7-8). An extract copy of the morning report (Pros.Ex.A) of Detachment 97, dated 3 August 1945, showing accused from duty to "AWOL" on that date was offered in evidence. The defense objected to its admission on the ground that it was not an official document as the maker thereof had no personal knowledge of the facts contained therein (R8). It was then stipulated that if Second Lieutenant Robert L. Armour, whose signature appeared thereon, were present in court he would testify he had no personal knowledge of the entry of 3 August 1945, pertaining to the accused (R9).

3. It is apparent that the morning report could not properly be received in evidence as an official writing as it was admitted that the maker had no personal knowledge of its contents. Furthermore, the evidence shows that the original entry of 3 August was signed by the personnel adjutant or assistant personnel adjutant, a person who subsequent to 8 July 1945 was not authorized to sign morning reports (CM ETO 18295, Jones, Allison and Lindsay).

The only remaining theory on which the morning report could be received in evidence would be, as contended by the prosecution, that it was a record made in the regular course of business under the Federal "shop book" rule (Act of June 20, 1936, c. 640, sec. 1, 49 Stat. 1561, 28 USCA 695), which is recognized as a rule of evidence in courts-martial cases (CM ETO 4691, Knorr; CM ETO 10199, Kaminski; CM ETO 14165, Pacifici). Although the regular course of business for the preparation of morning reports was established, and was supposed to have been followed, it was not agreed that the procedure was followed with reference to the morning report entry pertaining to accused on the date he was alleged to have absented himself. Defense counsel in agreeing to proposed stipulation of the prosecution establishing the "regular course of business" specifically declared:

> "We stipulate that the proceedure outlined is a prcceedure which was supposed to have been followed. We do not stipulate that the proceedure was, in fact, followed with respect to the morning report of Detachment 97, GFRC, ETOUSA, on the date in question, or with respect to any specific morning report that may be introduced" (R8).
>
> The law member inquired:
> "Does that qualification meet with the approval of the Prosecution?" (R8).
>
> Prosecution:
> "Yes, sir" (R8).

In view of the limiting language of the stipulation it was necessary for the prosecution to produce evidence to show that the morning report entry in question was, in fact, made in conformity with the procedure outlined. The Board of Review is of the opinion that under the circumstances shown the court was not entitled to indulge the presumption of regularity to the extent of admitting the morning report as a writing made in the regular course of business. In this connection see CM ETO 18914, Martin.

Judge Advocate

Judge Advocate

Judge Advocate

18839

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 JAN 1946 TO: Commanding General, Seventh United States Army, APO 758, U. S. Army.

1. In the case of Private WARREN E. BENDER (33587011), Attached-Unassigned, 480th Reinforcement Company, 72nd Reinforcement Battalion, formerly Detachment 97, Ground Force Reinforcement Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. The findings and sentence are therefore vacated and the record is transmitted herewith under the provisions of Article of War 50½ for rehearing or such other action as may be deemed proper.

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 18839. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18839).

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

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

BOARD OF REVIEW No. 5

17 JAN 1946

CM ETO 18865

U N I T E D S T A T E S	CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private First Class GEORGE T. DOCKERY (33542116), 3131st Quartermaster Service Company	Trial by GCM convened at Camp Twenty Grand, France, 14 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 5
VOLLERTSEN, JULIAN and FARQUHAR, 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 George T. Dockery, 3131st Quartermaster Service Company, did, at Rouen, Seine Inferieure, France, on or about 7 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Gaston Lefebvre, a human being, by shooting him with a revolver.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. 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. During the early part of the afternoon of 7 October 1945 accused, a member of the 3131st Quartermaster Service Company, left his unit and went into Rouen (R12). He attended the movies, had something to eat and travelled about to various cafes drinking with other soldiers (R12). About 2130 hours he told Private First Class Jefferson he was going back to camp and might be alone. He asked Jefferson if he had a gun. The latter replied that he did and gave him a revolver loaded with six rounds. He stuck it down in his belt, had a drink with Jefferson and departed. At that time he seemed sober (R7-10). About 2145 hours accused was in the Cafe Madeleine. Also present were other colored American soldiers, three French soldiers and civilians (R26,64). Suddenly a quarrel began between accused and a French civilian (R64). A scuffle ensued and they landed on the floor (R31,40). Sergeant Lefebvre of the French Army, deceased, separated them and other colored soldiers took accused away (R41). Shortly thereafter the cafe was closed (R64). Accused went to Gambetta's Cafe and said to Private First Class Emory, "Charles, come on". They left and walked back toward Cafe Madeleine where they found five or six French people, including the deceased, arguing among themselves in front of the Cafe (R13,20). Accused approached them and became involved in a discussion with the deceased. The latter told him he was not correct and accused struck him and deceased then struck back (R13,44). Accused took his revolver from his belt. Deceased said he was going to get the military police and began running

down the street. Accused started after him and when at a distance of from 10 to 30 meters from him fired a shot. Deceased fell to the ground. Accused ran up an alley (R13,14,15,29,30,45). Deceased did not draw a weapon of any kind and none were found on his person (R25,29,47).

The body of Sergeant Lefebvre was immediately taken to the Caserne Gendarme (R47). An examination that night by Lieutenant Pierre Branchard, a French medical officer, disclosed that he was dead. An autopsy performed the following day showed that death was caused instantaneously by a bullet which passed through his brain (R50).

A confession signed by accused, after he had been advised of his rights and without the use of any threats or promises, was admitted in evidence (R52,53,59). Some of the phraseology used in the confession was that of the agents to whom accused gave the statement (R54). Accused in effect substantiated the facts as above set forth. While in the Cafe Madeleine, after having several drinks, a civilian bumped his arm causing him to spill part of his drink. Accused pushed him away and said "Go away, I don't want any trouble". Some of the civilians then became excited, talked very loud and waved their hands. He went outside but was followed by some of them who kept shouting at him in French. He did not remember striking the civilian as he was feeling "very high" and had had a lot to drink. A French soldier came over and tried "to break us up by pushing us apart". He pushed pretty hard and accused "swang" at him but missed. The soldier turned and ran down the street. Accused followed. He saw the soldier turn a little to the right and it seemed as if he was reaching for something. He thought it was a gun so he took his revolver from his pocket and, without taking any aim, fired. The soldier fell. Accused turned to the right, waited for Emory to catch up with him and then told him he had just shot the soldier. They then returned to camp. The firing was the result of heavy drinking and the remembering of details was possible only after a lot of thinking because of the condition he was in at the time (Pros. Ex. D).

4. James H. Griffin, First Sergeant of 3131st Quartermaster Company, testified that accused had been

with the company ten months and that he had observed him daily. He had never caused any trouble, obeyed orders, and had been a good soldier. His efficiency rating was excellent (R65,66).

Accused, after his rights had been fully explained to him, elected to remain silent (R67).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which caused the 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).

The evidence shows that accused pursued the deceased and fired his pistol at him without justification or provocation. He was chargeable with knowledge that such act might cause death or grievous bodily harm and when, as here, death results a finding of murder is justified (CM ETO 8630, Williams; CM ETO 10714, Turner). The degree of intoxication of accused shown by the evidence is not sufficient to raise an issue in the case (CM ETO 14047, Lancaster et al; CM ETO 16711, Mobley). The confession was shown to have been voluntarily made and the fact that the phraseology was not that of accused did not render it inadmissible (CM ETO 438, Smith 1 B.R. (ETO) 377).

6. The charge sheet shows that accused is 23 years of age and that he was inducted 12 October 1943. 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).

18865

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).

Jack R Vollertsen Judge Advocate

Anthony Julian Judge Advocate

William H Ingalsbe Judge Advocate

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

BOARD OF REVIEW No. 4

4 JAN 1946

CM ETO 18870

U N I T E D S T A T E S	)	102ND INFANTRY DIVISION
v.	)	
Private ELMER A. VANOVER, (34112618), Company G, 405th Infantry	)	Trial by GCM, convened at Bayreuth, Germany, 4 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 4.
DANIELSON, ANDERSON and BURNS, Judge Advocates

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

2. The record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I, and of Charge I as involve a finding of guilty of absence without leave from 30 January 1945 to a date unknown, in violation of Article of War 61. The court found accused guilty as charged with having deserted the service by absenting himself from his organization without leave on 30 January 1945 and remaining absent in desertion until 18 April 1945. The reviewing authority approved only so much of the finding of guilty of the Specification as involves " * * * a finding of guilty of desertion as alleged but terminated in manner and place unknown at a date subsequent to 30 January 1945 but prior

to 18 April 1945, in violation of Article of War 58 * * *." It is thus apparent that he disapproved so much of the court's fact findings as involved a finding that the absence without leave continued to 18 April 1945, and that he failed to substitute any other definite date as the one on which accused returned to military control. Since, in the state of the record, the conclusion is inescapable that the court based its inference of an intent to desert primarily upon the length of the period of absence without leave as found by it, and since the reviewing authority has, with justification, in effect disapproved this major premise and has definitely reduced the period of absence to less than that found by the court, and since neither his action nor the evidence fixes with certainty the date of accused's return to military control, the record as a whole is too indefinite and uncertain to support findings of guilty of the serious offense of desertion (CM ETO 14735, Clark et al; CM ETO 12271, Cuomo). The case of CM ETO 15206, Burton, is distinguishable from this on its facts. In it there was other evidence in addition to the length of unauthorized absence in an active theater of operations from which to infer intent to desert, whereas here there is not.

3. Inasmuch as the only findings of guilty supported by the record of trial are those of absence without leave, confinement in a penitentiary is not authorized (AW 42). The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (AW 42; Cir.210, WD, 14 Sept. 1943, sec VI, as amended).

Lester A. Tousley, Judge Advocate

John R. Anderson, Judge Advocate

John A. Laura, Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 4 JAN 1946 TO: Commanding General, 102nd Infantry Division, APO 102, U.S. Army.

1. In the case of Private ELMER A. VANOVER (34112613), Company G, 405th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of findings of guilty of Specification 1, Charge 1, and of Charge 1 as involve a finding of guilty of absence without leave from 30 January 1945 to a date unknown, in violation of Article of War 61, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published Court-Martial Order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18870. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18870).

OUT 4 JAN 1946 BOTJAG-ET

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

RECEIVED 8 JAN 1946 HEADQUARTERS 102nd

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

BOARD OF REVIEW NO. 1

CM ETO 18893

11 JAN 1946

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by CCM, convened at Heidelberg, Germany, 6, 7 September 1945.
First Lieutenant ALBERT J. DAUNIS (O-1592756), Second Lieutenant EDGAR H. RHODES (O-1845954) and Technician Fourth Grade HENRY L. EXSTEIN, JR. (32860654), all of 341st Quartermaster Depot Company (Supply)	Sentence: As to Daunis and Rhodes, dismissal; as to Exstein, dishonorable discharge and as to each accused, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the officers and 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 were tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that 1st Lt. Albert J. Daunis, 341st Quartermaster Depot Company (Supply), 2nd Lt. Edgar H. Rhodes, 341st Quartermaster Depot Company (Supply), and Technician Fourth Grade Henry L. Exstein Jr., 341st Quartermaster Depot Company (Supply) acting jointly, and in pursuance of a common intent, did, at Morlenbach (Odenwald) Germany, on or about 2 June 1945, feloniously take, steal, and carry away three (3) men's pocket watches, value about one hundred seventy-two dollars ($172.00); seventeen (17) men's rings, value about one hundred thirty-six dollars ($136.00); seven (7) necklaces, value about thirty-five dollars ($35.00); four (4) lavalieres, value about thirteen dollars and sixty cents ($13.60); one (1) pocket watch chain, value about nineteen

dollars ($19.00), sixteen (16) ladies' rings, value about sixty-four dollars ($64.00); five (5) ladies' wrist watches, value about forty-five dollars ($45.00); five (5) men's wrist watches, value about one hundred twenty dollars ($120.00); and eleven (11) cigarette holders, value about seventeen dollars and sixty cents ($17.60), the property of Karl Karolus, Morlenbach, Germany, of a total value of about six hundred twenty-two dollars and twenty cents ($622.20).

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced against any of the accused. Accused Daunis and Rhodes were sentenced to be dismissed the service and accused Exstein to be dishonorably discharged the service, and in addition, each accused was sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for three years. The reviewing authority, the Commanding General, Seventh United States Army, approved the sentence, designated the U.S. Disciplinary Barracks, Greenhaven, New York, as the place of confinement of Exstein, and forwarded the record of trial for action pursuant to Article of War 48 as to Daunis and Rhodes, and for action pursuant to Article of War 50½ as to Exstein. The confirming authority, the Commanding General, United States Forces, European Theater, as to Daunis and Rhodes, confirmed the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the orders directing the execution of the sentences pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on the evening of 2 June 1945, the three accused went to the home of Karl Karolus, a watchmaker residing in Morlenbach, Odenwald, Germany, where, after questioning him and other members of his family, Daunis and Exstein went to the basement and there dug up from the basement floor a bottle or jar containing various items of jewelry. Meanwhile Rhodes remained in one of the upstairs rooms. Daunis and Exstein placed the contents of the bottle in a bag which they had brought with them, but when Karolus' son protested that the jewelry was their only remaining stock with which to resume business when conditions again became normal, replaced about two-thirds of what they had taken. The three accused then left the house carrying the remainder of the jewelry in the bag. Jewelry and other property of the types and values alleged was later found in the possession of the three accused.

Each accused took the stand and admitted freely that he had committed the acts outlined above, offering evidence only as to mitigating circumstances. They stated that they had gone to the house as the result of information given them by a German employed by the United States Army to the effect that Karolus was formerly an active member of the Nazi party, had stolen two houses from Jews, had once murdered a displaced person brought to Germany as a slave laborer and had valuables hidden in his cellar. They had no intimation that he was a watchmaker until his son protested against their action in removing the jewelry. They also stated that looting or practices akin to looting were prevalent in the area, participated in by officers and men alike, and at least tacitly condoned by higher authority. They made no attempt to conceal their actions on the evening in question or thereafter. They asserted that they had intended to share the spoils with the other members of the company.

Extremely favorable character testimony was offered on behalf of each accused. All members of the court concurred in a recommendation for clemency based in part on

a. The excellent character ratings of all three accused prior to this offense and their superior efficiency ratings as officers and soldier.

b. The practice apparently engaged in by other military personnel to confiscate German property to their own use and personal convenience as creating an environment inducive to the offense committed by the accused.

Their immediate commanding officer also recommended clemency.

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

4. Each element of the offense charged was proved by substantial competent evidence and admitted by each accused. Hence, despite the evidence offered in mitigation of their acts, the court was warranted in finding that the accused jointly committed larceny, as alleged.

5. The charge sheet shows that Daunis is 22 years three months of age, Rhodes 38 years three months of age, and Exstein 37 years one month of age. Data as to service is as follows: Daunis: "Inducted at New Cumberland, Pa., 15 January 1943, for duration and six months; commissioned 18 June 1943"; Rhodes: "Inducted at Oklahoma City, Okla. 24 March 1942, for duration and six months; commissioned 28 April 1943";

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Exstein: "Inducted at New York, N.Y., 11 March 1943 for duration and six months". None had prior service.

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

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

Edward L. Stevens Jr. Judge Advocate

B A Avery Jr Judge Advocate

Isadore H. Ewell Judge Advocate

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

BOARD OF REVIEW NO. 4

10 JAN 1946

CM ETO 18894

U N I T E D S T A T E S	)	BERLIN DISTRICT
	)	
v.	)	Trial by GCM, convened at Berlin, Germany, 14 September 1945. Sentence: Dismissal.
	)	
Captain CARL G. SCHULTZ (O-406349), Headquarters First Airborne Army	)	

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON and BURNS, 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 found legally insufficient to support the findings of guilty and the sentence.

2. Accused, a member of Headquarters, First Airborne Army, was charged in two specifications laid under Article of War 95 with bigamy and with falsely stating that his prior marriage had been terminated by the death of his spouse on 12 May 1945, and in another specification laid under Article of War 96 with contracting marriage without permission. He was found guilty of all charges and specifications, but, the Specification and Charge pertaining to Article of War 96 having been disapproved, only the offenses of bigamy and making a false statement are presented for consideration here.

3. The evidence for the prosecution discloses that accused married Ruth Priscilla Smith on 7 May 1941 in Allen County, Indiana (Pros.Ex.1), and that he married Corporal Kanella Koulouvaris, WAC, on 23 July 1945 in Berlin, Germany (Pros.Ex.4). It further shows that on 21 July 1945 accused executed an affidavit in connection with his application to marry Corporal Koulouvaris, stating, inter alia, that "My previous marriage to Ruth P. Schultz was terminated by death on 12 May 1945" (Pros.Ex.5). The record of trial, however, fails to show that accused's first wife was living on 23 July 1945. It is true the evidence shows that Corporal Koulouvaris in May 1945, examined "an officer's questionnaire" while working in the Adjutant General's Section of Headquarters, First Airborne Army, which recited that accused was married (R9); but even though this were evidence of marriage, which we do not decide, it does not establish that his first spouse was living on 23 July 1945. Likewise there is evidence that accused informed

Corporal Koulouvaris on 27 July 1945 that the newspapers had reported his first spouse to be alive (R12), but this evidence, being of hearsay character, is without probative weight (CM ETO 15719, Kennedy).

The record of trial, then, establishes only the following: (1) that accused married Ruth Priscilla Smith in 1941, and (2) that he married Corporal Koulouvaris on 23 July 1945. It does not disclose that his first spouse was alive on 23 July 1945 - the date of the second marriage; and it likewise does not show she was living on 12 May 1945 - the pertinent date in connection with his alleged false statement.

4. Although there is some opinion to the contrary, the weight of authority and the better-reasoned cases hold that the prosecution in a bigamy case must prove the first spouse was living at the time of the second marriage (Underhill's Criminal Evidence (4th Ed), sec. 654, p.1245; Annotation, 56 ALR 1273; cf. Annotations, 34 ALR 487, 77 ALR 739; 7 CJ, sec. 38, p. 1170; 10 CJS, sec. 16, p. 373; 20 Am.Jur., sec. 163, p. 166; Prentis v. McCormick (C.C.A.6th 1928), 23 F (2nd) 803). The rule is aptly stated in Underhill's Criminal Evidence, supra, as follows:

> "The state must prove affirmatively, and beyond a reasonable doubt that the first husband or wife was alive at the date of the void marriage. This is not presumed, as a matter of law, from proof that he or she was alive at a prior date, for the presumption that the accused is innocent will nullify the presumption of the continuance of life. Hence, in the absence of direct evidence that the earlier spouse was alive when the later marriage was solemnized, the jury must acquit".

In Prentis v. McCormick, supra, the Circuit Court of Appeals for the Sixth Circuit subscribed to this rule and said:

> "That she had been married in 1911 to Avann and had never been divorced from him is also admitted; but those facts, in the absence of a showing that Avann was living when she married the second time, do not show the second marriage to have been bigamous, as against the formal ceremony thereof, in favor of which there is a presumption of validity" (Underscoring supplied).

Although a Board of Review (sitting in Washington) has held the life of the first spouse may be presumed from a showing she was living one year prior to the bigamous marriage (CM 254548, Harmon, 35 BR 279, 281 (1944)), that holding is not followed in view of the rule in the federal courts (Prentis v. McCormick, supra) which claims our allegiance. Moreover, we are persuaded that the rule requiring proof of the life of the first spouse

at the time the second marriage is celebrated, is more in harmony with logic and reason. The presumptions of innocence, of regularity and of morality, do in fact countervail the presumption of the continuance of life in a bigamy case; and the continuance of life being an element of the offense, the prosecution must prove it.

The record of trial is likewise barren of any substantial competent evidence to show accused's first spouse was alive on 12 May 1945, and therefore fails to establish that accused's statement that she died that day was false.

For the reasons stated we conclude that the record of trial is legally insufficient to sustain the findings of guilty of Specifications 1 and 2 of Charge I and Charge I.

Lester A Danielson Judge Advocate

John R. Anderson Judge Advocate

John A. Burns Judge Advocate

(242)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 10 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Captain CARL G. SCHULTZ (O-406349), Headquarters First Airborne Army, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18894. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18894).

OUT 10 JAN 1946 BOTJAG-ET

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

IN 12 JAN 1946 AG W&R USFET

13 JAN 1946 PRDS

AG 201-Schultz, Carl G. (O)MPO (10 Jan 46) 2nd Ind. JCR/VHB/jll

Hq, U. S. Forces, European Theater (Main), APO 757, 9 February 1946.

TO: Assistant Judge Advocate General, Branch Office of The Judge Advocate General with U. S. Forces, European Theater, APO 887.

1. Returned herewith is opinion of the Board of Review with 1st Indorsement, which holds that the record of trial in the case of Captain Carl G. Schultz, O-406349, Headquarters First Airborne Army, (CM ETO 18894), is legally insufficient to support the findings of guilty and the sentence.

2. Inasmuch as the power of the Theater Commander to take corrective action in this case in conformity with the Board of Review's holding has been terminated by War Department cable to USFET, dated 19 January 1946, (Reference No. WCL 39392) and letter from the Acting Secretary of War to Commanding General, USFET, dated 19 January 1946, Subject: "Exercise of confirming powers, United States Forces, European Theater.", the inclosed holding of the Board of Review is returned for inclusion in the record of trial, which was forwarded to your office by this headquarters on 28 December 1945, and which should now be forwarded to The Judge Advocate General, Headquarters, Army Service Forces, Washington 25, D. C., in compliance with the directives mentioned.

FOR THE THEATER COMMANDER:

John C Rose

JOHN C. ROSE,
Lt Col., AGD,
Assistant Adjutant General.

(Findings and sentence disapproved. GCMO 127, W.D. 20 May 1946).

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

BOARD OF REVIEW NO. 5

17 JAN 1946

CM ETO 18895

UNITED STATES	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
First Lieutenant SUTTON F. TAYLOR (O-1105858), Company C, 829th Engineer Aviation Battalion, 922nd Engineer Aviation Regiment	Trial by GCM, convened at Marseille, France, 21 August 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Sutton F. Taylor, Company C, 829th Engineer Aviation Battalion, did, at or near Istres, France, on or about 28 June 1945, feloniously take, steal and carry away about 200 gallons of gasoline of the value of about $32.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * , did, at or near Istres, France, on or about 29 June 1945 feloniously take, steal and carry away about 276 gallons of gasoline, of the value of about $44.00, property of the United States furnished and intended for the military service thereof.

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Specification 3: In that * * *, did at or near Avignon, France, on or about 28 June 1945, wrongfully and knowingly sell about 200 gallons of gasoline, of the value of about $32.00, property of the United States furnished and intended for the military service thereof.

Specification 4: In that * * *, did, at or near Avignon, France, on or about 29 June 1945, wrongfully and knowingly sell about 276 gallons of gasoline, of the value of about $44.00, property of the United States furnished and intended for the military service thereof.

Specification 5: In that * * * ,did, at or near Istres, France, on or about 28 June 1945, knowingly and willfully apply to his own use and benefit one 3/4-ton truck, of the value of more than $50.00, property of the United States furnished and intended for the military service thereof.

Specification 6: In that * * *,did, at or near Istres, France, on or about 29 June 1945, knowingly and willfully apply to his own use and benefit one 3/4-ton truck, of the value of more than $50.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty and was found guilty of the Charge and its 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, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case, reduced the period of confinement to two years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On 28 June 1945, around noon, the motor sergeant of Company C, 829th Engineer Aviation Battalion, which was then stationed near Istres, France (R13) was instructed by accused, who was an officer of the company (R29), to furnish him a weapons carrier that night to go to Avignon and to load as many 5½-gallon drums thereon as possible (R20). Accused was informed that only four drums were available and that since

they did not belong to the company a tallyout would be necessary. Accused directed the motor sergeant to prepare such tallyout and to make it out to the RTO at Avignon (R22). In accordance with said instructions the motor sergeant had a weapons carrier with driver dispatched for the accused and at about 5:00 o'clock that evening, assisted by the driver, loaded four empty 53-gallon drums on the vehicle and placed the tallyout in the pocket of the weapons carrier (R13,20,21). The driver then parked the vehicle at the motor pool and left it until he returned after 7:00 o'clock to drive the accused to Avignon (R13).

A tallyout for 175 gallons of gasoline, dated 28 June 1945, to "Taylor, 829th E.A.B" was identified by the motor pool truckmaster of the 415th Headquarters and Base Service Squadron, who was in charge of the tally for gasoline on 28 June 1945, and was received in evidence without objection by defense as Pros. Ex. No.2 (R50,51). It was the opinion of the driver that the drums were no longer empty when he drove accused to Avignon that evening because of the way that the truck stopped and because they did not "shift around like empty drums would" (R14). Upon arriving at Avignon accused took over the vehicle, told the driver to wait for him, returned with the truck empty in about twenty minutes, gave the driver a pass and 200 francs to spend and instructed him to meet accused at the Hotel Europe at 2400 hours (R12, 15,18). Oscar Stoltz, a French civilian, testified that he had met accused several weeks prior to 28 June 1945 (R38), that they had done considerable drinking together during the period of their acquaintance, that the accused had indicated that his finances were low and that they had discussed "an arrangement" on gasoline several days prior to 28 June 1945 (R38,39,40), at a price of twenty francs per liter(R42). That he met accused about 9:00 o'clock on 28 June 1945 and directed him to the home of another French civilian where four drums of gasoline were unloaded from the truck driven by accused (R33,34,43). Stoltz was then paid 40,000 francs for the gasoline (R34,38-60). He retained one-half as his share and gave the other half to accused after deducting 3,000 francs owed him by the accused (R35). Stoltz and accused then went to a night club where they drank and stayed until early in the morning. During their conversation Stoltz told accused that he needed some gasoline to make several trips and accused replied that he would render that service (R35,39,42). No price was discussed and Stoltz indicated to accused that he would receive not "money service" but "certain favors of the same value" Stoltz paid the entire check that night of approximately 4500 francs and told accused that he had already ordered several bottles of champagne and some cognac for a party the next day and that the amount would be as high as if he paid him (R44,45). Accused indicated that this type of arrangement would be satisfactory to him (R44). On 29 June 1945 accused again instructed the motor sergeant to have a truck dispatched for him to go to Avignon that night and to load some more drums on the truck (R21). The sergeant informed accused that they had no more drums, but did have the vehicle dispatched with the same driver as on the preceding night (R21). The driver reported to accused that evening with the truck and accused took the truck which was then empty and returned around eight o'clock at which time the driver noticed that three or four 55-gallon cans were then in the truck (R15,16).

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Some time after 6:00 o'clock on the evening of the 29 June 1945 accused came to the fuel control point of 1411-1-Y Air Base Unit at Istres, France (R23,26,27). Accused was driving a weapons carrier containing five 55-gallon drums which he requested be filled with gasoline for his organization (R23,24,27). After checking with the Operations Officer on duty the accused was given 276 gallons of gasoline for which he signed a "Stores Charge" form with the name "E. J. Baker" acknowledging receipt of said gasoline for the 829th Eng. (R24,27). This instrument was received in evidence, without objection by the defense, as Pros. Ex. No.1 (R25,26).

After accused returned to the motor pool around 8:00 o'clock the driver drove him to Avignon where accused again took the truck alone and returned in twenty or twenty five minutes (R16) at which time the drums were no longer in the vehicle (R18,19). The French civilian, Stoltz, testified that he again met accused about 9:00 o'clock on the night of 29 June 1945 and directed him to the home of another French civilian where they unloaded five drums of gasoline (R35,36). The same evening the five drums were discovered and confiscated by the military police at the home of this French civilian (R55,64,65). The military police interrupted a party later that night at the home of Stoltz which was attended by accused and several girls (R37,49,65). Accused's Commanding Officer testified that on the dates in question no authority was given to accused to draw any gasoline for the organization, that none was needed and that none was received through the efforts of accused (R29,30). The officers of the organization had been verbally authorized to use vehicles in the evenings for recreational purposes but such authorization did not extend to the transporation of gasoline to Avignon (R30,31).

A voluntary statement signed by accused on 6 July 1945 after first being duly advised of his rights under Article of War 24 was received in evidence without objection by defense as Pros. Ex. 3 (R71,72). Accused therein admitted that on 28 June 1945 he ordered the motor pool sergeant of his organization to put some empty 55-gallon drums on a weapons carrier which he drove to the motor pool of the 484th Bomb Group where he received four 55-gallon drums of gasoline from the motor pool sergeant and for which he signed a tallyout sheet using his own name. That on 29 June 1945 he drove a weapons carrier from the motor pool of his organization to the 1411-1-Y where he picked up five empty 55-gallon drums on the field and placed them on the truck. The sergeant at the 1411-1-Y fuel control point referred the accused to a captain and accused then obtained five full 55-gallon drums of gasoline for which he signed a form sheet, but not with his own name (Pros. Ex. 3).

4. Accused after being fully advised of his rights as a witness elected to testify under oath (R72,73). He testified as to his prior good record in the army which included 2½ years overseas, that he had been transferred to his present organization shortly after the first of the year and was dissatisfied with such assignment (R74-77). That as a result of such dissatisfaction he had been doing considerable drinking and his finances were low (R75-78). With respect to the present charges the accused stated, "Until the last day I live I will never know

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how I could have gotten mixed up in anything like this. I cannot for the life of me give any reason for it, whatsoever. I know I committed an awful crime and I am ready to take anything the court gives me" (R79). Superior officers of accused who had known him for several years testified that his character, efficiency, attention and devotion to duty had been "superior" (R31,32,80,81,83). His prior excellent performance of duty was further indicated by his Form 66-1 which was received in evidence as Def. Ex. A. (R82).

5. The allied papers disclose that during the course of the trial there was presented to each member of the court for reading and initialling the published order approving the sentence in the general court-martial case of another officer (CM ETO 10413 Shipley) which was confirmed as follows:

> "....the sentence is confirmed though wholly inadequate punishment for an officer guilty of such grave offenses. In imposing such meager punishment the court has reflected no credit upon its conception of its own responsibility. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.
>
> s/Dwight D. Eisenhower
> t/DWIGHT D. EISENHOWER
> General of the Army, U.S.A.
> Commanding"

That this writing was not distributed to the court merely for the purpose of reprimand in the case therein confirmed is further indicated by the fact that in the trial of another officer, tried on or about the same date as accused, the same Assistant Trial Judge Advocate who prosecuted the present case made a distribution of the above quoted confirmation of sentence to the members of the court. In that trial, after objection by the defense, an entire new court was appointed to try the case.

As stated in CM 253209, Davis, 34 B.R. 297 (1944) at 303-304, "Whatever may have been the practice prior to 1920 when the present Articles of War were enacted, it is now clearly contemplated that our courts-martial should freely exercise certain distinctively judicial functions in a manner which will guarantee independence of judgement in determining the guilt or innocence of an accused and in the imposition of his sentence. That Congress intended to protect our courts-martial in the performance of their judicial duties against the possibility of coercion and undue influence by superior military authority is clearly shown by the Articles themselves" (Underscoring supplied).

In CM 216707, Hester, 11 B.R. 145 (1941) the facts were similar to the present case in that a directive of the appointing authority was distributed to members of a general court-martial during the course of trial of an officer case. The directive outlined the policy of the appointing authority with respect to courts-martial within

the division but did not in terms or by implication apply to the trial of officers. It was further conceded that by no reasonable construction of its text could it be said that the letter introduced into the deliberations of the court the convening authority's personal view of the evidence or of the merits of the case. Nevertheless, it was held that "the distribution of the letter to each member of the court just prior to his vote on the findings and sentence so far oversteps the limits of propriety as to constitute coercion. This act tended to overcome the volition and independent judgement of the members of the court, and in the opinion of the Board of Review it vitiates both the findings and the sentence". The following principles announced in the Hester case are pertinent to the situation in the case under consideration:

> "The functions of a court-martial and the convening authority are, and should remain, separate and distinct. It is the function and duty of the court-martial alone to pass upon questions arising during the trial (with certain authorized exceptions not here material), to arrive at findings on the guilt or innocence of the accused based upon the evidence of record, and upon conviction to impose a legal, appropriate and adequate sentence. No higher authority, or for that matter no authority whatever, should be consulted by, or should directly or indirectly interfere with or influence the action of the court in its closed sessions. This principle is fundamental and its violation strikes at the very root of justice and opens the door for undue influence".

The same principles were recognized and followed by the Board of Review in CM ETO 14349, McCormick, in which the findings of guilty and the sentence were set aside because the appointing authority had previously published a directive to all members of his command that in the event of conviction of a specific crime the maximum punishment would be imposed. In that case the Board of Review held it was not necessary to determine the effect thereof upon the members of the court in arriving at the findings and sentence. In the words of the Board of Review:

> "It is enough to impugn the results of those processes and deliberations that they were exposed to the influence. Every accused has a right to be tried by a court-martial which is completely free from the force and effect of improper considerations. A contrary conclusion would be both unrealistic and dangerous, would open the door to all undue influence if only it were subtle enough, and would jeopardize the very basis of our military jurisprudence. The complete independence and freedom of members of courts-martial from improper external influence,

particularly that of the commanding general, in all their deliberations must be beyond suspicion; otherwise it cannot be said that they are in a position to fulfill the sacred obligations of their oath and administer true justice".

In the present case the general court-martial order referred to each member of the court for reading and initialling during the trial of an officer was in effect a reprimand of that or another court for imposing an inadequate sentence upon an officer previously convicted and bore the signature of the Commanding General of the Theater. That such an instrument may have influenced the court in its determination of the sentence is apparent and its distribution to the members of the court during the trial of the present case vitiates both the finding of guilty and the sentence and the same must be set aside. In view of the foregoing it is unnecessary to consider other questions involved in the case.

6. The charge sheet shows that accused is 30 years eleven months of age and that he had been in the service since 13 January 1941 and was commissioned 28 October 1942. He had prior service from 18 March 1938 to 15 February 1939.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Error injuriously affecting the substantial rights of the accused was committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as confirmed.

Jack R. Wolverton Judge Advocate

Anthony Julian Judge Advocate

William J. Taylor Judge Advocate

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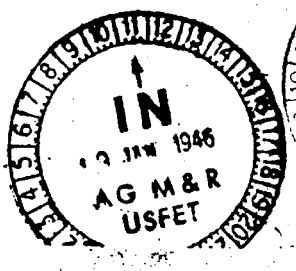
1st Ind.

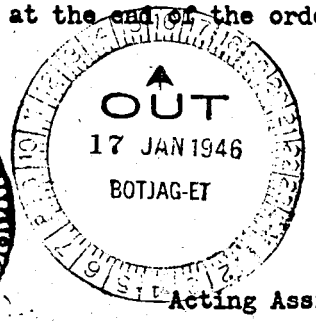
War Department, Branch Office of The Judge Advocate General with the European Theater. 17 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

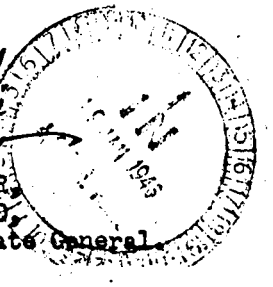
1. In the case of First Lieutenant SUTTON F. TAYLOR (O-1105858), Company C, 829th Engineer Aviation Battalion, 922nd Engineer Aviation Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved.

2. The record of trial is transmitted herewith for a rehearing or such other action as the convening authority may deem proper.

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. The file number of the record in this office is CM ETO 18895. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18895).







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

(Findings and sentence disapproved. GCMO 109, W.D., 8 May 1946)

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

BOARD OF REVIEW NO. 1

18 JAN 1946

CM ETO 18898

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters, 10th Air Depot Group, APO 149, U. S. Army, 1, 2 and 3 August 1945. Sentences: As to CAMPER, dismissal, total forfeitures and confinement at hard labor for one year; as to BOEHM, KREMER and SMITH, dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year; as to ROTH, confinement at hard labor for six months and forfeiture of $19.00 per month for a like period. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as to CAMPER. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as to BOEHM, KREMER and SMITH. Oise Intermediate Base Section Guardhouse, Metz, France, as to ROTH.
First Lieutenant RAYMOND E. CAMPER (O-571178), Corporal JACOB F. BOEHM (33588926), and Privates HENRY ROTH (36365453), HENRY KREMER (32448346) and FRED SMITH (36774907), all of Headquarters Squadron, 1st Air Disarmament Wing (Provisional)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant RAYMOND CAMPER, Corporal JACOB F. BOEHM, Private HENRY KREMER, Private HENRY ROTH, and Private FRED SMITH, all of Headquarters

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Squadron, 1st Air Disarmament Wing, (prov) U. S. Army, acting jointly and in pursuance of a common intent, did, at Oberstedten, Hessen, Germany, on or about 9 June 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Herr Willi Henrich, and Frau Elise Franz,

2 8 Radios
1 pr man's shoes
2 bottles champagne
1 pr Field glasses
1 Brief case (with stamp collection)
1 Pearl inset brooch
1 gold bracelet
1 tie pin with 4 diamonds and one (1) pearl
1 pin flower shape with 3 diamonds
1 bottle perfume
1 box powder
1 man's wrist watch
1 man's pocket watch
1 Topaz lavalier
1 necklace
1 powder compact
1 ladie's ring with 6 diamonds and 3 rubies
1 pr binoculars
1 iron
2 bars soap
1 box powder
6 handkerchiefs
1 pr ladies shoes
1 pr leather gloves
1 bottle Italian cherry Esperato
1 lock and key
1 string of beads
1 flashlight
3 alarm clocks
1 pocket knife
1 pr opera glasses
1 large sapphire brooch
1 pr gold earings
1 brief case
1 gold watch with chimes
1 gold watch with chain

property of the said Herr Willi Henrich and Frau Elise Franz, of a value of more than fifty ($50.00) dollars.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification excepting the words "8 radios, 1 pair of men's shoes, one gold bracelet, one tie pin with one [sic] diamond and one pearl, one pin flower shaped [sic] with three diamonds, 1 topaz lavalier, 1 powder compact, 1 pair binoculars, two bars of soap, six handkerchiefs, 1 pair lady's shoes, 1 bottle Italian cherry esperato, 1 lock and key, 1 string of beads, 1 flashlight, 1 pocket knife, 1 large sapphire brooch", and substituting therefor the words "6 radios". No evidence of previous conviction was introduced as to any of accused except Smith who had one conviction by special court-martial for absence without leave for six days in violation of the 61st Article of War. Accused Camper was sentenced to be dismissed the service, and acused Boehm, Kremer and Smith to be dishonorably discharged the service, and, in addition, all of the aforementioned accused were sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. Accused Roth was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for six months and to forfeit $19.00 of his pay per month for a like period. The reviewing authority, the Commanding General, IX Air Force Service Command, in the case of Camper 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 48; in the case of each of Boehm, Kremer and Smith, he approved the sentence, ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated "the Delta Base Section Disciplinary Training Center, Les Mills, near Marseilles, France", as the place of confinement; and in the case of Roth he approved the sentence, ordered it executed, and designated the Oise Intermediate Base Section Guardhouse, Metz, France, as the place of confinement. The confirming authority, the Commanding General, United States Forces, European Theater, in the case of Camper approved only so much of the findings of guilty of the Specification of the Charge as involved a finding that accused and the other persons named therein, acting jointly and in pursuance of a common intent, did, in the place and at the time alleged, by force and violence and by putting them in fear, feloniously take, steal, and carry away, from the presence of Herr Willi Henrich and Frau Elise Franz, 6 radios, 1 pearl inset brooch, 1 man's wristwatch, 1 man's pocket watch, 1 necklace, 1 lady's ring with six diamonds and three rubies, three alarm clocks, 1 pair of opera glasses, 1 brief case, 1 gold watch with chimes, 1 gold watch with chain, property of the said Herr Willi Henrich and Frau Elise Franz, of some value. He confirmed the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

The proceedings as to Boehm, Roth, Kremer and Smith were published in General Court-Martial Orders Nos. 141, 143, 142, and 144 (respectively), Headquarters IX Air Force Service Command, APO 149, U. S. Army, 29 August 1945.

3. At the outset of the trial all five accused challenged the sufficiency

of the Specification as laid under Article of War 93, and the sufficiency of the Charge, on the ground that this Article of War denounced only crimes against the people of the United States and not against enemy nationals. Briefly, they contended that historically the Articles of War denounced what may be called common-law crimes only when they were committed against the person or property of the people of the United States and they maintained that despite the change in language in what is now Article of War 93 Congress did not intend that it should be applied to depredations against enemy nationals, at least in occupied enemy territory. The motion was denied (R6-8).

Accused did not contend that the conduct described in the Specification was not punishable under some Article of War nor did they argue that the Army is powerless to penalize its members for depredations against enemy nationals. With that concession having been made, possibly the correctness of the court's ruling in denying the motion might be sustained on the basis that designation of the wrong Article of War is not ordinarily material (MCM, 1928, par. 28, p.18). However, accused stand convicted of common-law robbery after they seasonably objected that the court had no jurisdiction to try them for that offense, and they are entitled to have that objection disposed of on its merits.

So far as common-law crimes are concerned, it is true that the early codes limited the jurisdiction of courts-martial either by denouncing such crimes only when committed against the people of the United States or by coordinating the punishment for their commission with that imposed by the state, territory, or district where committed (cf. Art. 1, Sec. IX and Art. 1, Sec. X, American Articles of War of 1776; Arts. 32,33, American Articles of War 1806; Art. 58, American Articles of War 1874). Presumably, in the cases not provided for, punishment would be imposed under one of the general articles. However, the situation was changed in 1916 and in the revision of that year courts-martial were specifically given jurisdiction over a series of common-law crimes without any territorial limitation (AW 93) and this general jurisdiction was continued in the 1920 revision (AW 93). We cannot conclude other than that the change was intentional and that the Congress purposely endowed courts-martial of the Army with power to try its members for the commission of common-law crimes as common-law criminals regardless of where and against whom the offense was committed. Certainly that has been the practice during two wars and in this connection it is to be noted that the 1920 revision was made by the Congress with full knowledge of this practice in World War I. We conclude the motion was rightly denied.

4. Evidence for the prosecution: On 9 June 1945 about 1100 hours accused Camper, Boehm and another soldier came to the home of Herr Wilhelm Henrich in Oberstedten, Germany, and inquired of his housekeeper, Frau Elise Franz, whether he was in the possession of furniture and radios which had been taken from "the dulag", a German prisoner of war camp. Henrich was not at home and after a short wait Frau Franz invited them in to show them four radios which she said they were keeping for a German soldier. Accused went into the house and removed four radios (R21-23,41). She permitted them

to take the radios because she believed they were acting under orders (R48). She asked for a receipt for the radios and, after some hesitancy, Camper gave her one (R22). He, Boehm, and their companion then left and drove to the home of Herr Wilhelm Hock where they were joined by accused Kremer and another soldier (R15). Three of these radios had been intrusted to Henrich by a sergeant of the German armed forces and when removed from the house they were in a container bearing the legend "To the High Commander of the Luftwaffe, Leading Staff 1-c-6, Berlin, W-15, Knesebeck Street". The German sergeant had taken them from the dulag (R68). These radios were not registered with the United States Military Government authorities (R67). Frau Franz admitted that on their first visit accused asked her only about the radios that had come from the dulag and that their attitude was pleasant and courteous (R41). When they left the house, everyone, including Frau Franz, was in a pleasant state of mind (R42).

In the meantime, Henrich returned to his home and was informed of what had occurred. He noticed two cases with wine and liquor missing and left the house with the intention of reporting the incident to the burgomaster. Enroute, he noticed what he claimed to be a bottle of his liquor in a jeep which was parked outside Hock's house. He took the bottle, went into the house, and demanded to speak with the interpreter. Boehm could speak German and Henrich asked him what they had done with the wine they had taken. When Boehm learned that he had taken a bottle out of the jeep, he informed him that he had stolen American property and was under arrest. Smith guarded him with a rifle for about 20 minutes and then he was "escorted" to the jeep. All five accused drove with him to his house where Boehm and Roth "guarded" him outside (R53-56).

The others immediately rushed into the house and proceeded to remove articles from the drawers and chests and throw them on the floor. Camper shot a locked cabinet open when the key could not be found. Two or three rooms were ransacked in this manner and then Henrich was called in to help remove aradio (R23-25,56). Henrich helped move two radios out of the house and then went to Frau Franz's room. The search was still going on. One of the five accused took a catalogue and when Henrich protested Camper pushed him into a chair and pointed a gun at him (R57-58). With their work completed Boehm told Frau Franz that Henrich was under arrest and apparently indicated that they were going to take him with them. They yielded to her pleas, however, and let him stay, with a warning to remain in the house or within ten meters of it.

All accused in extra-judicial statements, which were properly received in evidence, admitted that they were involved in the incident. Roth and Boehm admitted visiting the Henrich house twice (R80,85) and Smith and Kremer admitted being present on the second visit (R75,93). Camper denied all knowledge of the second incident although he conceded that he had participated in the first search (R95,99-100).

Accused were charged with stealing 36 items. The evidence sustains

a finding that only the following were taken: a gold watch with chime (R59;Pros.Ex.P-1); a gold watch with chain (R60;Pros.Ex.P-2); another gold watch with chain (R60;Pros.Ex.P-3); a necklace (R33;Pros.Ex.P-4); a ring with stone (R61;Pros.Ex.P-5); a wrist watch (R34;Pros.Ex.P-6); a ring (R35;Pros.Ex.P-7); a brooch (R35;Pros.Ex.P-8); three alarm clocks (R35; Pros.Exs.P-9,P-10,P-11); a pair of opera glasses (R36;Pros.Ex.P-12); and six radios (R37-38,62-63;Pros.Exs.P-13,P-14,P-15,P-17,P-18,P-23).

There was evidence bearing on the sobriety of Camper. In his extra-judicial statement Boehm said that Camper had a drink when they stopped at Hock's house after the first visit (R89). In a supplemental statement he admitted Camper was "feeling pretty good" (R90). Similarly, Kremer admitted he observed Camper drinking (R92,94). Camper in his extra-judicial statement contended that he was drinking at Hock's house after the first visit to Henrich's and that he remembered nothing after putting Henrich in a jeep until they woke him up in his quarters about 1700 or 1800 hours (R100). Captain Francis J. Stines, commanding officer of Headquarters and Headquarters Squadron, testified that he saw Camper at 1830 hours on the day in question and that in his opinion accused was drunk (R102).

5. Evidence for the defense: Hock testified that Camper was drunk (R107). Frau Lang, who was present in Hock's house, testified that Camper was drunk when he left them (R122). Captain Richard G. Kent testified that he saw Camper in bed about 1715 hours on the day in question and that accused was drunk. There was evidence that he had vomited on the floor and bed (R124-125).

Captain Stines testified that he was the assistant provost marshal of the First Air Disarmament Wing, Provisional, and that the intelligence officer attached to his headquarters had instructed him that it was proper for the men to take motorcycles, pistols, and binoculars from the Germans so long as they gave receipts for them (R114-115).

Major Roy L. Sullivan testified that the duties of a disarmament unit were to search given areas for all equipment, material and technical data belonging to the German Armed Forces, seize it, and turn it into the United States Army. This material was so widely dispersed that the teams charged with this assignment were given wide discretion in searching homes and other buildings. If a member of a unit engaged in this work received information as to the whereabouts of such material it was his duty to seize it immediately (R118-119).

The court took judicial notice of Law 76, Article II, paragraph 6 of the SHAEF handbook for occupation forces, which, among other things, required all persons having radios to register them with the Military Government authorities (R113;Def.Ex.4).

Lieutenant Camper, after being advised of his rights, elected to,

be sworn and testify (R126-127). His testimony consisted merely of a short summary of his army career (R127-128).

The remaining accused, after an explanation of their rights (R126-127), elected to remain silent (R128-129).

6. Robbery is the taking, with the intent to steal, of the personal property of another, from his person or presence, against his will, by violence or intimidation (MCM, 1928, par. 149f, p. 170). The evidence clearly shows that the five accused were engaged in the joint venture of ransacking Henrich's house and that, when he protested against this, accused Camper, in the presence of the other accused, pushed him into a chair and leveled a gun at him. This is sufficient to constitute the crime of robbery (CM ETO 78, Watts, 1 B.R. (ETO) 45 (1942); CM ETO 3628, Mason; CM ETO 17314, Newman et al).

The only difficulty presented by the record is the number of items stolen. Dealing first with the question of the radios, the evidence shows that four radios were taken on the first visit; that three of these were in a container so marked that it was reasonable to suppose that they at one time were the property of the German Armed Forces, amd that they came from the neighboring dulag. We think that the circumstances surrounding the seizure of these radios are such that it cannot be said that the prosecution proved by substantial competent evidence that accused had the intent to steal them. It was not contended by Henrich that three of the radios had not been property of the German Armed Forces at one time, and he conceded that they had not been registered with the American Military Government authorities, a plain violation of regulations in force at the time. We think that the record is not at all clear as to what disposition the accused made, or intended to make, of these radios. The burden was on the prosecution to prove that this property was taken animo furandi and, since the substantial evidence that accused were acting under a claim of right stands unrebutted on the record, the conviction as to these items cannot stand. To be sure, there were four radios taken on the first visit but it was all one transaction and there is nothing to show that accused did not regard all four as belonging in the same category.

As to the other items alleged to have been stolen, those which the proof shows to have been removed are set out above. Two things are worthy of note. First, the proof shows accused took two rings while they are charged with taking only one. Obviously, they cannot be convicted of stealing two rings. Secondly, the radios that were taken on the second visit were taken as part of a general looting expedition and not under any claim of right.

Although accused stipulated that the value of the items introduced in evidence was over $50. the force of that stipulation is not now apparent in view of the exceptions made by the court in its findings and by this opinion. The point is not important, however, since the value of the property alleged

to have been stolen is not material where, as here, we are dealing with a robbery charge (CM ETO 15252, Lambert; CM ETO 17314, Newman et al).

It follows that the record of trial is legally sufficient to sustain only a finding of robbery of the items listed above with the exceptions that have been noted.

7. The charge sheet shows that accused Camper is 40 years 10 months of age and enlisted 10 June 1942 and was commissioned 20 January 1943; that accused Boehm is 37 years six months of age and was inducted 1 March 1943 at Philadelphia, Pennsylvania, to serve for the duration of the war plus six months; that accused Roth is 27 years one month of age and was inducted 20 August 1942 at Camp Grant, Illinois, to serve for the duration of the war plus six months; that accused Kremer is 41 years of age and was inducted 13 August 1942 at Albany, NewYork, to serve for the duration of the war plus six months; and that accused Smith is 33 years 11 months of age and was inducted 24 November 1943 at Chicago, Illinois, to serve for the duration of the war plus six months. No prior service is shown as to accused Camper. Accused Boehm, Roth and Smith had no prior service. Accused Kremer had prior service as amember of Battery B, 18th Field Artillery, from 31 December 1925 to 6 March 1926.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial as to each accused is legally sufficient to support only so much of the findings of guilty as involves a finding that accused, acting jointly and in pursuance of a common intent, did, at the time and place alleged, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Herr Willi Henrich and Frau Elise Franz one gold watch with chime, one gold watch with chain, one man's pocket watch, one necklace, one man's wrist watch, one lady's ring with six diamonds and three rubies, one pearl inset brooch, three alarm clocks, one pair of opera glasses, and two radios, of ownership as alleged, and of some value, and legally sufficient to support the sentence.

9. A sentence of dismissal is authorized upon conviction of an officer of a violation of Article of War 93. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, NewYork, is proper as to Camper (AW 42, Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended). The designation of the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as to Boehm, Kremer and Smith is proper (Ltr. Hqs. TSFET, AG 252, GAP-AGO, 20 Aug. 1945).

Edward L. Stevens Jr. Judge Advocate

R. V. Levy Jr. Judge Advocate

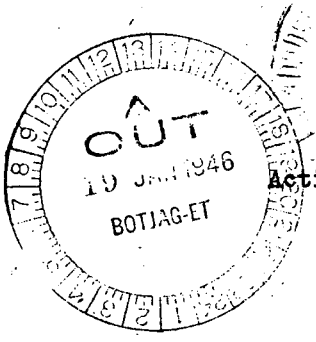
Donald R. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant RAYMOND E. CAMPER (O-571178), Headquarters Squadron, 1st Air Disarmament Wing (Provisional), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves a finding that accused, acting jointly and in pursuance of a common intent with certain others, did, at the time and place alleged, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Herr Willi Henrich and Frau Elise Franz one gold watch with chime, one gold watch with chain, one man's pocket watch, one necklace, one man's wrist watch, one lady's ring with six diamonds and three rubies, one pearl inset brooch, three alarm clocks, one pair of opera glasses, and two radios, of ownership as alleged, and of some value, 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 18898. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18898).



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

(As to accused CAMPER, Sentence confirmed, but forfeitures in excess of $ 50. for 3 months, and confinement remitted. GCMO 85, W.D. 1 May 1946).

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

BOARD OF REVIEW NO. 1

12 JAN 1946

CM ETO 18914

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Marburg, Germany, 23 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROSS W. MARTIN (38468110) Attached-Unassigned 480th Reinforcement Company, 72nd Reinforcement Battalion (formerly Detachment 97, Ground Force Reinforcement Command)	

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

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

2. Accused was charged with and convicted of absence without leave from his organization, Detachment 97, Ground Force Reinforcement Command, from about 17 June 1945 to about 23 October 1945. The only evidence submitted in support of the charge consisted of testimony that accused was seen "in the stockade" on 24 October 1945 and an extract copy of a morning report reading in part as follows:

"Det 97 GFRC ETOUSA
22 Jun 45
Martin, Ross W. 38468110 Pvt.
Fr dy to AWOL 0715 17 Jun 45
/s/ Richard S McNeill
/t/ RICHARD S McNEILL
1st Lt AUS " (R6-7; Pros. Ex.A).

In addition, it was stipulated between prosecution, defense and accused that the regular course of business and standard operating procedure of Detachment 97, to which accused was attached unassigned on or about 17 June 1945, was substantially as follows: The platoon sergeant makes a roll call at which he notes absentees and reports them to the

first sergeant who in turn reports them to the morning report clerk of the particular company. Such clerk makes an entry on the morning report work sheet which is then signed by the company commander and forwarded to Detachment Headquarters, where morning report clerks, working under the supervision of the personnel adjutant, consolidate the morning report work sheets of the various companies into a detachment morning report. This document is then signed by the personnel adjutant or assistant personnel adjutant. Such procedure was followed daily in Detachment 97 from its activation until its deactivation.

The following qualification upon the foregoing stipulation was agreed to by the prosecution:

> "Defense: We stipulate that the procedure outlined is a procedure which was supposed to have been followed. We do not stipulate that the procedure was, in fact, followed with respect to the morning report of Detachment 97, GFRC, ETOUSA, on the date in question, or with respect to any specific morning report that may be introduced in this case" (R7).

When the prosecution offered the mentioned extract copy in evidence, the defense objected thereto on the ground that it was not properly admissible as an official document because the maker thereof had no personal knowledge of the facts contained therein and requested that the maker be called as a witness. After stating that the maker was not available, the prosecution agreed with the defense counsel "that if Lt McNeill were present to testify, he would testify that he did not have personal knowledge of the entry on the extract copy of the morning report" (R7-8). After argument the law member overruled the defense objection and received the extract copy in evidence (R8-10).

Had the defense not objected to the extract copy on the ground that the signer of the original had no personal knowledge of the facts recited therein, there would be no question for determination. It may be presumed in the absence of evidence to the contrary, that entries in a morning report were made by the proper officer (CM ETO 5234, Stubinski), and as the entries were not "obviously not based on personal knowledge," the document would be admissible as an official writing (MCM 1928, par. 117a, p. 121; CM ETO 10199, Kaminski). The stipulation, however, that the maker of the original would testify that he did not have personal knowledge of the entry on the extract copy must be regarded as rendering the document inadmissible as an official writing just as fully as if it had contained entries obviously not based on personal knowledge (cf. CM ETO 12726, Dye). The only other theory, then, upon which the extract copy properly could be admitted was that of an entry in the regular course of business under the Federal "shop book rule" statute (Act June 20, 1936, c. 640, sec. 1; 49 Stat 1561; 28 USCA 695; CM ETO 4691, Knorr; CM ETO 10199, Kaminski). To bring an entry within that statute two things must be proved: (1) that the entry was made in the regular course of business of the organization in question and (2) that it was the regular course of such business to make the entry at the time of the event recorded or within

a reasonable time thereafter. Lack of personal knowledge by the entrant affects merely the evidentiary weight of the entry but not its admissibility. (Act June 20, 1936, supra).

In the instant case, it may be assumed that the second element of proof was met by the prosecution in the stipulation concerning the method of preparation of morning reports in Detachment 97, Ground Force Reinforcement Command, in effect at the time when the morning report in question was prepared. Specifically excepted from the stipulation, however, was the fact that such regular course of business and procedure was in fact followed with respect to the instant morning report on the date in question. The prosecution adduced no independent evidence of this fact. It may not validly be contended that the extract copy itself furnishes substantial evidence that the original morning report was prepared in accordance with the regular procedure. All it reveals is the name, rank and organization of accused, the name of the detachment, the entry, and the name and rank of the authenticating officer. There is no indication of Lieutenant McNeill's capacity, whether as personnel adjutant or otherwise. Therefore, in the opinion of the Board of Review, the prosecution failed in a vital element of its proof to establish the admissibility of the document under the "shop book rule" and the findings of guilty, being unsupported by substantial evidence, must fall together with the sentence.

Reference is made to the recent holding of the Board of Review in CM ETO 18839, Bender, wherein the record of trial was held legally insufficient to support the findings of guilty and the sentence on substantially the same grounds as herein.

Edward L. Stevens Jr. Judge Advocate

B K Dewey Jr Judge Advocate

Daniel R. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 JAN 1946 TO: Commanding General, Seventh United States Army, APO 758, U.S. Army.

1. In the case of Private ROSS W. MARTIN (38468110), Attached-Unassigned 480th Reinforcement Company, 72nd Reinforcement Battalion (formerly Detachment 97, Ground Force Reinforcement Command), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in such holding. Under the provisions of Article of War 50½, you may direct a rehearing of the case coincidentally with your disapproval of the findings of guilty and the sentence. Care should be taken upon such rehearing to introduce competent evidence that the particular morning report entry was made in the regular course and according to standard operating procedure in the Detachment.

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 18914. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18914).

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

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

BOARD OF REVIEW No. 5

11 JAN 1946

CM ETO 18915

UNITED STATES	SEVENTH UNITED STATES ARMY WESTERN MILITARY DISTRICT
v.	
Private TRAMMEL F. GILMORE (34540352), Attached-Unassigned, 376th Reinforcement Company, 72nd Reinforcement Battalion.	Trial by GCM, convened at Marburg, Germany, 6 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 Years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD of REVIEW No. 5
VOLLERTSEN, JULIAN and FARQUHAR, Judge Advocates

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

2. Pros. Ex.A was properly admitted as a duly authenticated copy of an entry made in regular course of business (CM ETO 4691, Knorr; CM ETO 10199, Kaminski; CM ETO 14165, Pacifici; CM ETO 14362, Campise). It was stipulated and agreed by and between the prosecution and the defense in connection with the introduction of Pros. Ex. A that a standard operating procedure had been followed with respect to the preparation of such documents in accused's organization from the date of its activation to the date of trial. This period necessarily included the date of the instrument in question and in the absence of objection by defense it follows that the stipulation admitted that the document in question was prepared in accordance with the standard operating procedure followed in the organization. This was not the situation in CM ETO

18839, Bender and CM ETO 18914, Martin wherein defense counsel expressly refused to stipulate that the document sought to be introduced had been prepared in accordance with the standard operating procedure followed in the organization and no further proof of such fact was introduced by the prosecution.

Jack K. Wollertsen Judge Advocate

Anthony Julian Judge Advocate

William H. Ingalsbe Judge Advocate

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

BOARD OF REVIEW NO. 5

11 JAN 1946

CM ETO 18920

UNITED STATES	) SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v	)
Privates CHARLES A. MYERS (32/51942), and RUDOLPH McLEARY (36/9043/), of 533rd Quartermaster Group and 3676th Quartermaster Truck Company, respectively.	) Trial by GCM convened at Paris, France, 15 November 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. The court by substitutions and exceptions to Charge I and its Specification found the accused Myers guilty of a violation of Article of War 61 in that he did "on or about 10 August 1945 absent himself without leave from the service of the United States, and did remain absent without leave until he was apprehended at Saint Denis, France; on or about 16 September 1945". The court thereby excepted the place of commission of the offense, but since the gravamen of the offense was absence from the service of the United States for a stated and specific period it is the opinion of the Board of Review that the accused was not thereby misled or prejudiced (CM NATO 1087, 3 Bull. JAG 9). It is also the opinion of the Board of Review that notice to accused of the order of transfer was sufficiently established by the properly authenticated extract copy from the morning report of his former organization showing that he actually departed therefrom on 23 July 1945 pursuant to said order of transfer.

3. Confinement in a penitentiary is authorized upon conviction of robbery by Article of War 42 and section 284 Federal Criminal Code (18 USCA 463). Since each accused is 25 years of age or younger and with sentence of not more than 10 years the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II pars. 1a (1), 3a, as amended).

Jack R Wollerstein Judge Advocate

Anthony Julian Judge Advocate

William M Vaughan Judge Advocate

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

BOARD OF REVIEW NO. 1

12 JAN 1946

CM ETO 18922

U N I T E D S T A T E S	SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private WALTER A. BROWN (6147854), Attached-Unassigned, 179th Replacement Company, 39th Replacement Battalion, 19th Replacement Depot (formerly of Company C, 20th Armored Infantry Battalion)	Trial by GCM, convened at Paris, France, 6 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States, Disciplinary Barracks, Greenhaven, New York.

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

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

2. The specification alleged that accused, then of Company C, 20th Armored Infantry Battalion, did, en route from the 17 Replacement Depot, United States Forces, European Theater, to Company C, 20th Armored Infantry Battalion, on or about 22 February 1945, desert the service of the United States and did remain absent in desertion until returned to military control on or about 6 September 1945.

It was stipulated that Detachment 53, Ground Force Reinforcement Command, was "a part of" the 17th Replacement Depot, and also was "known and referred to as" the 53rd Reinforcement Battalion (R12). There was introduced into evidence a copy of Special Orders 52, Headquarters 53rd Reinforcement Battalion, dated 21 February 1945, paragraph 32 of which recited that accused was "reld AU GFRC Det 53 and trfd 10th Arm'd Div WP o/a 22 Feb 45 reporting upon arrival to the CG thereat for dy" (R5; Pros.Ex.A). A duly authenticated extract copy of the morning report of Detachment 53, Ground Force Reinforcement Command, for 22 February 1945, showed the following:

> "Brown, Walter A. Pvt
> Above EM trfd to 10 Armd Div pp 32
> SO 52 Hq 53" (R6; Pros.Ex.B).

There also was introduced into evidence, over the objection of the defense counsel, an extract copy of the morning report of Company C, 20th Armored Infantry Battalion, for 20 March 1945, containing an entry as follows:

> "Brown, Walter A. Pvt
> From Reasgd & not jd (enroute to jn) from
> 17th Reinf. Depot 22 Feb 45 to AWOL 22
> Feb 45 time unknown" (R7; Pros.Ex.C).

The court apparently purported to take judicial notice that the 20th Armored Infantry Battalion was a component of the 10th Armored Division (R7). The foregoing is the only evidence of record tending to show that accused absented himself without leave on the date alleged.

The entry in the morning report of Company C, 20th Armored Infantry Battalion, for 20 March 1945 shows on its face that accused did not rejoin that unit. Hence, in so far as it purports to state that he absented himself without leave on "22 February 1945 time unknown", it is hearsay and incompetent to establish the fact recited (CM 187252, Hudson, 1 B.R. 19 (1929); CM 224325, Michael, 14 B.R. 117 (1942); CM 229562, Bangs; 17 B.R. 197 (1943); CM 245991, Cruff, 29 B.R. 361 (1944)). There is, however, authority for the proposition that the entry in the morning report of Company C, 20th Armored Infantry Battalion, is competent to show that accused was, at least in an administrative sense, properly reassigned to that organization and also competent to show that he never reported thereto for duty (CM 189682, Myers, 1 B.R. 179 (1930); CM 199270, Andrews, 3 B.R. 343 (1932); and see CM 187252, Hudson, supra). Even so, the instant

record of trial contains nothing which affirmatively establishes, or from which it legitimately may be inferred, that accused had knowledge of his reassignment to the unit in question. If he had no such knowledge, he was under no legal obligation to report to that unit for duty. Hence, even though the entry in the morning report of Company C may be accepted as proof that he was administratively reassigned to that company and did not report thereto, it is without probative force, under the circumstances of this case, to establish that accused was under a legal duty to report to that company and that he absented himself without leave by failing to do so. It is accordingly the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence (CM ETO 11356, Crebessa; CM ETO 11518, Rosati; CM ETO 13565, Slominski; CM ETO 14836, Mackey; CM ETO 18630, Adamczyk; CM 187252, Hudson, supra).

Judge Advocate

Judge Advocate

Judge Advocate

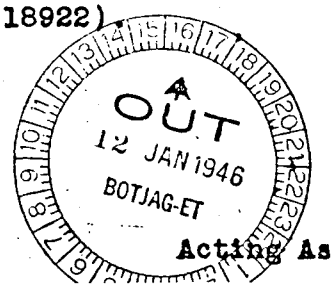
(274)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 JAN 1946 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private WALTER A. BROWN (6147854), Attached-Unassigned, 179th Replacement Company, 39th Replacement Battalion, 19th Replacement Depot (formerly of Company C, 20th Armored Infantry Battalion), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18922. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18922)



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

(Sentence disapproved. GCMO 76, USFET, 12 Feb. 1946).

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

BOARD OF REVIEW No. 5

18 JAN 1946

CM ETO 18923

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Privates DORIS JACKSON (38361147), and FLETCHER CULBERSON (35280853), both of the 19th Reinforcement Depot and Private MAURICE D. ROUSSEAU(36387789), Company A, First Staging Area Battalion	Trial by GCM, convened at Marseille, France, 14 November 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio, (Jackson and Rousseau). United States Penitentiary, Lewisburg, Pennsylvania, (Culberson).

HOLDING by BOARD of REVIEW No. 5
VOLLERTSEN, JULIAN and FARQUHAR, Judge Advocates

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences (CM ETO 12793, Crump et al; CM ETO 13575, Crump, Lamb et al).

2. However, it is the opinion of the Board of Review that the evidence is legally insufficient to support the findings of guilty of the Separate Charge under Article of War 94 and of the Specification thereof with respect to accused Culberson and legally insufficient to sustain the findings of guilty of the Specification to the Separate Charge and the Separate Charge Under Article of War 61 with respect to accused Rousseau.

Larceny and the subsequent wrongful disposition of government property are separate and distinct offenses under Article of War 94 (CM ETO 9784, Green and CM ETO 18895, Taylor). The only evidence as to wrongful disposition alleged in the Specification of the Separate Charge against Culberson and Rousseau was the testimony of the taxi cab driver that he was paid for the use of his cab with twenty vials or ampules of penicillin, that same was given to him by the accused "Russell" (the name by which he knew accused Rousseau) and that neither of the other accused was present when such payment was made.

With respect to the violation of Article of War 61 as to the accused Rousseau the only evidence thereof introduced was an order of transfer dated 21 July 1945, purporting to be effective 27 July 1945, together with testimony that he did not report to the new organization pursuant to said order. This was insufficient to establish any part of the alleged absence without leave.

With respect to the accused Jackson the evidence is sufficient to establish an absence without leave only from on or about 7 July 1945 to 12 August 1945.

3. Confinement in a penitentiary is authorized upon conviction of larceny of property furnished for the military service of a value exceeding $50 by Article of War 42 and section 35 (C), Federal Criminal Code (18 USCA 82), as amended. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Jackson and Rousseau, and of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Culberson, is proper (Cir. 229, WD, 8 June 1944, sec.II, pars. 1a (1), 1b (4), 3a, 3b, as amended).

Judge Advocate

Judge Advocate

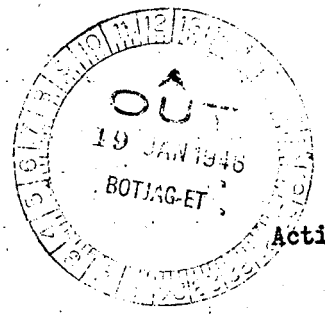
Judge Advocate

1st Ind.

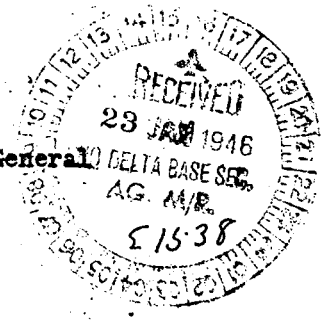
War Department, Branch Office of The Judge Advocate General with the European Theater. 18 JAN 1946 TO: Commanding General, Delta Base Section, Theater Service Forces, European Theater, APO 772, U.S. Army.

1. In the case of Privates DORIS JACKSON (38361147), and FLETCHER CULBERSON (35280853), both of 19th Reinforcement Depot and Private MAURICE D. ROUSSEAU (36387789), Company A, First Staging Area Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Separate Charge under Article of War 94 and of the Specification thereof with respect to accused Culberson, legally insufficient to support the findings of guilty of the Specification to the Separate Charge and the Separate Charge under Article of War 61 with respect to accused Rousseau, legally sufficient to support only so much of the findings of guilty of the Specification of the Separate Charge under Article of War 61 with respect to accused Jackson of an absence without leave from on or about 7 July 1945 to 12 August 1945, and legally sufficient to support the findings of guilty of the remaining charges and specifications and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. 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 18923. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18923).



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



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

BOARD OF REVIEW No. 5

29 JAN 1946

CM ETO 18972

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
v.	)	
Technician Fifth Grade EPHRIAM B. McDANIEL (34221249), Privates First Class CHARLES W. JEFFERIES (38097155) and CARDELL G. COLLINS (37581689) all of 645th Quartermaster Truck Company and Private LINWOOD E. WILLIAMS (32440518) of 3499th Quartermaster Truck Company	)	Trial by GCM, convened at Heidelberg, Germany, 29 September, 1 and 2 October 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Technician Fifth Grade Ephriam B. McDaniel, Private First Class Cardell G. Collins and Private First Class Charles W. Jefferies, all of 645th Quartermaster Truck Company, and Private Linwood E. Williams, 3499th Quartermaster Truck Company, acting jointly, and in pursuance of a common intent, did, at Saarwellingen, Kreis Saarlautern, Germany, on or about 16 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Margot Conrad.

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at Saarwellingen, Kreis Saarlautern, Germany, on or about 16 April 1945, wrongfully and unlawfully enter the dwelling of Herr Josef Conrad, with intent to commit a criminal offense, to wit: rape therein.

Each accused pleaded not guilty and two-thirds of the members of the court present at the time the votes were taken concurring, each was found guilty of all charges and specifications. No evidence of previous convictions was introduced as to any of the 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 for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Josef Conrad, his wife, son and 17-year-old daughter Margot occupied a house at Saarwellingen, Kreis Saarlautern, Germany (R6, 12,18). On or about the night of 16 April 1945 the Conrad family had retired prior to midnight, Herr Conrad and his wife occupied one room and his son and daughter each a separate room (R7,12). Before retiring Herr Conrad closed and locked the entrance door (R10,98). At about twelve-thirty at night Herr Conrad was awakened by the noise of people moving in the house. He got out of bed and as he opened his bedroom door he saw two or three negro American soldiers one of whom pushed Herr Conrad back to his bed by shoving a pistol against his chest (R7,10,11). One of the soldiers asked him "where is a fraulein?". His wife screamed and Herr Conrad became excited because of his daughter and sprang out of bed but two or three of the soldiers came around him with pistols and forced him to return to his bed (R7). His son then came out of his own room and was pushed by one of the soldiers into Herr Conrad's room (R8). Thereafter at least onesoldier with a pistol always remained in Herr Conrad's room, but he saw and heard that the other soldiers would change from his room to his daughter's room and he heard one urinate in the hallway after leaving his daughter's room (R8).

Margot Conrad testified that at about twelve-thirty on the night of 16 April 1945 she was awakened by noises in the hall and at the same time the door of her room was opened and three or four colored American soldiers entered the room. The only light was a small candle carried by one of the soldiers but she saw that they all had pistols (R12,13). She heard her mother cry out one time from her

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parent's bedroom "and then it was deathly silent" (R16). The soldiers approached her bed and took the blanket off and one of them hit her on the head twice with his fist. Several of them then pulled off her underpants and five different men successively entered her bed and each had sexual intercourse with her (R13,14,22,24). She saw the men continually changing with her go to the entrance of her parents' room with a pistol in their hand (R16).

Each of the five men that entered her bed held a pistol in his hand pointed at her breast (R14,21) and other soldiers who remained in the room also held pistols pointed at her (R15). She had never before seen a male sexual organ and had never previously had intercourse (R18,21). After she was hit "two times on the head" she did "not make any further attempts to struggle because I believed it would lead to more serious conclusions, perhaps shooting" (R22). She did not cry out or speak to the soldiers and during the acts of intercourse she lay completely still and did not resist in any way (R16,17,20,22). She saw only the pistols pointed at her and thought all she could hope for was for them to leave the house as quickly as possible (R16, 17). She testified that she pressed the sexual organ of one or perhaps two of the soldiers and inserted it for one because she had "heard something about pressing it prior to this time and I believed it would do something good", (R21,22) and because

> "through signs and motions he indicated that he wanted me to do it and the other times I saw the pistol and figured that if I did not comply he would injure me or shoot me" (R23).

About five minutes after the soldiers finished and left the house she heard a motor start and drive away from a point about 100 meters from the house. She noticed that the bed sheets were smeared with blood and she was examined by a doctor the next morning (R17). It was stipulated and agreed in writing by the prosecution, defense and all accused that the doctor, if present, would testify that he examined the prosecutrix on the morning of 17 April 1945 and

> "found dried blood at the entry of the vagina. The hymen was torn on the left side and on the right back. The tissue was split and blood still ran when spread apart. Parts of the hymen were stained with blood" (R24;Pros.Ex.A).

Herr Conrad went to his daughter's room as soon as the soldiers left the house where he found her crying, "She was through. She was broken up". He reported the incident to authorities at six o'clock the next morning (R5). He observed the next morning that a pane of glass had been broken in the entrance door so that it could be opened from the outside (R10, 99). Neither Herr Conrad or his daughter identified any of the accused and both indicated their inability to identify any of the soldiers involved even if confronted by them (R9,17). Three days after this incident a bicycle owned by Herr Conrad was taken (R67). This bicycle was found by a CID agent in the orderly room of the organization of the accused Jefferies, Collins and McDaniel on or about 10 May 1945 and was identified in court and received in evidence over objection of defense as Prosecution Exhibit D (R66,67).

Pre-trial statements were made by the accused Jefferies, Collins and McDaniel to CID agents and by all of the accused at a later date to the investigating officer. Considerable testimony as to the circumstances surrounding the taking of each statement was heard by the court. Each accused testified that his statement or statements were made as a result of undue pressure or through a misunderstanding of his rights (R34-37, 44-46,54,55,58,77,79). This was in direct conflict with the testimony of the CID agent who testified that prior to the taking of the statements by him each accused was fully advised of his rights under Article of War 24 and was informed that he did not have to make a statement, that any statements made could be used against him in the event of trial; and that no force, threats or promise of benefit was employed or made to secure any of said statements (R26,28,38,39,48,49,51,62).

The investigating officer also testified that prior to taking statements from the accused he read and explained Article of War 24 and advised them that they were not required to make a statement and that any statement made could be used "for them or against them" at time of trial (R70,84). He read to all of the accused the statements previously made to the CID agents and each of the accused who had made such a prior statement at that time informed him that no force, threats or promises had been used or made when such statement was secured and with a few changes and corrections gave substantially the same statement to the investigating officer (R87). At the reading of these prior statements the accused Williams offered a number of corrections thereto (R75) and indicated that he also desired to make a statement (R71).

With the exception of the statement made by accused Jefferies to the CID agents (R39) the court admitted in evidence over the objections of the defense all of the statements made by the accused to the CID agents and to the investigating officer (R47, 64,85,90,92,95; Pros.Exs. B,C,E,F,G,H). The court was properly instructed that each statement could be considered as evidence only as against the accused making the statement (R65,85,90,95).

The accused Collins in a statement made to CID agents on 23 May 1945 stated that on the evening of 16 April 1945, accompanied by the other three accused and a Sergeant Mathews, he drove his truck from their camp at Berkenfeld, Germany, to a cafe in France near the border. They drank beer and cognac and started back to camp drinking as they went. On the way back he stopped the truck at McDaniel's direction and while Mathews remained in the truck the rest of them went to a house and went in it.

> "I stood guard by the front door. There was a family here, a man and wife in one room and a girl in another room. They were all in bed. Williams stood by the room with the parents and Jefferies and McDaniel were in the room with the girl. I realized they were fucking the girl and then they called for me to come in. They had finished with the girl and came out when I went in. Williams came in with me. Then Williams fucked the girl and then I did".

He and the others all had pistols in their hands while they were in the house but when he had intercourse with the girl he put his gun in his shoulder holster. The girl did not scream or cry out in any way and did not struggle or attempt to get away. "She just lay still and did not help any" (Pros.Ex.B, R47). In his later statement to the investigating officer made on 14 June 1945 the accused Collins corrected and supplemented his prior statement by denying that he told the CID agents that all the boys had their pistols in their hands while in the house but stated that he merely gave the caliber and description of the pistols. He also said that the way McDaniel told him to stop the truck as they approached the house led him to believe that McDaniel was taking them to a house where a prostitute lived and that "at first I stood by the door to keep lookout for MP's and such" (Pros.Ex.F; R90).

The accused McDaniel in a statement made to CID agents on 21 May 1945 stated that on the evening of 16 April 1945 he left camp

with the other accused and a Sergeant Mathews and went in Collins' truck to a small village in France where they had beer and cognac. As they returned to camp Collins stopped the truck at a house

> "up a little lane to the right of the main road. We went to the house up a long stairway to the front door and walked in. I don't know if the door was open or if the man of the house opened it. When I got in I saw a man and a woman in a bedroom and then a little boy came out in the hall. One of our boys made a motion at the boy and he turned around and went away. Then I went into another room where there was a girl in bed. Williams had lit a candle in this room. Collins was standing there with his pistol and said he would watch me while I fucked the girl. I then took my pistol from my belt and put it in my pants pocket. Then I got on the bed and had intercourse with her. She did not offer any resistance and I had no trouble to get my penis in. There was no blood on my pants afterwards. I had been drinking too much and I couldn't come so after while Collins told me to get up. Then I went and stood in the door of the other bedroom where the man and woman were, and held my hand on my gun. Williams had been there while I had intercourse with the girl. Williams, Jefferies and Collins were all in the room with the girl and they all had intercourse with her. Collins came and stood in the bedroom door then I went out on the porch. Then when the others got through with the girl and came out, Mathews was just coming up the steps from the truck. He had not been in the house and he did not have intercourse with the girl"

McDaniel further stated that on the night of 20 April 1945 in the company of others he stopped "at the same house where we had been on the night of 16 April 1945, up the little lane to the right". He entered through a window and found no one there and took a bicycle from the kitchen which he put on the back of the truck (Pros.Ex.C, R64). In his later statement to the investigating

officer made on 14 June 1945 accused McDaniel amended his prior statement as follows:

> "Collins said he would watch me while I fucked the girl and stood there but he did not have his pistol in his hand but in a shoulder holster" (Pros.Ex.G, R92).

The accused Williams in a statement made to the investigating officer on 16 June 1945 said that on a day he was told was 16 April 1945 he went to a place in France with the other accused and one Mathews to get some cognac. They arrived in France where they bought cognac, drank calvados in a cafe and talked to some girls. They left there about 10:30 or 11:00 p.m. and on the way back, while still in France but near the German border, McDaniel suggested stopping at a "Chicks" house but Collins said that her husband was there so they kept going. They had gone quite a distance into Germany when Collins said "Doggone it we passed the house" and backed the truck up and parked it. While Collins was parking the truck Williams and the other two accused went up to the house where they knocked but nobody came to the door.

> "I think McDaniels pushed on the door and it opened. Things were getting pretty hazy for me at that time because I was pretty high. I'm pretty sure that the three of us entered through the door. Collins came in right after us, in a little while. Collins and I talked in the hallway for a while about having 'beaucoups' of chocolate. I walked into a room and saw McDaniels having intercourse with a girl and Jefferies standing near the bed. Collins was standing in the hall near the door of the same room. Collins had his gun in his shoulder holster and I had my pistol in my pocket. I didn't see either Jefferies or McDaniels guns out since the room was pretty dark. I walked back out into the hall and looked into another room and saw a man, a woman, and a kid laying in bed. They didn't say anything and I just stood in the hall with Collins, McDaniels came out of the room, and then I went in ahead of Collins. As I went in Jefferies was just getting on the girl. The girl didn't struggle at all. I stood there while Jefferies had intercourse and when he finished I had intercourse with her. About

this time I was getting sick from the liquor when I got thru I went outside and Collins went in. Jefferies and McDaniels stayed in the hallway. I stood outside getting some air because I felt like I was going to puke. Then the other three fellows came out and Collins said something about this being the third or fourth time he had been here. We started back to the truck and Mathews was just getting out of the truck. We all got into the truck and went back to camp. I don't remember the ride back at all.

I didn't see any violence used by the men, and didn't use any myself, * * * because there was none necessary. From what I could see and from what I did it was just strictly business exchanging chocolate, cigarettes and coffee for sexual intercourse. I understood that Collins had been here before" (Pros.Ex.E; R85).

The accused Jefferies in a statement made to the investigating officer on 14 June 1945 stated that on the night of 16 April 1945 he was out of camp in a truck with the other three accused and one Mathews. That they went to a house where he went around to the back alone, then came around and went in the front door, the others having already entered except Mathews whom they had left asleep in the back of the truck.

"When I finished having intercourse with the girl she asked me for 'cafe' but I didn't have any. I went out to the truck leaving Collins, Williams and McDaniels inside the house. They stayed in about a minute or two more before they came out.

I had had about a half of quart of cognac. I took about one or two more drinks when I got back in the truck and then I must have fallen asleep or passed out because I don't remember anything about the ride back to camp" (Pros.Ex. H; R55).

Each of the statements made by accused Collins, McDaniel and Jefferies contained a statement to the effect that the prior statement given by him to the CID agents was given and signed

voluntarily, that no force was used and that no promises were made, that he had reread such former statement and except as changed in present statement it was a true and correct statement ofwhat took place (Pros. Exs.F.G.H).

4. After a full explanation of his rights as a witness each accused elected to remain silent. (R97,98).

5. The record of trial contains competent evidence to the effect that shortly after midnight on the morning of 17 April 1945 a group of three to five colored American soldiers entered the home of Josef Conrad at Saarwellingen, Kreis Saarlautern, Germany, and that such entry was effected by breaking a pane of glass in the front entrance door. That members of the group, all of whom were armed, kept Josef Conrad, his wife and son in one bedroom by force and threats of force while others and they by changing such guard function went to another room occupied by Conrad's 17-year-old virgin daughter where according to her testimony five different colored soldiers successively threatened her with pistols and forced her thereby to submit to sexual intercourse with each of them.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). Although prosecutrix in this case stated that she offered little or no resistance and even assisted one or perhaps two of the soldiers in inserting his penis in her vagina she testified that such assistance and lack of resistance on her part was prompted by fear of being shot and because she believed that under the circumstances there was nothing else she could do. It has long been recognized that consent cannot be inferred from lack of resistance by prosecutrix when the circumstances are such that, in view of the strength and violence of her assailant or the number taking part in the crime, resistance on her part would be useless if not perilous, or if her acquiescence is induced through reasonable fear of death or threatened severe injury (Winthrop's Military Law and Precedents (Reprint, 1920), p.678; CM ETO 1069, Bell 3 B.R. (ETO) 373 (1943); CM ETO 1202, Ramsey and Edwards 4 B.R. (ETO) 109 (1944); CM ETO 3740, Sanders et al; CM ETO 14875, Swain and CM ETO 17622, Boyd). It has also been recognized that the circumstances or setting in which the act takes place may be considered in not inferring consent from mere lack of physical resistance (CM ETO 8837, Wilson;CM ETO 10700, Smalls; CM ETO 12329, Slawkawski; CM ETO 18224, Dunson; CM ETO 18625, Van Riper et al). In the present case it is the opinion of the Board of Review that ample evidence was induced to justify

the inference that the prosecutrix submitted to the acts of intercourse in question only because of fear of death or serious bodily harm and that same were acts not of seduction but of rape. CM ETO 10799, Glover; CM ETO 18834, Scott and Sharp).

6. Housebreaking is the unlawful entry of another's building with intent to commit a criminal offense therein (MCM, 1928, par.149e, p.169). The actual commission of a criminal offense in the building has been recognized as sufficient evidence to sustain the inference that the intent to commit such act existed at the time of the unlawful entry (CM ETO 3679, Roehrborn; CM ETO 3707, Manning and CM ETO 4071, Marks). Also the manner and the hour of entry in the present case further indicate the unlawful intent of the perpetrators of the acts at the time of entry.

7. The corpus delicti for the offenses of rape and housebreaking were adequately established but the prosecution witnesses failed to identify any of the accused as the perpetrators of the acts which occurred. Such identity was entirely dependent upon admissions thereof contained in pre-trial statements made by the various accused. Consequently, the admissibility of said statements, objected to by the defense, is the vital issue of the present case. Such statements, if admissible in evidence constitute substantial evidence that, the crime was committed by the accused (CM ETO 8234, Young et al). It is well established that an involuntary confession is not admissible and facts indicating that a confession was induced by hope of benefit or fear of punishment or injury are evidence that such confession was involuntary (MCM, 1928, par.114a, p.115-116).

Prior to admitting each statement in evidence the court heard considerable testimony with reference to the circumstances under which it was made, the majority of which was in direct conflict. The court by thereafter admitting or excluding each statement resolved the conflict in the testimony as to the circumstances under which it was made. The voluntary character of aconfession is a question of fact for the court and its decision will not be disturbed on review since there was competent substantial evidence to support its findings (CM ETO 82, McKenzie 1 B.R. (ETO) 69 (1942); CM ETO 422, Green 1 B.R. (ETO) 345 (1943); CM ETO 804, Ogeltree et al 2 B.R. (ETO) 337 (1943); CM ETO 4701, Minnette, CM ETO 5584, Yancy; CM ETO 9877, Balfour and CM ETO 15843 Dickerson). The court was properly instructed that the statement of each accused could be considered only as against him and there is nothing to indicate that the court failed to adhere to this

principle (CM ETO 895, Davis 3 B.R. (ETO) 59 (1944) and CM ETO 3803, Gaddis).

The defense objected to the admission of the statement made by accused Jefferies to the investigating officer on the ground that improper influences recognized by the court in excluding the prior statement made by him to CID agents extended to and rendered his subsequent statement inadmissible. It is the opinion of the Board of Review that the first statement of accused could properly have been admitted by the court on the basis of the evidence submitted, but even assuming that the first statement was secured by improper influence or inducement this would do no more than raise a rebuttable presumption that such inducement or influence continued to the making of the subsequent statement (CM ETO 1201, Pheil 4 B.R. (ETO) 91 (1944); CM ETO 1486, MacDonald et al 4 B.R. (ETO) 367 (1944). Substantial evidence was adduced in the present case to rebut this presumption and to sustain the finding that the subsequent statement made by accused Jefferies, more than three weeks later, was removed from any improper influence or inducement that may have existed and affected the making of his prior statement (R93,94).

Testimony was also introduced to the effect that accused Jefferies was fully advised of his rights prior to making his second statement and that he made such statement voluntarily without promise of benefit or threat of punishment. Jefferies took no exception to this testimony and made no denial of such facts. Consequently, in spite of its ruling as to the inadmissibility of his first statement the court was fully justified in resolving the question of fact as to the voluntary character of the second statement against said accused.

8. The charge sheet shows that accused McDaniel is 26 years four months of age and was inducted 4 May 1942 at Fort Benning, Georgia; that accused Jefferies is 23 years three months of age and was inducted 28 February 1942 at Camp Wolters, Texas; that accused Collins is 20 years ten months of age and was inducted 12 November 1943 at Fort Snelling, Minnesota; that accused Williams is 26 years of age and was inducted 29 August 1942 at Fort Jay, New York. Each accused had no prior service.

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

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

10. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape and housebreaking by Article of War 42 and section s 278 and 330, Federal Criminal Code (18 USCA 457,567) and section 22-1801 (6:55) District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec. II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

12 JAN 1946

CM ETO 18973

U N I T E D S T A T E S	) 3RD INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Bad
	) Wildungen, Germany, 28 August
Private CLAUDE M. MOEN (6582023),	) 1945. Sentence: Dishonorable
Headquarters Company, 1st	) discharge, total forfeitures
Battalion, 30th Infantry	) and confinement at hard labor
	) for life. United States
	) Penitentiary, Lewisburg,
	) Pennsylvania, or elsewhere as
	) Secretary of War may direct.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private CLAUDE M. MOEN, Headquarters Company, 1st Battalion, 30th Infantry did, at Mad di Quarto, Italy on or about 3 July 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at Pozzuoli, Italy, on or about 22 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of accused's natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of accused's natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Competent, substantial evidence for the prosecution establishes that, on 3 July 1944, accused absented himself without leave from his organization, Headquarters Company, 1st Battalion, 30th Infantry, in the vicinity of Mad di Quarto, Italy (R7,8-10,13; Pros.Ex.A) and that he returned to military control at Pozzuoli, Italy, on 22 May 1945 (R16-17; Pros.Ex.B).

4. After his rights were explained, accused announced his desire to remain silent and defense counsel stated "He means he'd like me to read his unsworn statement" (R17). This statement was in pertinent part as follows:

> "I enlisted in the Army in March 1940. I was assigned to the 1st Division and was later transferred to the 3rd Division on the 15th of September 1943. I made the landing at Fedala with my outfit and served faithfully through the North African, Sicilian and Italian campaigns. While in Italy I was hospitalized with yellow jaundice. I remained in the hospital for two months. From the hospital I was sent to the 7th Replacement Depot. I had been placed on limited assignment. While in the Replacement Depot on March 1944 I was examined by a board of five doctors. They found me to be close to a nervous breakdown and advised that I rest for three months. The truth of the matter is that I never had any rest and spent my time between details, K.P. and guard duty. I am credited with 100 days of combat. While in good health I have willingly and

ably served. However, when I reached the point of nervous exhaustion I could no longer control myself. Another fact was that the Army authorities disregarded my application for marriage, and gave me no satisfaction as to a future hope in this matter. I love my girl friend dearly. She was in a family way and I was given no opportunity to help her. It caused me great distress and worry" (R18).

5.a. In paragraph 4 of the review of the Staff Judge Advocate of the reviewing authority appears the following:

> "The charge upon which the accused was tried was not sworn to, but he made no objection to trial, and it is not believed that his rights were prejudiced (par. 31, MCM, 1928)".

As indicated in paragraph 7b of the review of the Acting Theater Judge Advocate, the charge sheet itself, dated 5 August 1945, bears an affidavit in the usual form, signed by a summary court officer, reciting that the accuser swore to the charges on 8 August 1945. The advice of the Staff Judge Advocate of the reviewing authority, dated 22 August 1945, does not state that the charges were unsworn. However, on 14 August 1945, the appointing authority returned charges of "desertion in that he /accused/ intended to avoid hazardous duty" for further investigation, suggesting "that the specification be redrawn to allege a permanent desertion". Affidavits of two enlisted members of accused's platoon, each verified 17 August 1945, appear in the accompanying papers. No report of further investigation, however, appears. It is apparent that a new charge sheet was drafted and dated back to conform to the original. Such practice was irregular and is not to be condoned. Even assuming, however, that the new charges were not sworn and that accused was not permitted to participate in the further investigation, it is well established that such irregularities were procedural rather then jurisdictional and were not prejudicial to his substantial rights (CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; and authorities therein cited).

b. That accused's announcement, after the explanation of his rights, that he wished to remain silent was the result of a misunderstanding on his part, is evident from the fact that an unsworn statement had already been prepared for presentation on his behalf. Defense counsel's interpretation of the announcement as stating a desire to remain physically silent and to allow counsel to read the statement was within his sound discretion, as the favorable contents of the statement indicate.

6. Accused's unauthorized absence from his organization for a period in excess of 10½ months as alleged fully warranted

the court in inferring an intent not to return and in finding him guilty of desertion as charged (MCM, 1928, par. 130a, p.143;CMETO16290'Donnell, 5 B.R. (ETO) 119 (1944).

7. The charge sheet shows that accused is 25 years of age and enlisted 13 March 1940 to serve for three years. 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 as commuted.

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

Edward L. Stevens, Jr. Judge Advocate

B. H. Berry Jr. Judge Advocate

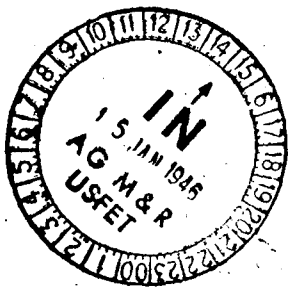
David P. Cannon Judge Advocate

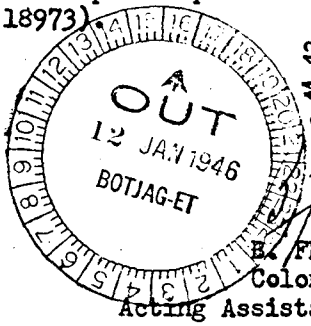
1st Ind.

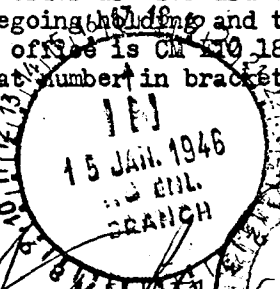
War Department, Branch Office of The Judge Advocate General with the European Theater. 12 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

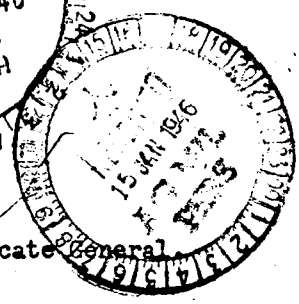
1. In the case of Private CLAUDE M. MOEN (6582023), Headquarters Company, 1st Battalion, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18973. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18973).









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

SPJGF CM 313197 2d Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 20 1946

TO: The Adjutant General (Enlisted Branch), Washington 25, D. C.

1. In the case of Private Claude M. Moen (6582023), Headquarters Company, 1st Battalion, 30th Infantry, attention is invited to the foregoing holding by the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, that the record of trial is legally sufficient to support the sentence; and to the approval of said holding by the Acting Assistant Judge Advocate General in charge of said Branch Office. Under Article of War 50½, execution of the sentence is now authorized.

2. Accused was tried by a general court-martial convened by the Commanding General, 3d Infantry Division, and found guilty of desertion on 3 July 1944 terminated on 22 May 1945, in violation of Article of War 58. He was sentenced to be shot to death with musketry. The

reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. As appears from the foregoing, the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, with the concurrence of the Acting Assistant Judge Advocate General in charge of the Branch Office, held the record of trial legally sufficient to support the findings and the sentence as commuted and confirmed, and the record was forwarded to the Commanding General, United States Forces, European Theater, for further action. That officer, due to the suspension of his confirming powers, did not promulgate the proceedings or order execution of the sentence. The required action may be accomplished by publication of a War Department general court-martial order.

3. The evidence shows that accused deserted in Italy a short time before his unit participated in the invasion of Southern France, and remained absent for about ten and a half months. He stated that he had taken part in the campaigns in North Africa, Sicily and Italy and had been in combat for 100 days. He was nervously exhausted and had been hospitalized for malaria. He had been refused permission to marry a girl who had become pregnant.

4. In view of all the circumstances and in order to bring the sentence within the limits of War Department postwar clemency policies, it is recommended that the term of confinement be reduced to seven years, that the place of confinement be changed to a United States Disciplinary Barracks, and that a War Department general court-martial order promulgating the proceedings and ordering execution of the sentence as modified be published in accordance with the inclosed draft.

5. Return of this correspondence, with copies of the published general court-martial orders, is requested.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial and accompanying papers
2 Draft of GCMO

(Confinement reduced to seven years and sentence as modified ordered executed. G.C.M.O. 170, WD, 11 June 1946).

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

BOARD OF REVIEW NO. 1

12 JAN 1946

CM ETO 18990

UNITED STATES	)	3RD INFANTRY DIVISION
v.	)	
Private CLARENCE J. RYAN (35876861), Company A, 7th Infantry	)	Trial by GCM, convened at Bad Wildungen, Germany, 18 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD of REVIEW NO. 1
STEVENS, DEWEY and CARROLL, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Clarence J. Ryan, Company "A", 7th Infantry, did, near La Rosierr, France, on or about 23 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he came into military control at a place unknown on or about 21 November 1944.

Specification 2: In that * * *, did, near Rimling, France, on or about 14 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he returned to military control at Lyon, France, on or about 15 April 1945.

He pleaded not guilty and , two -thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. Evidence was introduced of two previous convictions, one by summary court for absence without leave for three days, and one by a special court-martial for absence without leave for seven days, both in violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for an appropriate period of time, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority for clemency, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and witheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution introduced into evidence an extract copy of the morning report of Company A, 7th Infantry, with an entry carrying accused as absent without leave on 23 September 1944 (R7; Pros. Ex.A). On that day Company A was engaged in severe fighting with the enemy at Rupt sur Moselle, France, and planning to cross the Moselle river. Accused knew of the planned crossing, as did everyone in the company. The crossing was made on 23 September after accused left. He was not present in the company during the period 23 September to 21 November (R8,9,14).

On 14 March 1945 accused was a member of Company A, 7th Infantry, which was then moving up to a forward assembly area in the vicinity of Rimling, France. Accused's platoon were told that they were going to attack the enemy and the customary preparations for an attack were made. Accused was present at the briefing and participated in the preparations for the attack. He was not present when the attack was made, although he did not have permission to be absent. He was not present with the company from that

day until 15 April 1945(R15-18). Testimony was stipulated by and between the prosecution, the defense, and accused that the latter returned to military control at Lyon, France, on 15 April 1945 (R18; Pros. Ex.B).

4. Accused, after an explanation of his rights, elected to make an unsworn statement (R19). He said he joined the 3rd Division in Italy in June 1944. He participated in the invasion of Southern France on 15 August and was slightly wounded by a small shell fragment. He was not hospitalized. After 40 days of combat he became nervous so he was sent to the rear for a rest. However, the shell fire was "too much" for him and he left. He returned to combat voluntarily and served for 80 days until he came to the breaking point. He became so "intolerant" to shellfire that he could not control the fear that gripped him. He never left his organiztion with the intent to avoid dangerous or hazardous duty (R19-20).

5. Accused was charged in two specifications with absence without leave with intent to avoid hazardous duty, viz., combat with the enemy. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par. 130a, p. 142). The absence without leave was established in each case by competent substantial evidence and there remains only the question as to whether there is substantial evidence in the record to warrant a finding that accused absented himself with the specific intent alleged.

This intent may be established by accused's admissions (CM ETO 9597,Jusiak,Jr.; CM ETO 14359, Hart; CM ETO 16573, Sabella) or by a showing that he could not have failed to know that hazardous duty was impending at the time when he absented himself (CM ETO 8147, Pierce; CM ETO 9857, Harrell; CM ETO 14510, Collins). Although accused in his unsworn statement denied that he had left his organization with the intent to avoid hazardous duty he made certain admissions as to his inability to endure combat from which the court could infer the contrary. Moreover, there was evidence that on both occasions he knew that his platoon was about to attack the enemy and that with that knowledge he absented himself before the attack was made. This sufficiently establishes the intent as alleged (CM ETO 12726, Dye; CM ETO 14510 Collins; CM ETO 15227, Mason).

6. The charge sheet shows that accused is 20 years 10 months of age and was inducted on 24 September 1943 at Cincinnati, Ohio, to serve for the duration of the war and six months. He had no prior service.

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

(300)

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Edward L. Stevens, Jr. Judge Advocate

B. L. Lewey Jr Judge Advocate

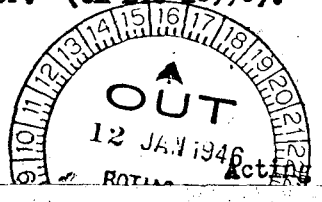
Donald K. Carroll Judge Advocate

1st Ind.

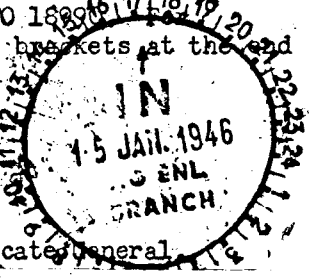
War Department, Branch Office of The Judge Advocate General with the European Theater. 12 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private CLARENCE J. RYAN (35876861), Company A, 7th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18990. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 18990).



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



(Confinement reduced to seven years, Sentence as commuted and modified ordered executed. GCMO 169 , W.D. , 11 June 1946).

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

BOARD OF REVIEW NO. 1

CM ETO 19004

12 JAN 1946

U N I T E D S T A T E S	) SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER.
v.	)
Private ERNESTO GUERRA (38339194), 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot (formerly of Company A, 9th Infantry)	) Trial by GCM, convened at Paris, France, 28 November 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for three years. Loire Disciplinary Training Center, Le Mans, Sarthe, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ernesto Guerra, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, United States Forces, European Theater, (then of Company A, 9th Infantry Regiment), did, at or near 2nd Medical Battalion Clearing Station, Harperscheid, Germany, on or about 7 February 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at or near Verviers, Belgium, on or about 11 July 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification excepting the words "desert", "in desertion", and "he was apprehended at or near Verviers, Belgium," substituting therefor, respectively the words "absent himself without leave from" and "without leave", and not guilty of the Charge but guilty of a violation of the 61st Article of War. Evidence

was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 1283, Headquarters, Seine Section, Theater Service Forces, European Theater, 16 December 1945.

3. The prosecution, over the defense's objection that it was hearsay, introduced into evidence an extract copy of a morning report of accused's organization (Company A, 9th Infantry), containing the following entry:

"38339194 Guerra, Ernesto Pvt Fr slightly sk
2nd Med Bn Clr Sta (Non-Battle LD) to AWOL 0800
7 Feb/45 SSN:745" (R6; Pros. Ex. A)

No other evidence relevant to the charge was adduced.

4. Accused, after an explanation of his rights, made an unsworn statement through his counsel (R11, 15). It contained nothing revelant to the issues of this case.

5. In CM ETO 15233, Hanley, the prosecution introduced an extract copy of a morning report of accused's organization (Company F, 11th Infantry) with an entry pertaining to the accused in that case as follows:

"Fr sl sick (LD) NBC Co D 5th Med Bn Clr sta
to AWOL 17 Nov 44."

We held that the admission of that extract copy was error because the lack of personal knowledge of the extract was apparent on its face. We regard the two cases as indistinguishable. The fact that a personnel officer signed the entry in the Hanley case, while presumably accused's commanding officer signed it in the case at hand, is immaterial. It follows that the record is legally insufficient to sustain the findings and the sentence.

6. The charge sheet shows that accused is 31 years six months of age and was inducted 20 November 1942 to serve for the duration of the war and six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offense. For the foregoing reasons, the Board of Review is of the

opinion that the record of trial is legally insufficient to sustain the findings and the sentence.

Edward L. Stevens, Jr. Judge Advocate

B. H. Levy Jr. Judge Advocate

Donald R. Carroll Judge Advocate

(306)

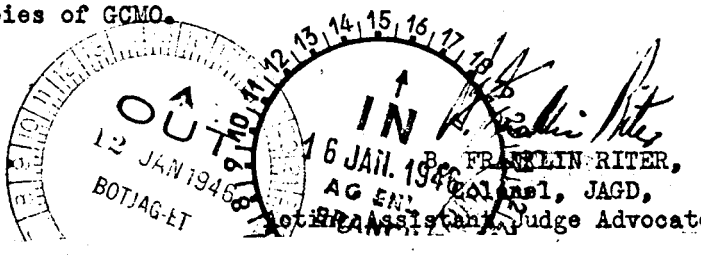
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private ERNESTO GUERRA (38339194), 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot (formerly of Company A, 9th Infantry).

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

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



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

(Findings and sentence vacated. GCMO 175, W.D. 12 June 1946).

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

BOARD OF REVIEW NO. 4

19 JAN 1946

CM ETO 19056.

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER.
v.	
Private First Class HENRY WITKOWSKI (32656648), 3274th Ordnance Base Depot Company	Trial by GCM, convened at Marseille France, 12 and 15 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct.

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

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

2. Accused was arraigned upon seven specifications alleging either the larceny or unlawful sale, on various named dates during 1945, of specified numbers of either automobile batteries or spark plugs, alleged to be property of the United States, furnished and intended for the military service thereof, in violation of Article of War 94. Each specification originally alleged that the offense charged therein was committed by accused "in conjunction with Private First Class Earl B. Davis." Accused pleaded not guilty to the Charge and specifications, and was found guilty of four specifications and the Charge, and not guilty of three specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be

confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority disapproved the findings of guilty of one specification, approved in part the findings as to the remaining three specifications, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution's first witness, upon whose subsequent testimony the conviction is chiefly dependent, was Mrs. Earl B. Davis, wife of Private First Class Earl B. Davis, in conjunction with whom accused was alleged to have committed the offenses. At the beginning of her testimony, the defense moved that she be declared incompetent to testify, contending that Mrs. Davis could not testify against her husband, and could not disclose confidential communications between her husband and her, without their joint consent (R8-10). The law member ruled that the witness was competent to testify, but that she would not be required to testify if she or her husband claimed her privilege of not testifying (R14). Upon motion of the prosecution, the name of Earl B. Davis was stricken from the specifications (R15). After explaining to Mrs. Davis that she was not required to testify at all, and after she had expressed her willingness to testify (R15-17), the law member directed the trial judge advocate to secure a statement from her husband to the effect that he did not object to his wife testifying as to any confidential communications between them (R17-18). The trial judge advocate then requested and was granted permission by the law member to "secure a ruling on this question about whether or not Mrs. Davis should testify" from the convening authority, contending that such practice was authorized by paragraph 64a of the Manual for Courts-Martial (R18-19).

Following a three-day adjournment, the court met and read a letter signed "By Command of" the convening authority, which was attached to the record as an exhibit (R25, Court's Ex. 2). The letter, addressed to the president of the court, discussed the question raised, and advised, among other things, that Mrs. Davis might testify, regardless of her husband's non-consent, as to six of the offenses alleged to have occurred prior to her marriage, the date of which "can be established during the trial of the case." With respect to the remaining offense, the letter pointed out that the non-consent of the husband is immaterial unless a specific question relates to a confidential communication between husband and wife. It was also pointed out that Davis is

not a "co-accused" in the case, and that his statement (which shows non-consent (Court's Ex. 1)) should be made a part of the record of trial (Court's Ex. 2).

4. A discussion of the evidence adduced at the trial, and of the correctness of the advice given by the convening authority, is unnecessary since under military precedents the unauthorized interference here made by the convening authority with the functions of the court, at the request of the prosecution and with the consent of the court, require setting aside the findings of guilty and the sentence. It is noted that the defense did not request or invite the action of the convening authority, although defense counsel did request that the record be typed in order that such authority might "have the whole picture" (R19).

In CM ETO 18703, Cover, in denouncing action by the convening authority in rendering an "opinion" as to the admissibility of evidence and other matters during the course of a trial, the Board of Review stated:

> "The theory of our military jurisprudence is that a trial by court-martial is a judicial proceeding in which the functions of the court and the convening authority are separate and independent. Courts-martial 'pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law' (Runkle v. United States, 122 U.S. 543,558,30 L.Ed. 1167,1171 (1887)). The Boards of Review have recognized repeatedly that it is the function of the court alone (with certain authorized exceptions) to pass upon questions arising during trial, and that the complete independence and freedom of its members from all improper external influence, particularly that of the commanding general, must be beyond all doubt and suspicion. (CM ETO 14349, McCormick; CM 216707, Hester, 11 BR 145 (1941); CM 253209, Davis, 34 BR 297 (1944); CM 272457, Smith, 46 BR 281 (1945)). Although Manual for Courts-Martial, 1928, par.64, p.50 and par. 74, p.57, provide respectively that the convening authority may rule during the course of trial on 'special pleas or other similar objections' where as a result of the court's action thereon the trial cannot proceed further, and that he may also during the course of trial advise the court on the procedure to be taken when the evidence is not responsive to the charges but indicates the commission of an

offense not alleged, these provisions have been held not to confer power on him to rule on the acceptance or rejection of evidence (CM 272457, Smith, 46 BR 281 (1945); cf. CM ETO 15212, Hovis; CM ETO 15216, Miller).

It has heretofore been held that unauthorized intursion by the convening authority into the exclusive province of the court constitutes error prejudicial to the substantial rights of the accused (CM ETO 14349, McCormick; CM 216707, Hester, 11 BR 145 (1941); CM 253209, Davis, 34 BR 297 (1944); CM 272457, Smith, 46 BR 281 (1945)). In the Smith case, supra, for example the Board of Review held that the action of the convening authority in instructing the court to admit certain documentary evidence was prejudicial error, and said:

'The Board is compelled to conclude that there was an unauthorized interference on the part of the appointing and reviewing authority with the functions of the court, which in itself constituted prejudicial error. * * *

* * *

* * * it is only when the court has completed its labors that the case is presented for approval to the reviewing authority, who is then vested with authority to act. Any instruction theretofore given by the appointing or reviewing authority on the admissibility of evidence has the effect of being a mandate which is not merely not authorized, but at least inferentially prohibited.'"

It being clear that the convening and reviewing authority here had no power to rule upon the matters contained in his letter of advice to the court, under the authorities cited and discussed above, the findings of guilty and the sentence cannot be allowed to stand (see also CM MTO 7339, IV Bull. JAG 422-423).

5. The charge sheet shows that accused is 22 years nine months of age and was inducted 5 December 1942 at New York City, New York. He had no prior service.

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

Lester A Dameron Judge Advocate

John R. Anderson Judge Advocate

John A. Bunn Judge Advocate

(312)

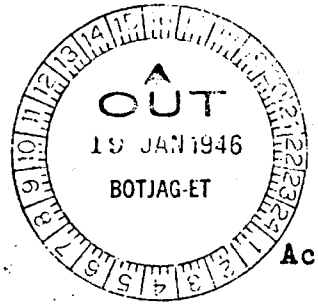
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 19 JAN 1946 TO: Commanding General, Delta Base Section, Theater Service Forces, European Theater, APO 772, U.S. Army.

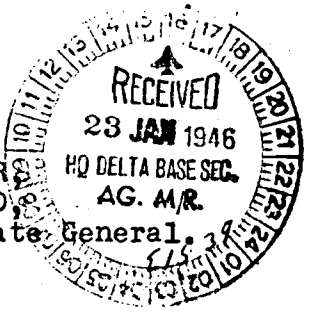
1. In the case of Private First Class HENRY WITKOWSKI (32656648),3274th Ordnance Base Depot Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. The error which results in the nullifying of the findings of guilty and the sentence does not prohibit a re-trial of accused. With respect to the question of the eligibility of Mrs. Davis as a witness for the prosecution and the right of accused to assert the privilege, it is suggested that they should be the subject of careful pre-trial research and brief work.

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 19056. For convenience of reference, please place that number in brackets at the end of the order:(CM ETO 19056).



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



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

BOARD OF REVIEW NO. 4

7 FEB 1946

CM ETO 19100

U N I T E D S T A T E S	SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private ROCCO J. GALLETTA (32022460), Attached-Unassigned, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot	Trial by GCM, convened at Paris, France, 1 November 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON and MAYS, 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 Rocco J. Galletta, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, United States Forces, European Theater, did, at or near Company A, 8th Infantry, 4th Infantry Division, Huberville, France, on or about 23 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Lyon, France, on or about 8 August 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 of the Specification except the words "was apprehended at or near Lyon, France",

substituting therefor the words "came under military control". 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 twenty-five (25) years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, 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 consists of an extract copy of the morning report of Company A, 8th Infantry, for 3 July 1944, admitted over objection of the defense, which shows accused from "dy to drpd from rolls 23 June 44 (MIA in France)" (R5, Pros. Ex. A). A pre-trial statement allegedly made by accused was excluded by the law member (R6-9). No evidence was offered to show the date of, or circumstances surrounding, accused's alleged return to military control. The court took judicial notice of the fact that accused was under military control on the date of trial, 1 November 1945 (R9). A motion by the defense for a finding of not guilty was overruled (R9).

4. After his rights as a witness were explained to him, accused elected to remain silent (R10-11).

The defense introduced in evidence without objection a certified true copy of a War Department record which recites that accused was reported officially as missing in action as of 23 June 1944, and that, pursuant to a named act of Congress, his death is presumed to have occurred on 24 June 1945, in line of duty and on duty status. Under a heading "Remarks", the following statement appears:

> "Circumstances of disappearance: Soldier failed to return to his unit after meeting stiff resistance from the enemy in the vicinity of La Glacerie, France" (Def. Ex. 1).

5. Assuming that the morning report entry was properly received in evidence, the findings of guilty are predicated solely upon the facts (1) that accused was listed as missing in action and dropped from the rolls on 23 June 1944, and (2) that he was under military control at the time of trial. In CM ETO 18741, Lunger, we held that a finding of guilty of desertion was not supported by a showing merely that the accused was listed as missing in action and thereafter absent from his organization for five months, because from such entry it is equally as reasonable to infer that he was a prisoner or a battle casualty as to infer that he was absent without leave. It is true that other circumstances may appear, such as that an accused surrendered himself to military police, which may negative the reasonable hypotheses of innocence arising from the "MIA" entry, and warrant the court in finding circumstantially that the accused was in fact absent without leave during the period of his absence (see CM ETO 12726, Dye; CM ETO 18747, Dolberry). However, the mere fact that the accused is on trial in court is not inconsistent with the reasonable

inference that his absence was excused and not wrongful.

We might also point out that even if the entry showing accused was missing in action were sufficient, in the absence of explanation, to establish his initial absence without leave, there is no proof as to the time of termination of the absence. Where the prosecution relies upon the duration of an unauthorized absence to support an inference of intent to desert, such duration must be shown affirmatively, as any other fact essential to establish guilt of the accused (CM ETO 14735, Clark and Ashlock).

6. The charge sheet shows that accused is 30 years three months of age and was inducted 24 February 1941 to serve for the duration of the war plus six months. He had no prior service.

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

Lester A. Dameron, Judge Advocate.

John R. Anderson, Judge Advocate.

Thomas J. Mayo, Judge Advocate.

RESTRICTED

(316)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 FEB 1946 TO: Commanding General, Western Base Section, Theater Service Forces, European Theater, APO 513, U. S. Army.

1. In the case of Private ROCCO J. GALLETTA (32022460), Attached-Unassigned, 198th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. The error which results in the nullifying of the findings of guilty and the sentence does not prohibit a re-trial of accused. If re-trial is had, it should be directed in the final action in this case.

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 19100. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 19100).

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

(317)

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

BOARD OF REVIEW NO. 4

15 FEB 1946

CM ETO 19139

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Augsburg, Germany, 22 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct.
Corporal ROBERT THOMPSON (34942798), 3286th Quartermaster Service Company (formerly 4461st Quartermaster Service Company)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Robert Thompson, 4461st Quartermaster Service Company, did, at the Furstenfeldbruck Airport Barracks, on or about 28 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Staff Sergeant Wilbert H. Ooley, Battery C, 160th Field Artillery Battalion, a human being, by shooting him in the back with a U. S. carbine, calibre 30, thereby inflicting a mortal wound from which said Staff Sergeant Ooley did die.

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 wasintroduced. 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, Seventh United States Army, approved the sentence and

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

3. The evidence for the prosecution shows that at about 0020 hours on the night of 27-28 May 1945, accused, while driving with another colored soldier and four Polish nationals in a civilian automobile in Olching, Germany, was stopped by a "roving patrol" consisting of Staff Sergeant Ooley, the deceased, and two other soldiers, whose duties included the impounding of civilian vehicles driven by soldiers without proper authorization (R7,20-21). Deceased asked accused to produce such authorization and, after some conversation, accused, at the direction of the patrol, left his companions in the automobile which was parked on the roadside, and accompanied the patrol to his barracks at Furstenfeldbruck, eight to ten kilometers away, for the purpose of securing the proper "papers", which he claimed he had left there (R8,21, 29,51). Accused had been drinking but was not drunk, and "seemed pretty mad about the idea", asserting that the patrol had no authority to take the vehicle and that he "would take a court-martial" before he would give it up (R8,15,33). Upon reaching the barracks, the patrol vehicle was parked near the doorway and accused and the patrol members entered the barracks, passing a guard sitting on the inside of the door. Accused woke several soldiers and inquired for "Joe", who supposedly had his "driving permit" (R9-10,16.22,45). Accused appeared angry with the members of the patrol, but was laughing and talking loudly, and stated that "these sons of bitches" wanted to take his automobile on which he had "papers" and that he would "rather face a court-martial" before they took it away (R22,30,45). When he was unsuccessful in locating the papers, the members of the patrol decided to see his commanding officer or the officer in charge, and left the barracks at about 0100 hours (R14,18,24,27). Accused calmly picked up his carbine, which had a clip in it, cocked it and slung it over his shoulders, and followed the patrol to the door (R10-11,22-24,32,43). At the patrol car, each of the patrol members other than deceased saw accused standing in the door of his barracks with the carbine in his hand (R11,23). Deceased started the patrol car and began driving it away from the barracks (R24). After it had proceeded in low gear from 20 to 50 yards from the barracks, and while it was in a position where the driver could be seen through a curtain of the vehicle from the barracks door, two shots were heard from the direction of the door (R12-13,24,26). Staff Sergeant Ooley began groaning and fell over, saying, "Oh, I'm hit" (R12,24).

The guard, who was seated alone about eight feet inside the barracks door, and who heard the shots as the patrol car drove away, testified that he did not fire his carbine and did not know what direction the shots came from, but that "It sounded like right by me", and on the ground level, outside the building (R38,43,44). He went outside three or four minutes after the shots

were fired, but saw nobody, and accused did not re-enter the building that night (R39).

Deceased was taken to an aid station and on examination was found to be dead (R12,24). His death resulted from a single bullet wound extending from his back to a point near his heart (R64-65). Testimony showed that the shot came from about the same level as the bullet hole (R66), and a witness concluded that from a bullet hole found in the patrol vehicle to the rear of the driver's seat, and the position of the vehicle, it was "possible" that the shots were fired from the doorway of accused's barracks (R17).

At about 0130 hours, the two other patrol members returned to accused's vehicle in Olching and found nobody in or near it (R13,27). After 0200 hours everyone in accused's barracks was present at a bed check except accused (R54). Thereafter, until 0530 hours, a relief patrol searched several times for accused between his barracks and Olching, but he was not found and wasnot seen around his vehicle (R28,61-63). At about 0540 hours he was seen entering his barracks with his carbine slung over his shoulder. When arrested, he denied shooting the deceased, and the accusation did not seem to "phase" him (R61-62). The chamber of his carbine contained burned powder, and the magazine, which would hold 15 cartridges, contained 10 cartridges (R58,63).

At about 1400 hours on 27 May, accused had cleaned and oiled his carbine and placed it on a table in the company area for inspection. At about 1800 hours the same day, he had carried it back with him to his barracks (R51-52). At about 0930 hours on 28 May, a .30 caliber carbine cartridge case was found about one foot in front of the doorway of accused's barracks (R28). It was stipulated that it was impossible to determine from a ballistics test whether accused's weapon fired this cartridge (R34).

At about 1900 hours on 28 May, the date of the shooting, accused told an officer that he had shot at rabbits about twice and had given a rabbit to a Pole "night before last". On the night of the killing accused admitted hearing the shots outside the door of his barracks, but stated that he did not go outside (R89-91).

4. After his rights were explained to him, accused elected to testify (R67). He admitted disassembling his rifle on 27 May, but had no rod to run through it (R68). He had fired it "three or four days" earlier, or "a month or two months ago" (R70,72). At about 1900 hours he took the rifle across the road, and with one shot killed a rabbit, which he took to a "Poles' house" (R68). Later he and another soldier went to see some other Poles. He admitted being stopped by the patrol but denied that either he or the deceased was angry, or that he stated he would prefer a court-martial rather than give up his car (R69,77). After he could not find the soldier to whom he had given the permit, he was told by deceased he could come down in the morning at 0800 hours. Accused replied that he had to return that night to and stay with his vehicle and the "stuff" in it, and slung his carbine and started walking out of the barracks (R69). He admitted that he "reversed" the carbine to make sure it was not loaded, and put a clip in it (R69). Before he got outside the door he heard two shots, and asked the guard, "What was that?". The guard went

outside and stated that he saw nothing. Accused then walked out of the open door and across the airstrip and to his car (R69). After stating on cross examination that he did not see the patrol vehicle after going outside, he admitted that he saw it stopped about 150 yards from the barracks (R81). He arrived at his car about 0300 hours and spent most of the night covered with blankets in the back seat (R69,77-78). At about 0530 hours he awoke and returned to his barracks where he was arrested and accused of killing the sergeant. He knew he had not done this, and denied the accusation (R69). He did not recall telling the officer about shooting rabbits.(R79-80).

For the defense, Lea Dabolins testified that during the evening of 27 May accused gave her a rabbit which had been killed with a bullet and which was still warm (R84-85). It was stipulated that accused's commanding officer, if present, would testify that accused's character and efficiency as a soldier are excellent, and that another officer of accused's organization would testify that accused was trustworthy, reliable and well-liked by members of the organization (R88,Def.Exs.A,B).

5. The evidence for the prosecution shows that Staff Sergeant Coley, while in the performance of his duties as a member of a patrol at the time and place alleged, was shot in the back with a rifle, as a result of which he died shortly thereafter. While the record fails to show the first name or initials of the deceased, his identity is otherwise unequivocably established throughout the record of trial, so that this lack of proof is of no significance (CM ETO 16623, Colby).

While accused denied that he shot the deceased, it appears from other convincing testimony that shortly before the fatal shot was fired, in the early hours of the morning, accused was angry with deceased and followed deceased and other members of the patrol to the door of his barracks with a loaded carbine in his hand, and that within a few seconds the fatal shot was fired from the vicinity of and just outside the barracks door. The physical facts disclosed by the record of trial, together with the apparent state of mind or motive of accused, his conduct following the firing of the shots, which he admittedly heard, and the inconsistencies in his testimony and defense, constitute abundant proof from which the court could conclude beyond a reasonable doubt that he fired the fatal shot.

The record is devoid of any evidence indicating any legal justification or excuse for the firing of the shots. Mere anger, in and of itself, is clearly not sufficient to reduce the offense to manslaughter; and whether accused was activated by uncontrollable passion or by mere anger was, under the circumstances disclosed by the record, a question of fact for the determination of the court (CM ETO 292, Mickles; CM ETO 3042, Guy, Jr.; CM ETO 4497, DeKeyser; CM ETO 17441, Hall, Jr.). Malice being presumed from accused's intentional and unlawful use of a deadly weapon in the manner shown, the evidence fully supports the findings of the court that accused fired the fatal shot with malice aforethought as charged (CM ETO 1901, Miranda; CM ETO 1941, Battles; CM ETO 3932, Kluxdal; CM ETO 6159, Lewis; CM ETO 7815, Gutierrez; CM ETO 16397, Parent; CM ETO 17106, Conley).

6. The charge sheet shows that accused is 22 years seven months of age, and was inducted 17 May 1944 at Fort Benning, 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 as commuted.

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

Lester A. Tamelson Judge Advocate

John R. Anderson Judge Advocate

Thomas J. Mayo Judge Advocate

(322)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 FEB 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Corporal ROBERT THOMPSON (34942798), 3286th Quartermaster Service Company (formerly 4461st Quartermaster Service Company), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 19139. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 19139).

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

SPJGF CM 312268

2d Ind.

Hq ASF, JAGO, Washington 25, D. C. MAY 9 1946

TO: The Adjutant General (~~Enlisted Branch~~), Washington 25, D. C.

1. As appears from the basic communication Corporal Robert Thompson, 34942798, 3286th Quartermaster Service Company (formerly 4461st Quartermaster Service Company), was tried at Augsburg, Germany, on 22 June 1945, by a general court-martial convened by the Commanding General, Seventh Army, upon a Charge and Specification of murder in violation of Article of War 92. He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seventh Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it

to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings and the sentence as commuted and confirmed. The Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review, and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for further action. That officer, due to the suspension of his confirming powers, did not promulgate the proceedings or order execution of the sentence. The required action may be accomplished by publication of a War Department general court-martial order.

2. It is recommended that a War Department general court-martial order promulgating the proceedings and ordering execution of the sentence be published in accordance with the inclosed draft.

3. Return of this correspondence, with copies of the published general court-martial order, is requested.

HUBERT D. HOOVER
Colonel, JAGD
Assistant Judge Advocate General

2 Incls
1. R/T and accompanying papers
2. Draft of GCMO

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 174, W.D., 12 June 1946).

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

BOARD OF REVIEW NO.1

26 JAN 1946

CM ETO 19179

UNITED STATES	)	XX CORPS
	)	
v	)	Trial by GCM, convened at Starnberg, Bavaria, Germany, 27 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Technician Fifth Grade BENJAMIN F. VARNER (34757928), Company C, 1697th Engineer Combat Battalion	)	

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

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

2. Accused was found guilty of committing an assault, at the time and place alleged, upon a named victim by willfully and feloniously shooting him with a pistol. It has been pointed out that the offense of assault with a dangerous weapon is not listed in the table of maximum punishments (MCM, 1928, par. 104c, pp. 97-101), nor is it specifically denounced by the Criminel Code of the United States, but is denounced in section 22-502 of the District of Columbia Code (1940), which provides for a punishment of not more than ten years confinement for assault with a dangerous weapon (CM 230478, Maynor, 17 B.R. 375 (1943)). However, since the table provides a maximum punishment of five years for assault with intent to do bodily harm with a dangerous weapon, the maximum for the offense found by the court is not to be construed as more than five years confinement. The sentence in the present case was therefore authorized. The offense for which accused was convicted is technically a violation of the 96th Article of War.

Edward L. Stevens, Jr. Judge Advocate

B. V. Dewey Jr. Judge Advocate

Daniel K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 5

4 FEB 1946

CM ETO 19181

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Wasserburg, Germany, 7, 8 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private PAUL L. SHULLER (44017876), Battery B, 84th Field Artillery Battalion	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Paul L. Shuller, Battery B, 84th Field Artillery Battalion, did at Gars, Bavaria, Germany, on or about 12 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Melvin D. Sherbert, a human being by shooting him with a pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the

term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. At about 0030 hours on 12 November 1945 the accused, a member of Battery B, 84th Field Artillery Battalion, was in the enlisted men's club above the Martin Strasser Gasthaus at Garrs/Inn, Bavaria, Germany (R8,9,11, 15). Between 0030 and 0100 hours the accused engaged in a scuffle with Private First Class Plunkett which was stopped by the intervention of Private Melvin D. Sherbert, the deceased, and others (R8,9,11,12,16). At this time, accused threatened to kill the deceased (R9,12) and pulled a knife against another soldier who had intervened to stop the scuffle, which knife was taken away from him (R9,12,36). Accused thereafter drank a glass of beer and departed stating that he was going to bed (R12,36). After the scuffle the deceased went to a booth with Plunkett where he remained except for two short intervals when he went outside (R17). Only beer and Coca Cola were sold at the club (R21) and accused was observed only to have been drinking a glass of beer (R11,21). At the time of the scuffle the accused did not appear to be under the influence of alcohol (R11,36,37,41).

Sergeant French, who shared a room with accused and deceased, was awakened at about 0200 hours when accused entered the room and turned on the lights (R12,13). He saw accused take a .32 calibre Mauser pistol from a box under his bed and put it in his jacket. He asked accused where he was going with the gun and accused replied that he had had a little trouble with Plunkett and deceased and that they had better leave him alone (R13, 14). Sergeant French noted that accused seemed to be in a hurry and spoke a little more loudly and sharply than usual but handled himself well, walked straight, and that his speech was not slurred (R14,38,39). The deceased entered the room about five minutes after accused had left with the gun and Sergeant French warned deceased as follows: "You better be careful. I don't know if Shuller was drinking or not, but he has a gun and you can't tell if he had been drinking what he might do." (R25). Deceased went back and rejoined Plunkett in the booth at the club. Plunkett, deceased, another soldier and a German girl later left the club and went downstairs into a hallway leading to the kitchen of the business place located on the lower floor. As they stood there talking for a few minutes the accused walked by and as he passed them deceased asked him whether he had to get a gun or whether he could not fight without a gun (R17).

Deceased and his party entered the dining room a few minutes later and shortly thereafter accused and deceased were observed to be in an argument in the dining room (R17,22). Several soldiers present attempted to intervene and heard deceased say to accused "If you try to use a gun on me I'll shove it down your throat" and accused replied "No, you won't, you wouldn't get a chance" (R17). Deceased and accused pushed aside the soldiers who were attempting to intervene and deceased took a step toward accused who jerked out his pistol and fired two or three shots point blank at deceased who was facing him at a distance of two to three feet (R17,18,19,22,24). Deceased did not raise his hands as he moved forward and had no weapon (R20,23,24). He

sank to the floor and accused departed (R18,19). Plunkett went to the orderly room to report the shooting and to secure a doctor (R20,45). As Plunkett left the orderly room at about0225 hours the accused walked in and said to West, the first sergeant, "Sergeant, I shot Sherbert" (R45). Accused's walk and speech appeared to the first sergeant to be normal. Sergeant West thereupon placed accused in arrest and under guard in a room at the CP (R46). The deceased was placed on a couch in the dining room of the Gasthaus where he was attended by a German doctor and later at 0340 hours by an American medical officer who then pronounced him dead as a result of two bullet wounds (R6-10).

Accused was first confined in a room at the "CP" with three other prisoners (R68,69). One of the three testified that accused in his opinion was pretty drunk and walked "kinda zig zag" (R69-71). The other two testified that in their opinion the accused was suffering from shock and that his hands and whole body were shaking (R72,74,77,79). Accused told them that he had shot Sherbert and that "I was drunk and didn't know what I was doing" (R72,77,78). He also said that "the guys would shoot him if they saw him there" and asked that the lights be turned out (R71,77). After walking back and forth in the room he sat on the edge of a bed and a minute later fell off on the floor and passed out (R70,77). The battery executive officer entered the room about 0230 hours and found accused lying on the floor. He picked him up, placed him on a cot and attempted to wake him up by slapping him and throwing water in his face but although his eyes fluttered he did not wake up (R50). The executive officer sent for a doctor because he was of the opinion that accused was suffering from shock from the way his body was trembling and shaking, although his facial appearance was very natural and normal (R51). A German civilian doctor examined accused at about 0245 hours and in his opinion the accused "was probably suffering from shock, and smelled from alcohol" (R27). His face was red, his pulse was not steady and his heart was not very good so the doctor gave him a shot of sympasol, a drug similar to adrenalin (R27,66,67). This doctor testified that emotional shock induced by the realization that he had killed a man might be sufficient to produce the state in which he found accused; that it would be more probable if the person were a highly emotional type and that alcohol might have contributed to the condition (R27,67). Accused was later examined by an American medical officer who found him still unconscious and was of the opinion that his condition was a result of the drug previously administered by the German civilian doctor. This witness testified that he smelled no alcohol and did not examine accused for evidence of alcohol (R63-65).

4. The accused, after being fully advised of his rights as a witness, elected to make a sworn statement (R28). He stated that he had known deceased for approximately three months and that their relations had been friendly. On the evening of 11 November 1945 he drank half of a Coca-Cola bottle of schnapps and some beer prior to going on guard at 9:00 o'clock. After coming off guard at 1100 o'clock he returned to the beer house under the club where in approximately 15 minutes he finished the remaining half of a Coca-Cola bottle of schnapps, one other Coca-Cola bottle of schnapps and a bottle of wine. That he did not know if anyone witnessed his drinking of the schnapps and "after that I was getting so drunk I don't remember what happened" (R29,30). On

cross-examination, he stated that he remembered nothing of the events of the evening after drinking the schnapps and did not know that he had killed deceased until he was so informed the next day (R32,41).

The wife of the proprietor of the Gasthaus where the shooting occurred testified that her husband gave the accused a Coca-Cola bottle about three-quarters full of schnapps between 5:00 and 6:00 o'clock in the afternoon of 11 November 1945 (R53,56). That she saw accused drink this with a girl in the Gasthaus prior to leaving at 6:30 o'clock. He returned to the kitchen of the Gasthaus for several minutes around 9:00 o'clock before he went on guard but had not thereafter returned when she lay down to sleep at about 12:30 that night (R54,55).

A German girl called as a witness testified that she had several drinks of schnapps from a Coca-Cola bottle with accused in the Gasthaus in question around 5:00 o'clock in the afternoon of 11 November 1945. Accused left to eat and later returned to the club upstairs where they danced together between 8:00 and 9:00 o'clock. During this time she drank Coca-Cola and the accused drank several beers. Accused left to go on guard at 9:00 o'clock and she next saw and danced with him at the club between 11:00 and 11:30 o'clock. She noticed that he had had something to drink and when she asked him what he had drunk, he replied "a little schnapps" (R58,59). That she did not drink or see accused drink any schnapps except from the Coca-Cola bottle at 5:00 in the afternoon (R63).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of intention to cause the death of, or grievous bodily harm to any person (MCM, 1928, par. 148a, pp. 162-164). The law presumes malice when 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). According to the testimony of accused there had been no ill will between himself and decedent until the deceased intervened to stop a scuffle between accused and a third soldier an hour or more before the shooting. There is no evidence that deceased at this time used any unwarranted force or thereby inflicted any injury upon the accused. With no other or further provocation accused at this time threatened to kill decedent and later went to his billet, secured a pistol and returned to the place where he knew deceased to be. While it does not appear from the record as to whether accused or deceased was the instigator of the argument which immediately preceded the shooting it is clear from the testimony of eye witnesses that during the argument the accused drew his pistol and fired three shots at deceased from a distance of only several feet. At this time the deceased had not laid a hand on accused, had no weapon and had made no motion to draw a gun. Under such circumstances it would presumptively appear that the killing was with malice aforethought and without legal justification or excuse. (CM ETO 18623, Bailey; CM ETO 18220, Bankston; CM ETO 18051, Sharpton; CM ETO 12486, Herbert; CM ETO 11178, Ortiz; CM ETO 6682 Frazier)

The only defense raised by accused was his sworn testimony to the effect that he was intoxicated to such a degree on the night of the shooting that he had no recollection of any of the events that occurred and was pre-

sumably thereby incapable of entertaining the requisite intent or malice to commit murder. There was substantial competent testimony from a number of witnesses as to the state of sobriety of the accused both before and after the fatal shooting. The question of intoxication of accused at the time of the offense and such degree thereof as to render him incapable of entertaining the requisite malice were questions of fact to be determined by the court (CM ETO 3932, Kluxdal; CM ETO 5747, Harrison; CM ETO 6265, Thurman et al; CM ETO 9877, Balfour). There was considerable testimony to the effect that accused was not drunk before or at the time of the shooting. When he surrendered to the first sergeant after the shooting it was his opinion that accused was not drunk. Upon being confined it appears that he was sufficiently alert mentally to be concerned for his own safety and requested accordingly that the lights be extinguished. It is true that he subsequently lapsed into an unconscious state but there was uncertainty even on the part of medical experts as to whether such state was produced by excessive alcohol or from shock induced by the act he had committed. Since there was substantial evidence to sustain the findings of the court such findings will not be disturbed on review.

6. The charge sheet shows that accused is 19 years six months of age and was inducted 18 October 1944 at Camp Croft, South Carolina. 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).

John Townsend, Judge Advocate.

Jack B. Wollertsen, Judge Advocate.

Anthony Julian, Judge Advocate.

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

BOARD OF REVIEW No. 5

13 FEB 1946

CM ETO 19182

UNITED STATES	)	42ND INFANTRY DIVISION
v.	)	
Private First Class HORACE E. TRIPP (44040602), Company I, 242nd Infantry	)	Trial by GCM, convened at Salzburg, Austria, 28 December 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

OPINION by BOARD of REVIEW No. 5
HILL, VOLLERTSEN and JULIAN, Judge Advocates

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

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

CHARGE 1: Violation of the 93rd Article of War.

Specification: In that Private First Class Horace E. Tripp, Company I, 242nd Infantry, did, at Tenneck, Austria, on or about 11 October 1945, by force and violence and by putting him in fear, feloniously take, steal and carry

away from the person of Karl Vleck (civilian), seventeen thousand (17,000) Reichsmarks, property in the custody of Karl Vleck (civilian), value about one thousand seven-hundred dollars ($1,700.00). (as amended)

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

Specification: In that * * * having been duly placed in confinement in 42nd Infantry Division Stockade, Salzburg, Austria, on or about 19 October 1945, did at Salzburg, Austria, on or about 28 October 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did without proper leave, absent himself from his organization from about 28 October 1945 to about 28 November 1945.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 5, Headquarters 42nd Infantry Division, APO 411, U.S. Army, 15 January 1946.

3. We are concerned only with the Specification of Charge I, since there is substantial evidence to support the findings of guilty of the specifications of Charges II and III and those findings are unaffected by any error that the court may have committed in its rulings.

As to the Specification of Charge I, which alleged that accused robbed a German civilian, Herr Karl Vleck of 17,000reichmarks, the prosecution introduced evidence in the form of testimony by Vleck that accused lured him to a lonely spot where, aided by a second man who was apparently a United States soldier, he beat him and robbed him as alleged (R25,26). Vleck admitted in cross-examination, however, that he had failed to identify accused as his assailant at an identification parade on 15 December 1945 (R29,30).

The prosecution then introduced in to evidence, over the objection of the defense, a pre-trial statement of accused in which he confessed to the robbery (R32, Pros. Ex. E). This statement was the second one which accused had given to two agents of the Criminal Investigation Division and was taken because these agents felt the first one was false. On the occasion of this second interrogation accused was told by one of the agents that the first statement was false; that it was "a lie"; that unless he changed it he would be court-martialed for committing perjury; and that the penalty for perjury was very severe(R19,20).

4. Accused, after an explanation of his rights, testified twice, once for the limited purpose of contesting the voluntariness of his confession, and the second time on the merits.

Accused said that he was questioned for four hours before he gave the first statement. Subsequently, two agents of the Criminal Investigation Division removed him from the stockade and held him in their office for about five hours. They told him the first statement was a "God-damned lie" and that if he did not give them a second statement he would be charged with perjury, dishonorably discharged, sentenced to 20 years in prison, his allotment would be stopped, and his wife and family disgraced. After he made the second statement the first was returned to him and he destroyed it (R20-23).

On the merits, accused testified that he was with a girl at the time the robbery was committed (R33,34). A German girl corroborated his testimony on this point (R37,38).

5. The questions presented by this record are whether the admission of accused's confession was error and, if error, whether there is compelling evidence of accused's guilt apart from the erroneously admitted confession. The uncontradicted evidence shows that the confession was extracted from accused by threats of punishment. His inquisitors posed to accused the alternative of making a second statement to their liking or facing a trial on a perjury charge. In no real sense can accused's response, in the form of a confession, to this dilemma be said to have been a voluntary act. It follows that the confession was improperly received in evidence (CM ETO 13279, Tielemans et al; CM ETO 17665, Miller).

Without the confession the evidence as to accused's guilt is far from compelling. His defense was alibi, a defense that was corroborated. Vleck had known accused for several days but his identification of accused as his assailant was impeached by his admission that he had failed to identify him at an identification parade. It must be concluded that the confession was the factor which prompted the court to resolve this conflict and doubt created by evidence adversely to accused. The record is legally insufficient to sustain the findings of guilty of the Specification of Charge I and Charge I (CM ETO 1201, Pheil, 4 BR (ETO) 91 (1944); CM ETO 9128, Houchins; CM ETO 17665, Miller).

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6. The charge sheet shows that accused is 24 years two months of age and was inducted 26 August 1944 at Fort Oglethorpe, Georgia. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I, legally sufficient to support the findings of guilty of the remaining specifications and charges, and legally sufficient to support the sentence.

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is now improper. A Disciplinary Training Center should be designated (pars.5 and 6, AR 600-375, 17 May 1943, and changes thereto).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 13 FEB 1946 TO: The Judge Advocate General (for action by the Secretary of War), Washington 25, D.C.

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 First Class HORACE E. TRIPP (44040602), Company I, 242nd 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 of Charge I and Charge I be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings of guilty, viz: robbery, so vacated, be restored.

3. Under the authority cited in paragraph 8 of the opinion of the Board of Review a disciplinary training center should be designated as the place of confinement. It is recommended that the period of confinement be reduced to two years.

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

(Findings vacated in part in accordance with the recommendation of Assistant Judge Advocate General, and confinement reduced to one year. Sentence as modified ordered executed. GCMO 171, W.D. 12 June 1946).

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

BOARD OF REVIEW No. 5

2 FEB 1946

CM ETO 19186

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private First Class TELMON LISTER (38199050), 581st Port Company	Trial by GCM, convened at Marseille, France, 1 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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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 Telmon Lister, 581st Port Company, Transportation Corps, did, at or near Calas, France, on or about 1 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditiation kill one Private First Class Albert P. Lavorin, a human being, by shooting him with a pistol.

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

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

3. Evidence for the prosecution showed that on the evening of 1 November 1945 accused (a member of the 581st Port Company (R31) played craps with a group of soldiers at Calas (R7). Private First Class Lavorin, deceased, was in charge of the game. Accused made a bet of three hundred francs which he won and thereby became entitled to be paid six hundred francs by deceased (R8,18,23). An argument ensued between them as to the amount to be paid. One witness testified deceased offered to pay the full amount and another testified he offered to pay back only the amount accused had bet (R8,14,23). Accused refused to accept the money offered and left the room (R8,18). Five or ten minutes later he returned and stood by the table. About two minutes later he pulled his gun out, reached across the table until about a foot from deceased, and fired three or four shots at him (R9,10,18,19). Accused was seen taking one drink that evening but was not drunk (R11,22).

Captain Edwin L. Williams, Medical Corps, examined the body that night and made a diagnosis of death on arrival at the hospital (R27). An autopsy performed the following day showed that death was caused by a bullet that penetrated the large vessel of the heart and lodged in the diaphragm (R28).

Accused, after having been advised of his rights, voluntarily signed two confessions which were admitted in evidence without objection (R30-31,34,35). They may be summarized as follows: On the night of 1 November 1945 he was engaged in a crap game with a mixed group of colored and white soldiers. He made a bet of three hundred francs which deceased called. He won and when deceased refused to pay him he became angry and left. He stood outside about five minutes, became more angry and returned to the game. He pulled a pistol from his pocket and, when approximately six feet from deceased, fired two or three shots. He had been drinking off and on all day and was "tight" (Pros. Ex.3,4).

4. Accused, after having been fully advised of his rights, elected to remain silent (R37).

5. Accused, without legal justification or excuse, when about a foot away from deceased intentionally fired three or four shots at him which caused his death. He was chargeable with knowledge that such

act might cause death or grievous bodily harm and when, as here, death results a finding of murder/(MCM, 1928, par.148a, pp.162-164; CM ETO 8630, Williams; CM ETO 10714, Turner; CM ETO 16851, Moore).

6. The charge sheet shows that accused is 27 years nine months of age and was inducted 4 August 1942 at Camp Wolters, Texas 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 the 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

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Branch Office of the Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 5 9 FEB 1946

CM ETO 19245

U N I T E D S T A T E S	4TH ARMORED DIVISION
v.	
Private First Class CHARLIE M. HIGGS (34671734), Battery A, 658th Field Artillery Battalion	Trial by GCM, convened at Regensburg, Germany, 20 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD of REVIEW NO. 5
HILL, VAN LIERTSEN 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 92nd Article of War.

Specification: In that Private First Class Charlie M. Higgs, Battery A, 658th Field Artillery Battalion, did, at Regenstauf, Germany on or about 23 September 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Theresia Seebauer.

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

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Specification: In that * * * did, at Regenstauf, Germany on or about 23 September 1945, with intent to commit a felony, viz sodomy, commit an assault upon Frau Theresia Seebauer, by willfully and feloniously striking her on and about the face and head with his fist.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. 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 from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the rest of his natural life. The reviewing authority approved the sentence, designated the 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 in pertinent part shows that on the evening of 23 September 1945 at about 7:00 o'clock Frau Theresia Seebauer passed the accused on the road near her home in Regenstauf, Germany (R7). The accused stopped her and spoke to her in English and she replied that she did not understand. He then grabbed her hands and "told me something and I understood what he wanted and told him I'm an old woman, there is nothing to be done with me" (R7). Frau Seebauer was 51 years of age (R9). Against her protests and by holding her hands he led her to a field where he pushed her to the ground and pushed up her coat. He was unable to open her underwear and indicated that she should open it for him, which she did since she "saw he wouldn't leave me" and "thinking to get rid of him this way" (R7). She testified that "he got into my sex privates" but was not satisfied and then knelt on her arms and attempted to "put his sex apparatus into my mouth"(R7). She succeeded in frustrating his attempts to do this by defending herself with her hands and by moving her head to and fro (R7, 9). She also cried out for help and accused struck her about the neck and face "blow after blow", caught her mouth and tried to shut it until "I thought I was dying because I couldn't breathe" (R7, 8). He then again "abused" her by putting "his sex apparatus into mine" and when satisfied got up and walked away without saying a word (R8,9).

Frau Seebauer went directly towards her home, creeping part of the way (R8). Her face was cut and bleeding and her eyes were swollen (R8). When she arrived at the court of her farm she was met by several neighbor women, one of whom had heard her cries for help, and both of them testified to the fact that her face was swollen and bloody and one of her eyes so swollen "that you couldn't see it" (R10,11).

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She related to the women what had occured (R9,11). Two American doctors came to her home that evening and took her to a hospital where she was examined the following morning by a Dr. Ederer (R8,9,12). This examination revealed that her cheeks, chin and lips were swollen, her left eye was very swollen and bloody, there was dried blood inside her nostrils, her upper lip was cut on the inside and the upper part of her left leg was black and blue. He examined the exterior of her private parts and noted no sign of injury, but he again examined her private parts on 25 September 1945 when she complained of pain "in the southern part of her privates" and noted inflammation of the neighboring parts of the uterus. No microscopic examination was made and in the absence thereof and in view of her age he was unable to state whether or not she had had sexual intercourse (R12,13).

4. The accused after being fully advised of his rights as a witness elected to remain silent (R14).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p. 165). A suggestion of consent is contained in the testimony of the prosecutrix that she opened her underwear for accused, but it is the opinion of the Board of Review that the surrounding circumstances negatived any inference of consent from this act. It is well established that consent cannot be inferred from lack of resistance by prosecutrix when in view of the strength and violence of the assailant resistance on her part would be useless if not perilous, or if her acquiescence is induced through reasonable fear of death or threatened severe injury (Winthrop's Military Law and Precedents (Reprint, 1920), p. 678; CM ETO 1069, Ball 3 B.R. (ETO) 373(1943); CM ETO 10799, Glover; CM ETO 14875, Swain; CM ETO 17622, Boyd; CM ETO 18224, Dunson). Furthermore, it appears in the present case that the 51-year-old prosecutrix offered considerable physical resistance in addition to crying for help. Her physical condition following the incident indicates that she perhaps offered more resistance than is apparent from a reading of her testimony. Although the medical testimony failed to establish that she had been subjected to an act of intercourse, the uncontradicted testimony of prosecutrix that during the last phase of the assault accused abused her by putting his sex apparatus into hers was sufficient to sustain the findings of the court that the physical requisites of the act of rape were accomplished. Also the uncontradicted testimony of prosecutrix as to the efforts of accused to insert his penis in her mouth justified the finding of the court that the intent of the accused, reasonably inferable from his overt acts, was to commit sodomy per os. Her physical condition immediately following the incident clearly substantiated her testimony that accused assaulted her person in an effort to effect his intent.

No testimony was introduced to identify accused as a member of the military service either at the time of the offense or at the time of trial.

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This omission is not material in view of accused's plea to the general issue by virtue of which he admits his own identity (Winthrop's Military Law and Precedents (Reprint, 1920), p. 276; CM ETO 5510, Lynch).

6. The charge sheet shows that accused is 32 years one month of age and was inducted 20 April 1943 at Fort Bragg, North Carolina. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape and of assault with intent to commit sodomy by Article of War 42 and sections 276, 278 and 330, Federal Criminal Code (18 USCA 455, 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).

JOHN WARREN HILL _____ Judge Advocate

JACK R. VOLLERTSEN _____ Judge Advocate

ANTHONY JULIAN _____ Judge Advocate

19245

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

BOARD OF REVIEW NO. 5

15 FEB 1946

CM ETO 19345

U N I T E D S T A T E S	) OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
Private ALONZO JONES (34627610), 3935th Quartermaster Gas Supply Company	) Trial by GCM, convened at Metz, France, 18 and 19 December 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Alonzo Jones, 3935 Quartermaster Gas Supply Company, did, at or near Clermont-en-Argonne, France, on or about 30 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Private D. C. Hawkins, a human being, by shooting him in the body and head with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence of two previous convictions by special court-martial was introduced, one for absence without leave and breach of arrest and one for absence without leave and breach of restriction, both in violation of the 61st and 69th Articles of War respectively. 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

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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. Accused, deceased, both of whom were negro soldiers, and Madame Germaine Bourdian, who apparently had been friendly with both accused and deceased, were all present in a cafe in Clermont-en-Argonne, France, on the evening of 30 October 1945. An altercation developed between deceased and Madame Bourdian and deceased struck her. The group then left the cafe together with another negro soldier and a French girl (R14). Outside, deceased again struck Madame Bourdian, this time knocking her to the ground, and pointed a pistol at her and accused. Accused, Madame Bourdian, and the other couple, then drove away in a truck, apparently leaving deceased behind (R23,24).

Madame Bourdian seems to have left this group, because the next fact the record reveals is that she was alone in a forest where she had been for about ten minutes. Accused drove up in a truck and she sat in it with him until deceased came along and pulled her out of it. Accused dismounted and an argument developed between him and deceased. The latter pointed a pistol at accused, who reached into the truck, got his carbine, and hit deceased on the head with it, knocking him down. Madame Bourdian ran away. Five minutes later she heard some shots (R16,17,21). About one hour later she met accused, who gave her a pistol to hide (R17).

Deceased's body was found the next morning in a ditch. There were seven discharged carbine shells in the vicinity of the body (R9). Medical examination revealed that there were contusions on deceased's head, face and arm. These were not the cause of death. There were nine penetrating wounds, caused by bullets, which resulted in hemorrhages and death (R38,39).

Accused made an extrajudicial statement which was properly admitted in evidence (R29). He described the altercation in the cafe between deceased and Madame Bourdian. All of them thereupon left, accused going in search of a truck. When he returned deceased and another negro soldier were arguing and Madame Bourdian was on the ground. Deceased threatened to kill the other soldier with a knife. Finally the latter and his girl companion, Madame Bourdian and accused, got in a truck and drove off. Unknown to anyone but Madame Bourdian deceased had climbed into the back of the truck. When accused discovered this, to avoid trouble with deceased he stopped and told him to take Madame Bourdian. Deceased took Madame Bourdian out of the truck and threatened to kill her with a pistol. He then searched the other negro soldier and threatened to kill his companion. In the meantime, Madame Bourdian fled. Accused drove the other two home, stopped for a couple of drinks, and then returned to the place where he had left deceased and Madame Bourdian. He met the latter there and talked with her a short while when deceased came along.

"Hawkins asked me to get out of the truck, which I did. He then threatened me with a pistol which he was holding and

forced me to back up to the front of the truck. I then reached into the cab of the truck and got my carbine. I warned him not to advance any further because I was afraid that he was going to shoot me. When I grabbed the carbine from the truck, Hawkins cocked the pistol and then I slapped him on the side of the head with the butt of the carbine. He staggered and I struck him again. I then drug him off the road and into a ditch. I fired my carbine at him several times. I do not remember the exact number of shots that I fired. D C Hawkins had dropped his pistol when I hit him the first time. I picked up the pistol and put it into my pocket. I spent the night at the home of Louise, when she saw me with the pistol, she took it and put it into the latrine in the rear of her house" (R29,Pros.Ex.3).

In a supplemental statement made to agents of the Criminal Investigation Division accused said that after he struck deceased he dragged him off the road into aditch. Deceased said to him, "You better finish me now or I'll get you later". Thereupon, accused loaded his carbine and shot him (R34).

4. After an explanation of his rights accused elected to make an unsworn statement (R40). He said that his home was in Belzoni, Mississippi, where he was a cotton farmer. He went to school for three or four months a year for five years. He had been in the Army for 31 months, two years of which had been spent overseas. He is entitled to wear five battle stars (R40,41).

5. There can be no doubt on this record that accused shot and killed deceased, as alleged. He is therefore guilty of murder, under the facts here shown, unless he acted in justifiable self-defense or unless he killed in "hot blood" after due and adequate provocation, in which latter case he would be guilty of voluntary manslaughter (MCM 1928, par. 149a, p. 165).

Obviously when accused struck deceased with the carbine he effectively disabled him and rendered him incapable of effectuating his aggressive designs. Accused admitted that deceased had dropped his pistol when he was hit the first time. Whatever right accused may have had up to that time to inflict death ended when he no longer was threatened with any present harm. Deceased's promise to kill accused in the future was of course an insufficient excuse for the latter's subsequent conduct. There were methods by which he could protect himself other than the one he chose. The killing was not an act of justifiable self-defense (CM ETO 292, Mickles, 1 B.R. 231 (1943); CM ETO 1941, Battles; CM ETO 4640, Gibbs; CM ETO 17315, Moore).

There was no evidence that accused killed in "hot blood". Rather, his extrajudicial statement would indicate that his action wasthe result of a deliberate plan to rid himself of deceased when the latter threatened to kill him in the future. While deceased's actions were, to say the least, obnoxious, there is no reason to believe that they stirred accused to such a passion that he was incapable of entertaining the requisite malice (CM ETO 292,

Mickles, supra; CM ETO 422, Green, 1 B.R. 345 (1943); CM ETO 2007, Harris, Jr.)

The record is legally sufficient to sustain the findings of guilty of the Specification and the Charge.

6. The charge sheet shows that accused is 22 years of age and was inducted on 31 March 1943 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 murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330 Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 4

15 FEB 1946

CM ETO 19354

U N I T E D S T A T E S	HEADQUARTERS COMMAND, ALLIED FORCE
v.	Trial by GCM, convened at Caserta, Italy, 21 and 22 December 1945. Sentence as to each of the accused Sardella, Dello and Tincher: Dishonorable discharge, total forfeitures and confinement at hard labor, Dello for life, Sardella for 10 years, Tincher for 9 years. United States Penitentiary, Lewisburg, Pennsylvania, as to Dello. Federal Reformatory, Chillicothe, Ohio, as to Sardella and Tincher. Motions for findings of not guilty sustained as to Hull and Nichols.
Technician Fifth Grade GERALD SARDELLA (32894010), Headquarters and Service Company, Allied Force, Privates First Class PAUL M. TINCHER (35791477), 2012th Ordnance Maintenance Company, Air Force, CHARLES A. NICHOLS (38202755), 204th Car Company, Headquarters Command, Allied Force, LEE R. HULL (38464106), 36th Air Depot Squadron (formerly of 4th Troop Carrier Squadron, 62nd Troop Carrier Group) and Private CARMINE DELLO (32873580), 204th Car Company, Headquarters Command, Allied Force	

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON and MAYS, 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. The accused were tried jointly upon the following charges and specifications:

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

Specification: In that Private Carmine Dello, 204th Quartermaster Car Company, Private First Class Lee R. Hull, then of 4th Troop Carrier Squadron, now of 36th Air Depot Squadron, Technician Fifth Grade Gerald Sardella, Headquarters and Service

Company, Allied Force (Overhead), Private First Class Charles A. Nichols, 204th Quartermaster Car Company and Private First Class Paul M. Tincher, 2012th Ordnance Maintenance Company, Air Force NAFGD, acting jointly and in pursuance of a common intent did at or near San Rosalio di Caserta, Italy, on or about 17 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Luigi Criniti, a human being by shooting him with a pistol.

CHARGE II: Violation of the 93rd Article of War. (Findings of not guilty).

Specification: (Findings of not guilty).

Each accused pleaded not guilty to all charges and specifications. Motions for findings of not guilty made on behalf of both Hull and Nichols at the conclusion of the prosecution's evidence were sustained as to all charges and specifications, and the remaining accused were found not guilty of Charge II and its Specification. Two-thirds of the members of the court present at the time the votes were taken concurring, Dello was found guilty of Charge I and its Specification, and Sardella and Tincher were found guilty of the Specification of Charge I, except the words "with malice aforethought, willfully, deliberately", after the words "17 November 1945", and except the words "and with premeditation" after the word "unlawfully", substituting the word "and" between the words "feloniously" and "unlawfully", and not guilty of Charge I but guilty of a violation of the 93rd Article of War. No evidence of previous convictions was introduced as to any accused. As to accused Tincher, two-thirds, and as to Sardella and Dello, three-fourths, of the members of the court present at the time the vote as to each 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, Sardella for 10 years, Tincher for nine years, and Dello for the term of his natural life. The reviewing authority approved and ordered executed the sentence as to each accused, and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of Sardella and Tincher, and the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of Dello.

Although the reviewing authority stated in his action as to each sentence that it was "approved and will be duly executed", no orders were published and the case was actually forwarded by his order to the Branch Office of The Judge Advocate General with the European Theater for action. Accordingly, under Article of War 50½, the Board of Review treats the case as if the order directing the execution of the sentences was withheld pursuant to Article of War 50½.

3. The evidence for the prosecution shows that Antonietta Amantea Criniti, also known as "Vera" Criniti, and Luigi Criniti, the deceased, were married in 1941 (R22), and lived together as husband andwife for approximately two months before Luigi Criniti joined the Italian Army (R23,24). Antonietta did not see her husband after he joined the army until 17 November 1945 (R25), but she occasionally received letters from him, in one of which he stated "for your husband you should do any sacrifice - even do the prostitute" (R24). Luigi Criniti was captured by the Germans and held as a prisoner of war during a large part of this period (R29). In June 1945 and subsequent thereto, Antonietta Criniti and her sister Angelina Amantea were employed as hostesses in a club known as "The Village" in Caserta, Italy (R19). They resided in a house in Caserta with their mother and two younger brothers. Shortly after Antonietta was employed as a hostess in "The Village", she became acquainted with accused Dello, and they fell in love and became engaged (R26). In September 1945 they visited an Army chaplain in an effort to secure a divorce for Antonietta so that they might get married (R26,Def. Ex.A). At that time Antonietta thought she was pregnant and that accused Dello was the prospective father, but the pregnancy was terminated by "something like but not exactly a miscarriage" (R29,31).

At about 1400 hours on 17 November 1945 Criniti returned to his home and his wife Antonietta in Caserta, Italy, accompanied by a friend named Coppola, who came along to help Criniti "settle a family dispute with Vera" (R17). At 1900 hours that day Antonietta and her sister Angelina left the house and went to work at "The Village" (R19). Upon arriving at the club, Antonietta met Dello, and "told him that my husband arrived and if he would see Carmine he would kill him and that he wanted to go to bed with me and that he threatened to cut my face" (R19). She also reported to Dello that her husband had "threatened to cut her genital area with the knife"(R28). Dello replied that he would scare her husband off with a gun (R20) and that "he would scare him out of the town so that he wouldn't come back and would leave me alone so that we could proceed with obtaining an annulment eventually" (R28).

Around 1930 hours Criniti and his companion Coppola, accompanied by one of Antonietta's brothers, visited a wine shop in Caserta and had a few drinks, following which they returned to the house and all went to bed (R42). At about 2300 hours, Dello asked Hull, who had a government "6x6" truck, to drive him to his girl friend's home, as he wanted to "take some Italians up the road and beat the shit out of them" (R104). Hull, who testified he was drunk (R103), agreed to do so. Prior to leaving, Dello obtained his revolver which he had checked at the club, and borrowed a revolver from accused Nichols (R118). Dello had been drinking with Tincher and Sardella, who also agreed to go. The four of them, namely, Dello, Tincher, Sardella and Hull then got into the truck, driven by Hull (R108), and drove to Antonietta's home, where Criniti and Coppola were sleeping. The four accused entered the house, turned on the lights, and compelled Criniti and Coppola to dress and accompany them (R8). At that time Dello and Sardella each were armed with pistols (R9). Dello asked Criniti if he came to Caserta to get Signorina "Vera", whereupon Criniti replied, "Signorina

Vera is my wife" (R9). Dello then struck Criniti with his fist (R9). Criniti and Coppola were then forced to get on the truck, where they were guarded by Dello, Tincher, and Sardella (R10). Hull got into the cab and drove the truck (R108). He drove for several miles into the country (R11), and then stopped at the direction of someone in the back of the truck (R110). When Hull stopped the truck, Dello and Tincher compelled Criniti to get off the truck and walk to the rear for seven or eight meters, where they began beating him and knocked him down (R11). While Dello and Tincher were beating him, Sardella pointed his revolver at Coppola and compelled him to remain on the truck (R12). Dello then took his revolver and shot Criniti,who was lying on the ground, in the back of the head, from a distance of approximately one foot (R12). When the shot was fired, Sardella momentarily released Coppola, who fled down a ditch bank and escaped (R13). While Coppola wasrunning away he heard three or four more shots fired (R13). The four accused then got back in the truck and drove away (R13).

Two English soldiers discovered the body of Criniti at 0800 hours on 18 November 1945. At that time he was still alive, and they observed wounds on his right temple and the back of his head. He was removed to a hospital, where he died as a result of the wounds on 18 November 1945 at 2245 hours (R17,18;Pros.Ex.1).

Following the shooting, Dello and Sardella returned to the club where Antonietta and her sister were employed, and at about 0100 hours on 18 November 1945 they escorted the girls to their home (R22). Dello told Antonietta's mother that he had killed Criniti because he was in love with "Vera" (R45).

At the conclusion of the case for the prosecution the defense moved for a finding of not guilty as to each accused. This motion was sustained as to Hull and Nichols (R91), and denied as to the other accused. After the defense had rested its case, the prosecution called Hull and Nichols as witnesses, which procedure wasobjected to by the defense counsel, who expressed his intention to move to withdraw his original motions for findings of not guilty. The court overruled the objection (R100,116-117). Nichols admitted he loaned Dello his pistol on the night of 17 November 1945 (R118, and Hull testified substantially as the facts above show (R100-116).

4. Each of the three accused, Dello, Sardella and Tincher, was duly advised of his rights as a witness, and each elected to remain silent (R98-99).

For the defense, a sergeant testified that he observed Dello, Sardella and Tincher at the "Village Club" at about 2000 hours on 17 November, at which time they were "feeling good or tight" (R95). The records of the club showed that on 17 November, Dello, Tincher and Hull each purchased a $4.00 bar ticket book (Def.Ex.C,R98). Extracts from their service records were read to the court, showing that most of the character ratings of each were excellent (R96).

5. The evidence discloses that prior to the commission of the homicide, and during Criniti's involuntary absence, Dello became enamored of his wife and sought to marry her. When Criniti returned and learned of her unfaithfulness he threatened her with bodily harm and she informed Dello of these threats. Dello thereupon declared he would take measures to frighten him, and, with the help of Sardella, Tincher and Hull, broke into the bedroom of Criniti and Coppola, forced them into a vehicle and took them into the country. Hull drove the vehicle and Dello, Sardella and Tincher kept them under guard. The vehicle was then stopped and Criniti was removed and beaten. Dello then shot him in the back of the head, and as a result thereof he died the following day. Shortly after the offense was committed, Dello told the mother of Criniti's wife that he had killed him.

The record is devoid of any evidence suggesting justification or excuse for the homicide. Nor is there any evidence to indicate accused were not mentally responsible for their acts. The evidence is undisputed that Dello intentionally shot deceased; and, malice being presumed from the intentional and unlawful use of a deadly weapon in the manner shown, the evidence supports the finding that malice aforethought attended the commission of the homicide (CM ETO 1901, Mirandi; CM ETO 1941, Battles; CM ETO 3932, Kluxdal; CM ETO 6159, Lewis; CM ETO 7815, Gutierrez; CM ETO 16397, Parent; CM ETO 17106, Conley). Sardella and Tincher knowingly and willingly assisted and participated in the commission of the offense. From the undisputed and uncontradicted evidence, the court was abundantly justified in finding Dello guilty of murder, and Sardella and Tincher guilty of the lesser included offense of voluntary manslaughter (CM ETO 16623, Colby, and cases cited therein). The varying degrees of criminality attributable to accused were, under the circumstances disclosed by the record of trial, peculiarly within the province of the court (Carter v. Tennessee (CCA 6th 1927), 18 F(2d) 850).

6. After motions for findings of not guilty were sustained as to Hull and Nichols, they were called as witnesses for the prosecution (R99, 116). It was contended that the action of the court in compelling them to testify constituted a violation of their rights under the Fifth Amendment by reason of the self-incriminating character of their testimony. In the view we take of the matter it is unnecessary for us to determine the validity of this contention because at this late day it is no longer open to doubt that the protection afforded by the Fifth Amendment is a personal one which is claimable by and a protection to the witness alone (London v. Everett H. Dunbar Corporation, (CCA 1st 1910), 179 F. 506; Hale v. Henkel, 201 U.S. 43, 50 L. Ed. 652 (1905); Village of Brookfield v. Pentis, (CCA 7th 1939), 101 F(2d) 516). Even if the rights of Hull and Nichols were improperly invaded, their testimony possessed no inherent infirmity. Its testimonial value was, like that of the other evidence, a matter for determination by the court. The assertion that their rights were transgressed can be of no avail to Dello, Sardella and Tincher. As to them, the testimony was competent (cf. Goldstein v. United States, 316 U.S. 114, 86 L.Ed. 1312 (1942).

7. Following arraignment, and before their pleas were entered, defense

counsel moved to sever the case of each accused upon the stated ground that a joint trial would "prejudice them respectively". Severence was denied (R5). Nothing appears in the record of trial to indicate that accused had antagonistic defenses or that any accused was prejudiced in any manner by a joint trial. Upon all the evidence it is clear the court did not abuse its sound judicial discretion in denying the motion (CM ETO 6148, Dear,et al; CM ETO 15274, Spencer,et al; CM ETO 895, Davis,et al; CM ETO 4294, Davis and Potts; CM ETO 3197, Gayles, et al; CM ETO 18211, Williams,et al).

8. The charge sheet shows that Dello is 22 years one month of age and was inducted 1 April 1943 at Brooklyn, New York; Sardella is 21 years four months of age and was inducted 21 April 1943 at Middletown, New York; Tincher is 21 years two months of age and was inducted 1 March 1943 at Cincinnati, Ohio. None had prior service.

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

10. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement at hard labor not to exceed 10 years is authorized by the Table of Maximum Punishments for voluntary manslaughter. Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567), and upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to Dello is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement as to Sardella and Tincher is proper (Cir. 229, WD, 8 June 1944, sec. II, par. 3a, as amended by Cir. 25, WD, 22 Jan. 1945).

Lester A Danielson Judge Advocate

John R. Anderson Judge Advocate

Thomas J. Mays Judge Advocate

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BY CARL E. WILLIAMSON, LT. COL.,
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