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OF
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OPINIONS

CM ETO 8028
CM ETO 9419

VOLS. 19-20

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 20 B. R. (ETO)

CM ETO 8700 - CM ETO 9419

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

B O A R D O F R E V I E W

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 20 B.R. (ETO)

including

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(1945)

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Office of The Judge Advocate General

Washington : 1946

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

BOARD OF REVIEW NO. 3

8 MAY 1945

CM ETO 8700

UNITED STATES	84TH INFANTRY DIVISION
v.	Trial by GCM convened at Waubach, Holland, 22 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RAYMOND E. STRAUB (6979795), Company I, 334th Infantry	

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

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

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

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

Specification 1: In that Private Raymond E. Straub, Company "I", 334th Infantry, did, at Palenberg, Germany, on or about 14 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engaging with the enemy, and did remain absent in desertion until he surrendered himself at Palenberg, Germany, on or about 21 January 1945.

(2)

Specification 2: In that * * * did at Barvaux, Belgium, on or about 24 January 1945, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: rejoining his organization then in a combat area, and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 4 February 1945.

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

Specification: In that * * * having received a lawful command from Captain Andrew C. Elliott, his superior officer, to return to his platoon and to make the necessary preparations to move out that night, did at Eigelshoven, Holland, on or about 8 February 1945, willfully disobey the same.

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

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

On 12 December 1944, accused's company was on the outskirts of Lindern, Germany (R7). The town was in a combat zone (R25), and that night the company moved to Palenberg, Germany, a rest area some six to eleven miles behind the front lines (R7-8,21). Accused was with his platoon when it moved into Palenberg (R7). The men were not informed as to how long they would be there or whether they were going back into the front lines, although the latter was in fact contemplated: However, equipment and ammunition were being issued and it was "common knowledge" in the company that it would not remain there long, "the general indications" being to this effect (8,9). On 14 December 1944, at about noon, orders were issued for a return to the front. A check of the company personnel revealed that accused was absent, and he could not be found despite a thorough search of the area (R7,20). Such absence was without authority (R17,18). In a statement made to the investigating officer, after being warned of his rights, accused said that he had been evacuated to Palenberg because of illness and nervous-

ness on 11 December 1944 and "joined" his company when it arrived there on 12 December 1944. At the time he did not know how long the company was scheduled to stay in Palenberg, but upon discovering that it had gone, he attempted to rejoin it. He abandoned his efforts in this respect when he again became shaky and nervous and decided he couldn't take it, and then went back to Palenberg where he stayed until he surrendered himself several weeks later (R25-26). It was stipulated by accused, the prosecution and defense that accused surrendered himself voluntarily to the military police in Palenberg on 21 January 1945 (R26-27).

On the afternoon of 23 January 1945, accused was brought to the office of the regimental personnel officer. He was told that he was to be returned to his organization as soon as transportation could be arranged, although he was not advised as to the location of the company. Accused stated that he did not belong in the company and had been erroneously assigned to it, being an artilleryman rather than an infantryman. The personnel officer, being unable to obtain transportation, sent him to the Division Reinforcement Center with instructions to remain there until transportation to his organization was furnished (R12-15). When transportation became available next day, accused could not be found (R11). At this time the company was in contact with the enemy at Beho, Belgium, approximately 20 miles from Barvaux where the personnel office was located (R18). In his statement to the investigating officer, accused admitted that he left the reinforcement center on 24 January 1945 because he understood that he was going to be sent back to the frong lines and decided that he wouldn't be "able to take it" (R26). It was stipulated that this absence was terminated by apprehension in Liege, Belgium, on 4 February 1945 (R27). The testimony of the company commander shows both the fact of absence and its unauthorized character (R18).

Accused was brought back to his company by the military police and turned over to the company commander to be held until charges could be prepared. He was placed in arrest in quarters. On 8 February 1945, the company was ordered forward. The company commander called accused and told him that they were moving to a forward assembly area in about two hours. He instructed him to return to the 4th platoon of which he was a member and make the necessary arrangements and preparations to move. Accused said he would not join his platoon. The company commander said "I'm giving you a direct order to return to your platoon to make that move with the company". Accused said he recognized the fact that he was being given a direct order but that he would not go, complaining of physical disability. The captain promised to send him to the "medics" as soon as the move was made, but accused stated that he had already been to the "medics" and did not desire to go again. Thereupon the captain turned him over to battalion headquarters. Accused had ample time to comply with the order and after his second refusal to

comply, he was turned over to higher headquarters because of the imminence of the company's departure (R16-19,22-23).

There was received in evidence without objection by defense as authenticated extract copy of the morning report of accused's company (R27; Pros.Ex.A). The entries contained in the extract consisted of one current entry and corrections of three previous entries, all designed to show the absences without authority described in Specifications 1 and 2 of Charge I.

4. Accused, after being warned of his rights by the law member, elected to testify under oath (R28). He said that while in a foxhole in the front lines, he became nervous and sick and was accordingly evacuated to Palenberg. The next day, the company came back to the town. He didn't know how long they were to be there and since he was staying in another building, the company left without his knowledge. He attempted to rejoin it next day, but after progressing as far as Gereonsweiler, he couldn't go on and so returned to Palenberg for several weeks and then surrendered to the military police. He did not seek medical attention during this period because his previous experience with the "medics" had done him no good (R28,29,33,34). He admitted that he left the Replacement Center because he was nervous and fidgity and understood that they were going to send him back to his company. He "couldn't take it" and feared that if he returned the same thing would happen again. He went to Liege in an effort to get back to the organization but was apprehended after being there for about a week. He had intended to turn himself in, but was unable to make up his mind to do so (R29,31,36). With respect to the order of 8 February 1945, he admitted understanding what he was being asked to do, but stated that he could not comply because of his physical condition. He was too weak, sick and nervous and also had sinus trouble and rheumatism (R32). Accused admitted his absence during the periods described in the specifications, attributing them, however, to nervousness(R30). He described his nervous condition as deriving from his mother who had suffered a similar difficulty and from the fact that he had had "quite a lot of beatings in my younger life" (R29).

Accused's testimony relative to his illness in the foxhole and his evacuation to Palenberg on 11 December 1944 was corroborated by evidence given by a fellow soldier who shared the foxhole with him. Such evidence showed that accused was sick and jittery and was more nervous than the rest of the men in the company. The soldier testified that he saw accused in Palenberg on 13 December 1944.

5. It was stipulated between the parties that the Division Neuropsychiatrist, if present, would have testified that he examined accused on 16 February 1945 and found him as of that date so far free from mental defect, disease or derangement as to be able to distinguish right from wrong and to adhere to the right and to be able to

cooperate intelligently in his defense (R39).

6. With respect to the two charges of desertion with intent to avoid hazardous duty (Specifications 1 and 2, Charge I), the unauthorized absences upon which they are based are adequately proved by the testimony of the various witnesses, including accused, and by the stipulations relative to their terminations. The morning report entries, received in evidence without objection by defense, are of dubious competency (See CM ETO 7381, Hrabik), but it is unnecessary to pass upon their validity inasmuch as the absences to which they relate are proved by other competent and compelling evidence. Hence, even if incompetent, no prejudice to the substantial rights of accused resulted from their admission (CM ETO 3811, Morgan and Kimball).

On the issue of intent to avoid hazardous duty, the evidence as to the first absence is unsatisfactory and legally insufficient to sustain the finding of guilty of desertion. In order to justify an inference that the absence was designed to avoid hazardous duty, there must be substantial evidence that such duty was known to be impending and that accused was aware of it (CM ETO 455, Nigg; CM ETO 1921, King; CM ETO 5958; Perry and Allen). Moreover, the intent to avoid hazardous duty must concur in time with the quitting of accused's organization or place of duty (CM ETO 5958, Perry and Allen). In the present instance, the evidence is obscure as to accused's relations with his company during the period between its return to Palenberg on 12 December 1944 and his alleged absence on 14 December 1944.His platoon sergeant testified that he returned with the company on 12 December 1944, but accused contradicted this, stating that he was evacuated to Palenberg the day before and "joined" the company in Palenberg next day. Accused's testimony in this respect is corroborated to a certain extent by that of his companion in the foxhole who also stated that he saw accused in Palenberg on 13 December 1944. In any event however, the prosecution's case lacks substantial evidence of accused's actual physical whereabouts in relation to the company and of his participation in the company activities between 12 December 1944 and 14 December 1944, and is indefinite as to the exact time of his departure. Neither accused's statement to the investigating officer nor his testimony on the stand satisfactorily fills in this gap. He stated that he "joined" the company when it returned to Palenberg, but his statement and testimony contained no clear cut evidence that he was thereafter physically with it, and in fact contains considerable indication to the contrary, in view of his contention that he was unaware of its departure on 14 December 1944. The prosecution apparently sought to charge accused with knowledge of imminent hazardous duty by reason of the issuance of equipment and ammunition and the

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(6)

"common knowledge" that the company would not remain long in Palenberg. In the face of the positive testimony in the record that no one knew, at least before noon, 14 December 1944, whether or when the company would leave Palenberg or whether it was scheduled to return to the front, these circumstances are meager as a basis for the inference that the company members knew of impending hazardous duty. Whether or not they are sufficient for this purpose as far as those to whom they were known are concerned, however, need not be decided in this case, inasmuch as there is insufficient proof that accused as an individual was aware of them (See CM ETO 8300, Paxson). Accused's statement to the investigating officer that he attempted to rejoin his company after he discovered its departure, but abandoned such efforts when he became nervous and shaky and decided he "couldn't take it", does not supply the missing evidence of intent. Assuming that such statement can be construed as an admission of an intent to avoid hazardous duty, there is no evidence that such intent existed concurrently with the commencement of the unauthorized absence as alleged and proved. Accordingly, as far as accused's first absence is concerned, the record of trial is legally insufficient to sustain findings of guilty of desertion with intent to avoid hazardous duty (CM ETO 5958, Perry and Allen). Although the duration of the unauthorized absence was such that a charge of desertion based solely on the intent not to return might well have been brought, a finding of guilty of such offense may not be made on the basis of the specifications as framed (CM ETO 5958, Perry and Allen).

As to the second absence (Specification 2, Charge I), accused's intent to avoid hazardous duty is amply proved and hence the record is legally sufficient to sustain the finding of guilty of desertion. In this instance accused was advised that he was to be returned to his company although its exact location was not disclosed to him. The company was in combat at the time and accused admitted in his statement and testimony that he absented himself from the Reinforcement Center because he understood he was to be returned to it and sent back to the front lines, and "couldn't take it". The court was therefore justified in its finding that accused was aware of impending hazardous duty and absented himself with the design of avoiding it (CM ETO 8300, Paxson).

Likewise, the evidence is legally sufficient to support the finding of guilty of willful disobedience charged under Article of War 64 (Charge II and Specification). The order given was a direct one contemplating immediate performance. Accused twice refused to comply and upon his second refusal, was turned over to battalion headquarters. His orders were to return to his platoon and make the necessary arrangements to move out with the company. He had ample time and opportunity to obey and the court was justi-

fied in its determination that his failure to do so was a willful and deliberate act. His apparent defense that he was too ill and nervous to comply raises a factual question which was within the court's province to determine (CM ETO 4453, Boller).

8. The charge sheet shows that accused is 26 years of age and enlisted 27 October 1939 at New York, New York. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I, as involves findings that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until he surrendered himself at the time and place alleged, in violation of Article of War 61, legally sufficient to support the findings of guilty of Specification 2, Charge I, Charge I, and Charge II and its Specification, and legally sufficient to support the sentence.

10. The penalty for violation in time of war of either Article of War 58 or 64 is death or such other punishment as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levin Jr. Judge Advocate

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

7 MAY 1945

BOARD OF REVIEW NO. 3

CM ETO 8706

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U.S. Army, 3 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MILTON H. TWIST (42049123), Company L, 317th Infantry	)	

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

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

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

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

Specification 1: In that Private Milton H. Twist Company "L", 317th Infantry did in the vicinity of Niederfeulen, Luxembourg on or about 3 January 1945 desert the service of the United States, by quitting and absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he was apprehended at or near Niederfeulen, Luxembourg on or about 5 January 1945.

(10)

Specification 2: In that * * * did in the vicinity of Niederfeulen, Luxembourg on or about 5 January 1945 desert the service of the United States by quitting and absenting himself from his organization and place of duty without proper leave, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at or near Medernach, Luxembourg on or about 29 January 1945.

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

Specification: In that * * * having been duly placed in arrest at Niederfeulen, Luxembourg, on or about 5 January 1945, did, at Niederfeulen, Luxembourg, on or about 5 January 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications, except, in Specification 2, Charge I, the words "surrendered himself at or near Medernach, Luxembourg on or about 29 January 1945" and substituting therefor the words "was returned to military control at the 290th Military Police Company, APO 513, on or about 20 January 1945", of the excepted words, not guilty; of the substituted words, guilty. Evidence was introduced of two previous convictions by special court-martial, one for four days absence without leave in violation of the 61st Article of War, the other for breaking arrest and seven days absence without leave in violation of Articles of War 69 and 61 respectively. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution is summarized as follows:

Accused became a member of Company L, 317th Infantry, "about the 15th or 19th of December 1944" (R11). The company was "dug in" occupying defensive positions at Neiderfeulen, Luxembourg, from 29 December 1944 until 5 January 1945, when it moved a distance of approximately four miles to Tatler (R7,11). There it

occupied similar positions. Most of the time throughout January it was on the line in defensive positions, according to the testimony of the first sergeant, and during the last of January it was "on the move all the time" (R7). Accused's squad leader testified that, in January 1945,

> "We were on the line sir and had positions dug in - started off on the other side of Tatler in position - we were in the valley between Company I of the Third Battalion ofthe 317th Infantry and Company E of the 319th Infantry - were in position there and stayed there for two weeks, sir" (R11).

On the morning of 3 January 1945 accused was told by his squad leader that "we were falling out". His squad leader saw him that morning

> "in the building * * * we were moving out of * * * We stayed in that building for a while, but the company commander said he was under arrest in quarters and I stayed with him that morning. In the afternoon we were pulling out and he went to get his rations - I didn't see him after that"

until the 5th (R10). The first sergeant testified that on 3 January,

> "the company had had a report that [accused] was in town and we sent a man down to pick him up, * * * and [accused] reported to the Company Commander",

who placed him in arrest in quarters and told him that he would have to prefer charged against him. This all happened on the 3rd (R7). The company morning report for 4 January shows accused "fr dy to AWOL 0900 hr, 3 Jan 45"; for 5 January, "Fr AWOL 0900, 3 Jan 45 to Ar in Qtrs 0930" (R8; Pros.Exs.A,B). On 5 January while the company was preparing for its move to Tatler, accused left, ostensibly for the "CP" (R10). When he failed to return an unsuccessful search was made for him (R7,8). The morning report for 7 January shows accused "Fr Ar in Qtrs 5 Jan 45 to AWOL 1130, 5 Jan 45". The morning report entry for 29 January shows return to military control 20 January 1945 (R9; Pros. Exs.C,D).

Upon cross-examination, accused's squad leader - a staff sergeant - testified that accused had been a good soldier prior to the time he was charged with being absent and that the witness thought accused would make a good soldier if returned to his unit (R11).

4. No evidence was presented by the defense. After the law member had explained his rights to him, accused elected to remain

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silent (R11).

5. Accused was charged with twice absenting himself without leave with intent to avoid hazardous duty. On the occasion of each initial absence, his organization was "dug in" occupying defensive positions "on the line". The evidence thus shows hazardous duty of which accused was necessarily aware and which he necessarily avoided in going absent without leave on each occasion.

The evidence as to the hour of the initial absence on the 3rd is confusing. The testimony of the first sergeant and accused's squad leader indicate that he went absent without leave twice on that day, first in the morning, after which he was placed in arrest in quarters, and again in the afternoon, when he "went to get his rations". The morning report records only one unauthorized absence on the 3rd, at nine o'clock in the morning. Since the uncontradicted evidence shows that accused did absent himself without leave on the 3rd, as charged, and the variance concerns only the hour of the commencement of that particular absence which terminated on the 5th, it is clearly immaterial.

The Specification, Charge II alleges breach of arrest imposed on or about 5 January 1945. The first sergeant and accused's squad leader both testified that accused was placed in arrest in quarters on the 3rd, before he initiated , on that date, the absence without leave which terminated on the 5th. The only evidence of accused's being placed in arrest in quarters on the 5th is the morning report entry of that date. Since this was admitted without objection, it is deemed competent to show the status alleged at the time accused absented himself from his organization on the 5th. In view of the serious nature of the offenses alleged under Charge I, and the further fact that the initial absence alleged in Specification 2 thereunder involves the identical act which constituted the breach of arrest described in the Specification, Charge II, it would have been preferable to have ommitted Charge II and its Specification from the charge sheet. Their inclusion does not appear, however, to have injuriously affected the substantial rights of the accused.

6. The charge sheet shows that accused is 19 years three months of age and that, with no prior service, he was inducted at New York,City, 22 October 1943.

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

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

Benjamin A. Shepard Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

9 JUN 1945

CM ETO 8708

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 2 March 1945.
Private ALFRED C. LEE (37629027), Company C, 317th Infantry	)	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alfred C. Lee, Company "C", 317th Infantry, did, in the vicinity of Niederfeulen, Luxembourg, on or about 21 January 1945, desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near Medernach, Luxembourg, on or about 31 January 1945.

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He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 13 days in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 68, Headquarters 80th Infantry Division, APO 80, U. S. Army, 9 March 1945.

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

Accused was a rifleman in Company C, 317th Infantry, and on the night of 20 January 1945, he was seen "in the chow line with the company". On 21 January 1945 the company was located outside of the town of Niederfeulen, Luxembourg, in a defensive position. During the month of January 1945 "the company was in a defensive position northeast of Niederfeulen, Luxembourg - moved from that position toward Wiltz, Luxembourg, and went into the attack east of Wiltz - then went back to a rest area at Medernach" about the end of January or the first of February. The company had actual contact with the enemy, attacking and taking the town of Neidhausen, Luxembourg, about 25 or 26 January 1945 (R7,8). The morning reports of accused's organization were received in evidence showing accused absent without leave from 21 January 1945 to 31 January 1945 (R7).

4. Accused after his rights as a witness were fully explained to him (R8), elected to remain silent and no evidence was introduced in his behalf.

5. Inasmuch as accused's unauthorized absence from his organization is established, as alleged, by the unimpeached entries in his company's morning reports, the only question presented is whether there is contained in the record substantial evidence of the remaining essential element of the offense charged, namely, the intent to avoid hazardous duty (AW 28; MCM, 1928, par.130a, p.142).

Where desertion with intent to avoid hazardous duty is alleged, this specific intent must be proved by the prosecution (CM 224765, Butler, 14 B.R. 179 (1942)). In order to meet this burden it is incumbent

on the prosecution to present substantial evidence to establish that accused at the time of his initial absence, (a) knew that present or imminent hazardous duty was required of him and (b) that he intended to avoid its performance (CM ETO 7532, Ramirez; CM ETO 8104, Shearer; CM ETO 5958, Perry et al). While a court-martial is warranted in inferring that an accused had the aforementioned knowledge and intent, in a case where the accused makes his unauthorized departure under circumstances which lead reasonable minds to this conclusion, the record of trial in this case is devoid of any substantial evidence to this effect. The prosecution produced evidence that during the month of January, and, specifically on 21 January 1945, accused's company was in a defensive position northeast of Niederfeulen, Luxembourg, and that about 25 or 26 January 1945 the company went into an attack in another location, taking the town of Neidhausen, Luxembourg. A mere showing that accused's organization was in combat during his absence is alone not sufficient to establish his intent to avoid hazardous duty (Ramirez, supra) and this is likewise true of a general showing that his unit engaged in some combat activities during the month in which the absence occurred (Shearer, supra). All that remains, therefore, is the bare statement that accused's organization was, at the time of his initial absence, in a defensive position. As to the proximity of enemy forces, knowledge by accused that an attack was impending, or that preparations were being made therefor, the record is silent. No circumstances are shown from which the court could reasonably infer that accused knew hazardous duty was imminent and intended to avoid it. The Board of Review is therefore of the opinion that there is no substantial evidence to support the finding that at the time he absented himself without leave, accused intended to avoid hazardous duty.

6. The charge sheet shows that accused is 19 years and four months of age and was inducted 17 November 1943 at St. Louis, Missouri. He had no prior service.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as involves findings that accused did, at the time and place and for the period of time alleged, absent himself without leave from his organization in violation of Article of War 61, and legally sufficient to support the sentence.

8. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement was proper (Ltr Hq.

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European Theater of Operations, AG 252 OP. TPM, 19 Dec. 1944, par.3).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act, 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act, 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private ALFRED C. LEE (37629027), Company C, 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 of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz, conviction of desertion in time of war, so vacated, be restored.

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

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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 244, ETO, 26 June 1945.)

RESTRICTED

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

BOARD OF REVIEW NO. 3

CM ETO 8731

14 APR 1945

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at St. Trond, Belgium, 19 January 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant RALPH L. SIROIS (O-1579128), 432d Quartermaster Troop Transport Company	

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

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

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

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

Specification: In that Second Lieutenant Ralph L. Sirois, 432nd Quartermaster Troop Transport Company, did, without proper leave, absent himself from his command and duties in the vicinity of La Capelle, France, from about 2100 hours 17 September 1944 to about 0900 hours, 18 September 1944.

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

Specification 1: In that * * *, having received a lawful command from First Lieutenant Robert Q. Ostlund, his superior officer, to deliver eighteen (18) truck loads of gasoline to the Class III Supply Dump in the vicinity of La Capelle, France, and not to Class III Truckhead No. 31, did at La Capelle,

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France, on or about 10 September 1944 fail to obey the same.

Specification 2: In that * * *, did, on or about 18 August 1944, while on duty as Commanding Officer of a truck convoy, in the vicinity of Domfront, France, drink intoxicating liquor openly and publicly in the presence of enlisted men of his command.

Specification 3: (Disapproved by Reviewing Authority)

Specification 4: (Finding of Not Guilty)

Specification 5: In that * * *, did, on or about 15 September 1944, in the Orderly Room of 432nd Quartermaster Troop Transport Company in the vicinity of La Capelle, France, drink intoxicating liquor openly and publicly in the presence of enlisted men of his command.

He pleaded not guilty and was found not guilty of Specification 4, Charge II, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, First United States Army, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 3 of Charge II, confirmed the sentence, which he characterized as wholly inadequate punishment for an officer guilty of such grave offenses, and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

Specification and Charge I: On 17 September 1944 accused, a platoon leader in the 432nd Quartermaster Troop Transport Company, then bivouaced near La Capelle, France, was in command of a convoy the mission of which was to haul gasoline to a truckhead near Charleville, France, and thereafter to return to the company area (R7,8). Standard operating procedure followed by the company, with which accused was familiar, required convoy commanders to remain with and in effective control of their convoys during and until the completion of the mission at hand (R8,41,42). The convoy arrived at its destination at approximately 1800 hours but conditions upon arrival were not such that unloading could immediately be commenced (R9,12). It was raining at the time and accused, after making arrangements for the men to mess at the truckhead, had his driver drive him to a town some 10 or 12 miles distant where he secured a meal in a cafe (R10,13,17,19). After finishing his meal, he was driven to a "place" in the same town where he dismissed his driver with instructions that he was to be picked up at 0700 hours the following morning (R17,20). It became possible for the convoy

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to begin unloading about 2230 hours that night. This task required about one-half hour and, upon completion thereof, the ranking noncommissioned officer present, after waiting for accused until approximately 2330 hours, directed that the convoy return to the company area (R9,10,14,15). Accused did not return to his company until the following morning, after he had first returned to the truckhead from the town in which he had spent the night to find that the convoy had already gone (R11,18,19). Accused had no permission from his company commander to absent himself from his duties during the performance of the mission (R8).

Specification 1, Charge II: On 10 September 1944 accused was in command of a serial of 15 trucks which was part of a convoy commanded by First Lieutenant Robert Q. Ostlund, 431st Quartermaster Troop Transport Company. While the trucks were being loaded with gasoline at La Loupe, France, Lieutenant Ostlund informed accused that the gasoline was to be hauled to a Class III dump near La Capelle, France, the exact location of which was unknown to him at that time. Accused, who had information that Truckhead 31 was located at La Capelle, suggested that this was the proper destination for the cargo. To this suggestion Ostlund replied, "No, it isn't the truckhead that we are to go to. We are to go to the dump" (R23). Notwithstanding this, accused delivered that portion of the gasoline hauled by his serial of trucks at the truckhead (R25,28). Ostlund testified that the truckhead was located between La Loupe and the Class III dump, that the dump was marked with a sign, and that he himself, in searching for the dump, had first stopped at the truckhead and there received information which enabled him to reach his proper destination (R28,29). Upon completion of his mission, Lieutenant Ostlund asked accused if he had hauled the gasoline to the dump at La Capelle. Upon accused's reply that he had delivered it at the truckhead Lt. Ostlund reminded him of the instructions previously given him, to which accused replied only that "They seemed to be happy to get it at the truckhead" (R25).

Specification 2, Charge II: On 18 August 1944, while in command of a convoy, accused, who was driving a jeep in which his enlisted driver and another lieutenant also were riding, was seen to take a drink from a square bottle labelled "gin" which contained a clear colorless liquid. He also offered the lieutenant who was accompanying him a drink and, although the lieutenant did not accept, he drew the conclusion that the proffered drink was gin from the appearance of the bottle and its contents and from the fact that "when I was offered a drink I was offered it in such a manner as to accept it to be an alcoholic beverage" (R30-32).

Specification 5, Charge II: On the evening of 15 September a lieutenant in accused's company entered a tent used both as accused's living quarters and as the company orderly room and there saw accused and two enlisted men drinking out of a bottle. The lieutenant testified that the bottle, which was being passed back and forth among the men, contained cognac. Accused offered him a drink which he declined (R31-33).

4. Accused, whose rights as a witness had been explained to him by his defense counsel, elected to remain silent and no evidence was introduced on his behalf.

5. No substantial question is raised by the instant record of trial. The evidence clearly shows that accused absented himself from his command and duties as alleged in the Specification of Charge I and is equally clear with reference to the offense charged in Specification 1, Charge II. Further, there was competent substantial evidence from which the court could infer that accused drank intoxicating liquor in the presence of enlisted men under the conditions and in the manner alleged in Specifications 2 and 5 of Charge II. Accordingly, the record of trial is legally sufficient to support the findings of guilty, as approved and confirmed (CM ETO 6235, Leonard).

6. The charge sheet shows that accused is 26 years of age. He was inducted 18 November 1941, discharged 24 September 1942, and appointed Second Lieutenant in the Army of the United States with date of rank from 25 September 1942.

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

8. A sentence of dismissal is authorized upon conviction of Articles of War 61 and 96.

Benjamin P. Sleeper, Judge Advocate

Malcolm C. [illegible], Judge Advocate

B. V. Dewey Jr., Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant RALPH L. SIROIS (O-1579128), 432nd Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 8731. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8731).

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

(Sentence ordered executed. GCMO 117, ETO, 19 April 1945.)

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

BOARD OF REVIEW NO. 1

13 APR 1945

CM ETO 8732

U N I T E D S T A T E S	)	29TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 29, U. S. Army, 2 February 1945.
Second Lieutenant LEON WEISS (O-540327), Company B, 175th Infantry	)	Sentence: To be dismissed the service.

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

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

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

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

Specification: In that Second Lieutenant Leon Weiss, Company B, 175th Infantry, did, without proper leave, absent himself from his company, at Pattern, Germany, from about 1230 hours, 22 January 1945, to about 1630 hours, 22 January 1945.

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

Specification: In that * * * having received a lawful command from First Lieutenant Stephen B. Goodell, his superior officer, to accompany his troops to the field after lunch, did, at Pattern, Germany, on or about 22 January 1945, willfully disobey the same.

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

Specification: In that * * * did, at Neuwiler, Germany, on or about 6 January 1945, knowingly and willfully apply to his own use and benefit, one 1/4 ton motor vehicle, of the value of about one thousand dollars ($1000.00), property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to Charges I and III and the specifications thereunder and not guilty to Charge II and the Specification thereunder. All of the members of the court present at the time the vote was taken concurring, he was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 29th Infantry Division, approved the sentence, though deemed totally inadequate punishment for the offenses of which accused was found guilty, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deemed wholly inadequate, and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

a. Charge I and II and specifications: On the morning of 22 January 1945, First Lieutenant Stephen B. Goodell, acting company commander of Company B, 175th Infantry, the organization of accused, located in and near Pattern, Germany, telephoned accused (R6,11-12) and inquired why he was not in thefield with his troops. Accused replied that he was waiting for the transportation officer to assist him in locating a disabled jeep. Lieutenant Goodell then directed him to be available during the morning and "this afternoon accompany your troops to the field". Accused was asked if he understood and answered "Yes, sir" (R7-8). During the morning he informed two enlisted men that he was going to Holland (R13-15) and another that he was going "AWOL to Holland" (R17-18). He requested the three men to "cover up" his absence should anyone look for him (R14,16-17). He asked one soldier to say he had gone for a shower (R13) and told another to make a long search for him as he might be back by the time the search was completed (R17). He also informed one of the enlisted men that as Lieutenant Goodell would be in command in the absence of Captain Morris, the company commander, he would receive nothing more than a verbal reprimand when he returned (R15). On two occasions during the afternoon Lieutenant Goodell visited the defensive intrenchments where the troops of the platoon commanded by accused were at work and accused was not present (R7-9). Accused left the command post without permission at about 1230 hours (R8,12) and was next seen in the company area at about 1630 (R8,14,17).

b. Charge III and Specification: On 6 January 1945 while making an authorized trip in a jeep to Alsdorf, Germany, accused ordered the driver, an enlisted man, to take him to Kerkrade, Holland. When the driver protested that it was improper, accused said "I order you to Kerkrade". After accused took a shower at Alsdorf he repeated the order and the driver complied by taking him to Kerkrade (R19-21).

4. The defense stated that accused's rights were explained to him and that he elected to read an unsworn statement. He stated therein that upon graduating from high school he received a scholarship to college; that he made "ROTC" his career in college, attaining the ranks of Sergeant, Staff Sergeant, Cadet, Second Lieutenant, Captain and Major; and that after entering the Army he had his choice of officer candidate schools but chose the infantry school because he desired to be a front line soldier. On arriving overseas he volunteered as a paratrooper and was assigned to an airborne division, but due to injuries received in training was sent back to the Infantry (R25-26).

With reference to Charges I and III, he admitted he was absent from his platoon at a time when he was not "needed particularly" (R23,26) and that he misappropriated the jeep for a "kilometer or so", to deliver some clothes to a needy Dutch family. As the jeep was to go to Brunssum, he believed his use of the vehicle would be but a little out of the way (R25-26).

With reference to Charge II, he stated that the accusation that he disobeyed a direct order was "a direct lie", and that Lieutenant Goodell previously threatened to "get" him over a disagreement which took place on a patrol mission. He was placed in charge of a patrol to recover some boats and on being informed by Lieutenant Goodell that weapons would not be fired, toldhim he would fire if he saw fit in order to protect the men. Lieutenant Goodell then placed a Lieutenant Swain in charge and made accused assistant platoon leader. After the first attempt to recover the boats failed, accused took a volunteer and under enemy fire recovered one of the boats. On the way back they were subjected to our own mortar fire. He then obtained other volunteers and completed the mission. Since that time Lieutenant Goodell had "been on" him and took advantage of his absence without leave to charge him falsely with disobeying an order (R23-24). Accused stated that he was repentent for his actions and desired the opportunity to redeem himself with the division (R26).

After reading his unsworn statement, accused elected to be sworn as a witness (R26). In his testimony he repeated his reasons for believing that Lieutenant Goodell had directed his animosity toward him. He added that following the patrol incident he further angered Lieutenant Goodell and placed him in an "unfavorable light" when he succeeded in retrieving a rope in the presence of the enemy during daylight, when Lieutenant Goodell had previously failed in the same mission at nighttime. Lieutenant Goodell threatened to "get" him "sooner or later" (R27) and he had nothing but contempt for Lieutenant Goodell (R31).

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With reference to Charges I and II, he testified that when he

explained to Lieutenant Goodell over the telephone that he was acting under instructions from Captain Morris to wait for the transportation officer, Lieutenant Goodell told him to be "on tap" or "be available this morning". He did not receive an order to accompany the troops to the field after lunch (R26-28), nor did he ever say "Yes sir" to Lieutenant Goodell (R27,30-31). After the telephone conversation with Lieutenant Goodell, accused asked the enlisted men to "cover up" his absence and told one soldier to make a search if inquiries were made for him, as he might be back before the search was completed (R30-31). He also admitted stating to one of the men that he would go to Holland as soon as Captain Morris left and Lieutenant Goodell "took over" (R34), as the only punishment Lieutenant Goodell could give him for going "AWOL" would be a verbal reprimand (R30).

As to Charge III, he testified that on 6 January 1945 he had permission to go to Alsdorf, Germany, for a shower and obtained a ride there in the kitchen jeep (R27). He understood from the cook (R32) that a trip ticket had been issued to Brunssum and, not knowing that the jeep had made the authorized trip earlier in the day, he did not believe he would be taking it much off its course by going to Holland (R27-28). He stated to the driver, who protested it was not right to go to Kerkrade, "I will determine what is right and what is wrong and I will tell you where to go", and that if there was any repercussion he would take the blame (R32-34).

No other evidence was introduced for the defense.

5. a. Charge I and Specification: It is shown by the evidence and admitted by the pleas of guilty that accused absented himself from his company without proper leave from about 1230 hours to about 1630 hours on 22 January 1945, as alleged.

b. Charge II and Specification: The evidence shows that on the morning in question accused's acting company commander directed him over the telephone to accompany his troops to the field that afternoon. Accused affirmatively replied that he understood the order but instead of complying went absent without leave. He admitted receiving the telephone call but denied that any order was given him to accompany his troops. He related a series of events showing grounds for enmity existing between Lieutenant Goodell and himself, claiming that that officer took advantage of his being absent without leave to press a false charge of willfully disobeying a direct order. That the refusal of accused was willful is indicated by his conduct in soliciting the aid of enlisted men to cover up the fact that he was going absent without leave. The court determined against him the factual issue created by his denial that he received the order. As that determination is supported by competent substantial evidence it will not be disturbed by the Boardof Review on appellate review (CM ETO 4193, Green).

c. All of the elements of the offense alleged in the Specification of Charge III were established by the evidence and admitted in the pleas of guilty. Accused's testimony that he informed the protesting driver of the vehicle that he would determine whether it was right or wrong

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to make the trip establishes a knowing and wilful misappropriation in corroboration of the pleas of guilty (CM ETO 4184, Heil; CM ETO 3153, Van Breemen; CM ETO 996, Burkhart; CM ETO 128, Rindfleisch).

6. The record shows that trial took place the day after the charges were served upon accused (R.5). As accused stated in open court that he did not object to trial "at this time" (R5) and as it does not appear that his substantial rights were prejudiced in any way, no error was committed (CM ETO 8083, Cubley).

7. The charge sheet shows that accused is 21 years of age. The review of the Staff Judge Advocate reveals that he was commissioned 14 January 1944, having served as an enlisted man from 12 February 1942 to 14 January 1944.

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

9. A sentence of dismissal is authorized upon conviction of an officer of an offense in violation of the 61st, 64th or 94th Article of War.

B. Franklin Riter Judge Advocate.

Wm. J. Simmons Judge Advocate.

Edward L. Stevens, Jr. Judge Advocate.

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1st Ind.

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

1. In the case of Second Lieutenant LEON WEISS (O-540327), Company B, 175th 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.

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 8732. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8732).

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

(Sentence ordered executed. GCMO 120, ETO, 20 April 1945.)

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

BOARD OF REVIEW NO. 3

26 APR 1945

CM ETO 8733

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private THOMAS J. SMITH (33547139), 217th Port Company, 386th Port Battalion	Trial by GCM convened at Rennes, Brittany, France, 22 December 1944. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas J. Smith, 217th Port Company, 386th Port Battalion, did, at Goas-Vizien, Plourin des Morlaix, Finistere, France, on or about 13 November 1944, forcibly and feloniously, against her will, have carnal knowledge of Odette Larher.

The accused 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 hanged by the neck until dead. All members of the court present at the time the votes were taken concurred in the findings

of guilty and in the sentence. The reviewing authority, the Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

On the morning of 13 November at about 0930 hours, the accused, a private in the 217th Port Company, and two other enlisted men named Hopson and Parchman visited a cafe near the camp at Morlaix, France, where they all drank a little cognac and beer and became "pretty tight" (R25-28). About an hour later they started down the road back to camp. The accused was "pretty drunk". On the way to camp they met a fourth soldier named Tysom from the same company and the four of them then returned to the cafe (R29,34) where Tysom and Parchman had more cognac. About noon they returned to camp, meeting Lieutenant Nielsen on the way (R36,37). The accused was not walking very straight (R36,37). At camp they did not have the noon meal and did no more drinking (R29). They did nothing in particular except talk, accused taking part in the conversation (R26,33). About 1530 hours the same four left camp again (R26, 29,32). They stopped at two farm houses where they drank a little cider but no cognac (R31,38,39). The accused walked without the assistance of anyone and when they came to the third farm house he appeared to be sober (R39,40). He talked with his companions and there was nothing unusual in the way he talked (R31). At about 1630 hours the four soldiers arrived at the third farm house, which was in Goas-Vizien in Plourin near Morlaix (R9,10). Parchman and Tysom had previously purchased drinks there (R32,40). They entered but no one was at home except Odette Larher, a small 12 year old girl (R9,15,21,27), who told them, in response to their question, that her mother was gone but would be back soon (R10). A few minutes later all the soldiers except the accused left the house. They asked him to leave with them but he said he had some gum to give the little girl and would then catch up with them (R27,38). The accused was then alone in the house with Odette. She testified that he carried her to the clock so she could show him when her mother would return; that he offered her some chewing gum which she did not wish to take; and that he told her to close the door but instead she opened it and ran. He caught her in the court yard, took her in his arms, carried her back into the house and closed the door (R10,11,15). He put her down on the floor. She cried and took a little knife from his pocket and "put it on my throat. As I was shouting he put me down and put my scarf into my mouth" (R11). The scarf was in her mouth two or three minutes (R17). "Then he took me again in his arms and" carried her upstairs where he placed her on the floor. She struggled and cried and shouted. The accused removed one pair of trousers and began to unbutton a second pair. Odette

tried to "get down" but the accused caught her (R11) and again placed her on the floor. He separated her legs, tore her pants in two and let himself down upon her. He spit on his hands and rubbed it between her legs. He took out "his thing" ... "He urinates with it" and put it between her legs. It was hard, (R12) long, and black (R13). "He put the thing through which he urinates into my thing through which I urinate" (R15). It hurt her "in the thing from which I urinate" (R14). The accused pushed, moving his hips forward and backward (R14). His hands were on the floor (R16). The accused was on her for nearly half an hour (R14). She made a lot of noise, and said "leave me alone". At no time did she consent to what the accused was doing. The accused got up, buttoned his trousers and put on his other trousers. While he was doing this Odette went downstairs. He caught her just as she opened the door. He closed the door and went to examine the sideboard. Odette ran (R15,16) from the house and into a field where she cried out for help. The accused caught up with her, took her in his arms and threw her over a hedgerow where she fell into a ditch. "He heard the car of Mr. Leroux coming up and during that time, I went away to Mr. Leroux and I told what had happened"(R15).

Odette smelled liquor on the breath of the accused and observed him stagger a bit when he came to her house but when he ran after her he did not fall. However (R15) he did not run very fast (R16). Odette's home was about a hundred meters from the Leroux home (R23,43). Odette appeared there about 1600 or 1700 hours in a terrified condition. She was barefooted, her underclothing was hanging down and to Madame Leroux "she was very much terrorized". The first thing she said was that "she had been attacked by a nasty man". She said nothing more at the moment (R23,24). Madame Leroux's son went to Odette's home to investigate. As he arrived he saw a large strong brown boy or man in an American uniform leaving the house who ran away as soon as he saw Leroux. This was about 1630 hours (R43).

Dr. Mostini, doctor of medicine, examined Odette at 2200 hours on the day of the attack (R18). There were slight wounds on her private organs. These slight wounds were on the "internal face of the mucous of the little lips, and also a slight laceration on the hymen" (R17-19). The hymen was bruised (R19) but not broken (R21). The wounds were very fresh, apparently made five or six hours prior to the doctor's inspection. No other wounds were observed. The doctor took a smear from the depth of the vagina for examination by the Morlaix Hospital, which, he testified, reported that no male cells were present. After five or six days the wounds were healed. The doctor testified that it was possible but always very difficult for an adult male to penetrate the private parts of so young a girl; that the wounds he observed could have been caused by a finger as well as a penis, but the finger would have to be applied with pressure as in pressing or striking (R19-22).

4. The accused, after his rights were fully explained to him (R44,45) elected to take the stand in his own behalf and testified

substantially as follows:

He has been in the army since 1942. His home is Baltimore, Maryland, where his parents are living. In school he went only as far as the fourth grade. In civilian life he worked on a farm in Maryland. Ever since entering the army he has been with the 217th Port Company, 386th Port Battalion. He had never before been before a court martial nor had any trouble in the army. The only trouble he ever had in civilian life was in connection with an automobile (R45-49) for which he was fined $40. The last time he weighed himself his weight was about 180. He was about five feet 11 inches in height (R51-52). He had no recollection of anything he did from the time he went into the cafe in the morning until the following morning. That was the truth of which he was positive. He may have visited the Larher home that day but he had no recollection of it. However, he was certain that he did not attack the little girl because, in that case, he would have had some kind of stains on his pants and he had none (R50).

> "That morning we got up, the whole company, to go to work - to go to the job on the dock. Some of the boys didn't work. Two truck loads of boys come back to the camp and the rest of them worked" (R52).

> "I don't know what time it was, but we left camp. We went to four or five farm houses. Me and Grant Hopson and Robert Parchman left camp and went to four or five farm houses and Grant Hopson bought a half a bottle of cognac because I did not have any money. We got to feeling good. We left from there and went to a cafe. Hopsonbought some more cognac and calvados and I got high in there. I don't even remember leaving there at all" (R48).

From that time he remembered nothing that happened until the following morning (R49). He had never seen Odette before the day of the trial. Later in his testimony, the accused corrected this statement: he had seen the little girl before, at some identification held in camp (R53).

Lieutenant Nielsen, the only other witness for the defense, testified that he saw the accused with Hopson, Parchman and Tysom as they came down the road toward camp at about 1300 hours on 13 November. He noticed that the accused was slightly drunk. As his truck approached them the other three tried to straighten up the accused and take his arm, but he pushed them away with his hand (R54). The witness next saw the accused at about 1900 hours that evening. "He was sober then, sitting in the orderly room and he was sober". At that time the witness was about eight or ten feet from the accused but did not hear him talk (R55-57).

5. It is well established in the law that

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> The offense may be committed on a female of any age.
>
> Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165).

Every element of the offense is proved by the testimony of Odette Larher, the 12 year old victim of the attack. Corroboration is furnished in the testimony of Parchman and Tysom that they left the accused alone in the house with Odette, by the testimony of Madame Leroux who observed her distraught condition and torn clothing when Odette came to her after the attack seeking safety, and by Dr. Mostini who examined the body of Odette that evening.

As indicated above, much of the proof depended upon the testimony of a very young girl, but her competency as a witness was carefully tested before she was sworn and permitted to testify. In announcing his ruling of her competency the law member should have made it clear that his ruling was subject to objection by any member of the court (MCM, par.51, pp.39-40; AW31), but the child's apparent understanding of the moral importance of telling the truth and her obvious intelligence under examination demonstrate the correctness of the ruling. Presumably the members of the court had no objection to offer.

There is considerable evidence indicating that the accused was drunk on the morning of 13 November, and the accused testified that after he became drunk in the morning he could remember nothing more until the following morning. The evidence strongly supports his statement that he was drunk in the morning but there is only slight indication that this condition continued into the afternoon, and his testimony concerning his loss of memory is not convincing. Drunkenness could not, of course, constitute a defense to the crime of rape, but the testimony was properly admissible.

> "On the other hand, where, to constitute the legal crime, there is required no

> peculiar intent-no wrongful intent other than that inferable from the act itself - as in cases of assault and battery, rape, or arson, evidence that the offender was intoxicated would strictly not be admissible in defence.
>
> In military cases, the fact of the drunkenness of the accused, as indicating his state of mind at the time of the alleged offence, whether it may be considered as properly affecting the issue to be tried or only the measure of punishment to be adjudged in the event of conviction is in practice always admitted in evidence" (Winthrop's Military Law and Precedents (Reprint, 1920), p.293).

On cross examination by the defense, the doctor who examined Odette testified that the wounds could have been caused by a finger and that, in his opinion, penetration by an adult male of so small a female, though possible, would be difficult. The suggestion here that there may have been no penetration constituting rape is more than outweighed by the testimony of Odette that the accused removed his trousers, took out his penis, remained on her for what seemed to her about half an hour, placed his hands on the floor, moved his hips back and forth and finally, in her own childish language, "He put the thing through which he urinates into my thing through which I urinate" (R15).

The record of trial is authenticated by Alton R. Swindell, Lieutenant Colonel, Quartermaster Corps, who was president of the court by virtue of seniority. However, a note under the signature indicates that he signed as "a member in lieu of President because of his absence". The notation is obviously in error. A similar erroneous note appears below the signature of the trial judge advocate and the defense counsel. In the opinion of the Board of Review the signature of the president and trial judge advocate are sufficient for compliance with Article of War 33 and the misconception of the annotator may be disregarded.

6. The charge sheet shows that the accused is 24 years of age and was inducted 29 December 1942 at Fort George G. Meade, Maryland, to serve for the duration of the war plus six months. The accused has had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. N. Dewey Jr Judge Advocate

(40)

1st Ind.

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

1. In the case of Private THOMAS J. SMITH (33547139), 217th Port Company, 386th Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 8733. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8733).

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

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

(Sentence ordered executed. GCMO 130, ETO, 1 May 1945).
(Death sentence stayed. GCMO 139. ETO, 12 May 1945).
(Sentence commuted to dishonorable discharge, total forfeitures, and confinement for life, and as commuted ordered executed. GCMO 206, ETO, 7 June 1945).

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

BOARD OF REVIEW NO. 2

26 MAY 1945

CM ETO 8759

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 10 January 1945.
Private ELIAS M. LOPEZ (38002775), Company I, 13th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Elias M. Lopez, Company I, 13th Infantry, did, in the vicinity of Bergstein, Germany, on or about 10 December 1944, misbehave himself before the enemy, by failing to advance with his platoon, which had then been ordered forward by First Lieutenant Robert W. Beddow, 13th Infantry, to engage with the enemy, which forces, the said command was then opposing.

(42)

Specification 2: In that * * * did, in the vicinity of Bergstein, Germany, on or about 13 December 1944, misbehave himself before the enemy, by failing to advance with his platoon, which had then been ordered forward by First Lieutenant Robert W. Beddow, 13th Infantry, to engage with the enemy, which forces the said command was then opposing.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of Specification 1 of the Charge, except the words "to engage with the enemy, which forces, the said command was then opposing", substituting therefor the words "as a combat patrol", of the excepted words not guilty, of the substituted words guilty, and guilty of Specification 2 and of the Charge. Evidence was introduced of one previous conviction by special court-martial for willful disobedience of a non-commissioned officer in violation of Article of War 65. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence and forwarded the record for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but "due to special circumstances in this case" commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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. As to the first specification, it was proved by competent and uncontradicted evidence that on 10 December in the vicinity of Bergstein, Germany, the accused moved forward with the patrol to which his platoon was assigned but before the patrol reached its objective (R4,5,11), he left it and returned to the company area in the rear. The mission of the patrol was to proceed across terrain held by the enemy and establish contact with friendly troops on the left flank (R5,9-11). The enemy at the time was about 600 yards to the front. The patrol was receiving artillery and mortar as well as small arms fire(R7,11). When the mission was accomplished and the platoon returned to the company area, the accused was asked why he had not continued with the patrol. He replied that he became frightened when they started shelling. He had no authority to absent himself from the patrol (R6,11,12).

As to the second specification, the proof is much the same: On 13 December, likewise in the vicinity of Bergstein, the accused was a member of a patrol which had the mission of cleaning out an enemy pocket and thereafter digging in on a hillside. The enemy was about three or four hundred yards away and the company was receiving mortar and artillery fire. Again the accused moved out with the patrol, but was absent when it accomplished its mission (R6,7,11). At about that time the executive officer of accused's company discovered him near some buildings and asked, "What the hell he was doing there and he said he was sick" (R14). The executive officer then took him to the aid station. The battalion surgeon listened to the accused's complaint of minor aches, examined him and reported him as fit for duty (R13). The accused had no authority to absent himself from the patrol (R6, 11,12).

4. After his rights were explained to him, accused elected to remain silent and no evidence was introduced by the defense.

5. The evidence of record clearly presents one of the types of grave misbehavior against which Article of War 75 was directed. There can be no doubt these acts of misbehavior were committed before the enemy (IV Bull JAG 11,,12). Although the accused moved out with the patrol in each instance, he abandoned it at some point on its route to the assigned objective and was quite properly charged with the failure to advance. So far as the mission was concerned a failure to continue to advance might have placed its success in greater jeopardy than a failure to begin the advance. A few deceptive steps in the direction of the enemy could not relieve the accused of his duty to continue to advance, nor supply him with a substantial defense to a charge of failing to advance. As was said in CM ETO 1663, Ison, "The distinction between the active abandonment involved in running away from his company as alleged, and the passive abandonment involved in failing to advance with his company as found, is one of verbiage and is technical rather than substantial. The conduct is equally reprehensible and its effect is the same in each case - his absence from his company where it was his duty to be".

By making exceptions and substitutions in its findings as to Specification 1, the court rejected the allegation that the mission of accused's platoon was "to engage with the enemy which forces the said command was then opposing" and substituted, from its own conception of the evidence, the words "as a combat patrol". Obviously a combat patrol's mission would include engagements with such enemy units as it might be required or ordered to engage. The gravamen of the offense is accused's misbehavior before the enemy, viz., his failure to advance with his platoon (CM ETO 1404, Stack).

(44)

The court's action creates no material variance between allegation and finding in this respect and such variance as may be introduced does not change "the nature or identity of the offense charged" or increase the amount of permissible punishment. The matter may therefore be regarded as inconsequential (MCM, 1928, par.78c, p.65).

6. The charge sheet shows that accused is 24 years nine months of age and, without prior service, was inducted 8 July 1941.

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

8. The penalty for misbehavior before the enemy is death or such other punishment as a court martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Private ELIAS M. LOPEZ (38002775), Company I, 13th 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 8759. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8759).

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

(Sentence as commuted ordered executed. GCMO 203, ETO, 9 June 1945.)

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

BOARD OF REVIEW NO. 1 20 JUL 1945

CM ETO 8760

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Molsheim,
	)	France, 18 December 1944. Sentence:
Private First Class LOUIS	)	Dishonorable discharge, total for-
MASCUILLO, JR. (32589965),	)	feitures and confinement at hard
Company M, 7th Infantry	)	labor for life. Eastern Branch,
	)	United States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Louis Mascuillo Jr. Company "M" 7th Infantry did, near Nettuno, Italy, on or about 30 January 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he returned to military control at Rome Italy, on or about 31 October 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death by musketry. The review-

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ing authority, the Commanding General, 3rd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution established the following facts:

On 29 January 1944, accused was a machine gunner in the first platoon of Company M, 7th Infantry (R9,11). About four o'clock on the afternoon of said date, the platoon launched an attack against the enemy in the direction of Cisterna, Italy. The company remained in contact with the enemy until the fall of Rome on 6 June. Accused was present when the platoon went into the attack (R9). During the night he was sent to the rear to secure ammunition and bring it forward to the combat line (R12). About 5 AM on 30 January, the first sergeant of the company secured a report concerning accused. He immediately made a search of the platoon area, consisting of a front of about 100 yards, but was unable to discover him. The other platoons of Company M were attached to other companies which were extended over a wide area, so that it was impossible to search the areas of the other platoons (R10). Accused was not on duty with the company from 30 January and was not seen by the first sergeant from that date until he saw him in court (R10,11). The first sergeant did not give accused permission to leave the platoon nor to absent himself and to his knowledge no such authority was extended to accused by any authorized person of the company (R12). The accused was returned to military control at Rome, Italy, on or about 31 October 1944 (R13).

4. For the defense, the first sergeant of the company testified that he had known accused for about four months prior to his departure and that during such period accused's performance of his duties was "good" (R11,12).

After his rights were explained, accused through defense counsel made the following unsworn statement:

> "* * * I joined this Division on 14 June 1943 and made the landing in Sicily with my company. I served all through Sicily and Southern Italy and have approximately 100 combat days to my credit. I have not faced any court-martial previous to this time" (R14-15).

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5. No extended argument is necessary to demonstrate the correctness of the court's findings of guilty. Accused's conduct was of the exact pattern of the well known and understood "battle line" desertion cases. Proof of his presence with his platoon as it entered the attack upon the enemy with all of its concomitant hazards and perils, followed by his unauthorized departure at a time when his duties produced the propitious opportunity to leave his companions in arms, supplied all of the necessary elements of the offense of absence without leave to avoid hazardous duty under Articles of War 58 and 28 (See CM ETO 2481 Newton, p.9 and CM ETO 5958, Perry and Allen, p.8 for annotations of holdings of Board of Review (sitting in European Theater of Operations) on this type of desertion). Accused's extended period of absence (nine months) during which occurred the bitterly contested campaign against Rome fully justified the inference that his original absence was without authority (CM ETO 527, Astrella).

6. The charges were served on accused on 17 December 1944. He was placed on trial on 18 December 1944. His defense counsel in writing consented to trial on 18 December and in open court stated that trial at that time was agreeable (R7). The record of trial exhibits none of the defects and deficiencies of CM ETO 4564, Woods, Jr., and therefore it cannot be said under the circumstances that accused was denied due process of law or that any of his substantial rights were prejudiced (CM ETO 4988 Fulton; CM ETO 5004, Scheck; CM ETO 5255, Duncan).

7. The charge sheet shows that accused is 22 years of age and was inducted 13 November 1942 at Newark, New Jersey, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

8760

(50)

1st Ind.

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

1. In the case of Private LOUIS MASCUILLO, JR. (32589965), Company M, 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 8760. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8760).

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

(Sentence as commuted ordered executed. GCMO 295, ETO, 29 July 1945.)

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

BOARD OF REVIEW NO. 1

28 MAY 1945

CM ETO 8769

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Camp
	)	Elsenborn, Belgium, 21 February
Private LEO L. WOJTKOWICZ (36412283), Company K, 38th Infantry	)	1945. Sentence: Dishonorable
	)	discharge, total forfeitures,
	)	and confinement at hard labor for
	)	life. United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leo L. Wojtkowicz, Company K, 38th Infantry, did, at Kerarbiain, France, on or about 1 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: the attack on Hill 105, in the vicinity of Brest, France, and did remain absent in desertion until he returned to military control at Paris, France, on or about 12 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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. Undisputed evidence for the prosecution established the following:

On 1 September 1944, accused was present with his company, which was in a reserve position at Kerarbiain, in the vicinity of Brest, France, near Hill 105. At about 1000 hours, he and the other members of his squad were ordered by their squad leader to ready their equipment and prepare to move out at a minute's notice for an attack upon Hill 105. When the squad moved into the attack five minutes later, accused was absent without permission and could not be found in the vicinity despite thorough search. The attack upon Hill 105 was executed as scheduled, but accused was absent and did not return to military control until his surrender at Paris on 12 December 1944.

4. For the defense evidence was introduced that accused satisfactorily performed his duties, which included guard duty and action under fire, and was cooperative with the other members of his squad.

5. All the elements of desertion with the intent to avoid the hazardous duty alleged are clearly proven (CM ETO 8185, Stachura; CM ETO 7189, Hendershot, and authorities therein cited).

6. The charge sheet shows that accused is 22 years three months of age and was inducted 28 November 1942 at Kalamazoo, Michigan, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Rites Judge Advocate

Wm. F. Sweeney Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

31 MAY 1945

CM ETO 8801

U N I T E D S T A T E S	44TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bining, France, 3 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN T. McLAUGHLIN (31390754), Company F, 324th Infantry	

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

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

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

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

Specification: In that Private JOHN T. MC LAUGHLIN, Company "F", 324th Infantry, did, at Luneville, France on or about 24th November, 1944, with intent to commit a felony, viz, murder, commit an assault upon one Andre Houlle by willfully and feloniously shooting the said Andre Houlle in the left side with an M-1 rifle.

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

Specification 1: In that * * * did, at or near Embermenil, France on or about 17 November, 1944 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service

to wit, action against the enemy, and did remain absent in desertion until he was apprehended at Luneville, France on or about 24 November 1944.

Specification 2: In that * * * did, at or near Petit-Rederching, France on or about 12 December, 1944 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit, action against the enemy and did remain absent in desertion until on or about 19 December 1944.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial, for larceny of property valued at $56, and at $43, breaking arrest, and absence without leave for two days in violation of Article of War 64, 93, 94 and 61. Three-fourths of the members of the court pursent when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 17 November 1944 accused's organization was under enemy fire (R7) in an offensive position near Avricourt (R8) and was moving into an attack (R10). As the strength of his squad was reduced, accused's presence was essential (R8). He was absent without authority from 17 to 24 November (R11,12) and again for the period 12 to 19 December 1944 (R27-28,30). The company had just attacked to the northeast of Petit Rederching on 12 December and was receiving a heavy shelling. As its strength was reduced to 60 men, all men were essential (R28-29).

On 24 November 1944 Monsieur Andre Houlle of Luneville, France was working on a scaffold on the Jeanne D'Arc Church steeple, in that town, with only a belt around him when he was hit by a bullet (R17) and severely wounded (Pros.Ex.B). A sworn, signed statement of accused was admitted in evidence wherein he acknowledges his guilt of all the offenses charged.

4. Accused was sworn as the only defense witness. He admitted both absences without leave each terminated by apprehension and that on 12 December his company was actually under fire and that he knew his services were needed. He left about the middle of November without authority because of an urge to kill and he admitted deliberately shooting at the Frenchman working on the church steeple because the noise he was making disturbed his sleep. He knew it was wrong to kill and understood the consequences of his act (R31-35).

5. The evidence shows, and the accused admits, that he deliberately and intentionally committing the offenses charged, impelled as he says by the "urge to do something * * * to kill" (R31).

6. The charge sheet shows accused to be 19 years and five months of age and he was inducted 30 September 1943 at Fort Devens, Massachusetts. 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 the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 42). Confinement in a penitentiary is authorized upon conviction of assault with intent to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1 13 APR 1945

CM ETO 8832

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
First Lieutenant HERBERT MUIR GRAVES (O-2044497), 184th Medical Dispensary (Aviation)	Trial by GCM, convened at Central District, United Kingdom Base, London, England, 20 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for six months. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that First Lieutenant Herbert Muir Graves, 184th Medical Dispensary, (Aviation), European Theater of Operations, United States Army, did, without proper leave, absent himself from his organization at Cricqueville, France, from about 16 July 1944, to about 5 August 1944.

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

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Specification: In that * * * did, at Hounslow, Middlesex, England, on or about 28 July 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Midland Bank Limited, Hounslow, Middlesex, England, a certain check in words and figures as follows, to wit: "FA, C110097, 28 Jul 1944, Midland Bank Limited, Burton-on-Trent, Pay Bearer on Order Ten Pounds, £10-0-0, Pay Cash, Herbert M. Graves, Herbert M. Graves," and by means thereof did fraudulently obtain from aforesaid Midland Bank Limited, High Street, Hounslow, Middlesex, England, the sum of ten pounds (£10-0-0), exchange value of forty dollars and thirty-five cents ($40.35) American money, the said First Lieutenant Herbert Muir Graves well knowing that he did not have funds in the Midland Bank Limited, Burton-on-Trent for the payment of said check, and not intending that he should have.

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

Specification: In that * * * did, at Hounslow, Middlesex, England, on or about 4 August 1944, knowingly and without proper authority apply to his own use and benefit, by pledging and pawning, one (1) Elgin wristwatch, No. OC-1948 of the value of about eleven dollars and thirty-five cents ($11.35), property of the United States Government furnished for the military service thereof.

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

Specification: In that First Lieutenant Herbert M. Graves, 184th Medical Dispensary, (Aviation), European Theater of Operations, United States Army, did, without proper leave, absent himself from his station at London, England, from about 12 December 1944, to about 22 December 1944.

He pleaded guilty to Charge I, and the Specification thereunder, the Additional Charge and Specification, and not guilty to the remaining charges and specifications. He was found guilty of all charges and

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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 six months. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence, although wholly inadequate punishment for the offenses involved, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deemed wholly inadequate punishment for an officer guilty of such conduct, 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 competent evidence for the prosecution may be summarized as follows:

Specification, Charge I:

Accused, a first lieutenant, Medical Administrative Corps, Army of the United States, absented himself without proper authority from his organization, the 184th Medical Dispensary (Aviation), then stationed in the vicinity of Cricqueville, France, on 16 July 1944 (R9; Pros.Ex.4). He remained absent until apprehended on 5 August 1944 by a police constable in Hounslow, Middlesex, England (R12-13, 18).

Specification, Charge II:

On 28 July 1944, during the period of his absence without leave, accused entered the Midland Bank Limited at Hounslow, Middlesex, England, and presented to the bank a personal check for ten pounds drawn on the Midland Bank Limited, Burton-on-Trent. His identification papers were examined by the bank accountant who authorized payment of the check and the amount of ten pounds was paid out by the bank. On or before 5 August 1944 the check was returned to the Midland Bank at Hounslow marked "No account" (R9-11,18; Pros.Ex.5). With the personally expressed concurrence of accused (R11), the court received in evidence a stipulation that if Mr. Hume, chief cashier of the Midland Bank Limited, Burton-on-Trent, were present in court he would testify under oath that on 8 August 1944 he examined the records of the Bank and discovered that the accused had no account (R11; Pros. Ex.6).

Specification, Charge III:

At the time of his apprehension accused had on his person a pawn ticket (R14; Pros.Ex.8). On presentation of this ticket to the pawnshop named on it, the pawnbroker's manager surrendered an Elgin wristwatch similar in type to that furnished by the Government for

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use in the military service (R14-17). The back of the watch was inscribed, "U.S. Ser. No. OC ½ 1948" (Pros.Ex.8). The value of the watch was stipulated to be $11.35 (R18).

Specification, Additional Charge:

After a period of eight weeks confinement in England accused was returned to his unit in France (R24,27), but was later ordered to return to Headquarters Central District, United Kingdom Base Section, for court-martial purposes (Pros.Exs.1,2). At that time he was attached to the 156th Replacement Company, 130th Replacement Battalion (Pros. Ex.2). An extract copy of the morning report of that company for 12 December 1944 disclosed that on that date his status was changed from duty to detached service to Headquarters Central Base (R7; Pros.Ex.3). Presumably he departed from the 156th Replacement Company on that day. His orders directed him to report to the Commanding General at Headquarters Central Base and officers so directed normally report to the officer in charge of officer personnel at the Base. However, accused never reported to that officer and he never signed the Headquarters register for incoming personnel (R7). On 22 December 1944 he was apprehended in Hounslow by a detective sergeant of the Metropolitan police who surrendered him to the military authorities (R8).

On the day of his apprehension, 5 August 1944, the accused after being duly warned of his rights voluntarily executed a statement to an officer of the Military Police which was admitted in evidence as Pros.Ex.9 (R16,17). In general, the statement parallels the oral testimony of the accused (infra, par.4), but is more definite in some respects, viz., the accused stated that it was verbally agreed that if he were delayed after executing his mission he might spend such time in London, as was necessary in obtaining return transportation; that he completed his mission, insofar as that was possible, on 11 July 1944 and proceeded to London after arranging for his return to France on 13 July 1944. As for the girl who the accused supposed had opened the joint account he stated he had been intimate with her and refused to divulge her name (Pros.Ex.9).

4. The accused, after his rights were fully explained to him, elected to take the stand in his own behalf (R19) and testified substantially as follows:

He was stationed in England with the organization to which he belonged, the 184th Medical Battalion, from April 1944 until June 1944 when he departed with it in the invasion of France. He returned to England in July 1944 because the colonel who was executive officer of the wing thought it advisable that he return to secure more equipment for the patients' mess and also to recover some of the equipment which was left behind in England. He arrived in England sometime in July and accomplished his mission as far as possible. Accused could

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not obtain return transportation to his unit the next day or the following day. He then went to London and stayed several days at the Cumberland Hotel. In London he indulged in a drunken spree which continued until Sunday, 16 July 1944, when he realized his situation. After that he made three unsuccessful attempts to return to his organization but women and children were being evacuated and there were long queues waiting for the trains. Finally, near the end of July, he secured transportation on a train which returned him to the station where he had performed his mission (R20-21). On 28 July he cashed the check (Pros.Ex.5) and received ten pounds for it, approximately $40.35 (R27). He believed the check to be valid because a year ago when stationed in Burton-on-Trent accused and a girl commenced to save money for holiday purposes.

> "She suggested to open a joint account at the bank because she was supposed to be putting in some money too. I did not pay any attention to it. She said: 'All they need is your signature', and I gave my signature on a piece of paper. At different times I would give her £5 or £10 and in all, as near as I can figure it out, I gave her some £47. She told me she had put it in a bank in a joint account. I always figured I had that money sitting in the Midland Bank in Burton. I had never had occasion to use it before. I was figuring it was sitting there and I could use it" (R22).

He never made an attempt to determine whether there were sufficient funds in the account or whether an account had ever been opened. He left Burton-on-Trent in April and never returned except that he visited the warehouse on one occasion. After his return to England accused never had any conversation with the girl in Burton (R22,27).

As for the watch accused asserted he found it lying on the grass near Cricqueville where he was quartered. His organization formed part of an Air Corps outfit. He believed this was the type of watch issued by the Air Corps. He pawned the watchefor one pound five shillings but intended to redeem it at the end of the day (R22, 23). He knew that the watch was government property and should have known it was wrong to pawn it but did not think about it at the time (R27).

He did not obey his orders to report to the Commanding General, Central Base Section, Communications Zone (R28) but remained in Hounslow, a suburb of London, during the period 12-22 December (R24).

5. a. Accused pleaded guilty to the two absences without leave as alleged under Charge I, and the Additional Charge. There is ample evidence of record to like effect.

b. As to the Specification, Charge II, alleging the wrongful making and uttering of a ten-pound check, all elements of the offense were clearly established by the evidence except the matter of intent to defraud. Although more definite and positive evidence on so important a point is desirable, the Board of Review is of the opinion that the evidence introduced furnished sufficient proof to support the conviction. The accused made and uttered the check on 28 July 1944. On or before 5 August the check was returned, marked "No account". That evidence alone was not competent to prove the fact it recited (CM 185079 (1929), Dig.Op. JAG, 1912-40, sec.395(16), p. 210; CM 243091, McCarthy (1944), 27 B.R.273,III Bull. JAG 150; CM ETO 2452, Briscoe). There was, however, stipulated testimony to the effect that the bank records were examined on 8 August and accused had no account. The stipulation may reasonably be taken to mean that accused had no account, joint or otherwise, with the bank during the period in question. It is significant that accused inferentially admitted that he never had an individual account with the bank. He stated that when he cashed the check he believed that a joint account had been opened in his name and that of a former girl friend, whose name he refused to divulge. He never made inquiry at the bank and never had an indication from it as to the existence of such an account. Under these circumstances, the Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of the Specification and Charge II. An accused is properly chargeable with knowledge as to the status of his bank account (CM 236070, Warner (1943), 22 B.R. 279, II Bull. JAG 384) and the fact that the account may be owned jointly, subject to withdrawals by accused in one country and by the other party to the joint account in another country, is sufficient to put him on notice (CM ETO 1803, Wright).

c. As to the Specification, Charge III, it is clear that accused did, without proper authority, apply to his own use and benefit a watch of the type owned by the government and furnished for use in the military service. The watch bore marks which were evidence of government ownership. Accused testified that the watch was the property of the government, which he had found on the ground between Army tents. He volunteered an almost identical statement in his confession: "When I pawned the watch I knew that it was United States Government property and that I had no right to pawn it"(Pros.Ex.9).

6. The charge sheet shows that accused is 47 years seven months of age and that he was appointed a second lieutenant 11 May 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. A sentence of dismissal, total forfeitures and confinement at hard labor is authorized upon conviction of a violation of Article of War 61, 94 or 96. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir. 210, WD, 14 Sept. 1943, sec.VI as amended).

_____ Judge Advocate.

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

1. In the case of First Lieutenant HERBERT MUIR GRAVES (O-2044497), 184th Medical Dispensary (Aviation), 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. 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 8832. For convenience of reference please place that number in brackets at the end of the order. (CM ETO 8832).

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

(Sentence ordered executed. GCMO 123, Eto, 20 April 1945.)

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

BOARD OF REVIEW NO. 1 5 JUN 1945

CM ETO 8837

UNITED STATES	)	XVI CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters XVI Corps, APO 197, U. S. Army, 2, 3 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class WARDELL W. WILSON (38538056), Battery C, 777th Field Artillery Battalion	)	

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

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1. The record of trial in the case of the 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 61st Article of War.

Specification: In that Private First Class Wardell W. Wilson, Battery C, 777th Field Artillery Battalion, did, without proper leave, absent himself from his proper station at C. Battery Observation Post at Driesch, Germany, from about 1700, 7 February 1945 to about 2000 7 February 1945.

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

Specification: In that * * * did, at Haaren, Germany, on or about 7 February 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Sibilla Jorissen.

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

Specification: In that * * * did, at Haaren, Germany, on or about 7 February 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Mrs. Sibilla Jorissen.

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

Specification 1: In that * * * did, at Haaren, Germany, on or about 7 February 1945, wrongfully seize and hold Mrs. Helene von Der Forst about the neck.

Specification 2: (Finding of guilty disapproved by Reviewing Authority).

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the finding of guilty of Specification 2, Charge IV, 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. a. The evidence proved beyond doubt that on 7 February 1945 accused was absent without authority from his proper station for a period of three hours (Charge I and Specification) and that he committed an assault and battery at that time and place alleged upon the person of Frau Helene von Der Forst (Charge IV, Specification 1).

b. Accused's act of sodomy per os upon the person of Frau Sibilla Jorissen at the time and place alleged is proved by substantial evidence and admitted by accused. The question whether the perverted act was with the consent of the woman is immaterial. Sodomy per os is a crime under the 93rd Article of War. The finding of guilty of Charge III and Specification is legal (CM ETO 339, Gage; CM ETO 3778, Darcy; CM ETO 5879, Martinez).

c. The disapproval of Charge IV and Specification wherein accused was charged with fraternization with an enemy civilian was correct. "Fraternization" contemplates friendly social relationship;

not the infliction of anti-social acts by the soldiers upon the civilians involved. The disapproval of the findings of guilty is supported by CM ETO 10967, Harris; CM ETO 10501, Liner; and CM ETO 11854, Moriarity and Sberna.

4. a. With respect to the most serious charge against accused (Charge II and Specification), viz. rape of Frau Sibilla Jorissen, the Specification charged but one act of intercourse. The evidence showed two acts of intercourse. There was no motion by defense to require the prosecution to elect upon which act it would rely. On appellate review it will be assumed that the prosecution elected to stand on the offense first shown by the evidence (CM ETO 492, Lewis; CM ETO 7078, Jones). The Board of Review will therefore only consider the act of intercourse occurring prior to the commission of the crime of sodomy per os upon the woman.

b. Accused admitted his first act of intercourse and asserted that Frau Jorissen consented to same freely and voluntarily, that he did not threaten her with violence and that she did not give her consent as a result of fear of death or great bodily harm. The victim on the other hand testified that at no time did she consent to the act of intercourse, but that under fear of death or bodily harm she permitted his familiarities and orgiastic embraces.

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

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

The question whether the victim, without intimidation of any kind, fully consented to the first act of intercourse, or whether it was committed by accused by force, violence, terrorization and against her will was a question of fact within the exclusive province of the court. There is substantial evidence in the record of trial that Frau Jorrisen was overcome by fear of death or bodily harm and that the submission of her body to the lustful desire of accused was not a free and voluntary act. The facts that accused is a negro, that he was a member of a conquering army, and that he gained entrance to the victim's home by virtue of his uniform and the further fact that he was armed, form a matrix of substantial evidence to support the victim's claim that she submitted to the act of intercourse under

duress and fear. There is nothing improbable in her testimony. Inherently it possesses the tokens of truth. The case is of familiar pattern to the Board of Review which has consistently asserted in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it. Inasmuch as there was substantial evidence to support the findings, the Board of Review will accept them on appellate review (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson et al; CM ETO 4194, Scott; CM ETO 5363, Skinner; CM ETO 6042, Dalton; CM ETO 7078, Jones; CM ETO 7977, Inmon). The record of trial is legally sufficient to support the findings of the court that the first act of intercourse was rape.

5. The charge sheet shows that accused is 22 years of age and was inducted 17 May 1943 at Fort Sam Houston, Texas, to serve for the duration of the war and six months. No prior service is shown.

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

7. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567), and upon conviction of sodomy by Article of War 42 and section 22-107 District of Columbia Code (CM ETO 3717, Farrington, and authorities therein cited). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

27 APR 1945

CM ETO 8950

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Molsheim,
	)	France, 21 December 1944. Sentence:
Private HUGH KOMBRINCK	)	Dishonorable discharge, total for-
(35677294), Company L,	)	feitures and confinement at hard
7th Infantry	)	labor for 20 years. Loire Disciplinary
	)	Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Hugh Kombrinck, Company "L" 7th Infantry, having received a lawful command from 2nd Lt. G.C. Sullivan, his superior officer, to get his equipment, get into the jeep, and return to his company, did at Strasbourg, France, on or about 15 December 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 25 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years and forwarded the record of trial for

trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution consists solely of the testimony of Second Lieutenant Garland C. Sullivan, here summarized as follows:

Witness, assistant personnel officer, 7th Infantry, was, at Strasbourg, France, on the 15th of December 1944, instructed by the assistant adjutant "to go out to the stockade to interview some men with reference to their coming back to their company". The duty thus enjoined was in accordance with the regimental commander's policy (R8). Accused, according to Lieutenant Sullivan's testimony,

> "was one of the men I talked to that I saw that day with reference to returning to their company * * * He came out to me from the stockade. He was the last one I talked to. I told him that I was going to give him a chance to go back to his company; that he had a serious charge overhanging him and if he went back to his company and would perform his duties as a soldier should and satisfied his company commander and regimental commander that he would not be tried by a General Court-Martial; that the charges were not being completely dropped, but he would not be tried by a General Court-Martial * * * After I got through explaining the seriousness of the charge, I told him to go back into the stockade, get his stuff and get into the jeep, which was parked there, and the jeep would take him back to his company * * * He answered to the effect that he couldn't go back to the company -- he couldn't and that it hurt his back to carry a pack. He just would not return to the company * * * I asked him if he was sure he wouldn't go back. Then I asked him again if he was still sure and he answered 'Yes'. I told him to go back in the stockade" (R9,10).

With reference to the procedure followed in interviewing the group, Lieutenant Sullivan testified,

> "I talked to each man individually. I had the group wait inside the hall with an MP and brought them out individually on the porch with another MP present" (R10).

4. After his rights were explained to him, accused elected to remain silent.

5. Accused was convicted of willful disobedience in violation of Article of War 64. The evidence shows that, before telling him to return to his company, Lieutenant Sullivan explained to accused that he was giving him a chance to go back, a chance also to redeem himself and escape trial by General Court-Martial, for the "serious charge /then/ overhanging him". Moreover, according to Lieutenant Sullivan, who was assistant regimental personnel officer, the mission specifically assigned to the witness on the occasion in question was to go out to the stockade to interview accused and other prisoners with reference to their coming back to their company. He was not sent to order them back and his description of his method of discharging the duty thus imposed upon him indicates that he actually undertook to reason with and persuade the prisoners to return rather than to order them from the stockade to their company. He discussed with accused the seriousness of the charge already hanging over him, but there is not a suggestion in his testimony that he even intimated to accused that his failure to take advantage of the proffered "chance" would result in another charge - a capital one - being preferred against him for not doing so.

Isolating one excerpt from Sullivan's testimony, viz.

> "I told him to go back into the stockade, get his stuff and get into the jeep, which was parked there, and the jeep would take him back to his company",

there appears, it is true, to be testimony of a direct order; but in the context of the sole witness' preceding and subsequent testimony, which may not be ignored but must in fairness be taken into consideration in construing language upon which it has so direct a bearing, the telling appears to have been merely an emphatic form of persuasion. No intentional defiance of authority is involved in refusing to be persuaded, no matter how pointedly the superior may have stated his views in undertaking to impress them upon his inferior (vide Winthrop's Military Law and Precedents, Reprint, 1920, p.574; MCM, 1928, par.134b, pp.148-149). The evidence in the instant case follows the pattern held legally insufficient in CM ETO 1096, Stringer, (1944), and CM 230008, Post, 17 B.R. 273, (1943) to support findings of guilty of willful disobedience in violation of Article of War 64. As stated in the latter case, "facts must exist from which a reasonable inference may be drawn that wilful disobedience was actually intended. When the evidence in the present case is considered in its entirety the absence of such an evidentiary showing is clearly manifest".

6. The charge sheet shows that accused is 26 years of age and that, with no prior service, he was inducted at Cincinnati, Ohio, 12 December 1942.

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

Benjamin R Sleeper Judge Advocate

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

BOARD OF REVIEW NO. 1 20 JUL 1945

CM ETO 8955

U N I T E D S T A T E S)	3RD INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Saales,
)	France, 8 January 1945. Sentence:
Private JULIAN H. MENDOZA)	Dishonorable discharge (suspended),
(39237421), Company I,)	total forfeitures and confinement
7th Infantry)	at hard labor for 25 years. Loire
)	Disciplinary Training Center, Le
)	Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Julian H. Mendoza, Company "I" 7th Infantry did, at Raddon, France, on or about 20 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 surrendered himself at Strasbourg, France, on or about 8 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 12 days in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved the sentence but reduced the period of confinement to 25 years, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Order No. 109, Headquarters 3rd Infantry Division, 1 March 1945.

3. Substantial undisputed evidence showed that accused returned from the hospital on 20 September 1944. He was a member of a group of hospital returnees who were being returned to their respective companies for duty. His presence on that date at the S-1 office of his regiment, 7th Infantry, then located at Raddon, France, was determined by standard operating procedure which involved roll call. The letter order (R8,Pros.Ex.B) showed accused present. Such proof was not contradicted. After roll call and as the men left the S-1 office, they were issued .30 caliber ammunition and combat rations. At that time Company I, to which organization accused had been assigned, was engaged in heavy combat with the enemy - whether at Vagney, France, or at St. Bresson, France is unimportant as both places were in the line of the general north-easterly advance of the regiment. Accused did not report to the company and its morning report showed his

absence without leave on that date (Pros.Ex.A). He voluntarily surrendered to military authorities at Strasbourg, France on 8 December 1944.

Whether or not accused knew at the time he absented himself that his company was engaged in combat with the enemy and that his return to the company would mean that he would be exposed to the hazards of such combat was essentially a question of fact for determination by the court. He was a hospital returnee, and was one of a group of soldiers who were mustered at the S-1 office of the regiment for the purpose of returning them to their units. They were issued ammunition and combat rations. From this evidence the court was justified in inferring that accused understood full well the purpose of the operation; that he realized that his return to his unit would mean that he would face the same perils and hazards as his fellow soldiers, and that in order to avoid them he absented himself without leave. This case is of the same pattern as CM ETO 6637, Pittala; and CM ETO 7032, Barker. In the Pittala case, as in the instant one, the accused's knowledge of the combat situation was inferable from the evidence. In the Barker case the accused admitted such fact in his pre-trial voluntary statement. In the instant case it would be a travesty to conclude that the evidence was not sufficiently substantial to support the vital inference.

The holding in CM ETO 7532, Ramirez, is not controlling. In that case there was no evidence either of the tactical situation of accused's company or of circumstances under which he absented himself without leave from which it could be inferred that he knew that his company was exposed to battle hazards and that his absence was motivated by a desire to avoid them. The Ramirez case is the antithesis of the Pittala and Barker cases.

The record of trial is legally sufficient to support the findings of accused's guilt.

4. The charge sheet shows that accused is 25 years of age and was inducted 2 May 1942 at Los Angeles, California, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Peters Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens Judge Advocate

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

BOARD OF REVIEW NO. 2

26 JUN 1945

CM ETO 9025

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates ROBERT A. CLEGG (19099727), LYLE B. MERRITT (36452271), and LOUIS H. VINCENT (35727101), all of 975th Engineer Maintenance Company	Trial by GCM, convened at Luxembourg, Luxembourg, 26, 27 February 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CLEGG

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

Specification: In that Private Robert A. Clegg, 975th Engineer Maintenance Company, did, at or near Rancimont, Belgium, on or about 4 November 1944, forcibly and feloniously, against her will, have carnal knowledge of Julia Sauvenay Page.

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

Specification: In that * * * did, at or near Arlon, Belgium, on or about 4 November 1944, wrongfully and unlawfully apply to his own use one 3/4 ton truck, of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

MERRITT and VINCENT

(The charges and specifications are identical with Charge I and Charge II and the respective specifications thereunder against accused Clegg, supra, except for the substitution of the name of accused)

Each accused pleaded not guilty to and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications against him. Evidence was introduced of one previous conviction against accused Clegg by special court-martial for being drunk and disorderly in camp area and for absence without leave from camp area on 12 June 1944, in violation of Articles of War 96 and 61, respectively. No evidence of previous convictions was introduced with respect to accused Merritt or Vincent. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence of each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each, and forwarded the record of trial for action pursuant to Artide of War 50½.

3. Evidence introduced by the prosecution showed: Each accused was, on 4 November 1944, a private in the 975th Engineer Maintenance Company, stationed near Arlon and Rancimont, Belgium (R82; Pros.Exs. 4,5,6). On the afternoon of that day, the accused, Privates Clegg, Merritt and Vincent, were authorized to make a road test of a United States Army truck, a 3/4 ton weapons carrier, assigned to the company of which they were members and having a value in excess of $50 (R10). They left the company area and went to a town called Arlon. There they visited a cafe where for a time they drank cognac and beer. They then purchased a bottle of cognac and departed, driving on the highway which leads toward Rancimont, another town in Belgium, about

15 miles away. After they had driven about eight miles, they met the prosecutrix, Madame Julia Sauvenay Page (R9-11,24,82; Pros.Exs. 1,4,5,6). She was riding a bicycle. As they passed, she smiled; and they stopped and offered her a ride. She was only going as far as Anlies, about four miles farther, to buy shoes for her boy, but she accepted in order to save some time. Her bicycle was loaded in the back of the truck, and she sat in the cab between Clegg, who was driving, and Merritt. Vincent stood on the running board, leaning into the cab (R10,11,31,82; Pros.Ex.4,5,6). Cognac was offered her which she refused. When they reached Anlies, Madame Page, speaking French, tried to inform them that she wished to get out. Instead of stopping, the driver accelerated. After they had passed through the village accused "used the expression, 'zig zig'", speaking to her, and "they started to put their hands on" her knees. Madame Page "fought * * * screamed * * * yelled * * * even cried". She tried to grab the steering wheel, but Clegg, the driver, hit her. They continued to Rancimont, at which point she took the steering wheel and put the truck in the ditch at a place where a road leads off to the right. The driver, Clegg, could not get the truck out of the ditch. She had the steering wheel between her hands and the others could not quiet her. Thereupon Clegg released the steering wheel and put one hand around her throat and the other on her mouth, to still her screams, while one of the other accused took the steering wheel and managed to drive out of the ditch despite the fact that she was pulling "his" hair. "They" did the same to her. With the truck out of the ditch, accused "took the path on the right to go to the field"; and "she nearly threw him /Clegg/ out of the truck", being a very strong girl. About three-tenths of a mile down this side road, or path, the truck stopped (R12-14,19,27). Accused on Madame Page's right, Merritt and Vincent, got out. They tossed a coin to determine the order in which they would have intercourse. As a result Clegg, Merritt and Vincent, in that order, had sexual intercourse with Madame Page in the cab of the truck (R19,82; Pros.Exs.4,5,6). She testified that she did not consent to any of these acts, but to the contrary struggled and resisted. She said that they took off her dress and then her pants, unbuttoned her garters; that she cried and they hit her, "especially the driver", not Vincent however; that she pushed Clegg back with her hands and feet, but he hit her and succeeded, he was stronger and she was tired; that after Clegg finished she tried to get out of the left side of the car, but that they caught her foot. When Vincent's turn came, he tried to argue with her and one held her legs. After the intercourse by each of the accused in the truck, they pulled her out of the truck, lead her through a barbed-wire fence into a field, spread a coat out on the ground and there each of accused again violated her, one on each side of her, holding her

legs while the other was in the act. She kicked with her feet but "was not strong enough". Asked how many times each accused had violated her, she said that all had violated her "many times" over a period of time in excess of two hours.

After this second episode in the field, accused Clegg invited her to get back in the truck. She refused, her bicycle was unloaded, and she rode and walked back to her mother's home, arriving there about 8:30. There she made complaint to her mother that she had been ravished by three soldiers. Accompanied by her mother she visited her doctor (R14-21). The mother of the prosecutrix corroborated her as to the hour of her arrival, as to her appearance, she was "all torn and all dirty", and as to the explanation given and complaint made (R37,39). Doctor Perdand Pierret, a physician of 20 years practice, examined the prosecutrix that evening. He found "blow marks * * * injuries on the face * * * scratches and blue marks, injuries which did not bleed, * * * and finger marks deeply imprinted * * * red * * * on both sides of the throat". In addition, she had had her hair pulled out and there were some places where the skin had been pulled out with the hair. She had road blows on the knees which showed evidence of having bled. Her face had also bled. Her sexual organs "were not torn * * * only red and swollen" indicating "repeated acts of intercourse * * * made with force". There was evidence of semen in the genitals (R40-42).

Mademoiselle DeMarche lived in a house opposite the place where accused had turned the truck off the main highway onto the small road (R32). About four o'clock on the afternoon in question she saw a truck of the weapons carrier type, similar to that driven by the accused, pass her house going very fast and take a sharp right, opposite her house. In this truck she noticed an American soldier on the running board, "pushing back to the inside somebody" and she "heard a woman screaming * * * four or five times maybe". The truck returned about three hours later. The following morning she walked up the small road which she had seen the truck take. In the middle of a field about 60 feet beyond a barbed-wire fence in the general locality identified by prosecutrix, this witness found a pair of panties torn at the waist and all bloody, also an empty cognac bottle (R14,20,32-35; Pros.Exs.1,3).

The court received in evidence three writings which an agent, Criminal Investigation Division, testified were signed, sworn statements voluntarily made by each of accused, respectively, and taken by him in the course of his investigation. He said that the statements were written by him from what the accused told him (R43,47-50,82; Pros.Exs.4,5,6). The statements relate the same

general story, varying in certain details. Accused met Madame Page on the road and she indicated she wanted a ride. She sat in the front between Clegg and Merritt. According to Vincent and Merritt, after they had gone some distance "the girl" indicated that she had reached her destination and wanted to get out. Vincent said: "We didn't want to let the girl go". Merritt's version was: "I told Clegg she must want to get out * * * I argued with Clegg to let her out". Clegg did not stop but drove on. Vincent and Merritt related that she grabbed the steering wheel to stop them or to ditch the car. Merritt said she screamed. Clegg omits this part in his statement except to say he did not understand her signs. All admitted turning off on the side road, stopping the car and of having intercourse with the girl, in turn, in the cab of the car, except that Clegg said his act was not completed since the girl rose up and stopped him before he had finished. Vincent and Merritt told of taking the girl into the field through the barbed-wire fence and of having intercourse with her there. Merritt's story includes the episode in the field and his second act of intercourse at that place. Vincent said he had intercourse with her in the field. Each tells of gifts to the girl. Vincent said: "I did not mistreat this girl beyond having intercourse with her against her will". Merritt said, as to his experiences in the cab of the truck: "She didn't seem to put up any resistance". Clegg testified to cooperation by the girl to his act until the time she straightened up and made it impossible for him to continue. Each accused told of "loving the girl up" before starting his act in the cab, and each denied striking her (Pros.Exs.4,5,6). Both Vincent and Merritt agreed in admitting that after the incident in the cab the girl was taken into the field for the final act, with Clegg holding her arms, according to Vincent, and pulling her according to Merritt, and with Vincent and Merritt holding the barbed wires apart when they or Clegg got her to the fence. Clegg denied having intercourse with her in the field (R82; Pros.Exs.4,5,6).

4. On cross-examination of the prosecutrix, the defense developed the fact for the first time, that while she was on her way to her mother's home after this encounter with the accused, she fell off her bicycle, hurt herself, and that as a result of that had a number of bruises (R27); that she learned the name of accused Vincent by reading his name on his "dogtags" while the latter was violating her (she reached in and pulled out his "dogtags" (R146)), and that she did not call him "Vinsaunt" (phonetic version of French pronunciation of Vincent) and have him correct her, but that she remembered the name as "Vincent" (this despite the fact that she speaks no English)(R24,26-28); that she did not get in the truck "willingly", but that "they called" her; that after she got in the truck there was laughing, prosecutrix explaining: "I am joyous. I am of natural joy * * * in a correct way"; that her dress was not taken off (R30), although on direct examination she said that her dress was taken off just before any of her

other clothes (R14); that accused Vincent did not strike her (R27) although the other two accused did (R29.

The witness who heard the screams, saw the truck turn off on the side road and who found the panties, did not start her investigation until the next day. The panties, which she described on direct examination as "all bloody", did not have "much" blood on them; she found them in the center of a field at a distance, according to "Prosecution's Exhibit 1", of 100 feet from the place where the truck was parked, the place where they were removed, according to the prosecutrix (R14,34,35; Pros.Ex.1).

Cross-examination of the agent who interviewed accused, wrote out their statements and obtained their signatures, showed that he "asked them if they were familiar with the 24th Article of War", that he did not believe any of them knew what it /Article of War 24/ contained", and that the only "warning" he gave them was to read them the formal statement of the "rights" of a witness as it appears at the top of prosecution's exhibits 4,5 and 6 (R54). Witness also said that the word "yes", appearing after the "formal statement" mentioned above in each of these exhibits, was written in by him after each accused had said that he did thoroughly understand this statement (R54,56).

Defense counsel stated to the court that the rights of accused as witness had been explained to them. The court asked of each accused if he understood his rights as a witness and received an affirmative reply from each (R96).

Accused Clegg testified in his own behalf: The three accused left for the road test between 1400 and 1500 hours. They stopped at a cafe on the edge of Arlon. There they remained about an hour and had "more than one drink of beer" and two or three cognacs. They then proceeded up the highway shown on Prosecution's Exhibit A. "A little further than two miles" out, they approached an American truck "stopped" with a girl holding a bicycle standing opposite. The other truck pulled away as they approached. She indicated that she wanted a ride so they took her into the truck. She sat between Clegg and Merritt, Vincent sat on a box "alongside the seat with his feet on the running board". Before starting, Clegg offered her a drink out of a bottle of cognac purchased at the cafe. She refused. She did not scream along the road, but was "very jolly, laughing and all". Five minutes after she got in the car, the conversation was about "Zig Zig" and "coucher". One of the group had his arm about her. She often said "cafe". Clegg though she referred to a drinking place. He pulled up at such a place in the first village, but she indicated that she wanted to continue on. Later he realized that she had been talking about coffee.

Clegg was not sure that she at any time indicated her desire to get out of the car except that she made some motions when they went through one town which might have meant that. When they got to the turn-off road, shown in "Prosecution's Exhibit A", Madame Page made signs, as at the last village indicating that she wanted to get out at the farm-house there, and Vincent said it was time they returned to camp, so Clegg started to stop the car. He barely made the turn on to the side road - he did not however get into the ditch - and, driving carefully because the side road became a country trail, he proceeded about 50 or 60 yards to the first place where it was possible to turn around. He stopped at that point, but influenced by the fact that one of accused had been putting his hand up the woman's leg, with her dress up several times, and without her objecting but laughing, he did not turn the truck around. He remained sitting behind the driver's seat while the other accused got out. On Clegg's suggestion, they all had a drink. Madame Page refused one. Clegg "started feeling her legs". They started to talk about the order in which they would have intercourse. Clegg on the toss of a coin came out first, he "had the opportunity to try first". The other accused walked down the road; no one held the woman. Clegg then told of his efforts to seduce her. He talked about "Zig Zig". She didn't "look put out or angry", but she said "No". He continued "feeling her legs", and he attempted a conversation. He promised her "beaucoup coffee" and she said "Si" to that. By that time he had "gotten quite a ways in feeling her up". He again mentioned "Zig Zig", and she said "No" but "half giggling". He then gave her "one full package of cigarettes" and some chewing gum. She accepted both presents. After that, Clegg said, he did not think he would have further trouble with her. He got on the other side of her and started snapping her garter with his finger after which "she unhooked them and put her stockings below her knees". He then put on a rubber and proceeded to have intercourse with her. But, he said, he had no sooner started than she straightened right up in the seat. He was more or less thrown off of her. She then slipped over sideways so that a civilian passing by would not see her. She never attempted to get out the left side of the car. The car had a spare tire on the side. After that incident the woman refused to let him continue although he tried "for maybe two minutes to get her on again". He did not hit her. He even offered her 135 francs which she would not accept. After that Merritt got in the truck. Vincent and Clegg walked away to give merritt "an opportunity to make her". After Merritt finished, Vincent got in. The woman did not scream or cry out at any time that any of the three were with her in the truck. After Vincent finished the three men were standing to one side. Vincent was pointing to a place in an adjoining field where he had thrown the bottle of cognac. He had not wanted to take it back to camp and Clegg wanted to recover it. Madame Page came out of the truck and as Clegg walked up to the fence he indicated to her to come to the fence. Merritt and Vincent held the fence apart and she went through. In the field, Clegg laid his mackinaw on the ground, the woman and he sat down on it, she

didn't hesitate and he had intercourse with her. "She was normal, she didn't act like she was cold". She was "not cooperative, but she did seem to enjoy it". Clegg then said that Merritt and afterwards, Vincent "went in there" with Madame Page. Clegg said that all told they "must have been there for an hour or an hour and a half". He did not struggle with Madame Page, nor did she at any time yell; she laughed several times, but she didn't scream. After that they left. Madame Page refused their offer of a ride back (R96-120).

Accused Merritt testified in his own behalf: He related substantially the same story as told on the stand by accused Clegg. He said he had intercourse with Madame Page in the truck and in the field. "She didn't seem to resist a bit, and all during the time I had intercourse with her she was moving; she moved her own muscles like most women do". He stated that at no time did she attempt to grab the steering wheel, nor did she scream. At no time did he strike her or see anyone else strike her (R121-126,130).

Accused Vincent also took the stand in his own behalf: His description of the events of that afternoon corroborated that of his co-accused. He had intercourse with Madame Page twice, in the truck and in the field. She did not resist, did not resent it, and did not cry out at any time (R134-140).

5. At the time the prosecution offered in evidence the pre-trial, signed statements of the accused (R43-52; Pros.Exs.4,5,6), the defense objected (R52), contending that the rights of accused were not fully understood, that the accused believed they had to make statements and had to sign them, and further that the statements when completed by the agent who wrote them out narrated statements that had not in fact been made. The agent was cross-examined (R52-55,84), and accused each took the stand at that time, on the question of the voluntariness of these statements (R58-82). Then the following colloquy occurred:

> "Law Member: Does the defense object to the admissability of these documents?
>
> Defense: The defense does object on the grounds that they are not the true statements of each of the accused.
>
> Law Member: Is it the defense's contention that the admissability of these documents might eventually prejudice the rights of the accused?

Defense: The defense has come to the conclusion, after due consideration, that these statements having been so much in the light during this trial that the accused will not be afforded a fair chance if the court does not read the statements. The defense feels that the court may have a misconseption of what these statements contain.

Law Member: Then the defense feels it is proper to admit the statements in evidence, is that correct?

Defense: Yes, sir.

Prosecution: I would like to caution the court that these statements are being received in evidence on the basis that they were made to Mr. Sears, and they are not being admitted in evidence on the basis that they are true statements.

Defense: We want the record to show that the defense does not admit the truth of these statements and that they are not statements made voluntarily. The defense feels now that since such a point has been made of these statements that it is only fair that the court see them. We feel that they will not be as harmful to the accused if the court reads them, and we do feel they will be harmful to the accused if the court does not read them.

Law Member: Subject to objection by any member of the court, the statements will be received in evidence and marked as prosecutions Exhibits 4, 5 and 6. Each statement will be considered only against the accused making it" (R81-82).

When accused later took the stand in their own defense on the general issue, Merritt and Vincent specifically denied having made to the agent some of the statements found in his transcription. Specifically, all of the testimony on this point may be briefly summarized as follows:

The agent for the Criminal Investigation Department in his testimony in chief said in effect that each accused had been informed of his rights and had voluntarily made a statement to him which he transcribed in his own hand, employing the language of the accused, after which it was voluntarily signed and sworn to (R43-52).

The agent was questioned as to whether or not he was armed with a pistol which he had lying on the table when he interviewed the three. He was positive that he did not have a gun on his person or on the table at the time, although he has carried a United States Army forty-five, and did possess a Western type pistol. He denied that he told Vincent that Madame Page had not said much against him, and that if he (Vincent) came out with all the facts he would get off lightly. He denied that he had told the same thing to Merritt. He said that it was not accused but he who had written the word "Yes" after the question found at the top of each statement: "Do you thoroughly understand your rights?" They replied to a specific question that they were not familiar with Article of War 24. He did not read it to them. The only warning given them was to read the formal statement which appears at the top of each signed statement. Before the accused swore to their statements, "they examined them to see if they were the statements they made" (R52-56). Questioned by the court as to whether he had worn a revolver, a .38 caliber, during the interviews, the agent said it was possible that he wore it the first day when he interviewed Vincent (R84). He did not recall that when he interviewed Merritt he told him that Vincent had made a statement implicating him, but he did tell Clegg that the others had made statements directly contrary to his and that after that Clegg had not changed his story (R86,87). He did say to one of accused that it would be to his advantage to confine his statement to the truth (R87). He had interviewed the prosecutrix and knew of other prosecution evidence before he talked with accused (R90). Merritt testified that the agent, at his interview, said he "wanted the truth and not a bunch of_____", that he realized Vincent was only 20 years old and a minor and that he believed it was the other two who should be punished. The guard asked if his presence was required and the agent pulled a Western type gun which he carried and said he could take care of Vincent. He drew this pistol and put it on the table in front of him. He did not tell Merritt that he had a right to remain silent. He was not offered an opportunity to read the statement before he signed it or swore to it (R60,61,126). Merritt explained the fact that he signed without reading by: "Well, the way he went around to tell you to sign - he could make anybody sign it". He did think at the time that what had been written down was what he had said (R62). He did not tell the agent that the other two accused were intoxicated; the woman did not scream and he did not remember saying that the woman screamed twice. He felt it was necessary to sign the statement "the way he shoved it over to me and told me to sign it" (R126,127).

Vincent testified: That the "warning" was not read to him; that the agent told him he had a good chance of getting out of it as Madame Page had said he had not harmed her in any way; that he

that he had made an earlier statement and that, as what he considered an inducement, the agent had said "he would destroy the other statement which I had made and this statement was more or less in my favor in order to clear me". He was not offered a chance to, nor did he read his statement before he signed it (R66,67,140). There were discrepancies in the statement which he signed (R69). The reason he signed it was "being a Private I have always done what I have been told to do, and I was told to sign it" (R70). The agent was armed with a pistol during this time (R72). On cross-examination of Vincent, it was shown that at a prior trial he said that the agent had read the statement to him (R73).

Clegg testified as to the language employed by the agent in introducing the subject of taking his statement. He said he was told that the other two accused had broken down and given him the goods and that Clegg might as well come clean. He was not advised of his rights. In the statement were two parts which were not transcribed correctly. Clegg noticed the first mistake when the agent finished the first page and later when he noticed him making a second mistake, he discontinued his statement (R74,76). Despite this, the agent continued to write. Clegg, nevertheless, signed, because he was positive he had to, so he signed them to get it over with and to get out.

6. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The testimony of Madame Page afforded substantial basis for the findings by the court that accused committed rape as charged. The act of intercourse by each accused does not depend on her word. Each accused admitted it in his pre-trial statement and on the stand. If she is to be believed, she did not consent to any act of intercourse; her story is that she protested, struggled, screamed, sought to escape and resisted to the limits of her strength. There are elements of weakness to be found in her testimony, as for instance the incident she described when she ditched the truck before it turned off the side road. Clegg under the wheel was unable to back out because her hands were on the wheel, whereupon one of the others, necessarily reaching across her body, grasped the wheel and while Clegg transferred his hands to her throat, the other steered the car out of the ditch. This feat requiring pedal acceleration of the motor by Clegg who was then busily engaged in choking the prosecutrix rather strains the imagination since its success required a synchronization of effort rather difficult under the circumstances. And the defense appears to have satisfied the reasonable mind that Madame Page could not have gotten more than an edge of her torso out of that door on the left hand side of the car, latched as it was from the outside and, if unlatched, limited to a tiny aperture by the spare tire moored six inches from

the door. This somewhat impairs the credibility of her claim that she attempted to escape, after the raping in the car, by the left front door and would have succeeded had she not been caught by her foot.

Her failure to mention until cross-examination of the fact that some of the injuries which she described on direct examination and attributed to accused were occasioned by a subsequent fall from her bicycle indicates a lack of candor which might well discredit other portions of her testimony. How she could have read Vincent's dogtags had she been struggling is difficult to understand.

However, there was one bit of corroboration by testimony, not impeached, of her claim that she did not consent to the darker aspects of the episode. She was heard to scream by the woman who witnessed the truck turn off onto the side road and who saw a man on the running board who seemed to be pushing someone back into the car.

The pre-trial statement of each accused was damning evidence against its author. Clegg said that as they went up the side road she acted as though she did not want to go there and that she said "No Zig Zig". This was certainly not conclusive on the question of ultimate consent procured by seduction, but it tends to corroborate the prosecutrix. Merritt's statement shows that he knew she wanted to get out of the car on the main road; that she finally grabbed the wheel to ditch the car; that Clegg kept her in the truck after it stopped on the side road; that he told Clegg to take it easy as he was holding the girl too tightly; and that when Clegg took the girl through the barbed-wire fence, he pulled her and she struggled, and that he helped Vincent separate the wires for Clegg. Vincent among other things said: "I did not mistreat this girl beyond having intercourse with her against her will". These statements, if competent, give the strongest corroborative evidence that there was no consent. The proof that force was used is found in her testimony, in that of the physician who described physical injuries which rebutted consent, and in that of the woman who heard screams which indicate that there was violence.

There was evidence on both sides as to the voluntariness of the pre-trial statements. Without passing on the legal effect resulting from the defense's yielding attitude (R81,82) that these statements should go in, and the reasons stated for that consent, it may be said that the court listened with manifest interest and care to the evidence pro and con. It examined every aspect of that problem and within its own discretion received the statements in evidence. It cannot be said that in so doing there was any abuse

of discretion. As has been pointed out, with these statements in the record, before the court, there was substantial competent evidence to support the findings of guilty of rape, embodied in Charge I and its Specification against each accused.

7. Charge II and its Specification alleged against each accused the wrongful and unlawful application of a government truck to his own use. This was fully proved. Accused were authorized to take this car out for a road test. While so doing they picked up a civilian woman and thereafter diverted the use of the car from the purpose for which it was authorized and employed it for an unauthorized and unlawful purpose, that of enabling them to have sexual intercourse. This was a violation of Article of War 96, the Article under which the Charge was laid, as prejudicial to good order and military discipline (CM ETO 2966, Fomby; and CM 241285, Moudy, 26 B.R. 251 (1943).

8. Attached to the record are two recommendations for clemency. The first is signed by the president and five other members, out of seven, of the court which tried accused, and by the staff of defense counsel. The second is signed by the trial judge advocate and the two assistant trial judge advocates.

9. The charge sheets show that accused Clegg is 31 years of age and that he enlisted at Los Angeles, California, 25 June 1942, without prior service; that accused Merritt is 21 years of age and was inducted 16 February 1943 at Kalamazoo, Michigan, without prior service; and that accused Vincent is 21 years of age and was inducted 11 March 1943 at Evansville, Indiana, without prior service.

10. 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.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

27 APR 1945

CM ETO 9062

U N I T E D S T A T E S	) NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private JOHN E. BOYER (16070372), 569th Engineer Dump Truck Company	) Trial by GCM, convened at Rennes, Brittany, France, 8 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private John E. Boyer, 569th Engineer Dump Truck Company, did, without proper leave, absent himself from his organization and station at Ruaudin, Sarthe, France, from about 3 September 1944 to about 3 November 1944.

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

Specification 1: In that * * * did, at Bruz, France, on or about 8 October 1944, feloniously take, steal and carry away about 225 gallons of gasoline, of the value of about $165.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * did, at Bruz, France, on or about 11 October 1944, feloniously take, steal and carry away about 500 gallons of gasoline, of the value of about $375.00, property of the United States furnished and intended for the military service thereof.

Specification 3: In that * * * did, at Bruz, France, on or about 14 October 1944, feloniously take, steal and carry away about 55 gallons of gasoline, of the value of about $41.00, property of the United States furnished and intended for the military service thereof.

Specification 4: In that * * * did, at Bruz, France, on or about 17 October 1944, feloniously take, steal and carry away about 550 gallons of gasoline, of the value of about $410.00, property of the United States furnished and intended for the military service thereof.

Specification 5: In that * * * did, at Bruz, France, on or about 25 October 1944, feloniously take, steal and carry away about 335 gallons of gasoline, of the value of about $250.00, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that * * * did, at Ruaudin, Sarthe, France, on or about 3 September 1944, wrongfully and without lawful permission or authority take and use a 2½ ton, GMC, 6 x 6, dump truck, United States Number 4496245, property of the United States, of a value of more than $50.

Specification 2: In that * * * did, at or near Bayeux, France, on or about 25 September 1944, wrongfully and without lawful permission or authority take and use a 2½ ton, GMC, 6 x 6, dump truck, United States Number 4494316, property of the United States, of a value of more than $50.

He pleaded not guilty to, and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for about 27 days in violation of Article of War 61. Three-fourths of the members

of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. 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. While the instant case was poorly tried, the evidence of record includes an extremely full and complete confession in which accused acknowledged his guilt of each of the offenses charged. This being true, there remains for consideration only the questions (1) whether the confession was voluntarily made and (2) whether the record contains independent evidence that each of the offenses charged probably was committed, i.e., independent proof of the corpus delicti as to each offense (MCM, 1928, par.114a, p.114-116).

(1) An involuntary confession must of course be rejected and the court may, in its discretion, require a prima facie showing that a proffered confession is voluntary before admitting it into evidence. However, where the evidence neither indicates the contrary nor suggests further inquiry into thecircumstances, a confession may be regarded as having been voluntarily made and admitted into evidence without any preliminary showing as to its voluntary character (MCM 1928, par.114a, p.116; and see CM ETO 2343, Welbes). In the instant case, the confession was taken by two agents of the Criminal Investigation Division neither of whom was called as a witness for the purpose of laying a foundation for the introduction of the confession. However, the confession itself contains a preliminary recital which indicates that accused was advised of his right to remain silent and warned that anything he might say could be used against him, there is no suggestion in the record that improper influences were employed to induce accused to confess his guilt, the defense did not contend that the confession was involuntary, and no objection was interposed to its admission. Under these circumstances the court did not abuse its discretion in admitting the confession as having been voluntarily made and the confession thus suffers from no infirmity in this connection (CM ETO 2343, Welbes).

(2) Independent evidence that accused absented himself without leave from his organization and station as alleged in the Specification of Charge I is furnished by testimony of the first sergeant of accused's company tothe effect that he first noticed accused's absence at reveille formation on 3 September 1944 and did not see him thereafter until the day of trial (R20,21). This testimony was corroborated by that of Lieutenant Dudley, one of the company officers (R6,14,15,17). Independent proof tending to show the commission of the offenses charged in the specifications of Charge II was furnished by the testimony of Sergeant Thomas C. Vandergraff, who stated that he saw accused "drawing gas" from a petroleum, oils and lubricants dump, and through the introduction of certain tally-out slips, made in the regular course of business,

which indicated that accused received gasoline from the dump on the dates and in the quantities alleged (R23,24,27; Pros. Exs.5-10). There was also competent evidence of record, other than the confession itself, of the corpus delicti of the two offenses alleged in the specifications of Charge III. This being true, no objection to the admission of the confession can be advanced on the ground that it was unsupported by independent proof showing that the offenses charged probably were committed.

The requisite conditions having been met, accused's confession was properly admitted into evidence. Since this confession, as supported and amplified by other competent evidence of record (not all of which has been here summarized), amply shows the commission by accused of the offenses charged, it is the opinion of the Board of Review that the evidence is legally sufficient to support the findings reached by the court.

4. The charge sheet shows that accusedis 20 years of age and enlisted on 29 April 1942 at Chicago, Illinois. No prior service is shown.

5. Confinement in a penitentiary is authorized upon conviction of the offense of stealing property furnished or to be used for the military service by section 36, Federal Criminal Code (18 USCA 87), as amended by Public Law 188, 78th Congress, Act 22 November 1943 (Bull. No. 23, WD, 11 December 1943), where the value exceeds $50 (AW 42; MCM, 1928, par.104c, p.100). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement isproper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Benjamin A. Cooper Judge Advocate

Malcolm C. Chase Judge Advocate

B. L. Keogh Judge Advocate

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

BOARD OF REVIEW NO. 3

27 APR 1945

CM ETO 9064

U N I T E D S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private LOUIS C. SIMMS (38498706), 3116th Quartermaster Service Company	)	Trial by GCM, convened at Cherbourg, Manche, France, 19 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE I: Violation of the 86th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: In that Private Louis C. Simms, 3116th Quartermaster Service Company, did, at or near Bricquebec, Manche, France, on or about 29 December 1944, with intent to commit a felony, viz, sodomy, commit an assault upon Erich Mueller, Prisoner of War, by willfully and feloniously striking and kicking the said Erich Mueller on the head and buttocks with his fists and feet.

Specification 2: (Finding of not guilty)

He pleaded not guilty to all specifications and charges and was found not guilty of Charge I and its Specification and of Specification 2, Charge II, and guilty of Charge II and Specification 1 thereof. 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 seven years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, designated the Federal Reformatory, Chillicothe, Ohio, 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 29 December 1944 accused and Private Charlie M. Campbell, both of 3116th Quartermaster Service Company, were members of the guard at Prisoner of War Camp No. 56-G near Bricquebec, France (R6,7,28). At 1400 hours on that day they were posted at Post No. 3, a two man post located at one of the corners of the prisoner of war enclosure or stockade, for a four hour tour of duty (R7-10). Accused took up his station in a tower located on the post while Campbell remained on the ground in the vicinity of the base of the tower (R8,10). The guards were permitted to build and maintain a fire on the post and it was customary for both guards to warm themselves at such fire from time to time (R8,13). Although wood for the fire was customarily supplied by a prisoner of war detail, the detail failed to bring fuel on 29 December (R14). The supply became exhausted and shortly before 1700 hours, the time at which the prisoners ceased work, the accused, after first apparently discussing the need for wood with Campbell, selected a prisoner of war from a group of such prisoners who were working near the post and departed with him (R11,12,15,22). According to Campbell, accused returned some ten minutes later with wood for the fire (R11).

Erich Mueller, a German prisoner of war, testified that sometime between 1600 and 1700 hours on 29 December, while working under guard with other prisoners of war outside the stockade, he was approached by accused and made to understand he was to go with him into the woods (R15,17,18). After taking him into the woods, accused indicated to him that he should lower his trousers. Upon his refusal to do so, accused threatened him and, upon his continued refusal, struck him on the head with his fist (R16). Accused then threw him to the ground and attempted to pull his trousers down (R16,19). Mueller deduced that accused "would 'screw' me; he wanted to have intercourse with me" (R22). He then cried out and, upon his doing so, accused ceased his efforts, "arranged himself", ordered Mueller to arrange his clothing, "kicked me again and told me to go" (R16). Before leaving the woods he was required to pick up a piece of wood which he carried back to the location where his detail was working. This was some 100 meters from the guard fire (R17,20). He then rejoined his work group and shortly thereafter the prisoners ceased work for the day and were taken to

their camp (R17,22). He had previously been subjected to ill treatment by other guards (R19).

On the afternoon of 31 December Lieutenant Harlyn W. Lacey, accused's commanding officer, received a complaint regarding the treatment of certain prisoners of war as the result of which he sought out the accused, who at this time was in a hospital due to a minor foot injury, for the purpose of questioning him (R28,29,32,33). On direct examination, Lieutenant Lacey testified as follows with respect to the manner and result of his interrogation of the accused:

> "I talked to Private Simms and told him, explained his rights under the 24th Article of War. I told him there was much evidence that he had beaten the prisoner and he had committed sodomy, and I askedhim whether it was true, and told him if he had committed the offense it eventually would be brought out. I explained his rights, that he had the right to confess or not. He said he did" (R29).

On cross examination, Lieutenant Lacey testified that accused seemed nervous during the questioning. He also stated that, in interrogating the accused, he believed he employed the term "sodomy" and assumed that accused, although of low intelligence, knew the meaning of the term as the result of previous readings and explanations of the Articles of War. When asked whether he had informed accused that it would be to his advantage to confess he replied as follows:

> "I told him it would be to the advantage of all concerned, that eventually if he was guilty, it would take a lot of time if he was guilty, it would save all concerned a lot of confusion" (R30).

Defense counsel then moved to strike that portion of Lieutenant Lacey's previous testimony which related to his conversation with the accused on the ground that accused's statement amounted to a confession and that such confession was not voluntarily made. Further examination by the court elicited the following statement from the witness:

> "I said if he was guilty, under the 24th Article of War he didn't have to talk he could remain silent, but if he was guilty eventually the matter would be brought out, and it would be better for all concerned if he was guilty to tell me so there" (R31).

At the conclusion of its examination, the court closed and, upon reopening, the law member announced that the motion to strike that portion of Lieutenant Lacey's testimony relating to accused's confession was not sustained.

(100)

4. Private Campbell, recalled as a witness for the defense, testified that the term "sodomy" had never been explained to him and that he was unfamiliar with its meaning (R36). To Private Samuel Scales, 3116th Quartermaster Service Company, also called as a witness for the defense, the term sodomy meant "the truth, telling the truth" (R41). This witness, who was in command of a work detail of prisoners of war on 29 December, also testified that at about 1700 hours on that day accused came to him with the request that he be permitted to take one of the prisoners of war for the purpose of securing wood for the guard fire. Accused and the prisoner returned in approximately five minutes with wood and this wood was placed near the tower (R39,41). Scales knew the men were gone only about five minutes because he was waiting for the prisoner, for whom he was held responsible, and because "I know about then how long it would take a man to go to the woods to get wood when it is already cut" (R42,43). When accused returned, the prisoner rejoined his detail and continued with the work then in progress until returned to camp (R39).

Accused, after having been fully advised of his rights as a witness, elected to testify on his own behalf. He stated that at about 1645 hours on 29 December he approached Private Campbell, with whom he was on guard at Post No. 3, and asked him to get some wood for the fire. Campbell in turn proposed that accused secure the wood in which proposal accused acquiesced after some discussion of the matter and upon Campbell's agreement to get wood the following day. He then went to Scales and asked him for a prisoner (R47). Scales motioned one of the prisoners to accompany him whereupon he took the prisoner into the woods and indicated to him that he should gather some wood (R47,52). When the prisoner selected small sticks accused indicated that larger wood was desired and, when the prisoner continued to select only small sticks, he hit and kicked him. The prisoner then dropped the wood previously gathered and, at accused's direction, picked up a larger stick or log. Accused's testimony indicates that because of the prisoner's reluctant obedience, he himself ultimately carried this piece of wood to the tower and then returned the prisoner to his detail (R47,48). He was with the prisoner in the woods for a period of only about five minutes (R50).

He testified as follows with respect to his conversation with Lieutenant Lacey at the hospital:

> "When he came in, the first thing he asked me, 'Are you guilty or not guilty?' I said, 'Guilty of what, sir?'. He said, 'Beating the prisoners.' I waited a long time before I answered the question. First he asked the nurse where I was. I got my shoes on and put them on, came outside to the laundry tent out there, and told them-- he asked me, 'Is you guilty or not guilty?' 'Is you guilty of beating the prisoners' and I forget the second word.
>
> Q. Sodomy.
>
> A. Sodomy. 'If you plead guilty, it will be more

easy on you, they won't do anything to you.' I studied at the time. He asked me again. He asked me again, 'Are you guilty?' He had another lieutenant with him, a colored lieutenant. He looked at that lieutenant and I looked at him. He said to me, Lt. Lacey, 'if you plead guilty it will be more easy on you'. I said, 'There ain't nothing to plead guilty of.' I told him, 'Well, I'll plead guilty'" (R49).

At the time of his conversation with Lieutenant Lacey, accused did not know the meaning of the term sodomy (R49,50,51,53). He remembered that the word was used during the questioning because he "studied over it" but he did not ask for an explanation of its meaning at the time and did not learn its import until shortly before trial (R52,53).

It was stipulated that if First Lieutenant Kent McQueen, Medical Corps, Neuropsychiatrist, were present he would testify as follows:

"1. Neuropsychiatric examination on Private Louis C. Simms, 38498706, 3116th Q.M. Service Company, indicates that he has a psychopathic personality of inadequate type and mental deficiency with mental age of seven. The examination did not reveal any evidence of pathological sexuality.

2. Further opinion would indicate that this soldier is and was at the time of the alleged offense able to tell right from wrong and is and was able to do the right and refrain from doing the wrong. Also he is able to conduct his defense and cooperate with his counsel, but only as intelligently as is compatible with his mental age" (R53; Def.Ex.A).

5. In passing upon the legal sufficiency of the instant record of trial, consideration must first be given to the question whether the court properly considered accused's confession in making its findings. This, of course, turns upon the question whether such confession was voluntarily made. A confession is usually said to beinvoluntary when induced by promises giving rise to a hope of benefit or threats producing a fear of punishment made by a person competent (or believed by the party confessing to be competent) to effectuate such hope or fear (see MCM, 1928, par.114a, p.116; 2 Wharton's Criminal Evidence (11th Ed., 1935), sec.592, p.980). In the instant case, accused testified that he was informed it would be "more easy" on him if he confessed. Even if full credence is not given to this statement, the testimony of accused's commanding officer, to whom the confession was made, shows that although he advised accused of his rights under Article of War 24 prior to taking the confession, he simultaneously told him that it would be "better for all concerned if he was guilty to tell me so there". It is true that this statement did not offer a clear-cut

hope of benefit but, in appraising its significance to the accused, it should be remembered that

> "Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strong minded soldier might not be influenced by words and circumstances which might influence an ignorant dull-minded recruit" (MCM, 1928, par.114a, p.116) (Underscoring supplied).

The accused, who was nervous during the questioning, was shown to have a mental age of seven. The person to whom the confession was made was his commanding officer. The warning given him prior to the questioning was ambiguous and contained a statement susceptible of being interpreted, at least by a person of accused's low intelligence, as a promise of leniency if he would confess his guilt. In view of accused's testimony that he did not understand the meaning of the word sodomy, some question also exists whether he realized the full impot of his confession elicited as it was by a "double-barrelled" question involving both beating and sodomy. However, whether the confession is regarded at its face value or only as a confession of an assault and battery, it is the opinion of the Board of Review that in view of the circumstances mentioned above it was inadmissible as not having been voluntarily made and was erroneously received in evidence.

This being true, the following rule becomes operative in passing upon the record of trial:

> "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved" (see CM ETO 1201, Pheil).

Aside from accused's confession, the only evidence to support the finding that accused was guilty of an assault with intent to commit

sodomy is the testimony of the victim, a German prisoner of war. Because of his status as such and also because he had previously been badly treated by his guards, it is not improper to view his testimony with a certain amount of skepticism. The weight to which his testimony is entitled is further diminished by the consideration that accused's version of the incident, as corroborated by the testimony of Campbell and Scales, is an entirely plausible one and is fully as credible as that related by Mueller. The fact that the neuropsychiatric examination of accused revealed no evidence of pathological sexuality is a further circumstances tending to weaken the testimony of the victim and to buttress that of accused. In view of these considerations, the Board of Review is of the opinion that the legal evidence of record is not of such quantity and quality as practically to compel in the minds of honest and reasonable men the finding that accused was guilty of assault with intent to commit sodomy and that the record is accordingly legally insufficient to support such finding. However, while testifying on his own behalf, accused admitted that he struck and kicked the prisoner and this testimony together with other competent evidence of record is legally sufficient to support a finding of guilty of the lesser included offense of simple assault and battery in violation of Article of War 96.

6. The charge sheet shows that accused is 25 years of age and was inducted on 7 September 1943 at New Orleans, Louisiana. 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 other than those noted above were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of simple assault and battery in violation of Article of War 96 and so much of the sentence as provides for confinement at hard labor for six months and forfeitures of two-thirds pay for the same period.

Benjamin R. S. Keeper Judge Advocate

[illegible] Judge Advocate

B. K. [illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1

25 JUL 1945

CM ETO 9072

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Venlo,
	)	Holland, 9 March 1945. Sentence:
Private ANTHONY J. DIODATO	)	Dishonorable discharge, total
(32609452), Company F,	)	forfeitures and confinement at
320th Infantry	)	hard labor for life. Eastern
	)	Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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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 Anthony J. Diodato, Company F, 320th Infantry, did at or near Mortain, France, on or about 12 August 1944, desert the Service of the United States and did remain absent in desertion until he was apprended in Nancy, France, on or about 3 January 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, except the words "desert" and "in desertion until he was apprehended in Nancy, France", substituting therefor

respectively the words "absent himself without leave from" and "without leave until", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of the 61st 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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence would have sustained a finding that accused was guilty of desertion as charged (CM ETO 12045, Friedman and authorities therein cited). A fortiori it sustains the finding of guilty of the lesser included offense of absence without leave.

4. The charge sheet shows that accused is 21 years of age and was inducted 23 January 1943 at Newark, New Jersey, to serve for the duration of the war plus six months. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

18 MAY 1945

CM ETO 9083

U N I T E D S T A T E S	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 95, U. S. Army, 16 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Corporal LESTER BERGER (36247466) and Private DONALD W. BAMFORD (31246965), both of Battery "C", 359th Field Artillery	

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

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

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

BERGER

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

Specification: In that Corporal Lester Berger, Battery "C", 359th Field Artillery, did at or near Uerdingen, Germany, on or about 6 March 1945, forcibly and feloniously against her will, have carnal knowledge of Anneliesa Tillmanns.

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

Specification 1: In that * * * did at or near Uerdingen, Germany on or about 6 March 1945, wrongfully fraternize with German civilians

Specification 2: (Finding of Not Guilty)

BAMFORD

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

Specification: In that Private Donald W. Bamford, Battery "C", 359th Field Artillery, did at or near Uerdingen, Germany, on or about 6 March 1945, forcibly and feloniously against her will, have carnal knowledge of Anneliesa Tillmanns.

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

Specification 1: In that * * * did, at or near Uerdingen, Germany, on or about 6 March 1945, wrongfully fraternize with German civilians.

Specification 2: (Finding of Not Guilty)

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the respective votes were taken concurring, each was found not guilty of Specification 2, Charge II, and guilty of the remaining charges and specifications against him. No evidence of previous convictions was introduced against Berger. Evidence of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61 was introduced against Bamford. Three-fourths of the members of the court present at the time the respective votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

At about 2315 hours on 6 March 1945, approximately twelve German civilians, among whom were Peter Tillmanns, his wife, and his nineteen year old daughter Anneliesa, were in the "air raid cellar" of the Tillmanns home in Uerdingen, Germany (R10,21). When two soldiers (later identified as the accused) knocked at the door, Anneliesa and her mother admitted them into the house (R9,24). Upon being admitted, the accused followed the two women back down into the cellar and asked for schnapps and liquor. Despite the refusal of their request, they seated themselves among the group of German civilians in the cellar and began to converse with them in a friendly and amicable fashion. They also talked jovially between themselves and from time to time drank from "flasks" which they had with them on their arrival (R10,23,25).

Berger apparently centered his attentions upon Anneliesa and, after a time, told her that he loved her and wanted to sleep with her. Anneliesa replied that she slept in the air raid shelter with the others (R10). Apparently at about this time the soldiers commenced to exhibit some antagonism toward the German civilians and the evidence indicates that they became more and more antagonistic as the evening progressed. They began to call the people in the shelter "German swine" and at one point "wanted to shoot at the lamp and bed stands" (R11, 16,23,26). When, shortly before one o'clock, Tillmanns told Berger, "Comrade, you are drunk, it would be good to go home and sleep", Berger indicated that they would spend the night on the floor of the air raid shelter. Tillmanns pointed out to him that the shelter was already crowded, informed him that there were beds upstairs, and suggested that they sleep there (R21,25). Berger ordered one of the women in the shelter, Frau Irma Poell, "to sleep with my child in bed", taking her by the arm and shoving her at the same time. She accordingly ran out of the

Cellar to her living quarters on the second floor (R22,28). She stated that prior to her departure, she saw Berger angrily take hold of Anneliesa's arm (R22).

Anneliesa testified that at about this time, Berger again told her that she should sleep with him and that she again refused, saying that they all slept together in the air raid shelter. Thereupon Berger, who was very angry because she would not accompany him, went to the door of the shelter, indicated that he was going upstairs to sleep, and demanded a light in order that he might see his way (R11). Bamford then attempted to persuade Anneliesa to go along and sleep with him, telling her that "German officers had done it much worse" in France. Apparently failing to persuade her, he ultimately asked her at least to go to the door with him. Her mother, who had begun to cry, protested and said that if she went to the door her father should accompany her. Her father then stepped forward and announced that he would go wherever his daughter went. In order to get rid of the accused and thinking that her father would accompany her, Anneliesa then voluntarily followed Berger out of the shelter (R12,17,20,25).

Tillmanns was the last to leave and as he neared the door of the shelter, Bamford

> "drew back toward the door and through the door and I was directly behind him. The door was closed to about one foot. I held the door and the dark one [Bamford] said to me, 'carbine'. The door closed. I pulled back somewhat and the moment I tried the door it was closed" (R25,26).

He did not know whether the latch fell shut by itself or whether Bamford put it into place but in either event the closing of the outside latch operated to lock the door (R26,27). His wife and "another man who was there" later succeeded in opening the door and went to the top of the stairs but, since they were afraid, returned almost immediately. No other efforts to determine what had happened to Anneliesa were made (R27).

Anneliesa testified that she followed Berger up the stairs and that upon reaching the ground floor he wanted to go into one of the ground floor rooms.

She informed him that they were all locked. He then chased her upstairs to the first floor where he broke a pane of glass in a door and thus gained access to one of the bedrooms (R12). This testimony was corroborated by that of Frau Poell who stated that shortly after she went upstairs with her child when ordered to do so by Berger, "they came up by us and broke the door" (R22). Anneliesa testified that thereafter Berger, by threatening her with his carbine and "poking" her with it, forced her into the bedroom and threw her on the bed (R12,13). Although she did not physically resist or attempt to escape at this time, she did ask Berger to let her go. However, he "just said 'no, no, no' in answer to my questions" (R15). She stated that flight was impossible because Berger placed himself between her and the door and also held her when she attempted to run (R13). Further, he pointed at his rifle, which he apparently had leaned against the wall, and told her that resistance would be useless (R13,19). An additional obstacle to flight was the fact that Bamford was in the hall. Shortly after they entered the room Berger ordered her to remove her clothing and, when she refused to do so, he removed it himself, tearing her brassiere in the process. She stated that, except for holding herself rigid, she did not attempt to resist the removal of her clothing because she had "terrible fear" and also because she felt that resistance would avail her nothing. Also, she was afraid that if she tried to escape Berger would "strike me or harm me". As it was very cold in the room, once her clothing had been removed she got under the bedcovers. While she did this Berger removed his clothing. He then forced her legs apart with his hands and "immediately raped" her, i.e., "through force he inserted his penis into my vagina so he could use me" (R13). The sexual act was repeated five or six times during the course of the ensuing half hour. She tried to resist but ultimately her strength waned and she could resist no longer. When she attempted to scream, he prevented her from doing so by kissing her (R13,14). At the close of the half-hour period, Berger called Bamford into the room and Bamford then had intercourse with her. He was not as aggressive as Berger nor did he "force" her as much as Berger had and "when I resisted, he withdrew" (R15,16). However, when he entered her the contact was so painful that she screamed (R15). She was alone with Bamford for approximately half an hour but made no effort to escape because "I couldn't stand; I could hardly sit". Berger then returned and again had

sexual relations with her. By this time her strength was gone and she was incapable of effective resistance. At about 0330 hours both accused arose and prepared to leave. Before they did so, Berger asked her to make arrangements with her sister whereby all four would meet the following evening at eleven o'clock. She acquiesced in this proposal so that the accused would leave (R15).

On the following day, Herr Tillmanns went to the military authorities, "explained what had happened" and requested military protection (R27). As a result, two soldiers were detailed as guards at his home. Both accused returned to the Tillmanns' home at about 2330 hours that night and, when they did so, were taken into custody (R27,30).

On 9 March 1945 each accused voluntarily made a statement to the division Inspector General. These statements were admitted into evidence after a preliminary caution that each was to be considered as evidence only as against the man who made it. Berger's statement recites that on the afternoon of 6 March he and Bamford consumed a bottle and a half of cognac, became "pretty drunk", and, after having their evening meal at their battery area, "went uptown" to get more cognac. They secured a bottle of cognac and a bottle of schnapps from a "woman up the street" and, after drinking part of this, they continued along the street in search of more. They rang the doorbell at a house, were admitted and went downstairs into the cellar. Berger denied that they threatened any of the German civilians there congregated but stated that the civilians "probably were scared" because otherwise they would not have admitted the accused into the house. When he later told Herr Tillmanns that they wanted to look at the upstairs rooms, the girl accompanied them willingly and no threats were employed to force her to do so. It was not necessary to break open any doors in order to enter one of the bedrooms. Anneliesa removed her dress herself and he helped her remove her pants and brassiere. He remained on the bed with her, without getting under the covers, for about one-half hour and engaged in one act of sexual intercourse with her at this time. She did not cry or protest and, in fact, was "cooperative". After the intercourse was completed, he left the room. He returned in about half an hour, at which time he undressed, got into the bed and again had sexual intercourse with the girl. Thereafter, after making arrangements to return the following day with food and liquor, both he and Bamford

left. When they returned to the house the following day they were arrested and taken into custody. He stated, however, that they did not intend to return to the house that evening and in fact had no recollection of its location. Rather, they were again searching for schnapps and merely happened to come to the Tillmanns' home in their quest. He "guessed" that he was not so drunk on the night of 6 March that he did not know what he was doing although this was "hard to say". The matter of having intercourse with the girl "came at the spur of the moment "(R31; Pros. Ex.A).

Bamford's statement recites that on the evening of 6 March he and Berger, after securing several bottles of rum and schnapps from various houses "on the block there", a large portion of which they drank, arrived at the Tillmanns' home and there asked for schnapps. They secured none, but joined the group of people in the cellar and talked with them, at the same time drinking what was left of their supply. Although they were drunk and boisterous, they threatened no one in the shelter. When they started to leave after consuming their remaining liquor, a candle was furnished him, which he in turn gave to the girl and all three went upstairs. She did not cry or protest. After about an hour, he went into the room. The girl was dressed at this time but removed her clothing at his request. When he got into bed with her, she responded to his advances and willingly engaged in sexual intercourse with him. She did attempt to push him away once, at a time when she thought that he was about to have an orgasm, but otherwise was fully cooperative. He later had intercourse with her again and she again was cooperative. They left the house after making arrangements for a party the following evening. As stated by Berger, they returned to the house through coincidence the following night while searching for schnapps and were taken into custody. He remembered the events which occurred on the evening of 6 March clearly because, as he put it, "I can always remember no matter how drunk I am" (R31; Pros.Ex.B).

On 9 March 1945 Fraulein Tillmanns was examined by Captain Thomas Jarrold, Medical Corps. Although he found her vagina to be of a "small type", he found no inflammation, irritation, or lacerations and, in fact, "no abnormal

conditions at all". Evidences of "ordinary irritation" would have disappeared by the time he made his examination. Further examination revealed two bruises in the region of her hips and thighs and also three minor scratches, one on the right buttock, one on the anterior surface of the left thigh, and one on the lateral surface of the right thigh (R44,45).

4. Each accused was advised of his rights as a witness and each elected to testify on his own behalf. Berger testified that he did not point his carbine at any of the people in the cellar or threaten them with it in any way. He placed the carbine in a corner when he first arrived and did not retrieve it until he was preparing to leave. At no time did the occupants of the cellar show any outward manifestations of excitement or fear. No one attempted to stop him when he first went upstairs and when he went into the bedroom with the girl it was tacitly understood between them that they would engage in sexual intercourse. She herself removed her dress and shoes and during the intercourse was entirely cooperative. There was glass in the bed and it was possible that "she could have got these scratches from the glass or she could have got it when I was taking her pants off" (R48,49).

Bamford testified that except possibly for the fact that he and Berger were drunk, he knew of nothing in their conduct on the evening in question which would have caused the German civilians to become apprehensive or frightened. No effort was made to stop him from going upstairs. At this time his carbine was slung on his shoulder. When he went to bed with the girl, she responded to his love-making and made no resistance nor did she attempt to stop him in any way except "at the time of orgasm she pushed me because I didn't have a rubber" (R50-52).

5. That both accused had carnal knowledge of Anneliesa Tillmanns at the time and place alleged does not, under the evidence in this case, admit of doubt. There is, however, a sharp conflict in the evidence whether such carnal knowledge was by force and without her consent. The fact that the victim was an enemy national may properly be taken into consideration in weighing the reliability

and truthfulness of her testimony (see 1 Wharton's Criminal Law (12th Ed., 1932), sec.731, p.991). Certain of her activities, such as her voluntary departure from the comparative safety of the air raid shelter and the fact that she got under the covers once her clothing had been removed are somewhat inconsistent with her statements that she was forced to engage in sexual intercourse with the accused against her will. Nor does the evidence indicate that she offered vigorous physical resistance to the advances of the accused. Further, there is no indication that she was subjected to physical violence nor did the sexual acts concerning which she testified result in any pronounced injury to her genital organs. However, in order that rape be committed

> "It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other form of duress, or by threats of killing or of grievous bodily harm or other injury * * *. Absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance must be useless if not perilous" (Winthrop's Military Law and Precedents (Reprint, 1920), p.678).

In the instant case it appears that although accused conducted themselves in a friendly manner during the early part of the evening, they later became boisterous and antagonistic. Both men were armed. Berger, at least, angrily took hold of the girl while in the air raid shelter, telling her that she should sleep with him, and Bamford pointed out to her the treatment which French girls had received at the hands of German officers. She testified that she was forced to the first floor at the point of a gun and was told that resistance would be useless. According to her testimony, she was prevented from leaving the bedroom by the physical restraint of Berger and by the presence of Bamford in the hall. She stated that she offered only slight resistance to Berger's initial

advances because she was in "terrible fear" and because she felt that resistance would be useless and might cause the accused to harm her. She also testified that during the acts of intercourse she tried to resist and did so until her strength was gone. Her testimony with respect to the surrounding circumstances was corroborated by that of other witnesses. The version of the evening's events related by accused, while consistent within itself, contains at least certain elements of implausibility when considered in the setting shown by the record as a whole. Whether or not the prosecutrix consented to the acts of the accused was essentially a question of fact for the court and under the evidence here presented its determination of this question cannot be disturbed by the Board of Review (Cf: CM ETO 3740, Sanders, et al; CM ETO 6148, Dear and Douglas). The evidence indicates that Bamford was less agressive in his treatment of the girl than was Berger. However, the court could properly find that his acts, like those of Berger, constituted rape (Cf: CM ETO 1202, Ramsey and Edwards) and in any event there was evidence from which the court could find that Bamford aided and abetted Berger in accomplishing the rape committed by the latter. This being true, he could be found guilty as a principal (CM ETO 3740, Sanders, et al, supra). Whether the accused were too drunk to be responsible for their acts was also a question of fact for the court in the solution of which no abuse of discretion appears (Cf: CM ETO 4303, Houston; CM ETO 6207, Carter).

The record of trial clearly supports the court's findings that both accused also were guilty of wrongfully fraternizing with German civilians, as alleged.

6. The charge sheets show accused Berger is 25 years of age and was inducted on 24 June 1942 at Milwaukee, Wisconsin. He had prior service with the National Guard from 21 February 1938 to 20 February 1941. Accused Bamford is 23 years of age and was inducted, without prior service, on 26 December 1942 at Providence, Rhode Island.

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

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

Benjamin R Sleeper Judge Advocate

[illegible] Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

5 MAY 1945

CM ETO 9128

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class FLOYD M. HOUCHINS (33209559), and Private RIGGS BAILEY (35153980), both of 865th Ordnance Heavy Automotive Maintenance Company	Trial by GCM, convened at Paris, France, 23 December 1944. Houchins acquitted. Sentence as to Bailey: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Loire Disciplinary Training Center, Le Mans, France.

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

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

2. Accused were arraigned separately and with their consent were tried together upon the following Charge and Specification:

HOUCHINS

(Acquitted)

BAILEY

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Riggs Bailey, 865th Ordnance Heavy Automotive Maintenance Company, European Theater of Operations, United States Army, did, at Vincennes, Paris, France, on or about 26 November 1944, conjunction with Private First Class Floyd M. Houchins, feloniously take, steal and carry away 28,000 francs, French currency, value $560.00; 2 Swiss watch movements, value $100.00; one camera, value $90.00, all of a total value of $750.00, the property of Andre Girault.

Each accused pleaded not guilty. Houchins was acquitted and Bailey was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Bailey was sentenced to be dishonorably discharged the service, to forfeit all pay and allowance 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, 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 as to Houchins were published by General Court-Martial Orders No. 44, Headquarters Seine Section, Communications Zone, European Theater of Operations, dated 23 December 1944, and as to Bailey, by General Court-Martial Orders No. 161, same Headquarters, dated 9 March 1945.

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

On the afternoon of 26 November 1944 accused, Houchins and Bailey, were guests at the home in Vincennes, France, of Andre Girault, a French civilian and jeweler. When they arrived at about 1:30 pm, Girault, and the rest of his household consisting of his mother, his wife and three children, were present (R10-12,19). After dinner both accused and Girault sat in the dining room and drank cognac, smoked and talked together. At about 4:00 pm the wife and children went out and did not return until 7:00 pm. The mother stayed in the kitchen, and Girault was left alone with both accused in the dining room. Girault took out his billfold, showed them some photographs of his wife, and subsequently replaced the billfold in the inside pocket of his coat (R11,12). The billfold contained 28,000 francs in bank notes (R14,16). He later showed them his camera and two small watch movements and then placed these articles on the dining room table (R11). At about 5:30 pm Girault became drowsy, lay on a couch in the same room and soon fell asleep (R11). At this point accused were gay but not drunk (R13). Girault had his coat on while he slept (R19). When he was awakened by the return of his wife and children at 7:00 pm, both accused had left (R11,20). He took off his coat and had supper with

his family. When he put his coat on again later in the evening he noticed that his billfold was missing. He searched for it but did not find it (R11). He also discovered that the camera and the two watch movements were gone (R19,21). Accused were seen that evening at about 8:00 pm in a nearby cafe. They were both drunk. Bailey displayed two bundles of bank notes; he tore off several of them and gave them to three or four soldiers. He paid the proprietor of the cafe with a 1000-franc note. He gave one soldier 4000 francs and 5000 francs to another (R29,31). Houchins did not display any large amount of money, was unable to buy a round of drinks at about 8:30 pm, and at 11:00 pm, produced a 1000 franc note which he said he had borrowed from a friend (R29,32,33,34). Neither accused had a camera when seen in the cafe (R25,28,33).

An agent of the Criminal Investigation Division questioned accused concerning the alleged crime. Houchins refused to make any statement. According to the agent's testimony, Bailey, after being warned of his rights, admitted his participation in the crime. The statement was reduced to writing by the agent and was signed and sworn to by Bailey. Defense counsel objected to the admission of the statement and requested an opportunity to cross-examine the agent and to put Bailey on the stand to testify "as to the manner in which it (the statement) was taken" (R7). On cross-examination, the agent testified that he explained to Bailey his rights under Article of War 24, that no force was used and no threats or promises were made, that Bailey at first refused to make a statement and left the room, but that he soon returned and voluntarily made the statement (R8,9). The law member thereupon admitted the statement in evidence (Pros.Ex.A) "subject to the right of the defense at the proper time to show that the confession was voluntarily /involuntarily?/ given" (R9). It was received as evidence against Bailey only (R10). The statement reads as follows:

> At approximately 1300 hrs on 26 Nov. 1944, Pfc Floyd Hawkins of the same organization, and myself visited some French civilians friends of ours, where we had dinner at their home. In the early part of the afternoon the wife of our friend left the house, leaving our friend, Pfc Hawkins and myself alone. During the afternoon we drank three quarts of wine, and one quart of cognac, and as a result we became intoxicated. Our friend showed Pfc. Hawkins some pictures he had in a bill fold, and also a camera he had. To the best of my knowledge I don't know which one of us took the bill fold, but I do remember of Pfc. Hawkins and myself dividing the contents of this bill fold, and my part was approximately thirteen (13), one thousand franc notes. I remember of Pfc. Hawkins making the

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statement, 'I going to throw this pocket book away.' How I disposed, or what become of this money I don't recall, as by this time I had become highly intoxicated, and don't remember what happened on the rest of the night of 26. Nov. 1944. The next morning at chow I was informed that the MP's were looking for me. One MP. came up to me, and we went to the Security Officer of the whole Organization, who questioned me as to my action and whether I had taken the money or camera that was stolen from our friends house on night of 26. Nov. 1944.I denied all charges and he placed me under guard until 28, Nov. 1944, at which time I was taken to the Seine Section Guardhouse".

4. After the prosecution rested, defense counsel stated that he wished to place Bailey on the stand to testify solely concerning the manner in which the statement was obtained. The law member ruled that if Bailey took the stand as a witness he would be subject to cross-examination on all matters bearing on his guilt or innocence. Defense counsel thereupon withdrew his request (R34,35), and each accused elected to remain silent (R37-38).

The defense called only one witness, the mother of Andre Girault. She testified that she stayed in the kitchen doing her daily work after her daughter-in-law left the house on the afternoon in question. At about 5:45 pm she heard a noise in the dining room and went over to see what was the matter. It was Girault who had lain down on his couch. At that time both accused were in the water closet. They left the house at 6:00 pm. She opened the door for them and turned on the light so they could see their way. They were rather drunk and were staggering. Bailey said good-bye to her as he left but Houchins walked out "with his head down in a way that a man would do who had done something". She then went back to the kitchen and continued with her work. From the time accused left to the time her daughter-in-law returned, no person entered the house (R35-37).

5. Bailey's statement was an acknowledgment of guilty and was therefore a confession (MCM, 1928, par.114a, p.114; CM ETO 2625, Pridgen). A confession obtained by coercion or improper inducement cannot be used to convict an accused (MCM, 1928, par.114a, p.116; Bram v. United States, 168 U.S. 532, 42 L.Ed. 568; Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166; Ashcraft v. Tennessee, L. Ed. Ad. Ops. vol. 88, p.858). Whether a confession is voluntary in character and therefore admissible in evidence is a question to be determined by the law member, or, in his absence, by the president subject to objection by any member of the court (CM ETO 3931, Marquez). Where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, the presumption is that the confession was voluntarily made (MCM, 1928, par.114a, p.116; Murphy v. United States, 285 F. 801; Ah Fook Chang v. United States, 91 F (2nd) 805). The testimony of accused to show improper influence should be offered and received before the confession is admitted (Rossi v. United States, 278 F 349; Cohen V. United States, 291 F 368). A refusal to permit accused to testify as to the involuntary character of a confession, or to present other evidence on that issue, is error (Robinson v. State, 138 Md. 137, 113 Atl. 641; Palmer v. State, 136 Ind. 393, 36 N.E.130). An accused has the right to take the stand for the sole purpose of testifying to facts tending to prove the involuntary character of his confession without subjecting himself to cross-examination on the issue of his guilt or innocence of the offense (see, CM ETO 3931, Marquez). To hold that he does not have that right would force

upon him the choice of one of two alternatives: Either he must refrain from testifying altogether and permit the introduction of an involuntary confession, or, in order to prove its involuntary character he must take the stand and thereby subject himself to cross-examination covering the whole subject of his guilt or innocence of the offense. Either alternative would result in a deprivation of his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the Federal Constitution (Bram v. United States, supra) and also secured to him by Article of War 24 (CM ETO 2297, Johnson and Loper). Therefore the law member's refusal to permit accused to take the stand solely for the purpose of testifying to the manner in which the confession was obtained constituted error and the confession was improperly received in evidence. This being the case, the legal sufficiency of the record of trial to support the findings of guilty against Bailey depends on whether the evidence which remains after eliminating the confession "is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (CM 130415 (1919); CM ETO 1201, Pheil; CM ETO 1693, Allen). The evidence does not show that Bailey was the only person who had the opportunity to take Girault's billfold, camera or watch movements from the time Girault fell asleep to the time he discovered they were missing. The money seen in the possession of Bailey at the cafe was not identified as to amount, denominations of the bank notes, or in any other way, as being the same money that was taken from Girault's billfold. It is not shown that the camera or watch movements ever came into the possession of Bailey. Therefore the presumption of guilt based upon the unexplained possession of recently stolen property does not arise in this case (MCM, 1928, par. 112, p.110). Although the circumstances cast strong suspicion upon both accused, it cannot reasonably be said that aside from the confession there is compelling proof of Bailey's guilt. The Board of Review is, therefore, of the opinion that the legally admitted evidence is insufficient to warrant a finding of guilty against accused Bailey.

6. The charge sheet shows that accused Bailey is 26 years and eight months of age and was inducted 10 March 1941 at Fort Benjamin Harrison, Indiana. He had no prior service.

7. Errors injuriously affecting the substantial rights of accused Bailey were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally

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insufficient to support the findings of guilty and the sentence as to accused Bailey.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522 and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private RIGGS BAILEY (35153980), 865th Ordnance Heavy Automotive Maintenance Company.

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

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

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

(Findings and sentence vacated. GCMO 192, ETO, 29 May 1945.)

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

BOARD OF REVIEW NO. 3 8 MAY 1945

CM ETO 9144

U N I T E D S T A T E S	)	102ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Ubach, Germany, 20 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CLINTON W. WARREN (39333349), Company A, 407th Infantry	)	

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

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Clinton W. Warren, Company A, 407th Infantry, being on guard and posted as a sentinel at Oeldriesch, Germany, on or about 27 January, 1945, did leave his post before he was regularly relieved.

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

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

3. Undisputed evidence for the prosecution showed the following:

On 27 January 1945 at 2330, accused and another soldier were posted at an outpost (R6,9,13) in a shell hole (R16), with instructions to stay at the outpost for two hours or until properly relieved and to report by telephone any enemy activity in the section (R6,9). At about 2345 enemy small arms fire came over their shell hole (R6,7). Shortly afterwards, and before he had been relieved (R6,10,13), accused crawled out of the shell hole (R7) and at about 2350 he was found "cuddling in a hole" (R12), about 350 yards to the rear of where he had been originally posted (R10).

4. The accused after his rights as a witness were explained to him, elected to make an unsworn statement as follows: "Well sir, when I came back from the outpost the company commander he said 'I give you your choice to take a general court-martial or go back out to the outpost.' Being as he was an officer he should have given me an order to go back out to the outpost." (R17). No evidence was introduced on behalf of accused.

5. There is ample evidence in the record to establish every essential element of the offense of leaving post under Article of War 86 (MCM, 1928, par.146c, p.161).

Accused was clearly posted as a sentinel at the outpost within the meaning of that article, along with the other soldier, and the evidence sufficiently shows that both were under the continuous duty of remaining alert and on watch. This fact distinguishes the instant case from CM ETO 5255, Duncan, and CM ETO 5466, Strickland,

where the accused were not actively on watch at the time of their departures.

The matters contained in the unsworn statement of accused to the effect that his company commander had given him an alternative order, to go back to the outpost or be tried by a general court-martial, were irrelevant under the present charges, for the offense of leaving post had been completed prior to the giving of such order.

Although there is no direct evidence that the offense occurred at Oeldriesch, Germany, as alleged in the Specification, the geographical location is not of the essence of this offense, and such failure of proof did not injuriously affect accused's substantial rights within the meaning of Article of War 37 (Cf. CM ETO 9257, Schewe; CM ETO 5565, Fendorak).

6. The charge sheet shows that accused is 21 years of age and was inducted 7 June 1942. He had no prior service.

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

8. The penalty for a violation of Article of War 86 in time of war is death or such other punishment as a court-martial may direct. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Benjamin R. Geyer, Judge Advocate

Marcus C. Sherman, Judge Advocate

B. H. Levy Jr, Judge Advocate

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

BOARD OF REVIEW NO. 3

26 MAY 1945

CM ETO 9162

U N I T E D S T A T E S	)	V CORPS
	)	
v.	)	Trial by GCM, convened at Mechernich, Germany, 21 March 1945.
Private ROY A. WILBOURN (34033658), Battery A, 62nd Armored Field Artillery Battalion	)	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. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

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

Specification 1: Private Roy A. Wilbourn, Battery "A" Sixty Second Armored Field Artillery Battalion, did, at Bad Neuenahr, Germany, on or about 131800 March 1945, strike, First Lieutenaht John P. Wheeler Jr. his superior officer, who was then in the execution of his office, on the arm with his fist.

Specification 2: In that * * * having received a lawful command from First Lieutenant John P. Wheeler Jr, his superior officer, to turn over fire arm to an officer, did at Bad Neuenahr, Germany on or about 131800 March 1945, willfully disobey the same.

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

Specification: In that * * * having been duly placed in confinement at Bad Neuenahr, Germany on or about 131830 March 1945, did, at Bad Neuenahr, Germany on or about 131900 March 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Ahrweiler, Germany from about 131600 March 1945 to about 140900 March 1945.

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

Specification: In that * * * was at Bad Neuenahr, Germany on or about 131800 March 1945 drunk and disorderly while in the scene of military operations in occupied Germany.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for nine days in violation of Article of War 61 and one by summary court for being disorderly in uniform in a public place 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's evidence was substantially as follows:

Accused was a member of Battery A, 62nd Armored Field Artillery Battalion, which, on the dates material to this case, was stationed at Ahrweiler, Germany, approximately four to six miles from Bad Neuenahr, Germany (R21,25). At about 1800 hours, 13 March 1945, he was observed riding a bicycle down the street in Bad Neuenahr. The traffic on the street was heavy, consisting principally of military vehicles engaged in a "big push" then in progress. Accused fell off the bicycle and two or three soldiers went to his assistance. He had a carbine and said he would show them how to make a lot of noise, raising the gun and pointing it in the direction of several soldiers who were working on tanks in the vicinity. One of the soldiers grabbed the gun and removed its clip. While they were trying to disarm him, First Lieutenant John P. Wheeler, Jr., 19th Tank Battalion, 9th Armored Division, came up. The lieutenant saw that accused was "obviously drunk", and with the aid of one of the soldiers took his carbine from him and unloaded it. Accused again got hold of the carbine after a minute or so, and the lieutenant told him he was an officer and ordered him to relinquish it, saying "Hand me that carbine, just give it back to me". Seeing that accused apparently failed to realize he was an officer, he said "Are you going to give me that carbine?" Accused stood there grumbling and cursing and Lieutenant Wheeler thereupon reached for the gun. Accused resisted his attempts to get it and backed away and struck at him. The lieutenant warded him off with his arm, and although there was something of a scuffle, succeeded in avoiding the blows except for their impact on his arm. He testified that accused was "very inebriated", "definitely very drunk", and "irrational" and that his blows "would not have injured me particularly or anything like that". The carbine was finally taken from accused, and Lieutenant Wheeler placed him under arrest and sent for the military police. The lieutenant was wearing the insignia of his grade throughout this period and, in response to a question why he had stated that accused apparently did not recognize him as an officer, said "it is one of two things, he either did not recognize me or it is direct disobedience to a direct order. The man was definitely very drunk" (R6-11,14).

When the military police came, accused was put in a jeep and taken to Division Military Police headquarters, arriving there about 15 to 20 minutes after the incidents above described. Accused got out of the jeep as it stopped at a military police post en route to headquarters and refused to return when ordered to do so by the military policeman, arguing that he wished to go back to his unit. He returned, however, when so ordered by a captain whom he appeared to recognize as an officer. On reaching headquarters, a military police major asked accused what division he was from and told him to button his jacket. Accused answered the question and buttoned the jacket, whereupon the major told the sergeant to take him in and let him "sleep it off". The military policeman who took accused to headquarters testified that he could not swear that accused was drunk since he believed a medical test necessary to determine drunkenness. He stated, however, that accused's cursing and swearing indicated that he had been drinking and that, in his opinion, he was under the influence of intoxicating liquor (R11-13, 15-17).

Accused was then taken into the Prisoner of War Enclosure which was under guard, and the officer in charge, in his presence, instructed the guard to hold him there until released. Accused argued with the guard, saying he had to go on duty at 2030 hours, but the guard told him to be quiet and said they would do all they could to release him in time. Accused appeared to the guard to have been drinking, but the latter could not swear that he was drunk. At about 1840, the guard was called away for a few minutes and asked a special guard to watch the prisoners. In this interval accused escaped, leaving his carbine behind. The guard had received no instructions to release him from confinement (R18-20).

An extract copy of the morning report of accused's battery for 14 March 1945, showed the following entry relative to accused (R25, Pros.Ex.B):

> "Fr duty to AWOL, 1600 hrs, 13 Mar/45. Fr AWOL to arrest& conf at 9th Armd Div PWE 1830 hrs 13 Mar/45. Fr conf to escaped & AWOL 1900 hrs 13 Mar/45. Fr AWOL to conf 62nd Armd FA Bn 0900 hrs 14 Mar/45".

Accused's section chief saw him at about 1500 or 1530 hours, 13 March 1945, at which time he was "feeling good". He did not see him again until the following morning. The permission of the battery commander was necessary to authorize a trip to Bad Neuenahr from the battery area and accused had no such permission (R21-23, 26-31).

A sworn statement (Pros.Ex.A) given by accused to the investigating officer after an explanation of his rights (R24) was received in evidence without objection by the defense (R25). Accused stated therein that on 13 March 1945, he and another soldier drank two quarts of cognac before dinner. After dinner they went out on their bicycles, taking with them five quarts of cognac which they stopped from time to time to drink. Later they obtained some more liquor. The next thing he remembered was waking up in a bombed-out building in Ahrweiler (R23-25, Pros.Ex.A).

4. Accused, after explanation of his rights as a witness, elected to remain silent (R37).

Private David W. Alvey, Battery C, 62nd Armored Field Artillery Battalion, testified that he and accused went bicycle riding at about 1330 hours, 13 March 1945. They had no permission to leave the battalion area. Each had a quart of cognac and by 1530 hours, accused had drunk "more than he could handle properly and he started raising a lot of cain". Being unable to do anything with him, Alvey left and returned to camp (R31-35). Corporal Ben H. Forsyth of the same battalion testified that he saw accused in Bad Neuenahr at the time of the incidents complained of. He could see accused had been drinking, but didn't "know where you draw the line" on the matter of whether he was intoxicated. He spoke to accused but, although they had known each other for some time, accused did not recognize him (R35-36).

5. The findings of guilty of the charges and specifications under Articles of War 61,69 and 96 (Charges II, III and IV and specifications thereto), are so clearly supported by the record of trial that no extended discussion of them is necessary. With respect to the charge of absence without leave (Charge III and Specification),a variance between proof and allegation appears to exist by reason of the interruption of the alleged 17 hour absence by a brief return to military control in connection with accused's confinement

in Bad Neuenahr. Whatever legal effect may be attributed to such interruption, however (See CM ETO 5569, Keele; CM ETO 7474, Lofton; SPJGA 1944/13317, IV Bull.JAG, p.10), the variance, if any, in this cases is immaterial.

As to the assault and battery and the willful disobedience charged in violation of Article of War 64 (Charge I, Specifications 1 and 2), the Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings of guilty. In both these offenses, drunkenness constitutes a defense if it is of such a degree as to deprive accused, in the case of assault, of the ability to understand that the person assaulted was his superior officer (MCM, 1928, par.134a, p.147; CM 226842, Gayle, 15 B.R. 155 (1943); CM 223335, Price, 13 B.R. 383 (1942)), and, in the case of insubordination, of the ability to entertain the specific intent willfully to disobey (CM 223336, I Bull. JAG 159). A reading of the record of trial in this case leaves no reasonable doubt that accused was in a state of intoxication sufficient to deprive him of such capacity. The officer whom he is charged with having assaulted and disobeyed obviously did not regard him as either insubordinate or guilty of assault within the meaning of Article of War 64. He stated at various points in his testimony that accused was "obviously drunk", "very inebriated", "definitely very drunk", and "irrational", and described him as apparently failing to recognize him as an officer. By clear implication he ascribed accused's failure to recognize him to his intoxication and, with respect to the assault, said that his blows "would not have injured me or anything like that". Further evidence shows that accused failed to recognize a fellow member of his company at the time of the incident despite the fact that they were well acquainted, and that earlier in the afternoon, he and his companion had consumed an excessively large amount of intoxicants. Although there is some testimony that approximately half an hour after the incident complained of, he appeared to recognize a commissioned officer as such while in the custody of the military police, and although three witnesses testified that they were unable to state that he was drunk, this evidence, as adduced, is equivocal and of slight probative value, whereas all of the circumstances shown, considered as a whole, lead to no other reasonable conclusion than that accused was irrational on the occasion in question and too drunk either to recognize Lieutenant Wheeler as an officer or to appreciate the significance and purport of his own actions. Accordingly, it is considered that the case falls within the principles laid down by the Board of Review in CM 223336, I Bull.JAG, p.161, and that the record of trial therefore is legally in-

sufficient to support the findings of guilty of violations of Article of War 64. It is, however, legally sufficient to support findings of guilty of the lesser included offenses of assault and battery and failure to obey, both in violation of Article of War 96, drunkenness being no defense in either of such offenses (CM 223336, supra; CM ETO 7585, Manning).

6. The charge sheet shows that accused is 30 years and seven months of age, and enlisted 26 March 1941 at Fort McClellan, Alabama. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its specifications as involve findings that accused did, at the place and time alleged, strike First Lieutenant John P. Wheeler, Jr., and did fail to obey his command as alleged, in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining charges and specifications and legally sufficient to support the sentence.

8. The penalty for violation of Article of War 61 is such punishment, other than death, as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec. VI as amended).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

9 JUN 1945

CM ETO 9194

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JAMES L. PRESBERRY (33029142), 3860th Quartermaster Gasoline Supply Company	Trial by GCM, convened at Morlaix, Brittany, France, 28 October, 18, 19 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James L. Presberry, 3860th Quartermaster Gasoline Supply Company, did, at or near Kermat, Brittany, France, on or about 28 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Robert L. Williams, 3860th Quartermaster Gasoline Supply Company, a human being, by shooting him with a pistol.

He pleaded not guilty and, at least three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous

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convictions was introduced. At least three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of 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 determination of the legal sufficiency of the record of trial to sustain the court's findings that accused killed Williams with malice aforethought and thereby was guilty of murder is in turn dependent upon the validity of accused's plea of self-defense. The accused admitted both in his pre-trial extrajudicial statements and in his sworn testimony in court as a witness on his own behalf that he shot and killed Williams but justified the homicide on the ground that deceased immediately threatened to take accused's life or do him great bodily harm and asserted that he killed Williams as a last resort to protect himself. The law governing the defense is well established.

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

> "But before one may take the life of his assailant, he must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm, and he must also reasonably believe that it is necessary to kill to avert the danger (Acers v. United States, 164 U.S. 388; Davis v. Peo., 88 Ill. 350; State v. Thompson, 9 Iowa 188; Wesley v. State, 37 Miss. 327; Smith v. State, 25 Fla. 517, 6 So. 482). Furthermore, he must retreat if by so doing he may lessen the danger (15 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). As one court expressed it:

> 'When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die'(Comm. v. Drum, 58 Pa. St. 9, 22).

And as said by another court:

> 'No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live' (Springfield v. State, 96 Ala. 81, 11 So. 250).

Some courts have departed from the common law rule, but in the opinion of Professor Beale their ideal "is found in the ethics of the duelist, the German officer, and the buccaneer" (16 Harv. Law Rev. 577).

The Manual for Courts-Martial adopts the doctrine of retreat for excusable self-defense cases; i.e., those arising from mutual combat (M.C.M. 1928, p. 163). Presumably the intention is to adopt it also in cases of justifiable self-defense; i.e., those where accused is feloniously assailed (Clark and Marshall, Crimes, 3rd ed., sec. 276).

As noted, the Board of Review is of the opinion that accused was not absolved from the killing under the doctrine of self-defense. In the first place, it was not reasonable to believe that accused was in danger of being killed or suffering grievous bodily harm. The latter phrase refers to an injury so severe that it might maim accused, be permanent in its character, or produce death (Acers v. U.S., 164 U.S. 388). In Napier's Case (Fost. C.L. 278), deceased threw accused to the ground, beat him and held him in such a manner that he could not escape the blows. Accused killed him by cutting him with a penknife. The court held accused guilty of the homicide. In Blackburn v. State (86 Ala. 595, 6 So. 96), deceased, a vicious character who previously had threatened to kill accused, pursued him at a distance of five or six paces, with a stick in one hand and a pair of metal knuckles in the other. Deceased was a fine physical specimen. Accused jumped

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across a ditch, wheeled, and shot deceased. The conviction was affirmed. In State v. Thompson (9 Iowa 188), deceased advanced upon accused with a heavy board. He dropped the board and continued after accused unarmed. Deceased was strong and in the prime of life, whereas accused had recently fallen off a horse and broken several ribs. He had been out of bed only a day or two. When deceased reached a point near accused the latter shot him. It was held that accused was not justified in killing his assailant to avoid a violent beating, he having no reason to fear death or great bodily harm. Similarly, in the present case, accused, armed with a rifle which he could have used as a club, had no reason to fear death or grievous bodily harm, and it was not reasonably necessary for him to shoot deceased to protect life or limb. Furthermore, accused could have avoided the danger by retreating when deceased threatened to attack him from the steps. To have retreated would have lessened the danger materially, and his chances of suffering death or grievous bodily harm from a thrown bottle were infinitesimal. Instead, believing that deceased had been drinking, and knowing him to be in an ugly, threatening mood, accused elected to remain on the scene and invite the disaster. He failed to take proper steps to avoid the catastrophe" (CM 235044, Winters, 21 BR 265,271-272 (1943)).

4. With respect to the prosecution's case, the record of trial contains proof, although in some details confused, of the activities of deceased, accused and their fellow soldiers on the night of 27 September 1944 in the neighborhood of their organizations bivouac at or near Kermat, Brittany, France. Aside from the fact that a soldier named Storts saw accused and deceased in the house of a French farmer named Urien (Pros.Ex.2) earlier in the evening at which time they were engaged in a quarrel wherein accused said to deceased: "You mother fucker, you are so bad, let's go out in the field and shoot it out" (R45), the determination of the vital question in the case does not require a rehearsal of the events prior to the time accused, deceased and Privates Cordell Prather and Leroy Gibson and Private First Class Theodore F. Timberlake (all of 3860th Quartermaster Gasoline Supply Company) left the house and assembled in the barnyard of the Urien farm (R68,82). Accused and deceased then renewed their argument. Accused was armed with a pistol; Timberlake and deceased each held possession of carbines; Prather and Gibson were unarmed (R68,82). Timberlake protested to accused: "Don't do that", when accused, displaying his pistol advanced on deceased who cried,

"Stand back don't none of you come up on me" (R68,69). Following this episode, Timberlake and Gibson disappeared behind a haystack and according to Gibson finally went to the camp (R69). Deceased then turned to Prather and demanded: "What the hell you all doing here anyway?" and informed Prather that he "should be back to camp". Accused thereupon declared "Don't be bothering that boy" and handed his pistol - a German Luger - to Prather (R83,84,35,103; Pros.Ex.1). Williams, the deceased, snatched the pistol from Prather and said to accused: "You son-of-a-bitch you tried to give him your pistol" (R84). At this time deceased expressed the opinion that Gibson had concealed himself in the haystack for the purpose of later attacking him and declared he intended to set the haystack afire for the purpose of making Gibson disclose himself. Accused and Prather prevailed upon Williams to forego execution of the project (R85). Deceased then directed his attention to accused and Prather, ordered them to "walk-out" of the farm house driveway and exclaimed, "You two walk ahead of me" (R84,85). Neither accused nor Prather had a weapon. Deceased had his carbine slung over his shoulder and held in his hands accused's pistol and "another funny little pistol", which he had apparently kept concealed until that moment (R85).

Prather and accused walked from the driveway into its intersection with a road (Pros.Ex.2) and then turned right and proceeded on the road. Accused was first in the line followed by Prather and deceased was in the rear. On the right hand of the men as they advanced, the surface of the road was about six feet below the level of the adjoining field. A steep inclined bank was thus formed. When deceased reached a point about 100 feet from the driveway he suddenly climbed the embankment with the exclamation, "You all wait right here and don't start anything" (R85,86). He carried the German pistol in one hand and his own pistol and the carbine in the other hand. When he reached the top of the embankment accused and Prather had halted and turned and faced deceased. Deceased looked over his shoulder in the direction of the two soldiers (R86). A shot rang out. It came from the direction of the well in the farmhouse driveway (which was located behind a hedge) approximately southeast of deceased. Prather saw the flash of the discharge and hence knew its origin. Deceased fell from the embankment into the field and called out "Presberry". The latter climbed the embankment to the place where deceased fell. Upon arriving near deceased he called to Prather "I got my pistol". Then three shots sounded - the first, then a short pause and two in rapid succession. These three shots sounded alike to Prather; they did not sound like the first shot from the hedge (R13,27,87,95). Prather climbed the embankment and saw deceased lying in the field. Accused stood about two feet from deceased's head and held his pistol in his right hand. It was pointed to the ground. Deceased lay on his left side. His face was toward the open field; his feet were extended toward the barn (Pros.Ex.2). His helmet was on the ground about two feet west

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of his head. His carbine was on the ground (R87,89). Prather asked accused, "Did you shoot that man?" Accused replied, "Well, he tried to get me". Both accused and Prather descended the road bank and stood in the road. Accused said to Prather: "Let's go back in the house". Prather protested: "Don't you think we had better go back to camp?" Accused insisted: "No, let's go back in the house". The two soldiers then entered the Urien farmhouse. Prather fixed the time of the episode above described at about 10:30 pm. The two soldiers remained in the house until about 2:30 am, 28 September, when they returned to their camp, during which time they played dominoes and consumed intoxicants (R28,29,88,89). In the house Prather saw accused in possession of his own pistol, the German Luger, and the small pistol which deceased had held in his hand as he climbed the road embankment. On the way to camp, accused threw away the latter (deceased's) pistol (R89).

Gibson, as a witness for the prosecution, testified that on the morning of 28 September accused in his presence and in the presence of Prather and other soldiers, wiped a pistol (which was not of American make) with his handkerchief. Prather asked to inspect it and when he handed it back to accused the latter said:

"Baby, you strictly did the work for me" (R72).

When a soldier informed accused that deceased had been killed on the previous evening, accused exclaimed:

> "Every 'son-of-a-bitch' I meet up on telling me Williams got killed * * * people's getting killed every day, * * * I'm tired of these 'sons-of-bitches' telling me about he got killed, which he should have been dead a long time ago" (R72).

Cpatain Leroy L. Metz, accused's commanding officer, was informed by a French farmer on the morning of 28 September of the discovery of Williams' body in a field near the company bivouac (R32). He went to the scene of the homicide and saw deceased's body. He described his observations as follows:

> "The body of Williams was lying where the wedge starts breaking away from the even edge of the field on the lane side of the field on which there is a path that cuts up from the lane to the field. * * *[That position] was about thirty-five or forty feet [from the corner of the field where the well is located] * * *from the lane to the top of the embankment is around eight or nine foot, and from the top of the embankment to the field where the

> body was is about two to three foot from the top of the embankment. [The body was] about four feet [from the embankment]. * * * William's body was lying on his left side with his head on his left arm, and his right wrist crossing his left wrist, and his right leg was on top of his left leg. His feet were pointed towards the house [Pros.Ex.2] and his back was pointed toward the lane or to the embankment that separated the field from the lane.* * * His helmet was about two feet from his head * * * directly to the rear of his head. It was toward the other end of the field away from the house. * * * His rifle was lying about five or six foot from his feet, between he and the house. * * * The muzzle of the rifle was pointed toward the embankment -- toward the side -- the butt was pointing toward the barn" (R32,33).

First Lieutenant Phillip Schiff, one of Captain Metz's subordinate officers, accompanied the latter to the scene of the homicide. He picked up deceased's carbine, disengaged the magazine, pulled back the bolt and latched it. There was no cartridge in the chamber. Captain Metz examined the weapon. It gave off no smell of powder and the barrel had no appearance that it had been fired. There were 13 cartridges in the magazine (R37,39). Two nine-millimeter cartridge cases were found two feet from the center of the front of the body (R101,106; Pros.Exs.3 and 4). In investigating the homicide, Agent Charles L. Van Riper, Criminal Investigation Division, 18th Military Police, dug in the area of ground where deceased's head had lain. About 12 to 14 inches from the surface he discovered two bullets (R101; Pros.Exs.5,6). It was definitely determined that these bullets had been fired from the German Luger pistol which accused surrendered to Captain Metz on the morning of 28 September (R35,103,105; Pros.Ex.1).

The prosecution introduced in evidence accused's voluntary extrajudicial statements (Pros.Ex.7; R103; Pros.Ex.8; R118,123). Pros.Ex.7 was obtained from accused at 0200 hours on 29 September 1944. The pertinent part thereof is as follows:

> "I passed Prather my pistol and told them that they both had a piece, meaning a weapon. Then Williams and Prather continue to argue and Prather passes my pistol over to Williams. We all three then walked out of the yard around a bank of hedgerow and Williams starts arguring again. At this time Williams has three pistols and a carbine on himself. Williams says that he is going to kill us both and then he says, I am going to give you a pistol and Prather a pistol and he starts up the hedgerow bank into a field. As he gets to the top

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of the bank, he has both pistols in one hand his carbine in the other, which was pointed at us. When Williams gets to the top of the bank a shot rings out and he fell and calls to me asking me why I did it and I told him how could I shoot him when I did not have a weapon. He then asks me to come on up on the bank and help him and I went on up on the bank and Williams was lying on his belly, our pistol laying a few feet from him and he holding his carbine. As I got up on the bank, he fired a round and said that I thought he was hurt bad. He coughs and groans and he sorta turns over, then he asked me to help him again. I went over to pick up my pistol and he sorta bends over with his carbine pointed at me with his hand on the trigger and when he started shooting at me I started shooting at him, shooting him twice, both times in the head I think. Prather came up on the bank after the shooting. Who shot Williams the first time I do not know."

Pros.Ex.8 was obtained later in the day on 29 September 1944 by the same agent who obtained Pros.Ex.7. In pertinent substance it is the same as Pros.Ex.7.

Major Dolph L. Curb, Medical Corps, 127th General Hospital, made a post-mortem examination of deceased's body on 29 September. With respect to his findings he testified as follows:

"There were a number of wounds on this body. One of them was a small, round one about one centimeter in diameter just below the center-third of the right eyebrow. A second was located on the back of the head, slightly to the rear of the midline. This one was higher than the first being about two centimeters in diameter and contained fragments of bone and brain tissue, suggesting that it was one of exit. Another one was located on the back of the right shoulder. This one was small, round, with smooth margins and was also about one centimeter in diameter. It connected with the passage leading upward through the right shoulder muscle to the right side of the neck where there was a break in the skin about two centimeters in diameter. The passage then continued upward to the right angle of the jaw, which was fractured, then passed upward through the roof of the mouth and the base of the skull in the direction of another opening in the top of the head just to the left of the midline. There was another one in the left side of the front of the chest slightly below the nipple. This one was round, with smooth margins, about one

centimeter in diameter and it connected with the passage that led to the right missing the heart and lung, penetrating the diaphragm and then passing through both the left and right lobes of the liver. The right lobe of the liver was severely lacerated. The passage then continued outward through the right body wall, passing between the ninth and tenth ribs making exit through a wound in the skin about two centimeters in diameter. There was another one on the outer aspect of the right upper arm which passed a short distance barely beneath the skin. I believe that's all" (R41).

He further testified that immediate death would not necessarily have resulted from the wound caused by the bullet which entered deceased's left breast, penetrated his disphragm, passed through his liver and exited from his body along the right flank. There would have been a period of consciousness following this wound (R42). Death probably but not necessarily followed immediately from the wound inflicted by the bullet, which entered the skull above the right eyebrow and left at back of the skull and the bullet which penetrated the right shoulder and left the body at the top of the skull near the other exit. There would have been no period of consciousness following the entrance of these bullets (R51,42).

5. In justification of the homicide, the defense first showed deceased's bad reputation for peace and quiet in the company. The following is the testimony with respect to deceased on this issue and on his condition as to sobriety:

Private Stanley Storts of accused's unit testified:

"Yes, he was a nice fellow when he was sober ...when he isn't drinking, he was a nice fellow. * * */His reputation when drinking was/ Nasty" (R53).

Timberlake:

"it seems that Williams...he was pretty drunk. Prather was pretty drunk. They weren't off their feet, but they were drunk" (R59).

Gibson:

"/Deceased/ was cussing that night. * * * at all of the rest of them which was Presberry and Cordell Prather and Timberlake" (R77,78).

Prather:

"The reputation of the deceased, Robert Williams,

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was dangerous when he had been drinking" (R97).

Corporal Smith Cunningham of accused's unit:

"I have seen him /Williams/ drunk a lot. * * * I have been in his company while he was drinking /I know the reputation of Private Williams when he has been drinking. It is/ Pretty ugly when he was drinking" (R127).

Accused:

"Well, as much as I had been around him, I could not exactly say a mean sort of fellow. But I do know of occasions when he had been drinking, he had pulled a gun on our commanding officer or one of the sergeants who is here now" (R123).

As a witness on his own behalf accused testified as to the events immediately prior to the homicide as follows:

"Knowing Williams by some incidents that have happened in the past...what he would do when he is 'hilated'... in other words, when he gets mad, I pass Prather my weapon, my pistol. Prather in turn passes my pistol over to Williams cusses me then. He calls me a bunch of 'mf's'. So I tell him, 'I would do the same for you, if Prather had a gun pointed at you and you didn't have any weapon'. I was a little ahead of my story.... When Leroy Gibson left, well, Williams swears that Leroy is laying around the haystack waiting for him. So I tell Williams, 'I will go around the haystack.' If he was up there, I would let him know. I went around the haystack and returned. I didn't see Gibson. When I got back I told Williams. Williams says, 'I bet you 500 francs that I know a way to get him out.' I then tells him, 'O.K., it was a bet.' I takes the money from my shirt pocket, lays it on the ground. Williams reaches in his pocket, takes out matches and goes towards the haystack. Prather and I persuade Williams not to set the people's haystack on fire. Now back to where I left off. After Williams having my pistol, his carbine...he marches Prather and I to the rear end of the house, toward the lane. We gets to the lane...I stop and light a cigarette, thinking that if I could get close enough to him, I would grab him, try to take the weapon to prevent any trouble. Williams had sworn that he would go both of us" (R109,110).

* * *

"Then Prather was marching, I would say, to the right

of me...walking rather to the right of me next to the hedgerow. I was in the middle of the road. Williams gets in front of us. He was just about five feet from the opening going to the field, leading off the field. He said, 'Now I am going to give you both a chance. I have two pistols... I have your pistol and my own. I am going to climb up this bank, throw you the pistols and we will shoot it out.' So he began climbing the bank. * * * He climbed in a way that he had us covered" (R110).

* * *

"He was partly bent, with his back towards the northeast end of the field. His carbine was in his right hand. * * * I would say he had just about another step to go. His right foot was at the top of the bank. A shot rings out from the east...it could be the east... or from the corner of the field by the well. Somewhere in the vicinity...I don't say exactly it was in the corner, but it was at that end of the field. * * * He tumbled over the bank. * * * Williams called out to me, saying, 'Presberry, why did you shoot me?' I called back to him how could I shoot him when he had my weapon. * * * He called for me to help him" (R111).

* * *

"I climbed the bank, got over...I saw my pistol. It was a light night. * * * My pistol, I would say, was about two feet from the slope of the near side of the field in the bank row. * * * The position of Williams when I climbed over the bank...his feet was over towards the end of the field near the house. His head was towards the opening part of the field... the gate. He was lying on the right arm, kind of resting on his right elbow...kind of holding himself with his left hand. His carbine was in his right hand. * * * Well, when I was picking up my pistol, Williams was in the position I just described to you. When he fires...he fires a shot... * * *. He fired that shot at me. * * * I was picking up my pistol. * * * Well, being scared...seeing the muzzle of the carbine pointed at me...I immediately fired at him" (R112).

Accused further asserted that deceased fired just as he concluded the statement, "You thought I was hurt bad". The muzzle of deceased's carbine was pointed at accused after the shot was fired (R112). Accused declared he shot at deceased "merely to defend myself" as he was afraid deceased would shoot a second time at him. He went up the embankment to assist Williams and would not have shot him had Williams not fired at him first (R113). Accused admitted that he and Prather went to the Urien house and played dominoes until after 2:00 am on 28 September, but denied he had subsequently

talked to either Gibson or Prather with respect to the homicide (R114). When asked on cross-examination if he did not think it advisable to inform Captain Metz that he had killed Williams, accused replied:

> "To be frank with you, it never crossed my mind. After he called me, I went up there to help him... I was willing to help him. I merely picked up my piece and going to place it in my holster... to help to take him to camp...and while picking up my piece, looked over at him. He had his carbine trained at me. Then he says, 'You thought I was hurt bad.' He pulled his trigger. * * * I fired, sir" (R117).

Further, on cross-examination accused admitted that he signed another statement (which was not introduced as evidence) on 1 November 1944, upon request of Lieutenant Weiss, the investigating officer, which contained the following declaration:

> "His carbine was held by the right arm and hand, and he fired it that way. I was about 6 or 7 feet away from him. As soon as he fired, I fired back just above the flash. I could not see much more than the outline of his body in the position which I have described, so I did not take any other aim except above the flash from his carbine, so I cannot be sure that both my shots struck him in the head" (R121).

6. The court in the exercise of its functions as a fact finding body resolved all the conflicts in the evidence against accused. Therefore, the Board of Review accepts said findings as presumptively correct, but will examine the record of trial to determine if they are supported by competent substantial evidence (CM ETO 895, Davis et al; CM ETO 1554, Pritchard; CM ETO 1631, Pepper; CM ETO 11072, Copperman).

Certain physical and objective facts in the case presented for the court's consideration substantial evidence which denied accused's contention that he killed Williams only after Williams, lying prone on the ground, fired at him with his carbine. Medical testimony without contradiction established that deceased's body bore four separate wounds which evidenced the entrance of bullets into his body:

a. Below center third of right eyebrow exiting in back of head;
b. In back of right shoulder exiting at top of head to left of the midline;
c. Slightly below left nipple, passing through diaphragm and liver and exiting between ninth and tenth ribs;
d. On outer aspect of right upper arm inflicting a superficial flesh wound.

These four entrance wounds account for the four shots that were fired. One came from an unknown assailant who fired from a point near the well. Three of the wounds could only have been inflicted by accused. Two bullets were found underneath the surface of the ground where deceased's head had lain and it was clearly demonstrated that they were fired from accused's German pistol. The inference therefore is irrefragable that entrance wounds a. and b. supra were inflicted by accused. Prather and other witnesses testified that only four shots were heard - the shot from the unknown assailant and three shots of the same resonance which beyond doubt were fired by accused. There was no fifth shot according to this line of testimony.

Prather, who saw deceased within a few seconds after accused had discharged his third bullet, declared that deceased lay on his left side with his face toward the open field. Captain Metz, on the morning of the 28 September, a few hours after the homicide, discovered William's body in the position described by Prather, and also found deceased's carbine on the ground on the field side of his body with the muzzle pointed toward the embankment and the butt toward the house (Pros.Ex.2). Two cartridge shells from accused's pistol were found on the field side of accused's body and of crucial importance is the fact that deceased's carbine carried no evidence that it had been recently fired. It gave off no odor of burned powder. In the absence of a mechanical defect (which is not even suggested in the evidence) when a carbine is fired a loaded shell is automatically injected into the chamber. There was no shell in the chamber of accused's carbine.

The legitimate inferences from the foregoing facts, established beyond reasonable doubt, are obvious. When accused fired the two shots (a. and b.) deceased must have lain on his left side facing the open field because these entrance wounds were on the right side of his face and on his right shoulder. Wound c. was "on the outer aspect of the right upper arm which passed a short distance barely beneath the skin". The location and nature of this wound - a superficial flesh wound on the outer aspect of the right arm - are wholly consistent with the fact that deceased reclined on his left side when he also received this wound.

It cannot be determined from the evidence in what order the three wounds were inflicted, but the inference is reasonable

and sequential that wounds a., b., . and d. were the results of the three shots discharged by accused. Medical testimony proved that death most probably followed immediately upon the infliction of the head wounds, and the inference is reasonable and logical that deceased rested on his left side not only when he received the three shots from accused's pistol, but also that he never moved after they entered his body. Stated otherwise, he was in the same position when he received the death-dealing wounds as he was when he was seen a few seconds later by Prather and when discovered by Captain Metz.

Against this evidence, intrinsic in the case, and the legitimate inferences therefrom, is accused's declaration made as a witness in his own behalf:

> "The position of Williams, when I climbed over the bank...his feet was over towards the end of the field near the house. His head was towards the opening part of the field...the gate. He was lying on the right arm, kind of resting on his right elbow...kind of holding himself with his left hand. His carbine was in his right hand * * * Well, when I was picking up my pistol, Williams was in the position I just described to you, when he fires...he fires a shot * * * He fired that shot at me /when/ I was picking up my pistol" (R112) (underscoring supplied).

If accused's courtroom version of the events following his arrival at the top of the embankment is to be believed, it is necessary to discover evidence in the record that after deceased fired his carbine at accused he turned over onto his left side and threw his carbine on the field side of his body where it was found by Captain Metz. Only in accused's statement (Pros.Ex.7,8) is such action suggested:

> "As I got up on the bank, he fired a round and said I thought he was hurt bad. He coughs and groans and sorta turns over, then he asked me to help him again. I went over to pick up my pistol and he sorta bends over with his carbine pointed at me and with his hand on the trigger and when he started shooting at me I started shooting at him, shooting him twice, both times in the head I think" (underscoring supplied).

In his statement to the investigating officer, quoted above, which accused admitted he made, he gave a third version of the shooting:

"His carbine was held by the right arm and hand, and he fired it that way. I was about 6 or 7 feet away from him. As soon as he fired, I fired back just above the flash. * * * I did not take any other aim except above the flash of his carbine, so I cannot be sure that both my shots struck him in the head" (R121).

It is manifest that all of accused's descriptions of the episode cannot be true. With such conflict existing in accused's own statements an issue of fact was created peculiarly for consideration by the court. Had it believed accused's version of the homicide as given by him in open court, his acquittal would probably have resulted. Oppositely the status of the proof was such as to justify fully the court's action in rejecting accused's evidence and in accepting the facts, proved by the intrinsic evidence above demonstrated, and the reasonable inferences therefrom, as the basis of its verdict, viz. that deceased offered no violence to accused when the latter reached the top of the embankment, but that he was prostrate on the ground and cried to accused for succor, and that accused, having picked up his own pistol - the German Luger - stood over deceased and discharged three shots into his body - two of which were immediately fatal.

The facts of the homicide, being thus determined, it is manifest that accused's life was not imperiled by deceased nor did accused stand under threat of great bodily harm at the hands of deceased. Conversely, accused, having recovered possession of his pistol and seeing deceased in a wounded and helpless condition on the ground before him, deliberately and with calculation seized the opportunity to kill him. He discharged three bullets into accused's body, two of which beyond peradventure were of such a nature as would cause instantaneous death. The use of a deadly weapon under the circumstances disclosed established the essential element of malice and the resultant homicide was murder (CM ETO 438, Harold Adolphus Smith; CM ETO 1901, Miranda; CM ETO 6229, Creech; CM ETO 6682, Frazier; CM ETO 7315, Williams).

7. The charge sheet shows that the accused is 26 years nine months of age and that he was inducted 26 March 1941 at Philadelphia, Pennsylvania, to serve for the duration of the war plus six months. His period of service is governed by Service Extension Act 1941. 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.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate.

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

BOARD OF REVIEW NO. 1 5 APR 1945

CM ETO 9235

U N I T E D S T A T E S	10TH ARMORED DIVISION
v.	Trial by GCM, convened at Trier, Germany, 16 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ROBERT SIMMONS (34251650), 448th Quartermaster Truck Company	

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

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

2. The charges were served on accused on 16 March 1945 and he was arraigned and tried at 1405 hours on the same day (R3). The record of trial shows that the defense affirmatively stated in open court that accused did not object to trial at that time (R5). Under such circumstances no prejudice to substantial rights of accused is disclosed (CM ETO 8083, Cubley, and authorities therein cited).

3. 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.

4. Confinement in a penitentiary is authorized on conviction of assault with intent to commit murder by Article of War 42

and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4),3b).

B. Franklin Pitts Judge Advocate

Wm. J. Gunnow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3 29 MAY 1945

CM ETO 9246

UNITED STATES	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private FELTON JACOB (38238617), Company A, 447th Signal Heavy Construction Battalion	Trial by GCM, convened at Granville, Manche, France, 16, 17, 24, 25 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Felton Jacob, Company A 447th Signal Heavy Construction Battalion, XXIX Tactical Air Command, did, at Village du Bois, Monthuchon, Manche, France, on or about 9 August 1944, forcibly and feloniously, against her will have carnal knowledge of Mlle Yvonne Bellamy.

He pleaded not guilty, and all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by court-martial for absence without leave for one day in violation of Article of War 61 and for breach of arrest in violation of Article of War 69. All members of the court present at the time

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

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

Yvonne Bellamy lived with her family in a two-story house in Village du Bois, Monthuchon, Manche, France. The family consisted of Yvonne, her mother, her fourteen-year-old sister, Denise, her cousin, Andre Letrouit, and another sister and two brothers. On the night of 8-9 August 1944, accused's organization was bivouacked at a distance from the Bellamy home variously described by the witnesses as 200 yards and 300 meters (R7,14,82,88,96,97). Shortly after midnight, 8 August 1944 (Army time), the entire family was upstairs when it was disturbed by two colored American soldiers who were knocking at the front door. Andre and Yvonne went to the window and asked them what they wanted. They said they wanted the women to come down. When Andre told them this was impossible, they fired three shots, two in the air and one through the window from which Andre and Yvonne had spoken to them a moment before. The entire family then went downstairs and Madame Bellamy opened the door.

The two soldiers, armed with guns, stood outside. One was smaller than the other and spoke French "correctly enough". He kept asking Yvonne to "come here" and finally Madame Bellamy, being frightened, shut the door. The soldiers then fired another shot, this time above the door. The family fled through the back door and Yvonne and her mother ran toward their neighbor's house some 300 meters distant. When they had gone about half way, they found they were being followed by the two colored soldiers. The smaller one who had spoken French at the house seized Yvonne. She fought him and shouted and he struck her with his fist on the left side of her face. He put his weapon down, threw her to the ground and forcibly had intercourse with her. Penetration was accomplished and after about ten minutes, the soldier and his comrade, who had meanwhile occupied himself with Madame Bellamy, went off in the direction of their camp. Yvonne fought and shouted for help throughout and did not consent to the intercourse. Neither Yvonne, Madame Bellamy nor Andre was able to recognize Yvonne's assailant by sight. Andre, however, recognized the smaller soldier as one he had previously seen on three different occasions, such recognition being based

solely on the man's voice and manner of speaking French. He identified accused as the man. Accused was the only negro soldier he had ever heard speak French (R7-21,25-35,35-47,96-98,168-177).

On 9 August 1944, Yvonne, her mother, and her sister, Denise, were taken to the area occupied by accused's organization at Fougeres, France. Twelve men, including accused and two other soldiers who spoke French, were formed into an identification parade. None of the three women identified any one as having been at their home on the night of 8-9 August. Later in the evening the entire company marched past them and, again, none was able to identify Yvonne's assailant, although there is some evidence that Denise recognized accused as having been at their home on occasions previous to the night of the rape (R22-24,74-77,84-86,88,94-96). Yvonne testified that after the identification parades, they saw accused talking to the police and Denise told her that she had seen him previous to the night in question. Yvonne then recognized his voice as being the same as that of the small soldier who had spoken French to them at their house the night she was attacked (R22-24). On 15 August 1944, Andre Letrouit was taken out to a place where accused and ten other men of his company were working. The men were lined up and Andre pointed out accused, recognizing him from his previous encounters with him, and, after conversation with him, identified him as the soldier whose voice he had heard at the Bellamy home the night of the rape (R41,44-47,54-56,67-69,76-77,175).

Madame Bellamy identified two bullet holes in her house, one on the second floor and one on the first, as having been caused by the shots fired on the night of the incidents, stating that theretofore no such holes had existed (R33-35). The bullets were extracted from the holes in her presence, and upon being properly identified on trial, were introduced in evidence as Prosecution's Exhibits 1 and 2 (R48-59,60-72). On 9 August 1944, the Civil Affairs Public Safety Officer obtained a carbine, .30 caliber, which had previously been issued to accused and was admitted by him to be his rifle (R73-74,78,79). The carbine had been recently fired, but accused explained this by stating that he had used it to shoot at fish in a pond some days previously and was corroborated in this explanation by a sergeant (R87). The civil affairs officer then caused the gun to be fired into a piece of wood and the bullet thus discharged, upon proper identification, was admitted in evidence as Prosecution's Exhibit 5 (R79-84,88-90,90-94). Expert testimony by Mr. Robert Churchill, gun expert of the Metropolitan Police, London, showed that the three bullets (Prosecution's Exhibits 1, 2, 5) had all been fired from the same rifle and that such rifle was a United States Carbine, .30 caliber (R128-143).

4. Accused, after being warned of his rights, elected to testify under oath (R146). He stated that he spoke French, having learned

the language in Louisiana. On the evening of 8 August 1944, he went walking with a friend after chow and returned to camp at about seven o'clock. He and three other men occupied a double pup tent and two others had a tent approximately ten feet away. Accused and his tent mates went to bed at about ten o'clock, and after talking for a few minutes, fell asleep. He remained asleep until awakened by a sergeant and a private of his company who said there had been some screaming and shots in the vicinity and asked him, since he spoke French, to go with them to find out what had happened. Accused declined and went back to sleep. He did not awaken again until morning, and so far as he knew, no one left the tent during the night (R147-148,155-159). He admitted having seen and conversed in French with Andre on two occasions previous to the night of the offenses charged. On the two identification line-ups of 9 August 1944, none of the three women identified him as having been at their home on the night of 8-9 August 1944, but he overheard Denise tell the interpreter that she had seen him on a previous occasion. This statement was true and the interpreter thereupon had accused speak in French. The same evening, he was asked to give his gun to a British officer, who took it and caused it to be discharged. He did not have his rifle at any time during the evening of 8-9 August 1944, having left it in his tent. He did not lend it to anyone and the next morning he found it where he had left it, although he did not know whether it had been moved during the night. A few days later, while he was working with a group of about nine men, they were all lined up for identification by Andre. He pointed to accused and thereafter accused spoke French to him (R148-154,156-167).

Accused's story was corroborated in part by the testimony of the two occupants of the neighboring tent, both of whom stated that accused went to bed at about ten o'clock. They retired at about the same time and did not hear anyone leave accused's tent during the night. They next saw accused the following morning (R101-107). Further corroboration was given in the testimony of one of accused's tent mates and the stipulated testimony of the other two. All agree that accused went to bed at about ten o'clock and, to the best of their knowledge, did not leave the tent during the night. Accused was separated from the entrance of the tent by two of his tent mates and could not have left without disturbing them. All three heard the conversation during the night between accused and the men who asked him to aid them in investigating the disturbance (R107-117,144). Private Freddie Watson, one of the men who awakened accused for this purpose, testified that he and various others heard shots and screams coming from the vicinity of a house some distance away at about midnight. They went to investigate and after approximately an hour, returned to camp and awakened accused for the purpose of asking him, in view of his ability to speak French, to aid them in an investigation. Accused appeared to be sleeping soundly and upon being awakened, refused to go (R118-127).

5. The fact that rape was committed upon Yvonne Bellamy at the time and place specified is proved beyond any doubt by the uncontradicted evidence of the prosecution. The important question in the case is whether accused has been sufficiently identified as the perpetrator of the crime. This is primarily an issue of fact on which the determination of the court, as in all such issues, will be disturbed by the Board of Review only if it is unsupported by substantial competent evidence (CM ETO 9304, Suitt). The Board of Review's function is to determine whether such evidence exists and a brief review of the proof in this connection is therefore desirable.

Both Yvonne Bellamy and Andre Letrouit testified positively that they recognized accused as the shorter of the two men who were at the door of the Bellamy home on the night of 8-9 August 1944. Their recognition, however, was based not upon accused's appearance, but upon his voice and his manner of speaking French. Both witnesses were shown to have heard accused speak French on other occasions, Andre having heard him several times before the incident charged and once afterwards, and Yvonne having heard him the next day. Since Yvonne testified that her assailant was the smaller soldier who had spoken French at the doorway, in which testimony she was corroborated to some extent by her mother, the identification of accused as such assailant logically follows. Further proof on the issue of identity was produced in the form of the testimony of the ballistics expert, a type of evidence which is entirely acceptable provided, as in the instant case, that the expert is shown to be properly qualified (2 Wharton's Criminal Evidence (11th Ed.1935) sec.992, p.1734). Such testimony served here to establish that the bullets fired into the Bellamy house on the night of the crime were shot from a carbine issued to accused and acknowledged by him to be his weapon. Accused admitted that the rifle had not been given or lent by him to anyone else on the night of the rape and that on the following morning it was in its usual place in his tent.

All of this evidence was in effect contradicted by accused in his testimony that he had spent the entire night asleep in his tent. This testimony was corroborated to some extent by several witnesses who stated that he had gone to bed at ten o'clock and, to the best of their knowledge, had remained there throughout the night, and in any event was definitely in his tent approximately an hour after the disturbance at the Bellamy home.

As indicated in the foregoing summary, the evidence on the issue of identity is in conflict. It is apparent, however, that the prosecution's proof is substantial and, taken alone, fully justifies the court's findings of guilty. Moreover, except for the testimony of accused, it is not essentially contradicted by the evidence for the defense, since the testimony of accused's witnesses to the effect that he was in his tent an hour after the incidents at the Bellamy house

does not necessarily disprove the prosecution's contention that he was the perpetrator of the rape. In view of the substantial evidence of the prosecution therefore, the court's determination of the issue of identity will not be disturbed by the Board of Review.

6. The evidence to the effect that Yvonne, Denise and Madame Bellamy failed at the identification parades to identify accused as the assailant was entirely adduced by the defense on cross-examination. Since no identifications were made, the testimony of the third party witnesses in this matter constituted a mere description of physical acts and accordingly is not open to the objection on ground of hearsay discussed in CM 270871, IV Bull. JAG 4. As for Yvonne's testimony on the point, it clearly involved no hearsay (CM ETO 7209, Williams). Likewise, the testimony relative to Andre's conversation with accused in the line-up at Fougeres was free from objection on this score, being offered and received not for the purpose of showing that Andre identified accused on that occasion, but rather for the purpose of showing the physical act of conversation between them, thus supporting Andre's direct testimony that he recognized accused by his voice. That this was the basis on which the evidence was received is shown by the court's action in granting a motion by defense to strike the witness Kitchen's testimony that Andre on this occasion identified accused as the assailant (R55).

7. The charge sheet shows that accused is 23 years and eight months of age and was inducted 7 September 1942 at Houston, Texas. He had no prior service.

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

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

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

23 APR 1945

CM ETO 9257

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters, 36th Infantry Division, APO 36, U.S. Army (France), 9 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant FRANCIS J. SCHEWE (O-1320968), Company G, 143rd Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that 1st Lieutenant Francis J. Schewe, 143rd Infantry, did, at Bruyeres, France, on or about 20 October 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Lyons, France, on or about 25 December 1944.

He pleaded guilty to the Specification except the words "Bruyeres" and "desert the service of the United States" and "in desertion", substituting therefor the words "Lepanges" and "absent himself without proper authority"; of the excepted words not guilty, of the substituted words guilty, and to the Charge not guilty but guilty of a 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 found guilty of the Charge and Specification. No evidence

of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, 36th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

Until about two or three weeks prior to the alleged offense charged herein (20 October 1944), accused was S-2 of the 2nd Battalion, 143rd Infantry (R8). Major James C. Gentle, Commanding Officer and later Executive Officer of the battalion (R6), testified that accused performed his work as S-2 very well and showed no evidence of a desire to protect himself from personal danger. He was assigned as platoon leader of the 1st platoon, Company G, 143rd Infantry. For about one week of the period during which he served in that capacity, the company occupied a defensive position and was in contact with the enemy (R8,12).

On 19 October 1944 the 2nd Battalion proceeded from Faucompiere, France (R7), where for about five days it had occupied a rest camp (R11), to Lepanges, France, where it arrived about 1630 hours and went into temporary bivouac (R7). At about 1930 hours, after receiving permission from First Lieutenant Richard A. Grousset, Executive Officer of Company G (R10-12), accused went to the command post of the battalion commander, Major Gentle, and requested that officer to relieve him of his command as platoon leader in Company G.

> "He said he didn't feel that he could do it any longer; that he had talked to his platoon sergeant and they both worked out some way and they weren't successful; that he couldn't take it any longer and requested that I do something for him, to be fair to the man in the platoon" (R7).

Major Gentle told him he understood his difficulty (R8) but as he, Major Gentle, was required to proceed immediately to Bruyeres on reconnaissance, he explained to accused that he could do nothing at the time, and requested him to return to his company. He stated that at the first opportunity the next day he would call for him and try to make some adjustment if possible (R7). Had the events leading to accused's trial not occurred, he would have been willing with confidence after their conversation to assign accused as Battalion S-2 or to some other responsible and hazardous position in the battalion (R9-10).

At about 1930 hours, following a call from the battalion, Lieutenant Grousset searched for accused through the company area in order to send him on a quartering party, but was unable to find him (R10). He was not present for duty the next day (20 October) and "never returned to duty from that time on" (R11,12). At about 2000 hours 19 October, the battalion moved out pursuant to a change of orders which, because of its sudden nature, had not previously been announced throughout the battalion (R7).

On 25 December 1944, military police, acting under orders of the Criminal Investigation Division, discovered accused in the Grand Nouvel Hotel, Lyons, France, a transient hotel for officers, brought him to the military police station and notified the Criminal Investigation Division (R13-14).

4. a. For the defense, testimony of two witnesses was introduced to the effect that accused performed his duties as Assistant S-2 and S-2 creditably under enemy fire (R15-16).

Captain Wendell C. Phillippi testified that he was Adjutant and later Executive Officer of the 2nd Battalion, 143rd Infantry, when accused was Battalion S-2 (R16), and worked with him for about two weeks. When accused joined the organization he was immediately given a staff position because of his drive and aggressiveness and he functioned very well with the battalion in the Anzio breakthrough, the drive north and through southern France (R17). He led his section, which consisted of a sergeant and six other men (R18), on reconnaissance missions "when he never knew what the situation would be", and in witness' opinion was more aggressive under combat conditions than any other S-2 he had seen (R17). He was a member of Headquarters and Headquarters Company, and made "formations" with the company (R18).

An extract copy of the morning report of Company G, 143rd Infantry, for 20 October 1944 was introduced in evidence, showing four first lieutenants and two second lieutenants present for duty that day (R18;Def. Ex.A). Also introduced in evidence was an extract copy of accused's WD AGO Form 66-1 card, dated 6 January 1945, showing his promotions and appointments (R18; Def.Ex.B).

Captain Joel W. Westbrook, 143rd Infantry, individual counsel for the accused (R3) and Battalion S-3 at the time of accused's transfer to Company G(R32-33), testified that there was a shortage of officers in the company at that time. A former company commander of Company H, whose poor physical condition prevented extended walking, succeeded accused as Battalion S-2 (R34).

b. Individual defense counsel announced that accused's rights were explained to him and that he elected to take the stand on his own behalf. Accused stated that he understood his rights and did not desire any further explanation thereof (R18). He testified substantially as follows:

Prior to his training at Fort Benning, Georgia, where he was commissioned a second lieutenant, Army of the United States, on 12 June 1943 (R19), he was a platoon sergeant in the training platoon battalion at Camp Wheeler, Georgia, for about six months. His duties consisted of instructing recruits in basic infantry training (R20). For a time after he was commissioned, he engaged in training operations with the 13th Airborne Division, but neither before nor after the time he joined the 36th Division, on 16 March 1944, did he ever command a platoon (R19).

While serving as Assistant S-2 and as S-2 of the 2nd Battalion, he attended company formations and had charge of the drivers, cooks and the intelligence section which consisted of a sergeant and six other men (R19-20). He enjoyed his work and felt that he was performing it satisfactorily. He did not believe that his attachment to Company G as platoon leader was permanent because his senior officers explained to him that it was a temporary assignment necessitated by a shortage of officers and that he would resume his position as S-2 as soon as the shortage terminated. While he was with the company three officers returned (R20), one of whom was the original platoon leader, who was formerly platoon sergeant and knew the men far better than he (R30-31). There were then in Company G seven officers, including accused, whereas only six were necessary. The others "knew more about it" than he (R22,26,31). While he was in command of his platoon it was in a defensive position near Lavaline and Reahupal (R20). He knew of no attacks, but small patrols were sent against the enemy. He felt he did effective work on the patrol he accompanied (R21). He experienced no reaction after leading his platoon against the enemy (R31). The battalion was relieved and moved to the Faucompiere area, where it remained for four or five days. He knew the unit would cross the river to a new area, dig in, and go into combat, and believed the movement would occur that night or the next morning, but no movement orders were given before he left the company (R21,22,28).

Because he never commanded a unit of platoon size,

> "the feeling of security in regard to giving orders or making a quick decision with a large number of troops was not natural"

to him (R20). He was unfamiliar with "things that come up in combat" such as cooperating with other units (R28). He did not feel that he did a satisfactory job as platoon leader (R20) or that he was competent to lead his platoon in an attack. He therefore informed the battalion commander how he felt and requested him to reassign him as S-2. The commander seemed to understand his feelings and stated that he was satisfied with his work as S-2 and would "try to do something about that" (R21). Accused did not tell him he could not "take it" up there as platoon commander (R27). He did not remember Major Gentle's saying he would talk to him about it the next day (R32). Accused was never exactly afraid of combat, but was scared by enemy fire (R22).

After the conference with Major Gentle, accused returned to the company command post, took his equipment and left, but he did not feel he was abandoning the company. His motive was not to avoid the danger involved in leading a rifle platoon but

> "rather to get away as you say and suffer the consequences of AWOL for myself rather than make a bad mistake trying to command a platoon as I said before I knew nothing about" (R22-23).

He did not realize that he could be tried for desertion, but believed his status would be that of absence without leave because the command was not actually engaged in combat and he knew two officers of the battalion who were previously absent without leave but were punished merely by fine and reprimand (R23). He definitely intended to return from the time of his departure (R23,26), but left because he did not believe he could command a rifle platoon and because more capable officers were present (R26,29). He believed he could be made S-2 even after he was absent without leave (R27,29). When asked how long he intended to remain so absent, he stated he "had no definite time" (R27).

Accused went first to a town across the river from Jaremenil where he spent the night (R23). The next morning he rode to Vesoul where he remained five days. Thereafter he journeyed to Dijon (four days), Lyons (six days) (R24), back to Vesoul "on the way back" to his organization (two days), but back again to Lyons (three and one-half or four weeks), where he stayed at the Grand Nouvel Hotel (R25) and where he was apprehended 25 December (R28). He informed the CID agent that he was absent without leave from his organization (R26). During his absence he did not do much drinking and wore his uniform (R25).

He had no definite destination in mind and thought about returning, but failed to do so "Because coming back to face brother officers would likely be very hard at that time" (R23-24). After realizing the seriousness of his offense he expected to be returned to a combat unit (R29). He realized that throughout his absence, from 20 October to 25 December, his organization was fighting the enemy (R28).

5. Accused was charged under a general specification with desertion from 20 October to 25 December 1944. His absence during that period is clearly proven by the testimony of Lieutenant Grousset andof the military police sergeant who apprehended him. It may be inferred from the evidence of the tactical situation of accused's unit, the length of his absence and the lack of evidence of permission, that the absence was without leave (Cf: CM ETO 527, Astrella). His own testimony negatives permission. His pleas of guilty to the lesser included offense of absence without leave are thus amply corroborated. The only question for determination iswhether the record contains competent substantial evidence that when accused left his company he intended not to return to it or intended to avoid hazardous duty or to shirk important service (CM ETO 5117, DeFrank, and authorities therein

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cited; CM ETO 5196, Ford), or that at some time during his absence he entertained the intention not to return to his organization (Cf: CM ETO 5958, Perry and Allen). Accused affirmatively testified that he intended to return from the time he left and that his motive at that time was not to avoid the dangers involved in leading the rifle platoon.

The record contains evidence from which the court could properly infer that accused intended, both when he left his company and thereafter, not to return thereto. His unsatisfactorily explained absence without leave for over two months from his organization in a combat zone, during which he was in constant proximity to military installations, terminated by apprehension, was legally sufficient evidence in itself to support such inference (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell, and authorities there cited). His dissatisfaction with his assignment as platoon leader, his sense of incompetence to discharge the duties of such position in combat and his consequent desire to be relieved thereof, also support such inference. His testimony that he intended to return, believed his status throughout his absence to be absence without leave and that he would merely be fined and reprimanded as punishment therefor is not convincing and the court was not obliged to give it credence.

Although no movement orders were issued before accused departed, the court was warranted in inferring that he had notice that such orders were a matter of imminent anticipation. The battalion had just moved from a rest area, where it had remained about five days following contact with the enemy, into a temporary bivouac area. He testified he knew the unit would return to combat and thought the movement would occur on that evening or the next morning. It is a thoroughly reasonable inference that this knowledge prompted him to confer with his battalion commander for the purpose of being relieved of his assignment as platoon leader before the inception of the anticipated action against the enemy. When that conference failed in its immediate purpose, he left his unit and remained absent during a period when he knew it was in combat with the enemy. The court could properly infer from these circumstances that, even consistent with accused's testimony that his motive was to promote the welfare of members of his platoon and others by removing himself from his command, his intention was to avoid the hazardous duty and shirk the important service of performing the functions of that command in combat.

The findings of guilty were fully supported by substantial evidence and the court's determination therein of factual questions against accused will therefore not be disturbed upon appellate review (CM ETO 1629, O'Donnell; CM ETO 8083, Cubley).

6. The Specification alleges that accused deserted at Bruyeres, France, whereas the evidence, as well as accused's plea, shows that the place was Lepanges, France. As the place of desertion is not of the essence of the offense, the variance is immaterial within the contemplation of Article of War 37 (CM ETO 5565, Fendorak, and authorities therein cited).

7. The charge sheet shows that accused was inducted 30 July 1941 and commissioned 12 June 1943.

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

9. A sentence of dismissal, total forfeitures and confinement at hard labor for life is authorized upon conviction of an officer of a violation of Article of War 58. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is proper (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

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

1. In the case of First Lieutenant FRANCIS J. SCHEWE (O-1320968), Company G, 143rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9257. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9257).

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

(Sentence ordered executed. GCMO 126, ETO, 27 April 1945.)

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

BOARD OF REVIEW NO. 2

18 MAY 1945

CM ETO 9258

U N I T E D S T A T E S	OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Second Lieutenant MARTIN DAVIS (O-1647837), Signal Section, Headquarters, Oise Section.	Trial by GCM, convened at Reims, France, 24, 25 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 10 years. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Second Lieutenant Martin Davis, Hq, Oise Section, did at Reims, France, on or about 30 December 1944, wrongfully and unlawfully transport 1 case of cigarettes, value about $25.00 property of the United States, then lately before feloniously stolen, taken and carried away, he the said Second Lieutenant Davis, then well knowing the said cigarettes to have been so feloniously stolen, taken and carried away.

Specification 2: In that * * * did at Reims, France, on or about 30 December 1944, feloniously receive, have, and conceal 1 carton of cigarettes, value about fifty cents, and one box of chocolates, value about fifty cents, property of the United States, then lately before feloniously stolen, taken and carried away, he the said Second Lieutenant Davis then well knowing the said cigarettes and chocolates to have been so feloniously stolen, taken and carried away.

Specification 3: In that * * * knowing the location of a quantity of cigarettes and candy, property of the United States, then lately before feloniously stolen, taken, and carried away, did at Reims, France, on or about 30 December 1944, wrongfully fail to report the location of said property, he, the said Second Lieutenant Davis then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

He pleaded not guilty, and was found not guilty of Charge II and its specifications, and guilty of Charge I 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 10 years. The reviewing authority, the Commanding General, Oise Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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 prosecution's evidence showed that accused was a second lieutenant, Signal Corps, and on duty as assistant signal supply officer, Oise Section (R20-22; Pros.Ex.D). He had been billeted since October 1944 with Madame Paule Farrand (29 years of age) in

Reims, France (R8,12,14). On 29 December, a French soldier, wearing an American uniform, delivered to Madame Farrand and stored in her garage ten cases of cigarettes, Lucky Strikes and other American brands, and two cases of Hershey chocolate bars (R9-11,17). Madame Farrand was to sell six cases of the cigarettes and hold the rest of the property. From the money received by her for the cigarettes, she expected there would be a profit or commission amounting to five francs per package (R18-20). The night that Madame Farrand received these cigarettes, she asked accused to accompany her to the garage and "bring up a case of cigarettes" (R10,18). Accordingly, he carried a case up to the bathroom where, at her request, he opened it. She told him in the garage that she intended selling the cigarettes. He "just looked on and said nothing". In the bathroom she told accused she would sell the cigarettes as soon as possible and that she and the soldier who sold her the"packs at 45 francs" would receive a profit of five francs. The only comment accused "seemed to give" was "All right" and "Very well" (R10,18,19).

By ten o'clock on the following night, 30 December, Madame Farrand had in her possession 168,000 francs from the sale of cigarettes that evening at 60 francs a package. She testified that accused was present when she received this money (R12,15). At that hour, after the cigarette purchasers had departed, she went to bed. Accused left for Paris shortly before or after midnight (R16). The next day, Sunday, "the Military Police and French Police came" to Madame Farrand's home and took the money she had on hand from the cigarettes, and also took the remaining cigarettes and chocolate (R12). There was a discrepancy of 28,000 francs in the money found by the police and the amount she reported to them as received from the sales (R12,22). She said she gave accused none of this money and denied that she gave him any cigarettes or chocolate (R14,16). The packages of cigarettes involved in this transaction each bore the yellow "tax free" label that distinguishes cigarettes for United States Army personnel from those the subject of civilian purchase (R9,10,26; Pros.Exs.B,E).

On 3 January 1945, accused returned from Paris and was interviewed by First Lieutenant Simms of the Corps of Military Police who asked him if he was willing to open his foot locker for examination, since he was conducting a "black market investigation". Accused replied in the affirmative and unlocked his foot locker. A box of "Hershey bars", unopened, and a carton of Lucky Strike cigarettes containing ten packages each bearing the "Tax free" label were found in the foot locker. Accused, asked where he had obtained these articles, replied "from M. Farrand"; and asked if he believed they were stolen, stated, "No, not necessarily, they might have been bought in black market" (R23,24; Pros.Exs.B,C). Accused told this officer nothing more, except that he was not feeling well, that he was going to the hospital and that a car or ambulance was waiting for him. The officer thereupon told accused that he "would question him at a later date", after which

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the latter left to go to the hospital (R25).

The Chief of the Army Exchange Service, Oise Section, testified, in effect, that during his experience of the past five months there were no facilities in France whereby merchandise of the United States (cigarettes or candy) was issued or sold to civilians, and that the maximum issue of cigarettes to Army personnel during this time had been seven packs per week. He also testified that he had heard of French soldiers in American uniforms who had drawn American rations, issued to them in bulk through regimental headquarters (R26,28).

On 15 January 1945, accused was interrogated by an officer of the Inspector General's Department, Oise Section, after having been "warned of his rights under the 24th Article of War". The questions and answers were recorded stenographically and a transcript was received in evidence (R20,21; Pros.Ex.D). Accused stated at that time that he had known that Madame Farrand was engaged in black market activities since 27 December, realized that "these were United States government goods", and saw chocolate and cigarettes sold on 30 December. He said that he had warned the woman against "being involved in blackmarket goods". He also said that he had carried a case of cigarettes upstairs for her on 29 December. He left about 0300 or 0330 hours on 31 December (for Paris). The morning he left, Madame Farrand gave him 30,000 francs which she wanted him to have for her in America (R22,42; Pros.Ex.D).

4. Accused was fully advised of his rights as a witness in his own behalf. He elected to testify under oath. He briefly described the character of his services during four years in the Army. He told of arriving in France in August 1944 and of going to Reims as supply officer and of later receiving his present assignment. He stated that the testimony he had given the Inspector General was substantially true, and during the course of his testimony repeated much of what he said then. He and Madame Farrand became very good friends. Prior to 26 December, she had asked him if he would invest money for her in the United States. His reason for allowing the transactions to take place was to get as much evidence as possible. He believed that his actions proved that while he was ill-advised he was trying to be a private detective. He wanted to be present in the living room on the night of 30 December when the sales were taking place so as to see a certain "important citizen" expected by Madame Farrand to be present and the identity of whom neither Madame Farrand nor the citizen in question wished revealed. Accordingly, he arranged with the duty officer in the Signal Office to call him every five minutes so that he would have to answer the telephone in the living room and be able to see who was present. He witnessed two transactions amounting to 145,000 francs. He left for Paris on official business at about four o'clock in the morning, 31 December. Madame Farrand prepared cocoa for him before he left. He had not been paid, and he

asked her for 5,000 or 10,000 francs. She gave him 30,000 francs. This money he had seen paid "over the table for black market cigarettes", the night before. Madame Farrand told him the 30,000 francs "could be sent home, like she previously said". Accordingly, when he reached Paris, he sent 20,000 francs to his home by money order. He took the chocolate and cigarettes as evidence and put them in his foot locker before he left for Paris. He returned from Paris "about two o'clock on the 3rd of January". When he talked to the officer from the Military Police on his return and turned the cigarettes and chocolate over to him, he did not tell the officer he had taken them as evidence as he was sick at the time. When he was in confinement "Major Haberle" came over and he told him "about black market activities" (R29-42).

It was stipulated that if Second Lieutenant Willard A. Warthen, Jr. were present in court he would testify that at approximately 1920 hours on one of any of seven specified dates on which he worked nights, which included 30 December 1944, accused called him at Signal Center and, refusing to disclose the reason, requested that he be called at his apartment at frequent intervals. Lieutenant Warthen, complying, called accused several times at 15 minute intervals until told to discontinue as the calls had enabled "him to see a certain party in whom he was interested" (R49; Def.Ex.A).

5. The proven facts relevant to the findings of guilty are that on 29 December 1945, Madame Farrand, a civilian with whom accused was billeted, received 10 cases of cigarettes, 500 cartons, and two cases of Hershey chocolate bars from a French soldier. She intended to and did sell a major part of this merchandise the next night. When these cases were delivered, accused at her request carried a case of cigarettes from the garage, where it was all piled up, to her bathroom. She had told him the character of the merchandise and of her plans to sell it. Accused took a carton of cigarettes and a box of chocolate bars and locked them in his foot locker. He witnessed two of the sales on the evening of 30 December and saw 145,000 francs received by Madame Farrand, and he received from her 30,000 francs out of this purchase money. Of this he stated he sent home 20,000 francs after arriving in Paris, to which city he departed on Army business at about 0300 hours 31 December. He returned from Paris at about 1400 hours 3 January. Awaiting him at the house, evidently, was a military police officer who said he was conducting a black market investigation and requested permission to inspect accused's trunk. Accused opened the trunk and produced the carton of cigarettes and box of chocolates, contents untouched, and told of getting them from Madame Farrand. He was sick and about to go to the hospital. On hearing this, the investigator said he would question accused at a later date. Accused told what he knew to an official, for the first time, about two weeks later when he was interviewed officially as to his connection with

the case. He admittedly knew that the cigarettes were government property and that Madame Farrand was engaged in black market activities.

6. On these facts and on the further fact, commonly known, that the cigarettes and candy of the kind and quantity involved here could not have been the subject of legitimate sale to or purchase from a private individual, and could have been owned after leaving America only by the government of the United States, the Army Exchange Service, or an allied government, it follows without argument that this property must have at some time been stolen. There was no one who could have legally transferred ownership or control of the property to the French soldier or to any person whom he may in turn have represented for the purpose of making deliveries to Madame Farrand. Somewhere along the line these goods were acquired by trespass, without consent of the owner, and there was a larceny. There was ample proof to support the hypothesis that accused knew this was stolen property.

Specification 1, Charge I, alleges that accused knowingly transported one of the cases of stolen cigarettes. This refers to the case which he carried upstairs for Madame Farrand. This charge is laid under Article of War 96. It does not necessarily involve any statutory or common law offense. What accused did, and knowingly, was to aid and assist in the wrongful diversion of property from its intended purpose of consumption by United States military personnel to channels of black market trade. As stated, this merchandise could not have been the subject of legitimate commerce in the hands of Madame Farrand. For these reasons, the findings of guilty of this specification is sustained by the evidence.

Specification 2, Charge I, alleges that accused feloniously received one carton of cigarettes and one box of chocolates, property stolen from the United States Government, in violation of Article of War 96. Receiving stolen property is a common law offense (53 CJ, sec.I, p.502). As such, it is properly chargeable under Article of War 96 (Winthrop's Military Laws and Precedents, 2nd Ed.,p.721). To constitute this offense it is essential: (1) that the goods should have been stolen, (2) that accused should have received the property, and (3) that he knew it to have been stolen. The proof sustains each of these elements in this case. The prosecution did not prove specific ownership of the property. Title to this property, after it left the United States, could only have been in the government of the United States, the Army Exchange Service, or an allied government. The specification in question alleged that the property was that of the United States. This allegation may be treated as surplusage, since an erroneous allegation as to the ownership of stolen property is not material if the criminal act be described with sufficient certainty so as to identify it with the one accused is called on to answer (53 CJ, sec.43, p.520 and cited cases). Of course it must be shown that the

property in question was stolen. That element was proved in this case.

Specification 3, Charge I, alleges accused's failure to report this transaction and the location of this stolen property to the authorities as an offense in violation of Article of War 96. His conduct in this respect involved, at the very least, a disregard of an obvious military duty, to the prejudice of good order and military discipline. His duty under the circumstances and the fact that he knew this duty require no exposition. They are as self-evident as the known obligation of a soldier to report the presence of a spy or the approach of the enemy.

Of course, the honesty of purpose and good faith of accused was an issue in each of the three offenses of which he was found guilty. If his explanation that he was playing the role of a detective for the purpose of bringing wrongdoers to justice be accepted as true, he would not be guilty of any one of these offenses, excepting perhaps the third which in any event, overlooking any sinister aspect, involved a failure to discharge a clear military duty, reporting the location of important, stolen government property. If he were honestly trying to apprehend criminals and procure evidence of their guilt, his conduct would not have been stamped with the guilty intent essential to the commission of the first two of these offenses. However, there was convincing evidence that accused's motive in the entire transaction was to capitalize the situation for his own enrichment. He accepted, if in fact he did not demand as the price of his silence, 30,000 francs which he knew came from illegal gains and sent 20,000 francs home to his father. That fact in itself is enough to controvert the naive explanation he advanced and to impute wrongful intent to his cooperative act in transporting one case of cigarettes, to his receipt and retention of one carton of cigarettes and one box of chocolate bars, and to his failure to report the entire matter to the proper authorities. An innocent man would not have taken that money and sent it home.

7. The charge sheet shows that accused is 23 years and ten months of age. He enlisted at Philadelphia, Pennsylvania, 30 December 1940. He attended Signal Officer Candidate School, Fort Monmouth, New Jersey, and graduated 26 June 1943. He was assigned to Signal Section, Oise Headquarters, Communications Zone, European Theater of Operations. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board

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

9. The offense of knowingly receiving stolen property in violation of Article of War 96 committed by an officer is punishable upon conviction by dismissal and such other punishment as a court-martial may direct.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant MARTIN DAVIS (O-1647837, Signal Section, Headquarters, Oise Section, 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 9258. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9258).

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

(Sentence ordered executed. GCMO 182, ETO, 27 May 1945).

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

BOARD OF REVIEW NO. 1

8 MAY 1945

CM ETO 9259

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Headquarters 36th Infantry
First Lieutenant EDWARD J.	)	Division, APO 36, U. S.
BLACK (O-1309900), Service	)	Army, 16 January 1945.
Company, 141st Infantry	)	Sentence: Dismissal, total
	)	forfeitures and confinement
	)	at hard labor for 40 years.
	)	Eastern Branch, United
	)	States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that First Lieutenant Edward J. Black, Service Co, 141st Inf, did, in the vicinity of Bergheim, France, on or about 17 December 1944,

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misbehave himself before the enemy, by refusing to report to Lt Col Donald A. MacGrath, 141st Infantry, at the Third Battalion Command Post, after having been ordered to do so by Major Charles M. Beacham, 141st Infantry, his superior officer.

Specification 2: In that * * * did in the vicinity of Bergheim, France, on or about 17 December 1944, misbehave himself before the enemy, by refusing to report to Lt Col Donald A. MacGrath, 141st Infantry, at the Third Battalion Command Post, after having been ordered to do so by Brigadier General Robert I. Stack, O-7585., his superior officer.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 40 years. The reviewing authority, the Commanding General, 36th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

On 16 or 17 December 1944, the 141st Infantry was facing south and deployed on the top and forward slopes of Hill 393, which formed an east-west ridge line about three and a half miles south of Riquewihr, France. Forward elements were in contact with the enemy, and artillery fire raked the entire regimental sector day and night (R7,13,14). In the 3rd Battalion sector on the left of

the line, from 15 to 17 of our own dead lay on the battlefield in a place exposed to enemy observation and heavy fire (R14,18,19). Accused was regimental Graves Registration Officer, operating with a complement of sixteen men, four of which were attached to each battalion and the remainder under his immediate supervision at the service company. Standard Operating Procedure was for the battalion graves registration personnel to evacuate bodies to the battalion collecting point, and for the service company group to evacuate them by truck from such point to the Division (R9,10,18). Accused and his evacuation personnel were, as is standard, under the supervision of the regimental S-4 (R7). Considerable difficulty had been had with this system, and bodies had been left on the field at times for seven and eight days. The battalions would not cooperate or supply transport, and accused was not assigned a truck until about two months before this time (R10,11).

Request for evacuation of dead having been made from battalion to regiment, Major Charles M. Beacham, regimental S-4, at about 2000 or 2100 hours on the night of 16 or 17 December, acting pursuant to the specific direction of the regimental Executive Officer, issued an order to accused by telephone. He recognized accused's voice (R6,8,11,19,21). The order was that the graves registration group at the service company should report to the 3rd Battalion command post immediately (R8,11). A few minutes later, Major Beacham, as directed, gave an order by telephone to a member of the group for transmission to accused to the effect that accused was to report personally to Col. MacGrath, the 3rd Battalion commanding officer, that night at his command post (R8,12,19,22). Prior to midnight, accused, whose voice was recognized, telephoned Major Beacham and said that he could not go, because he had no driver who could drive without lights (R8). The major told him this was nonsense, that it was light enough to see and to "get somebody to drive and go on up there" (R9,13). It was possible that he could also have said he didn't see any reason for the order (R11). He did not recall whether he then repeated the specific instructions to report personally to Colonel MacGrath (R13). Accused did not go forward, but sent his sergeant instead, who reported to the 3rd Battalion commanding officer after mid-night (R13,17,19). The battalion

was receiving fire at that time (R15). The sergeant continued on the mission under heavy fire until 19 December (R16-19).

The next morning, the S-4 saw accused and spoke to him about his actions, but accused's reply was that he had nothing to say (R10,12). The regimental Executive Officer telephoned accused that morning, recognized his voice, and asked him if he had reported as ordered. Accused said he had received the orders but had not reported. When he said he did not know whether or not he was going to carry out the orders, the Executive Officer ordered him to report to headquarters.

Late that afternoon, accused reported to General Stack, acting regimental commander, at the command post at Riquewihr. The enemy had counterattacked during the day, and artillery fire was almost continuous (R22-24). General Stack ordered accused to go personally to the 3rd Battalion Headquarters and to Hill 393, supervise the evacuation of the dead, and report back when he had finished (R22,24). Accused did not report to the 3rd Battalion commanding officer during the period from 16 to 20 December (R13-15), nor to the command post on 16 or 17 December (R13).

4. The testimony of the defense was in substance as follows:

On the night that the S-4 ordered accused forward, his sergeant told him he did not believe it necessary for him to go, because he felt accused was very nervous under fire. The sergeant said he would take care of the detail. This conversation occurred at the regimental rear area (R26-27). On one occasion, this sergeant had been in a truck with accused when shells began landing nearby, and accused became so excited that he gave several conflicting orders. This sergeant had not been satisfied with the cooperation of battalions in evacuating the dead, and on the night in question learned that the graves registration personnel at the battalion had not been called upon to evacuate the bodies involved (R27).

The defense introduced in evidence a memorandum placing upon battalions the responsibility for evacuation of the dead to battalion installations. It also provided, however, that additional squads might be attached to battalions when the need arose (R35; Def.Ex.B).

A report of a psychiatric examination of accused was introduced in evidence. The psychiatrist found accused sane, but diagnosed his condition as "Psychoneurosis, anxiety state, chronic, mild, combat reaction". In his opinion, accused had developed a nervous condition as the result of long combat exposure, but knew right from wrong and could have refrained from a wrongful act (R34; Def. Ex.A).

After the defense counsel stated that accused had been warned of his rights, accused elected to take the stand in his own behalf (R27-28). He testified as follows:

He entered the service 17 June 1942 and joined the 36th Division 9 October 1943. After serving two or three days in a line company, and attending a school for new officers, he was assigned to the Service Company as Graves Registration Officer. He served in that capacity in battle in Italy from 15 November 1943 to 30 December 1943, and from 15 January 1944 to 26 February 1944 in the Rome-Anzio engagement, and also in the landing in France. His section had not operated successfully, because for a long period there was no transportation available (R28,29,34). It was impossible to evacuate the dead, and one regimental commander had ordered four bodies evacuated during a particular afternoon without assigning transportation for the purpose. His section was finally assigned a truck in the first part of October (R29,30).

Prior to 17 December 1944, he had received no reports from the 3rd Battalion concerning evacuation, although about two days before he had received a complaint from that headquarters for failure to remove a body. Upon check, he found the battalion had left its graves registration crew at the old area when the organization had last moved. He recalled talking with the S-4 about 2100 hours on 17 December, and sent his crew forward even though he had no experienced driver (R30). They had evacuated seven bodies when he talked personally with his sergeant in Riquewihr on the night of the 18th. He fixed the date of his conversation with General Stack as 19 December, and said the General told him to go to the 3rd Battalion area, clean up the situation and report back (R31). He then went to the 3rd Battalion command post and talked with the Battalion S-1 there. Later he talked with the graves registration sergeant (R31).

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On cross-examination, accused admitted: that he understood the order of the regimental S-4 to go forward personally; that he did not go; that he understood from General Stack that he was "to go up and personally supervise the taking away of the bodies"; that he did not do it; and that he did not report back (R32-34). He said that the S-4 told him he could not see why it was necessary for accused to go up the first night, but to go; and that thereafter, the sergeant said it was not necessary, so that accused allowed the sergeant to go without him (R32). On subsequent days, there was shelling every time an attempt was made to remove the bodies. One of his men had been wounded (R32). He said he talked with the regimental S-4 concerning the General's order, the shelling, and of a company commander not wanting the evacuation in the company area, because the detail drew fire. The S-4 did not reply (R33).

Accused said that in his first combat, he was excited under fire, but "got along all right" then and all through the winter, even though he usually worked on evacuations in battalion areas throughout the whole of nearly every night. At Rome in heavy shelling, he lost control of himself, and he became worse in France. Fear of shells, and the fact that his fear inspired fear in his men, were the reasons he did not obey these orders (R33). The fact that the system did not work well influenced his enthusiasm for his job, but did not affect his actions in this case (R34).

5. a. Specification 1:

There is a question whether the proof shows that the order alleged was transmitted to accused. The order alleged was:

> "Report to Lt. Col. Donald A. MacGrath * * * at the Third Battalion Command Post".

The proof showed:

(1) Accused received instructions from S-4 that:

> "the GRO group was to report to the 3rd Battalion CP that night, immediately" (R8).

(2) Someone in accused's group received an additional order from S-4, for transmission to him, that:

"accused was to report to Colonel MacGrath in person" (R8).

(3) Accused subsequently called S-4 and said: "I can't go". He was told to:

"go up there" (R8,9).

(4) The accused understood that he personally was to go forward, but he did not (R22,24, 32,34).

(5) The sergeant in the accused's group reported to Colonel MacGrath that night (R15).

The proof did not show:

That accused received personally and directly any order to report to Colonel MacGrath.

It is clear that the accused knew the original order was amended to include him, because of the telephone call he made to S-4. Furthermore, his sergeant reported personally to Colonel MacGrath. The accused at least knew of that part of the alleged order which required him to "Report * * * at the Third Battalion command post", and there was substantial evidence from which the court might reasonably infer that accused received the complete alleged order. Violation is clearly shown. There is no doubt that he was before the enemy, inasmuch as he and his organization were in the regimental area which the evidence shows was within range, under the fire of enemy artillery and the orders received involved the removal of our dead. The proof therefore sustains the offense charged (MCM, 1928, par.141a, p.156; Winthrop's Military Law and Precedents (Reprint, 1920), p.574; Richardson, Evidence (5th Edition, 1936), p.524; 1 Wharton Criminal Evidence (11th edition, 1935), par.379,p.601; CM ETO 6694, Warnock; CM ETO 5607, Baskin; CM ETO 2602, Picoulas.

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b. Specification 2:

The proof fails to show issuance of all the order alleged, and shows compliance with the part thereof issued. There is a variance between the order proved to have been given and violated, and the allegation. The order alleged was:

> "Report to Lt. Col. Donald A. MacGrath * * * at the Third Battalion Command Post".

The proof showed:

(1) Accused was ordered to:

(a) "Personally appear at the 3rd Battalion Headquarters in the performance of his duty" (R22) or "Report to the 3rd Battalion" (R24).

(b) "Go to Hill 393" (R24,32).

(c) "Personally supervise the evacuation of the dead" (R22,24,32,34).

(d) "Report back" (R24,31-33).

(2) Accused did not report at the 3rd Battalion Command Post on 16 or 17 December, and did not report to Colonel MacGrath during the period 16 to 20 December.

(3) Accused, after receiving the order, did report to the S-1 at the 3rd Battalion command post, according to his own testimony.

(4) Accused did not perform (b), (c) and (d) of (1) above, but they were not alleged.

The proof did not show accused was given any order to report to Colonel MacGrath.

The Specification can be construed liberally to allege that accused was ordered to "Report * * * at the

Third Battalion Command Post", but there is no testimony that he did not do so during the time in question, or within a reasonable time thereafter. On the contrary, the only testimony is that of the accused to the effect that he did report at the command post. The variance between the allegation and the proof of the remainder of the order given, and violated, is fatal (CM ETO 2747, Kratzman). It is therefore the opinion of the Board of Review that the evidence is not legally sufficient to sustain the finding of guilty of Specification 2.

6. The charge sheet shows that accused is 30 years of age, was commissioned a second lieutenant 2 February 1943, and promoted to first lieutenant 7 April 1944. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein indicated, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I, and legally sufficient to support the findings of guilty of the Charge and Specification 1 thereof and the sentence.

8. Dismissal, total forfeitures, and confinement at hard labor are authorized punishments for violation of the 75th 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; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B. Franklin Peters Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant EDWARD J. BLACK (O-1309900), Service Company, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, and legally sufficient to support the findings of guilty of the Charge and Specification 1 thereof 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 9259. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9259).

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

(Findings vacated in part in accordance with recommendation of The Assistant Judge Advocate General. Sentence ordered executed. GCMO 159, ETO 21 May 1945).

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

BOARD OF REVIEW NO. 3 3 MAY 1945

CM ETO 9260

U N I T E D S T A T E S	)	VIII CORPS
	)	
v.	)	Trial by GCM, convened at Neufchateau, Belgium, 26 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant ARTHUR J. ROSENBAUM (O-1167194), Headquarters, 58th Armored Field Artillery Battalion	)	

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

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

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

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

Specification: In that First Lieutenant ARTHUR J. ROSENBAUM, Headquarters, 58th Armored Field Artillery Battalion, did at Fontenoille, Belgium, without proper leave, wrongfully deviate from his proper route of travel and assigned duty, in pursuit of his personal activities from about 31 December 1944, to about 2 January 1945.

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

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Specification 1: In that * * * having received a lawful order from Lieutenant Colonel WALTER J. PATON, to proceed to Bastogne, Belgium on 31 December 1944, and if Longvilly, Belgium was in American hands, to proceed to Longvilly, Belgium so as to ascertain the salvageability of United States Government equipment, and thereupon, to return to the 58th Armored Field Artillery Battalion, the said Lieutenant Colonel WALTER J. PATON, being in the execution of his office, did, at Fontenoille, Belgium, on or about 31 December 1944, fail to obey the same.

Specification 2: In that * * * did, at Fontenoille, Belgium, on or about 31 December 1944, wrongfully and unlawfully and without proper authority, take and use one (1) Government truck (1/4t, 4x4), U. S. No. 20327779-S, property of the United States, of a value of more than fifty dollars ($50.00).

He pleaded guilty to Charge I and Specification, not guilty to Charge II and its specifications and was found guilty of both charges and their 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 a period of seven years. The reviewing authority, the Commanding General, VIII Corps, approved the sentence but reduced the period of confinement to three 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, European Theater of Operations, confirmed the sentence, although deemed, as modified, wholly inadequate punishment for an officer convicted of such grave offenses, designated the Eastern Branch, United States Disciplinary Barracks, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. A summary of the evidence for the prosecution is as follows:

On 30 December 1944, while the 58th Armored Field Artillery Battalion was at Fontenoille, Belgium, re-equipping for combat (R6,10), its commanding officer, Lieutenant Colonel Walter J. Paton, ordered accused, a survey officer, to check the state of the battalion's equipment at Longvilly, Belgium, where approximately 50 per cent of its equipment had previously been lost due to enemy action (R6,7,15). The colonel

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directed accused to go to Bastogne, Belgium, on 31 December and determine whether Longvilly was in American hands. In such event, he was to proceed to Longvilly, get the information and return immediately (R7,9). Accused left on the morning of 31 December in a jeep driven by an enlisted man, but instead of going to Bastogne, which is about 30 miles northeast of Fontenoille (R8,15), they proceeded directly to and beyond Aachen, Germany (R18,19), situated between 80 and 100 miles north of Bastogne (R8,15). They spent the night near Aachen and the following morning went about 60 miles to Namur, where they spent the second night (R20,22). The following day, 2 January 1945, they returned directly to their battalion area. At no time did they stop at Bastogne (R20). The vehicle used had a value in excess of $50 (R16,21,29).

4. The following was presented for the defense:

His rights having been explained (R23), accused testified that on 29 December 1944 Colonel Paton ordered him to go to Longvilly to check salvageable property and to leave the next morning. Accused called Headquarters VIII Corps by telephone on the morning of 31 December and confirmed his own information, which he had personally secured in Bastogne the day before, that Longvilly was then in German hands and would most likely so remain for several days. He therefore considered his mission already accomplished and, since nothing was said about returning immediately or otherwise, decided to go to the 96th Evacuation Hospital between Aachen and Brand, about 80 miles distant. Upon arriving there he discovered the unit was in the process of moving to a new location. He remained overnight and proceeded the next day to the new location, where he spent about three hours and remained the next night with civilian friends near Namur. On the following morning he returned to his battalion, after stopping on the way at Headquarters VIII Corps at Florenville, where he once more confirmed the information that Longvilly was still in the enemy's possession (R24,26,27). On cross-examination, he admitted that he considered, following his telephone call to Headquarters VIII Corps on the morning of 31 December, that any attempt to get to Longvilly would be superfluous and that it gave him "what might be called a couple of days' grace" (R27). He left the battalion area for his own personal convenience and had no permission to go either to Aachen or Namur (R30,31). He knew that the quarter-ton used by him was a Government owned vehicle of a value of over $50 (R29).

5. Accused's absence as alleged in Charge I and Specification is fully established by his plea of guilty, his own testimony and the prosecution's evidence.

The court's findings of guilty under Charge II and specifications are supported by substantial and convincing evidence, including accused's own testimony, that he failed to obey the order of Colonel Paton, as alleged in Specification 1 (CM ETO 5465, McBride, Jr.; CM ETO 1388, Madden) and that he wrongfully used a government vehicle, as alleged in Specification 2 (CM ETO 5026, Kirchner et al).

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6. The charge sheet shows that accused is 23 years of age and was commissioned a second lieutenant in the Army of the United States on 28 July 1942. Prior service is shown as follows: "Inducted into Field Artillery, Regular Army, on 27 January 1941; discharged as Sergeant".

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 approved, modified and confirmed.

8. The penalty for absence without leave, failing to obey the lawful order of his superior officer and wrongfully and without authority using a government vehicle is in each instance such punishment as a court-martial may direct (AW 61 and 96). 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).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Conway Jr. Judge Advocate

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1st Ind.

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

1. In the case of First Lieutenant ARTHUR J. ROSENBAUM (O-1167194), Headquarters, 58th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved, modified and confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. There is attached a letter from accused's father, received after the confirming action in which he requests clemency and refers to his son's service in Africa and Sicily, with the Rangers in Normandy on D day and since then in France and Belgium.

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 9260. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9260).

E. C. McNEIL,

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

(Sentence ordered executed. GCMO 179, ETO, 26 May 1945).

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

BOARD OF REVIEW NO. 3

CM ETO 9272

U N I T E D S T A T E S v. Privates JAMES K. HAYES (33721584), ANDREW ROLLINS (35684124) and CHARLES W. PRESTON (32974626), all of the 19th Replacement Depot	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM convened at Paris, France, 21 December 1944. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor Hayes and Preston each for two years, Rollins for one year, Loire Disciplinary Training Center, Le Mans, France.

OPINION of BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

HAYES

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

Specification: In that Private James K. Hayes, 19th Replacement Depot, European Theater of Operations, United States Army, did, at Villacoublay, France, on or about 11 November 1944, in conjunction with Pvt. Andrew Rollins, 19th Replacement Depot, European Theater of Operations, United States Army and Pvt. Charles W. Preston, 19th Replacement Depot,

United States Army, wrongfully apply to his own use, without proper authority, one (1) government motor vehicle, a 2½ ton 6 x 6 truck, No. 433712, of a value of more than Fifty dollars ($50.00), the property of the United States, furnished and intended for the military service thereof.

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

Specification: In that * * * having been duly placed into the lawful custody of Sergeant Elmer J. Thompson, 1177th Military Police Company, Aviation, European Theater of Operations, United States Army, on or about 13 November 1944, did, at Paris, France on or about 13 November 1944, wrongfully attempt to escape from said custody.

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

Specification: In that * * * having been duly placed in confinement in the Unit Guardhouse, 1177th Military Police Company, Aviation, European Theater of Operations, United States Army, on or about 11 November 1944, did, at Velizy, France, on or about 13 November 1944, escape from said confinement before he was set at liberty by proper authority.

ROLLINS

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

Specification: In that Private Andrew ROLLINS, 19th Replacement Depot, European Theater of Operations, United States Army, did without proper leave, absent himself from his organization from about 2nd November 1944 until he was apprehended on or about 11 November 1944 at or near Jouy en Josas, France.

CHARGE II: Violation of the 94th Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

PRESTON

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

Specification: In that Private Charles W. PRESTON, 19th Replacement Depot, European Theater of Operations, United States Army, did, without proper leave, absent himself from his or-

ganization from about 2nd November 1944 until he was apprehended on or about 11 November 1944 at or near Jouy en Josas, France.

CHARGE II: Violation of the 94th Article of War. (Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification: In that * * * having been duly placed in confinement in the Guardhouse, 1177th Military Police Company Aviation, European Theater of Operations, United States Army, on or about 12 November 1944, did, at Paris, France, on or about 14 November 1944, while being transported to the Unit Guardhouse, Seine Section, Com Z, European Theater of Operations, United States Army, wrongfully break such confinement before he was set at liberty by proper authority.

Each pleaded not guilty to, and was found guilty of, all charges and specifications pertaining to him. No evidence of previous convictions was introduced. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, Hayes for six years and six months, Rollins for five and Preston for six years. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I as to Hayes as involves a finding of guilty of wrongfully applying to his own use, without proper authority, a vehicle, the property of the United States, furnished and intended for the military service thereof; disapproved the findings of guilty of the Specification of Charge II and of Charge II as to Rollins and Preston, approved the sentences but reduced the period of confinement to one year for Rollins and two years for Hayes and Preston, suspended that portion of each sentence adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Nos. 208, 209 and 210 respectively, Headquarters Seine Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army, 25 March 1945.

3. The only evidence introduced to show the absence without leave alleged in Specification, Charge I as to Rollins and Preston consisted of extract copies of morning reports of the 39th Replacement Battalion, 19th Replacement Depot, certified by the assistant Personnel officer, 19th Replacement Depot. When these extract copies were offered in

evidence, defense counsel interposed the following objection as to each of them:

> "I object to the introduction of this extract on the grounds that it is not the original, and further, that there is no one here to testify as to its authenticity. It bears signature of the Assistant Personnel Officer. That is the only authority in court that it is a true copy. We feel that some one should be here to testify to this signature and also to the fact that a search, if any, was made and that the accused was not found on that date" (R8).

The Manual provides that

> "An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: * * * it does not appear that a purported copy of a public record is duly authenticated" (MCM, 1928, par. 116a, p.120).

While not artistically phrased, defense counsel's objections were apparently levelled at the validity of the purported authentication of the extract copies as well as their introduction without corroborative testimony as to circumstances surrounding the initial discovery of the alleged absences. Defense counsel specifically called the court's attention, in connection with his objections, to the fact that the certificates as to authenticity of the extract copies bore the signature of the assistant personnel officer. Objection on the ground that the unit personnel officer was not authorized to authenticate the extract copy may not therefore be regarded as waived.

A board of review in the Branch Office of The Judge Advocate General, European Theater of Operations, recently held that in the case of a morning report as with any other public record, an authenticated copy, to be admissible in evidence, "must be certified by the official custodian thereof (20 Am. Jur. sec. 1038, p.876; 2 Wharton's Criminal Evidence 11th Ed. sec.784, p.1351)", and that

> "the only officer in the unit personnel section who is the official custodian

> /of the third triplicate original copy of the morning report/ is the personnel officer himself and not * * * an assistant";

that therefore

> "the personnel officer and not the assistant personnel officer is the proper person to certify copies of such original * * * and that the purported authentication" (as in the instant case by the assistant personnel officer) "was improper" (CM ETO 5234, Stubinski).

Excluding from consideration the extract copies of the morning report entries which constitute the only evidence of Rollins' and Preston's absence without leave, the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I as to Rollins and Preston, respectively.

4. The charge sheets show that Hayes is 20 years 11 months of age and was inducted at Fort Meade, Maryland, 7 April 1943; that Rollins is 28 years six months of age and enlisted at Fort Knox, Kentucky, 1 January 1941; and that Preston is 19 years one month of age and was inducted at Camp Upton, New York, 25 June 1943. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial, as to Rollins, is legally insufficient to support the findings of guilty and the sentence; as to Preston, legally insufficient to support the findings of guilty of the Specification, Charge I, and of Charge I, legally sufficient to support the remaining findings of guilty and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year; as to Hayes, legally sufficient to sustain the findings of guilty and the sentence.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat.724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Privates ANDREW ROLLINS (35684124) and CHARLES W. PRESTON (32974626), 19th Replacement Depot.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and sentence of accused Rollins be vacated and that all rights, privileges and property of which he has been deprived by virtue thereof be restored; that as to accused Preston, the findings of guilty of the Specification, Charge I, and Charge I, and so much of the sentence as provides for confinement in excess of one year be vacated.

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

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General. 14 15, 1c

(As to accused Rollins, findings and sentence vacated. GCMO 334, ETO, 17 Aug 1945).
(As to accused Preston, findings and sentence so vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 335, ETO, 17 Aug 1945.)

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

BOARD OF REVIEW NO. 3

12 MAY 1945

CM ETO 9286

U N I T E D S T A T E S	28TH INFANTRY DIVISION
v.	Trial by GCM, convened at Ettelbruck, Luxembourg, 13 December 1944. Sentence as to each accused: Dismissal, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant ROBERT J. PAINE (O-1299977) and Second Lieutenant JOSEPH R. KOVACEVIC (O-1319625), both of Company K, 109th Infantry	

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

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

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

PAINE

CHARGE: Violation of the 75th Article of War.

Specification: In that First Lieutenant Robert J. Paine, Company K, 109th Infantry, did in the vicinity of Rott, Germany, on or about 12 November 1944, misbehave himself before the enemy, by refusing to go forward to re-

join his company when so ordered by Captain William T. Rogers, Executive Officer, Third Battalion, 109th Infantry, his superior officer.

KOVACEVIC

CHARGE: Violation of the 75th Article of War.

Specification: In that Second Lieutenant Joseph R. Kovacevic, Company K, 109th Infantry, did in the vicinity of Rott, Germany, on or about 12 November 1944, misbehave himself before the enemy, by refusing to go forward to rejoin his company when so ordered by Captain William T. Rogers, Executive Officer, Third Battalion, 109th Infantry, his superior officer.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the respective votes were taken concurring, each was found guilty of the respective Charge and Specification against him. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the times the respective votes were taken concurring, each accused 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, 28th Infantry Division, approved the sentences and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, although stating that the punishment imposed was wholly inadequate for the deplorably gross misconduct of which accused were found guilty, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

On 24 October 1944 the accused, then replacement officers attached unassigned to the 41st Replacement Battalion, 3rd Replacement Depot, were placed on detached service with the 28th Infantry Division for eight days for the purpose of enabling them to gain combat experience prior to their probable assignment as line officers. Unless assigned in the interim, they were to return to the 3rd Replacement Depot upon the completion of this duty (R13,14; Pros.Ex. 1d,1e). On reaching the 28th Infantry Division they were attached

to the 3rd Battalion, 109th Infantry, and on the morning of 2 November each reported for duty to Captain William T. Rogers, executive officer of that battalion (R9,12,13; Pros.Ex.1b). The battalion was at that time preparing to attack in an effort to secure certain high ground south of Hurtgen, Germany (R11, 15). Under the tactical plan contemplated it was foreseen that the movement which Company K, 3rd Battalion, was scheduled to make would leave the right flank of the battalion unprotected. In view of this danger, the battalion commander organized certain headquarters personnel and replacements into a provisional platoon under the command of the headquarters company first sergeant and gave to it the mission of securing the battalion right flank by occupying the foxholes to be vacated by Company K when it jumped off on the attack (R11,13,15). The accused were ordered to join this provisional platoon (R13). The battalion continued to attack on successive days subsequent to 2 November and fatal casualties were suffered by the platoon. Among those killed was the first sergeant in command (R11,14). On the evening of 6 November the accused, who in the meantime had been informed that they were no longer on detached service but had been assigned to Company K, 3rd Battalion, reported to Captain Rogers at the battalion command post and requested permission to see the battalion surgeon (R13,14,16). Noting that the men were unnerved, Captain Rogers granted their request (R13,14). When the accused reported to the battalion surgeon they were unshaven, dirty and tired but no more so than "any man who has gone through the front lines". While they were somewhat nervous, he was of the opinion that they were not suffering from combat exhaustion (R18). He reported these findings to Captain Rogers by telephone and requested instructions as to what disposition of the two men should be made. Although no definite decision with respect to this question was reached, as a result of the telephone conversation, the accused were sent to a rear aid station pending further orders. Prior to their departure the battalion surgeon, prompted by a suggestion made by Captain Rogers during the course of their prior conversation, asked them if they would consider reclassification. Each replied in the affirmative (R17,18). On the following day, Captain Rogers ordered accused to the kitchen area, then some three miles to the rear (R15,17,18). He stated that while they were nervous at this time they were "not terrified". He further described their condition as being "the same general condition as we were all in" (R15).

The battalion continued to be actively engaged with the enemy and on 12 November during an attack in which "the going was pretty rough and we seemed to be losing a lot of officers" Captain Rogers, acting pursuant to the orders of the battalion commander,

went back to the kitchen area, then approximately 12 miles to the rear of Company K, to order all the officers who had gone there for various reasons during the attack to return to their units. Among these officers were the accused (R10). Captain Rogers first explained his mission and then stated "the direct order is that you return to your units or stand trial by General Court-Martial" (R10,12,15). At the time this order was given, accused's company was engaged in keeping open a supply route to one of the regiments and was being subjected to heavy shelling (R11). Both accused stated that they lacked experience, felt themselves unfit to command a platoon, and that they could not return (R10,13). The 109th Infantry, including Company K, remained in continued severe combat with the enemy until relieved on 19 November. Neither of the accused rejoined their unit during this period (R10,11).

The prosecution introduced into evidence pre-trial statements voluntarily made by each accused to an investigating officer both of which contain a recital of facts substantially in accord with the facts as given above. In addition, each statement indicates that the move forward by the provisional platoon on 2 November was accomplished under small arms and artillery fire, that both accused reached their designated positions, and that both remained there under small arms and artillery fire for four days until they received permission to go to the aid station. Each accused admitted in his statement that he received a direct order from Captain Rogers at the kitchen "to report to the front lines or be subject to a court-martial" and each admitted that he remained in the kitchen area (R16; Pros.Ex.2,3).

4. For the defense, Private Robert J. Rivers, Headquarters Company, 3rd Battalion, who was a member of the provisional platoon ordered forward on 2 November, testified generally as to the situation existing at that time. His testimony indicated that the platoon attained its position despite a barrage which resulted in the death of the first sergeant and at least two other men and that it was shelled heavily after reaching and while holding its position. He also indicated that difficulty was had in obtaining rations and that the situation generally was somewhat disorganized during the period when the accused remained with the platoon (R19-21).

The rights of each accused as a witness were explained to him and each elected to testify in his own behalf. Their testimony as to their activities on 12 November and the background thereof followed closely that given by previous witnesses. In addition, each gave a brief resume of his military history from which it appeared that, although each had attended infantry officer candidate school and had taken advanced courses, Paine at Fort Benning and Kovacevic at Camp Wheeler, they had thereafter performed administrative duties only and had never commanded a platoon (R22,26,27,28).

When the provisional platoon went into position on 2 November, heavy fire was encountered and several men were killed (R24). During the period from 2 November to 6 November "there was heavy artillery and mortar fire and several attempted counter-attacks" (R28). Kovacevic stated that both he and Paine were "very much shaken up from the fire that came in on us"(R24). Rations and water were difficult to obtain and Paine stated that they had no blankets, overcoats or raincoats for two days (R24,29).Both stayed in their foxholes until 6 November when they went to the battalion command post to seek permission to see the battalion surgeon (R23,28). Each admitted that on 12 November while at the kitchen area near Rott, Germany, he received a direct order from Captain Rogers to return to the unit and each admitted that he did not comply with this order feeling unfit to command a platoon, Paine because he was nervous and "couldn't physically carry on" and Kovacevic because he was "shaken up" (R25,30).

5. No substantial question is presented by the instant record of trial. It is clear that the accused were before the enemy at the time they refused to obey the order to return to their unit (Winthrop's Military Law and Precedents (Reprint, 1920), pp.623-624). It is equally clear that in refusing to return to their unit they were guilty of misbehavior before the enemy within the meaning of that term as used in Article of War 75 (Idem; CM ETO 6177, Transeau and authorities therein cited). There was some evidence that accused were "nervous" and"shaken up" at the time of such refusal but whether or not their condition was sufficiently "genuine and extreme" to constitute a defense to the charge (See Winthrop's Military Law and Precedents (Reprint, 1920) p.624) was essentially a question of fact for the court and, under the evidence here presented, the court clearly did not abuse its discretion in resolving this question adversely to the accused (CM ETO 6767, Reimiller; CM ETO 4095, Delre). The court was therefore warranted in finding both accused guilty as charged.

6. The charge sheets show that both accused are 25 years of age. Data as to service is shown as follows: As to Paine -

"S-3, Hq 2nd Bn 345th Inf, 11/21/43;
Asst S-3 Hq 2nd Bn 345th Inf, 1/7/43;
Int Staff O, Hq 2nd Bn 345th Inf,
23/11/43; Liaison O, Hq 345th Inf;
Opn & Tng O Hq 1st Bn 345th Inf 10/4/44;
Repl O, 14th Repl Depot, 26/7/44;
Liaison O, D/S Hq 2nd Div 7/8/44;
Repl O, 41 Repl Bn 4/9/44; Repl O
3rd Repl Depot 13/9/44; Repl O 41
Repl Bn 3/9/44; Asgd 109th Inf 29/10/44;
R Plat O Co K, 109th Inf 5/11/44; Unasgd Co K, 109th Inf 7/11/44".

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As to Kovacevic -

"Student, Ord IRTC, Cp Wheeler, Ga, 5/28/43; Trainer O, 4th Regt, Transfer, Pa, 7/13/43, Co Ex Off, AGFRD, Ft Meade, 9/2/43, Co Ex Off, AGFRED Ft Meade 1/1/44; Co Ex Off AGFRD Ft Meade 3/5/44; Plat Ldr AGFRD Ft Meade, 4/6/44; Plat Ldr AGFRD Ft Meade 6/25/44; Repl O, 11th Repl Depot 9/26/44; Repl O, 3rd Repl Depot, 10/19/44; Repl O, 41st Repl Bn 10/21/44; Asgd 109th Inf, 10/29/44; R-Plat O Co K, 109th Inf 11/5/44; Unasgd Co K, 109th Inf, 11/7/44".

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

8. Dismissal and confinement at hard labor are authorized punishments for violation of Article of War 75. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.II, as amended).

Benjamin R Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

R. K. [illegible] Judge Advocate

9286

1st Ind.

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

1. In the case of First Lieutenant ROBERT J. PAINE(O-1299977) and Second Lieutenant JOSEPH R. KOVACEVIC (O-1319625), both of Company K, 109th 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 sentences, 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 9286. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9286).

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

(As to accused Paine, sentence ordered executed, GCMO 154, ETO, 20 May 1945).

(As to accused Kovacevic, sentence ordered executed, GCMO 155, ETO, 20 May 1945).

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

BOARD OF REVIEW NO. 1

8 JUN 1945

CM ETO 9288

U N I T E D S T A T E S v. Corporal JAMES R. MILLS (34148598), 44lst Quartermaster Truck Company	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 30 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Corporal James R. Mills, 44lst Quartermaster Service Company, European Theater of Operations, United States Army, did, at 44lst Quartermaster Service Company, European Theater of Operations, United States Army, on or about 9 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 16 November 1944.

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

Specification: In that * * * in conjunction with Private Haywood Madison, 3216th Quartermaster Service Company, European Theater of Operations, United States Army, did, at Paris, France, on or about 16 November 1944, wrongfully dispose of two hundred and twenty five (225) gasoline cans, six (6) fifty-five (55) gallon drums, and about one thousand four hundred and seventeen (1417) gallons of gasoline, property of the United States furnished and intended for the military service thereof, thus diverting said gasoline and containers from use in military operations.

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

Specification: In that * * * in conjunction with Private Haywood Madison, 3216th Quartermaster Service Company, European Theater of Operations, United States Army, did, at Paris, France, on or about 16 November 1944, knowingly and willfully and without proper authority, apply to his own use and benefit a Government motor vehicle, a 2½ ton 6x6 truck No. 439102-S, of the value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty and, all 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. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved only so much of the findings of guilty of the Specification of Charge II and Charge II as involved a finding of guilty of wrongfully disposing of about 225 gasoline cans and about 1417 gallons of gasoline, property of the United States furnished and intended for the military service thereof, thus diverting said gasoline and containers from use in military operations, approved the sentence with the recommendation that it be commuted from death by hanging to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances, in this case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due

or to become due, and confinement at hard labor for accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and pursuant to Article of War 50½ withheld the order directing the execution of the sentence.

3. Prosecution's evidence summarizes as follows:

The accused, a negro, was at the times alleged in the specifications a member of 441st Quartermaster Truck Company which was stationed at or near La Capelle, France (one mile south-west Nord de Guerre Zone (Blue)). He absented himself without leave from his organization on 9 September 1944 (R4; Pros.Ex.A).

On 16 November 1944 at about 1:30 pm, Sergeants John D. Bell and James P. Lassetter, both of 382nd Military Police Battalion, observed that a 6x6, 2½-ton United States Government truck, heavily laden with gasoline jerry cans and covered with a tarpaulin, was driven to the entrance of a garage owned and operated by Henri Francois Queulvee, located at 76 Rue Stephenson, Paris, France. A colored American soldier drove the truck. Immediately preceding the approach of the truck to the garage entrance another colored soldier dismounted from it and ran toward the garage. The door was closed but upon the approach of the truck it was opened to permit the truck to enter the garage and was then closed again (R5,7,9,23). The circumstances excited the suspicion of the two sergeants. Lassetter, armed with a carbine, was posted as guard with orders from Bell to allow no one to leave the garage. Bell went to the 787th Military Police Battalion headquarters and reported the incident observed by him. Approximately ten minutes later he returned to the garage with First Lieutenant Sidney Fain and Sergeant John J. Smith, both of 787th Military Police Battalion (R5,9,13).

Lieutenant Fain knocked upon the garage door and demanded entrance. After some delay the door was opened by Queulvee (R19). Lieutenant Fain, Lassetter and Smith entered. Bell remained on guard outside of the garage. The Government truck before mentioned stood in the garage (R5,6,9,13,20). Accused was one of the two colored American soldiers who accompanied the truck as it entered the garage. When the truck halted in the garage the two negroes and six French civilians including Queulvee commenced to remove the jerricans from it (R9,13,20,21,26). A 6x6 truck when completely loaded will carry 260 jerricans of five gallons capacity (R19). The truck involved in this incident was loaded to its approximate capacity (R6,10,20,30). About one quarter of the cans had been removed from the truck and placed in a civilian truck when Lieutenant Fain's party interrupted the proceedings (R6,9,13). The jerricans were each filled with gasoline (R20). Two tanks, each of a capacity of 55 gallons, stood on the floor of the garage near the truck. One had a pump attached. Each tank was filled with American gasoline (R10,11,13). Prior to the time the door was opened accused and his companion hid themselves in a civilian truck which stood in another part of the garage. They

were discovered and with the French civilians were taken into custody (R10,11,12,13) and removed to the military police headquarters in Rue Wagram (R26).

Immediately before the incident above described, the accused and his confederate had called at the garage of a Madame Royer located at 43 or 53 Rue Marcadet, Paris, with the truckload of gasoline (R25). Madame Royer directed a young man employed by her (Rene Mouton) to guide accused and companion with the truck to Queulvee's garage at 76 Rue Stephenson (R25). Mouton rode on the truck and directed the two negroes to Queulvee's garage (R20). Queulvee asserted that Madame Royer had purchased the gasoline from the colored soldiers and that he in turn intended to buy it from Madame Royer (R20,21).

On the afternoon of 16 November 1944 accused signed a written statement (R16; Pros.Ex.C) which in pertinent part is as follows:

> "About the end of August I left my company area near Mennecy in cahrge of a detail and one truck to proceed to Gomez to a P.O.L. dump to pick up a load of gasoline. On the return trip in Paris we encountered another truck from my company which was broken down. The Sgt. placed me in charge of the truck until my company could send a wrecker for it. I left my truck and in absence it was picked up by the M.P.'s - so I was informed by a Frenchman. I then went to a neighborhood hotel on the Blvd.: de la Chapelle where I stayed for two days. I then moved to certain other hotels where I stayed with various prostitutes. I had 1,500 francs with me at this time. I spent the money for lodgings, meals, drinks and women. I found a groupe of white and colored soldiers, AWOL'S who frequented a whorehouse in the neighborhood of Rue Fluery. I joined this groupe. My job was to find Frenchman who wanted to buy gasoline. I recieved a share of the money the gang received for the sale of the gasoline, for the work I did. I do not know the names of any of these AWOL's. In t_is job the gang I was working with ran about two truck loads of gasoline per week which we sold to French civilians. My share of the proceeds per sale was about 15000-18000 francs per job. I worked with this gang for about six weeks.

I then joined another gang of three colored soldiers all AWOL whom I knew as William and Robert. I did not know the other soldier's name. I stayed with them about two weeks, during which time we sold about three partial truck loads of gasoline to French civilians. One load was 100 cans and two loads of 50 cans each. My job was the same as before to locate and arrange the sales with the French civilians. My partners and I shared equally, and I received about 20000 franc's for my work with this gang.

I next joined a gang of 5 colored soldiers, AWOL's whom I knew as Curtis, Saul, Raymond, Madison and Snowball. While with this gang we ran two truckloads of gasoline and sold them to French civilians. I made the arrangement for the sales in each case. I received 12000 franc's as my share from the first deal.

On the night of 14 November 1944 all six of the gang dicided to run some gasoline, and all of us went in two U.S. Army trucks and one jeep to a P.O.L. dump near Soissons where we obtained 2 fulltruck-loads of gasoline by presenting a forged order signed by one of our gang, I don't know woh it was. We got back into Paris about 2'30 on the morning of 16 November 1944. A lady who runs the Sphinx Hotel, Rue de la Chapelle gave me the address of a French lady whom she said would buy our gasoline. This lady's name and address is, Madame Camille Royer, 53-55 rue Marcader, Paris, France 18. I went there and arranged with her to sell her both truck loads of gasoline at 500 franc's a can. I and Madame took one truck to her garage, but couldn't get throught the gate to unload. An employee at this garage whom I now know to be M. Mouton Rene 20 Qua, de la Loire, Paris, 19, guided me and Madison to another garage at 76 rue Stephenson where a Frenchman whom I now know to be M. Queylvee and his employee's were unloading our truck when the M.P.'s came. A Frenchman took us through a door and hid us in a French truck where the M.P.'s found us. Madame Camille Royer was to pay us when the gasoline was delivered" (Pros.Ex.C).

4. Accused elected to be sworn as a witness on his own behalf (R27). He admitted his absence without leave but denied he intended to desert the service of the United States (R27). He denied he had

taken the Government truck discovered in the garage and asserted "it belonged to the fellow I was with". He declared that he did not know "how they got it or where" (R27). With respect to the gasoline, he testified that although he was "along with this fellow with the gasoline" he

> "never drew any gasoline from any POL dump, but I was with those fellows" (R28).

He also denied he had drawn "any money from the gasoline jobs", but stated that certain soldiers who were absent without leave would

> "explain it to me * * * how they were getting to a POL dump to sign for gasoline or whatever it was they would get" (R28).

He admitted that on 16 November 1944 he knew that he rode on a Government truck which was loaded with gasoline that was to be sold, and that insofar as he was concerned the truck was used without authorization (R30).

5. Accused as a witness on his own behalf repudiated his extrajudicial statement (Pros.Ex.C)and asserted that he gave it to First Lieutenant Arthur O. Cobb, 20th Military Police Criminal Investigation Section, under threats by Lieutenant Fain who was present in the room while accused was interrogated by Lieutenant Cobb. He stated Lieutenant Fain

> "would 'holler' and ask me what I had said, and when I would try to explain why, and he would smack every time I would say anything, until I said - - and he said if I didn't give a statement he would let all the stuff fall on me" (R28).

The two civilian witnesses - Queulvee and Mouton - each testified that while the two negro soldiers and the French civilians were held under guard in front of the garage after their arrest, Lieutenant Fain struck accused in the face - once when accused lowered his hands from above his head and once when he failed to keep his face to a wall (R22,26). The prosecution traversed his testimony by evidence from Lieutenant Cobb that the statement was given and signed by accused freely and voluntarily without threats or promises of immunity or reward and after his rights under the 24th Article of War were explained to him (R15-17). Lieutenant Cobb denied that physical violence was visited upon accused at the time he gave the statement (R18) and Lieutenant Fain denied that he struck accused while under guard in front of the garage (R13,14).

A question of fact was created by this sharply conflicting evidence which it was the duty and function of the court to resolve. There was substantial evidence that accused gave the statement freely and voluntarily after being fully informed as to his rights. Under such circumstances the finding of the court that the statement was voluntarily given by accused is binding upon the Board of Review upon appellate review (CM ETO 5747, Harrison; CM ETO 7518, Bailey et al; and authorities therein cited).

6. The evidence is uncontradicted and is in fact corroborated by accused's testimony in open court that he was absent from his organization from 9 September 1944 to 16 November 1944 - a total of 68 days. When apprehended he was in the act of delivering Government gasoline to French civilians, who obviously were engaged in "black market transactions" (Charge I and Specification). His confession exhibits a course of lawless and perfidious conduct in the underworld of Paris including trafficking in Government gasoline in the "black market" during the period of his unauthorized absence. The court was completely justified in inferring from these facts that accused intended permanently to absent himself from the military service of the United States (CM ETO 952, Mosser; CM ETO 2216, Gallagher; CM ETO 2901, Childrey et al).

7. The proof is positive and substantial that accused knowingly and willfully and without proper authority appropriated to his own use and benefit a Government owned 6x6 motor truck (Charge III and Specification). It was used by accused at the time and place alleged to effect delivery of Government gasoline to the receivers of stolen Government property. The fact that accused did not actually drive the truck is an immaterial circumstance in face of the proof that he was an active participant in its use. While the prosecution failed to prove that the truck bore the number 439102 - S (as alleged in the Specification), the evidence is substantial and uncontroverted that accused was in unauthorized possession of and did use without authority a "2½ ton 6x6 truck * * * property of the United States furnished and intended for the military service thereof". The gravamen of the offense was therefore proved. It was unnecessary to allege the number of the truck and such part of the Specification may be disregarded an surplusage (2 Wharton Criminal Evidence (11th Ed. 1935), sec.1064, p.1869). The court was authorized to take judicial notice that the truck possessed a value of more than $50.00 (CM ETO 5666, Bowles et al). The record of trial is legally sufficient to sustain the findings of accused's guilt of the offense charged (CM ETO 128, Rindfleisch; CM ETO 5666, Bowles et al, supra).

8. a. The finding based on Charge II and Specification as approved by the reviewing authority is as follows:

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"At Paris, France, on or about 16 November 1944, wrongfully dispose of about two hundred twenty-five (225) gasoline cans, and about one thousand four hundred seventeen (1417) gallons of gasoline, property of the United States furnished and intended for the military service thereof, thus diverting said gasoline and containers from use in military operations".

The reviewing authority by his action eliminated the six 55-gallon tanks from consideration.

The Specification of Charge II as approved is fundamentally Form 112, Manual for Courts-Martial 1928, Appendix 4, pp.252,253, with the addition of the following phrase

"thus diverting said gasoline and containers from use in military operations".

It is unnecessary to consider whether the added phrase is sufficient to elevate the offense charge from a violation of the ninth paragraph of the 94th Article of War to the more serious offense under the 96th Article of War of interferring with or obstructing the national defense or prosecution of the war effort by diverting supplies furnished and intended for the military service from their regular channels of distribution to combat and other troops during a critical period of military operations within the principles announced in CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; and CM ETO 8599, Hart et al. Such consideration is unnecessary because there is entirely absent from the record of trial evidence of those highly necessary and relevant facts and circumstances which would show that accused prejudiced the success of the United States forces by diverting gasoline from its established channel of distribution at a time when it was vitally required for combat operations (CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski; CM ETO 9987, Pipes).

An offense under the ninth paragraph of the 94th Article of War is a lesser included offense of the greater offense under the 96th Article of War (CM ETO 9987, Pipes). The Specification under consideration manifestly charged at least the lesser offense under the 94th Article of War and it will be so considered. The fact that it was laid under the 96th Article of War is immaterial (CM ETO 6268, Maddox).

The Specification as amended by the reviewing authority alleged that accused "wrongfully disposed" of jerricans and gasoline "property of the United States furnished and intended for the military service thereof". The following statement is relevant in considering whether the Specification alleged facts constituting an offense under the 9th paragraph of the 94th Article of War:

"A specification alleging that an accused knowingly and without proper authority disposed of Government property by removing the same off the United States Government reservation, but failing to allege the manner of such disposition, is defective; and where an objection to the defect was overruled by the court resort may not be had to the evidence, under the provisions of paragraph 158a, M.C.M. (par.73, M.C.M., 1928), for the purpose of curing the defect. Findings of guilty disapproved. CM 162158 (1924)" (Dig.Op. JAG 1912-1940, sec.452(20), p.340).

The foregoing must be considered, however, in connection with the specific denunciation of the ninth paragraph of the 94th Article of War:

"Any person subject to military law who * * * knowingly sells or disposes of any * * * property of the United States furnished or intended for the military service thereof * * * shall * * * on conviction thereof be punished * * *" (Underscoring supplied).

Winthrop's comments on this clause of the Article are extremely pertinent:

"Under this designation are included sales, etc., such as are made punishable by Arts. 16 and 17, as also any other unauthorized sale, or any unauthorized pledge, barter, exchange, loan, or gift, of public property. The general and comprehensive term "wrongful disposition" includes also any appropriation or application of such property not embraced within the previous descriptions of offences in this Paragraph. Thus it would include unauthorized applications of the possession or use of the property not for the private purposes of the offender; as, for example, the loaning by an officer or soldier to a civilian, (for his benefit exclusively,) of stores, tools, materials, etc., of the United States, with the understanding that the same were to be returned. All such dispositions of public property are of course radically illegal for the reason that no executive officer, but Congress only, is empowered

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under the Constitution, (Art.IV, Sec.3, Par.2,) to dispose of property of the United States.

This term, wrongful disposition, however, like the designations of misappropriation and misapplication which precede, is, in practice, not always employed in a strict sense, and it would not be exceeding the privilege of military pleadings to charge as a 'wrongful disposition' under this Article, any illegal appropriation, diversion, or employment, knowingly made, of money or other property of the United States, not clearly constituting a larceny or embezzlement" (Winthrop's Military Law and Precedents (Reprint, 1920) pp.708-709).

The proper construction of the verb phrase "sells or disposes" contained in the statute appears to be as follows:

"The term 'dispose of,' as used in Pen. Code 1895, Par.680, providing that any cropper who shall sell or otherwise dispose of any part of the crop grown by him shall be guilty of a misdemeanor, includes only those transactions in which there has been a transfer by the defendant of either title or absolute possession of the property, or else some such disposition of it as would destroy it in whole or in part. It means to alienate,to effectually transfer. It covers 'all such alienations of property as may be made in ways not otherwise covered in the statute; for example, such as pledges, pawns, gifts, bailments, and other transfers and alienations.' 'To dispose of' in a popular sense, as used in reference to property, means to part with a right to or ownership of it; in other words, a change of property. If this does not take place, it would scarcely be said the property was disposed of. It differs in meaning from the word 'secrete'. When it is associated in the context with the word 'sell,' then under the principle contained in the legal expression 'noscitur a sociis' its meaning takes on some limitation from the association. Where the expression is 'sell or otherwise dispose of,' the other disposition must be somewhat in the nature of a sale. It does not include a mere removal of the property. In a statute prohibiting 'the selling, giving away, or otherwise disposing of' certain property under certain conditions, the expression 'otherwise dispose of,' in

the absence of any expression of a legislative intent otherwise, must be construed to apply only to such a disposition as a sale or gift, Scott v. State, 64 S. E. 1005, 1006, 6 Ga.App. 332, citing United States v. Hacker, 73 F. 292, 294; Bullene v. Smith, 73 Mo. 151, 161; Reynolds v. State, 73 Ala. 3; Franklin v. State, 12 Md 246, 248; Pearre v. Hawkins, 62 Tex. 434, 437; In re Carr, 19 A. 145, 16 R.I.645, 27 Am. St.Rep. 773; Phelps v. Harris, 101 U.S. 370, 25 L.Ed. 855; Hawxhurst v. Pathgeb, 51 P. 846, 119 Cal.531, 533, 63 Am.St.Rep. 142; Robberson v. State, 3 Tex. App. 502, 503; Robberson v. State, 14 So. 554, 100 Ala. 37" (12 Words & Phrases (Permanent Ed.), p.685).

When the above construction of the phrase "sells or disposes of" contained in the ninth paragraph of the 94th Article of War is applied to the Specification in the instant case it is believed that the Specification clearly stated facts constituting an offense under the 94th Article of War. Insofar as CM 162158 is in conflict with this conclusion the Board of Review (sitting in the European Theater of Operations) does not believe that it should be followed. However, it is considered that no substantial conflict exists. The accused in CM 162158 at the trial objected to the specification because it did not allege the manner of disposition. The objection was overruled and upon appellate review such ruling was determined to be prejudicial error. In the instant case no objection was made to the pleading, but accused stood on the general issue. He thereby might properly be regarded as waiving any objection to the form of the pleading (MCM, 1928, par.64a, p.51). There is therefore a valid distinction between the instant conclusion and the holding in the cited decision.

b. The evidence in the case under review without contradiction showed that accused and another negro soldier entered into an agreement with Madame Royer to sell her a truckload of gasoline contained in jerricans. The evidence satisfactorily showed that 225 jerricans contained 1417 gallons of gasoline, property of the United States furnished and intended for the military service thereof, were involved in the transaction. Acting under Madame Royer's direction, the accused and confederate were directed to deliver the gasoline at the garage owned by Monsieur Queulvee. Thereupon the soldiers, under guidance of young Mouton, drove to Queulvee's place of business with the gasoline, entered the garage and were in the process of unloading the gasoline from the Government truck when they were apprehended by the military police. Queulvee asserted that Madame Royer had purchased the gasoline from the negro soldiers and he in turn had purchased it from Madame Royer. While there was no "sale" in the strict legal meaning of the word because the accused and companion had no authority to pass title to

Government property and in fact no title passed, there was however the exact kind of a transaction Congress contemplated when it denounced the sale of Government property as a crime. Accused directly violated the statute. The Board of Review concludes that the record is legally sufficient to support so much of the findings of guilty of Charge II and Specification as approved by the reviewing authority as constitutes an offense under the 94th Article of War.

c. The court and the Board of Review may take judicial notice of the value of the jerricans and gasoline on 16 November 1944 (CM ETO 5539, Hufendick). By reference to the quarter annual report based upon the "Lend-Lease" Act (Act March 11, 1941, c.11; 55 Stat. 31; 22 USCA 411-419) of the Chief Quartermaster, European Theater of Operations to the Quartermaster General for period 1 October to 31 December, 1944, it is seen that both 73 and 80 octane petrol (gasoline) is valued at 19.34 cents per Imperial gallon. The price per United States gallon will be 5/6 of the price per Imperial gallon (Webster's New International Dictionary (2d Ed) p.1029). Therefore, the gallon value of the gasoline involved in this case on 16 November 1944 was 16.117 cents and the total value of the gasoline involved was (1417 gallons at 16.117 cents) $228.38. By the same reference the value of the jerricans was (225 cans at $2.00) $450.00.

9. The legal sentence which may be imposed upon accused for the offenses of which he was found guilty, exclusive of the desertion charge, includes dishonorable discharge from the service, forfeitures of all pay and allowances due or to become due and confinement at hard labor as follows:

Charge II and specification	5 years
Charge III and specification	5 years
Total confinement (MCM, 1928, par.104c, p.100).	10 years

Confinement in a penitentiary for said offenses is authorized by Article of War 42 and section 36 Federal Criminal Code (18 USCA 87). (See CM ETO 1764, Jones and Mundy).

10. The charge sheet shows that accused is 29 years five months of age. He was inducted 28 October 1941 at Fort Oglethorpe, Georgia. His service period is governed by the Service Extension Act of 1941. No prior service is shown.

11. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges I and III and their respective specifications and so much of the findings of guilty

of Charge II and its Specification as approved as involves a finding of guilty of violation of the ninth paragraph of the 94th Article of War, and legally sufficient to support the sentence as commuted.

12. 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, is authorized by Article of War 42 and Circular 210, War Department, 14 September 1943, section VI, as amended. Confinement in a penitentiary is authorized upon conviction of desertion in time of war by Article of War 42 and upon conviction of unlawful disposition and knowingly applying to one's own use of property of the United States furnished or to be used by 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement would be proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Corporal JAMES R. MILLS (34148598), 441st Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charges I and III and their respective specifications and so much of the findings of guilty of Charge II and its Specification as approved as involves a finding of guilty of violation of the ninth paragraph of the 94th Article of War, and legally sufficient to support 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. The offenses of which accused was convicted are punishable by penitentiary confinement. The evidence showed that accused was not only a common thief but was also one of the colored soldiers who was actively engaged in selling military gasoline in the Paris "black market". The evidence in support of his conviction of desertion showed that during his unauthorized absence he lived in the Paris underworld while engaging in his nefarious transactions involving Government property. I believe he should be confined in the penitentiary and not the Disciplinary Barracks. He is a criminal; not a military offender. If you are in accord with this suggestion, please evidence your decision by supplemental action to be forwarded to this office for attachment to record of trial.

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 9288. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9288).

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

(Sentence vacated in part in accordance with recommendation of The Assistant Judge Ad Advocate General. Sentence confirmed but commuted to dishonorable discharge, total forfeitures. and confinement for life. Sentence as commuted ordered executed. GCMO 245, ETO, 6 July 1945).

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

BOARD OF REVIEW NO. 3 19 MAY 1945

CM ETO 9290

U N I T E D S T A T E S	)	8TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	APO 8, U. S. Army, 22 January
Private LOUIS L. GRIJALVA	)	1945. Sentence: Dishonor-
(39291953), Company C,	)	able discharge, total forfeit-
8th Medical Battalion	)	ures and confinement at hard
	)	labor for life. Eastern Branch,
	)	United States Disciplinary Bar-
	)	racks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Louis L. Grijalva, Company C 8th Medical Battalion, did, in the vicinity of Germeter, Germany, on or about 5 December 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: ambulance evacuation from a battalion aid station, and did

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remain absent in desertion until he surrendered himself at Verviers, Belgium, on or about 5 January 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. Evidence was introduced of two previous convictions, one by special court-martial for taking a government vehicle for his own personal pleasure, and one by summary court for being drunk and disorderly in camp, both in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and a term of confinement at hard labor and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in this case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence showed that on 5 December 1944, accused, a member of Company C, 8th Medical Battalion (R4), was assigned as an assistant ambulance driver on the run from his company's collecting and clearing station in the Germeter-Hurtgen area in Germany to the Second Battalion's aid station in Hurtgen, Germany (R4-6,8,10-11), from which place wounded of the 121st Infantry were being evacuated (R5). The enemy was 1500 to 2000 yards south and east of Hurtgen (R5) and enemy mortar shells landed in the vicinity of the aid station. The route used by ambulances was under enemy observation (R11-12, 14,17). After completing the trip with one ambulance accused was assigned to another and 15 minutes later was discovered absent. A search of the area failed to reveal his presence. He had no authority to be absent (R4-5,6-7, 13-14,16-17,19). He surrendered to military authorities at Verviers, Belgium, at 1700 on 5 January 1945 (R19).

4. After his rights as a witness were explained to him, accused made an unsworn statement in which he admitted that he went absent without leave, but in effect denied any intention of absenting himself with intent to avoid hazardous duty. During the five days he was with the 8th Infantry Division, he never saw a shell land closer than 3,000 yards. Prior to this assignment, he "was always rear echelon" where he worked as a driver (R20-21).

5. All the elements of the offense of desertion with intent to avoid hazardous duty are fully established by competent, substantial evidence (CM ETO 3641, Roth; CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt and cases cited therein).

6. The charge sheet shows that accused is 20 years of age and was inducted 1 April 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 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).

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

(228)

1st Ind.

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

1. In the case of Private LOUIS L. GRIJALVA (39291953), Company C, 8th Medical Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9290. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9290).

E. C. McNEIL,

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

(Sentence as commuted ordered executed. GCMO 181, ETO, 27 May 1945).

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

BOARD OF REVIEW NO. 2 18 MAY 1945

CM ETO 9291

U N I T E D S T A T E S v. Private First Class MATTHEW CLAY, JR. (38490561), 3236th Quartermaster Service Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, Manche, France, 20 January 1945. Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private First Class Matthew Clay Jr., 3236th Quartermaster Service Company, did, at FONTENAY-SUR-MER, MANCHE, FRANCE, on or about 9 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one VICTOR BELLERY, a human being, by stabbing him with a bayonet.

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

Specification: In that * * * did, at FONTENAY-SUR-MER, MANCHE, FRANCE, on or about 9 October 1944, with intent to do her bodily harm, commit an assault upon MME. AUGUSTINE BELLERY, by cutting her on the body with a dangerous instrument, to wit, a bayonet.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing its execution pursuant to Article of War 50½.

3. The evidence for the prosecution shows that Madame Augustine Bellery, 37 years old, on 9 October 1944, was living with her husband and her two children, aged 6½ and 8 years, in their home, a one room bakery at Fontenay-Sur-Mer, Manche, France (R21). The familty were all in bed (R22,25) that night when a colored soldier kicked the door in, came into the room (R22,41) and extinguished the light (R23). He demanded some cider which was not given him (R22) and Madame Bellery testified that the soldier then took her husband (R23) who had either got out of bed (R27) or was dragged from his bed (R28) by the back and shoved or led him near the door where the soldier struck him in the back and neck with a knife. When she defended her husband, he also struck her three blows with the knife on the wrist and left shoulder. The soldier then ran away. She identified a mallet (Pros.Ex.C) as one found by her children (R23). Her husband, a healthy, 42 year old workingman, died that same evening (R24). Neither she nor her husband scuffled (R27) or struggled (R28) with the soldier nor did she attackhim but only took hold of her husband "to pull him towards me in order to save him" (R27). She was positive that during this time the door near which the stabbing took place (R29) was half open (R28).

Lieutenant S. Aber, 104th Division (R6) stationed at the air strip, Fontenay-Sur-Mer, France, was in front of the French Refugee Camp there at 10:45 on the night of 9 October 1944, with Technician Fifth Grade Peter Almoslino of his unit, when he was informed by a Frenchman that someone had been murdered and another injured. At the same time he heard footsteps and called "halt" and someone about 30 yards away stopped and shone a flashlight. He ordered the person to advance and as he came nearer Lieutenant Aber ordered him to drop the flashlight as well as something being carried in the other

hand. Lieutenant Aber identified the accused as the person he halted (R7). Accused spoke incoherently and in Lieutenant Aber's opinion was drunk (R8).

Almoslino testified that he was with Lieutenant Aber when accused was apprehended and picked up the flashlight and bayonet that accused dropped. The bayonet had on it dark red stains which Almoslino thought was blood. He gave them to the Military Police when accused was turned over to them (R9). It was but some 200 or 300 yards from where accused was stopped to the Bellery house and about 11:30 and comparatively dark when all this occurred (R10). When first seen accused was asked what he was doing and answered that he was looking for someone, that he too was looking "for the criminal" (R11).

Rafou Ramon, Mayor of the town of Fontenay-Sur-Mer, on 9 October 1944 (R29) testified that he had known M. Bellery for five years as a man in very good health. He saw his body on 10 October and took care of its burial at Fontenay on 12 October 1944 (R30).

Robert E. Fuller, Agent, 17th Criminal Investigation Section (R11) stationed at Cherbourg, investigated the murder and he testified that he went (R12) on the 13th or 14th of October (R13), with "Agent Shultz and a Captain, I don't know the name, his C.O.", to the Normandy Base Stockade where accused was identified as Matthew Clay, Jr. (R12). After advising accused of his rights, he asked him for a statement which accused made and signed (Pros. Ex.A) and which was without objection, admitted in evidence (R13).

Robert A. Shultz, Technical Sergeant and Criminal Investigation Division Agent, identified accused. He accompanied Agent Fuller to the Normandy Base Stockade to interview accused on 13 October and they obtained a statement from accused and from the Military Police, a mallet (Pros.Ex.C) and a bayonet (Pros.Ex.B) which were admitted in evidence (R14).

Joseph P. Denove, Investigation Section, 505 Military Police Battalion, Holland, identified accused as Private John Lewis of the 190th Ordnance Company. He testified that he visited accused on 10 October at the Normandy Base Stockade, in company with "Sergeant Davis and Lieutenant John Logan" (R15) and after advising accused of his rights, requested a statement from him regarding M. Bellery. Accused made and signed such a statement (R16; Pros.Ex.D) and it was admitted in evidence (R21) after accused had taken the stand for the sole purpose of testifying that it was signed by him as John Lewis after threats and violence directed at him by Denove (R20). Exhibit "D" reads a s follows:

"Statement of Pvt. John Louis, ASN 38490561, 190th Ordnance Battalion, made to T/Sgt. Joseph P. Denove, and T/Sgt. Russell O. Davis, Investigators, Corps of Military Police.

Having been warned of my rights under the 24th Article of War, I make the following statement freely without force or any promises on this date, 10 October, 1944, at the Normandie Base Sector Guardhouse.

My name is John Lewis. I have been asked to tell what happened to me last night, October 9, 1944. At about 9:30 P.M. I was walking down a road with 3 or 4 other colored soldiers I had met. I don't know the name of the road. I only know it was about a mile from where my outfit was on bivouac. I don't know the names of the soldiers I was with. They were just some soldiers who happened to be walking down the same road I was. I saw a home by the side of the road and I decided to try and buy some more cider. I had already drank a quart of cider but I wanted some more. I knocked on the door of this house and a man answered. He said something in French. I just kept saying 'Cider, I want some cider'.

Finally the man opened the door wider and I went into the house. He then came out with a bottle and a glass. I drank one glass of cider. I then asked him to give me another. He kept saying something in French and I didn't know what he was saying. He wouldn't give me any more cider. I asked him to sell me some. He wouldn't sell it to me. He kept on talking as if he was going to fuss with me. He kept on making a sign to me with his hands as if he wanted me to get out of the house. I didn't know what he was going to do, so I took out my bayonet and I held it up. Just then the French man grabbed something and hit me on my helmet. I struck at him a few times with my bayonet. His wife then grabbed something and came at me, so I struck at her, too. I thought they were going to kill me sure, so I ran out. I ran across the field and I finally came out on a road in front of a big white house. As I started to run down the road, a lieutenant who was also standing by the big white house, shouted at me to halt. He told me to drop the

bayonet I had in my hand, and I did so. He then told me to drop my pistol belt which was still around my waist. I did this, too. He asked me what had happened. I was scared. I told him that a soldier had just given me a bayonet, the same bayonet I had in my hand when he, the officer, stopped me. There were other white soldiers around by then. The officer put me in a truck and drove me down a road a few miles and finally turned me over to some M.P.'s. After a while the MP's put me in a jeep and started riding. I didn't know where they were taking me. I had got a hold of my pistol belt when I got out of the truck and I had it with me when I started out with the MPs in a Jeep. After riding a little while, I purposely dropped the belt over the side when the M.P.s weren't looking. The M.P's first took me to an M.P. colonel, whose name I don't know, and I told the colonel I didn't have anything to do with any cutting. The colonel didn't believe me so he sent me to the stockade near Cherbourg.

All of this is the truth. I can't write so well so I told the M.P. Sergeant to take it down as I told it.

JOHN LOUIS "

This statement varies in some particulars from his later statement (Pros.Ex.A) dated 13 October 1944, in which he says, the man

"started to fuss and I guess he wanted me to leave. I didn't know what he was going to do and I took out my bayonet and the man reached down for a mallet which was on the floor, close to the bed. At that time I was near the table near the center of the room. I had the bayonet in my right hand, raised it up when he hit me with the mallet on my helmet. I struck at him with the bayonet - I don't know how many times. At the same time the woman came at me and I struck her too.

* * *

The next day a Military Police Office and two sergeants questioned me at the stockade and I gave them a signed statement, but told them my name was John Louis and that I was from the 190th Ordnance Battalion. I did this because I was scared.

On Thursday 12 October, 1944 two agents of the C.I.D. questioned me and at the same time my commanding officer Captain Stevens identified me as Matthew (N.M.I.) Clay, a P.F.C. in his unit the 3236 Q.M. Service Co.

I have been read this statement of 3 pages and it is true.

signed. MATTHEW CLAY,JR."

4. Accused was the only defense witness. He testified that his home was in Louisiana, that he left school at the age of 14 while in the sixth grade, and thereafter worked (R31) at common labor. He had drunk a quart of cognac on the day in question, finishing it just "before chow in the evening". Following "chow" he went for a walk and "finally I felt like drinking some cider and just stopped to see if they had any at this house". No one answering when he knocked (R32), he shoved the door open and went in (R33). They were all in bed (R37). He asked the Frenchman and his wife for a drink of cider. The Frenchman got out of bed, picked up a mallet and as accused started for the door which was shut (R33), came after him with upraised mallet. Accused couldn't get the door open and fearing that Bellery and his wife were going to hurt him or kill him before he could get out, he pulled his bayonet out and (R34) struck M. Bellery first (R37,42) as he and the woman came after him "and I used my bayonet for to keep them off (R34) me, and that's when I did the sticking" (R34). He did not know how many times he struck them (R38). He was angry "because when I was trying to get out of the house, they hit me and that made me angry at the time. * * * I was pretty well lit, I had been drinking during the day" (R34-35). He denied having anycider in that house although admitting he had claimed in both his signed statements that he had cider there (R35-36). He admitted that Prosecution's Exhibit B was similar to the bayonet he had had but he didn't know if it was the same one. He had received no wounds or marks of any kind in the house (R36) which had but one small room (R37). He found the flashlight which he had (R38) and which he had on all the time (R41). He admitted being stopped by an officer and two enlisted men and by them turned over to the military police and that he never was in the 190th Ordnance Battalion; that he had given his name to the investigator as John Lewis of the 190th Ordnance Battalion (R38-40) the day after he was apprehended and that he had been identified as Matthew Clay Jr., by his own Company Commander (R40). He also admitted in his testimony that he was never struck with he mallet. "I stopped him before he did it" (R42). The bayonet had not been issued to him but had been secured from "a boy in my outfit" (R43-44).

5. The evidence shows without dispute and accused's story confirms the fact that he broke into the dwelling of M. Bellery

in the nighttime and with his bayonet stabbed both M. Bellery and his wife, Bellery dying from his injuries so inflicted that same night.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, par.148a, p.162; CM ETO 422, Green).

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a, p.110).

Accused's bayonet was a deadly weapon and

> "malice aforethough may exist when the act is unpremeditated" (MCM, 1928, par. 148a, p.163; CM ETO 6380, Himmelman).

> "an intention to kill may be inferred from the wilful use of a deadly weapon" (40 CJS, sec.44, p.905; CM ETO 422, Green).

From the facts shown as well as admitted, the only questions the record of trial presents for consideration on the charges preferred are those of self-defense and intoxication.

> "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 * * * the danger must be believed on reasonable grounds to be imminent and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty" (MCM, 1928, par.148a, p.163; CM ETO 3180, Porter).

Here accused, armed with a bayonet, forced in the door of a dwelling house in the nighttime when the occupants were in bed and extinguished the light in the room, making the lighting thereafter dependent on his flashlight. When M. Bellery "started to fuss", he drew his bayonet and stabbed both M. Bellery and his wife. Accused claims the door from the room was closed and he could not escape when he was attacked by M. Bellery with a mallet though he admits he struck first and was not himself hit.

He states he was angry because they hit him and in the next breath says he was never struck with the mallet. There was evidence that the door was half open all during this time. Ballery had the legal right to expel the intruder by whatever means necessary (1 Wharton's Criminal Law (12th Ed., 1932), sec.634,635, pp.867-9) and from accused's own testimony he understood that they wished him to leave. In view of the uncontradicted evidence, the court was warranted in rejecting his plea of self-defense for not only was he the aggressor, but there is no showing that either his life or person was in danger or that he had retreated as far as he safely could. He claimed in his statements that they hit him and made him angry. He admitted on the stand that they did not hit him because "I stopped him before he did it". In any event

> "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 a contol of his actions" (1 Wharton's Criminal Law, (12th Ed., 1932,)sec.426, p.647; CM ETO 3180, Porter).

There was nothing to provoke such anger here and no evidence of its existence. The violence of the blows, the weapon used, the depth of the penetration and the part of the body struck bespeak the requisite intent to kill or to inflict serious bodily harm which makes the slaying willful. The evidence is inadequate to sustain a claim that the killing is to be excused on the ground of self-defense.

While there is evidence that accused had been drinking prior to supper that evening, he had been walking after his meal and there is no evidence of intoxication at the time of the killing. He knew why he went to the house and he remembered the details of the encounter. He obeyed the orders given him when he was halted and his actions in giving a false story and identification at that time show he knew he had committed a reprehensible act. The issue of intoxication was not seriously raised as a defense and in any event the question of whether accused was sufficiently intoxicated so that he could not have had the necessary intent to constitute murder, was one of fact for the dertmination of the court. In the absence of substantial, competent evidence that he was so intoxicated, the findings of the court were fully justified(CM ETO 2007, Harris, Jr.; CM ETO 1901, Miranda; CM ETO 7253, Hopper).

The same evidence which supports the charge of murdering M. Bellery supports also that of assaulting his wife with the intent to do her bodily harm. Accused admitted he struck Madame Bellery with the bayonet, apparently in the same manner used towards M. Bellery, when she came to the aid of her husband as she had the right to do, and the use of a bayonet to repel her was

clearly unjustified (CM ETO 422, Green).

Prosecution's Exhibit D was received in evidence after accused had been sworn as a witness for the sole and limited purpose of claiming that it had been secured from him involuntarily by threats and by actual violence. Whether or not it had been voluntarily given after due warning of accused's rights and hence admissible in evidence, was decided against him, and in view of the various other admittedly false statements made by accused and the evidence supporting the admissibility of this statement, the Board of Review does not find that its admission in evidence was error.

6. The charge sheet shows that accused is 24 years and four months of age and without prior service, was inducted 11 December 1943 at Lafayette, Louisiana.

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Private First Class MATTHEW CLAY, JR. (38490561), 3236th 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 9291. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9291).

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

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

(Sentence ordered executed. GCMO 185, ETO, 27 May 1945).

9291

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

BOARD OF REVIEW NO. 2

CM ETO 9292

4 JUN 1945

U N I T E D S T A T E S)	FIRST UNITED STATES ARMY
)	
v.)	Trial by GCM, convened at St.
)	Trond, Belgium, 1 February 1945.
Privates TOMMY L. CHILES)	Sentence as to each: Dishonorable
(34660593), and HENRY L.)	Discharge, total forfeitures and
McCLENDON (34640889), both)	confinement at hard labor for life.
of 4043rd Quartermaster)	Eastern Branch, United States Dis-
Truck Company)	ciplinary Barracks, Greenhaven,
)	New York.

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

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

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

CHILES

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

Specification: In that Private Tommy L. Chiles, Four Thousand Forty-Third Quartermaster Truck Company, did, in the vicinity of Liverdy en Brie, France, on or about 3 September 1944, desert the

service of the United States, and did remain absent in desertion until he was apprehended by military authorities in the vicinity of Essonnes, France, on or about 12 December 1944.

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

Specification: In that * * * did, in conjunction with Private Henry L. McClendon, Four Thousand Forty-Third Quartermaster Trust Company, in the vicinity of Liverdy en Brie, France, on or about 3 September 1944, wrongfully, unlawfully, knowingly and willfully misappropriate and apply to his own use and benefit one motor vehicle of the value of about Two Thousand Nine Hundred and Fifty-Five ($2955.00) Dollars, property of the United States, furnished and intended for military service thereof.

McCLENDON

Charges and specifications identical with those above set forth except for the appropriate transposition of names of accused.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of Charge I and the Specification of Charge I preferred against him, except thewords "he was apprehended by military authorities in the vicinity of Essonnes, France", and guilty of Charge II and its Specification as preferred against him. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, First United States Army, approved the sentences, recommended that because of the low mentality of accused, they be commuted to dishonorable discharge, total forfeitures and confinement at hard labor in a Federal penitentiary for 20 years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentences, but owing to special circumstances in each case and the recommendations of the reviewing authority, commuted them as to each accused 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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

3. The evidence showed that the two accused were members of the 4043rd Quartermaster Truck Company which on 3 September 1944 was stationed at Ammunition Supply Point 113 near Liverdy en Brie, France. On that date they were ordered by their commanding officer to proceed with their truck to ASP 110, which was about 40 to 60 miles away, pick up a load of ammunition and report back to the company's bivouac area (R9,12,15). The truck they were assigned to drive was a "GMC cargo, 6x6", and on that trip formed part of a convoy of eight trucks, two others of which also belonged to accused's company. On the way to ASP 110, late in the evening, the truck operated by the two accused, dropped out of the convoy because of a flat tire. The corporal in the last vehicle, whose duty it was to pick up stragglers from the convoy, also stopped and offered to help them fix the tire and to stay with them until they were finished. The driver, however, told him they did not need any help and that he knew the route to ASP 110, whereupon the corporal left them behind (R10, 11,13). The remaining seven trucks reached ASP 110 the following morning, stayed there about two hours to pick up their loads and then left. Accused never rejoined them. The company's two other trucks which stayed with the convoy returned to ASP 110 that same day (R15). Accused's company remained at ASP 113 for about one week after 3 September, and before it left, the commanding officer posted a notice at the ASP office stating that the company was moving to ASP 116, - a procedure followed in that company since it began hauling ammunition in July 1944 (R12). Accused remained away from their organization from the time they dropped out of the convoy, 3 September, until they were returned to military control in the vicinity of Essonnes, France, 12 December 1944. They had no authority to be absent. The truck they drove was never returned to the company (R11,17). There is no evidence as to what they did with the truck after they became separated from the convoy on the night of 3 September. It was stipulated that the truck was the property of the United States, furnished and intended for the military service thereof, and of a value of $2955 (R17).

4. Defense counsel stated that he had advised both accused of their rights and that they elected to remain silent (R17). No evidence was introduced in their behalf.

5. a. Accused were absent without leave for three months and ten days. Since there was no explanation of this prolonged and unauthorized absence, the court was justified in inferring from that alone an intent to remain permanently away (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell, III Bull. JAG 282; CM ETO 2723, Copprue). The finding of guilty of desertion was therefore fully warranted against each of them.

b. The truck was entrusted to the two accused for the specific purpose of transporting ammunition from ASP 110 to ASP 113. It was not used for that purpose. When last seen with the convoy the truck was under the control of the two accused. The truck was never returned to the company to which it belonged and its disposition was wholly unexplained. These facts made out a prima facie case against both accused, and since they adduced no evidence to rebut the case thus made out against them, the court was justified in finding both guilty of the misappropriation and misapplication of the motor vehicle as alleged (CM ETO 1631, Pepper, III Bull. JAG 421).

6. The charge sheets show that accused Chiles is 20 years and one month of age and was inducted 4 January 1943 at Fort Bragg, North Carolina, and that accused McClendon is 23 years and nine months of age and was inducted 29 December 1942 at Fort Jackson, South Carolina. Neither had prior service.

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

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

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

Judge Advocate

Judge Advocate

Judge Advocate

(244)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates TOMMY L. CHILES (34660593), and HENRY L. McCLENDON (34640889), both of the 4043rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the 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 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 9292. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9292).

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

(AS to accused Chiles, sentence as commuted ordered executed. GCMO 210, ETO, 15 June 1945).
(As to accused McClendon, sentence as commuted ordered executed. GCMO 211, ETO, 15 June 1945).

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

BOARD OF REVIEW NO. 2 3 MAY 1945

CM ETO 9294

U N I T E D S T A T E S	XX CORPS
v.	Trial by GCM, convened at Thionville, France, 16 February 1945. Sentence: To be hanged by the neck until dead.
Private First Class WILLIAM J. McCARTER (34675988), 465th Quartermaster Laundry Company	

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

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

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pfc William J. McCarter, 465th Quartermaster Laundry Co, did at Thionville, France, on or about 1 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Pvt Charles P. Williams, a human being, by shooting him with a carbine.

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

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

3. The evidence for the prosecution shows that on 1 February 1945, accused was a member of the 465th Quartermaster Laundry Company, which organization was stationed at Thionville, France (R6,9, 12). During the evening of 31 January a dice game was in progress on the third floor of the barracks building in which accused and Charles P. Williams, the deceased, were quartered (R6,7,8).Various soldiers joined the game which continued until about 2:00 or 2:30 am, 1 February. Some of the soldiers, including accused, engaged in drinking during the course of the game. At one time accused left the game and went downstairs but later returned and again joined in the gambling. After midnight only three persons remained in the game, accused, and Privates James F. Hunt and Charles P. Williams, the latter being referred to by his fellow soldiers as "C.P." (R6,7, 8,9,10). About 2:00 am, just before the game "broke up", accused stated that someone had taken his pocket book. He went into the room of Corporal Thomas Williams, on the third floor of the barracks, and repeated this charge. According to the corporal, accused "seemed to direct his accusations" to C.P. Williams. A little later Privates Hunt and C. P. Williams came into this room and offered to be searched to satisfy accused that they were innocent of his accusations. They removed a part of their clothing but he declined to examine it or to search them otherwise. After reclothing themselves, Hunt and "C.P." left the barracks (R19).

Shortly after 2:00 am, accused went to the guardhouse and made inquiry of the guard, Private Kadell Mitchell, whether anyone was "out tonight". Mitchell replied that he guessed "everybody" was in "except Williams" who had "gone over to the hospital mess hall", whereupon accused said "I'll get him; he got my money" (R10). He left the guardhouse and about 15 minutes later the guard overheard accused say "Is that you Williams", and the latter's reply, "Yes it's C.P." Mitchell testified that he then heard a carbine being "fired" but that he did not remember how many shots (R10,11). He walked out of the guardhouse and heard accused say, "I got him" (R10). At the same time he saw C.P. Williams lying on the ground about six yards from the guardhouse and about three yards from the steps of the barracks. He was "scuffling for his breath" (R10). After saying that "he hoped the MP's would hurry up and come and get him", accused left the scene of the killing and went into the barracks (R11). In the opinion of Mitchell accused had been drinking but he was not drunk.

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He walked "steadily" and seemed "about the same as always" (R11).

Other witnesses who observed accused on the evening in question testified concerning his condition. Private Hunt stated that he did not notice any "thickening or slurring" of his speech (R8). Corporal Williams testified that he "wouldn't say that he was drunk" (R19). Sergeant Reginald Dyson, who was awakened by the shooting, testified that shortly thereafter accused came into the barracks and said "Somebody better go out there; he's laying out there" (R12). Accused then went to the room of Corporal Williams and reported the killing, stating: "I got him, that son-of-a-bitch-Williams; he's laying down there"(R19). He next awakened Private Hunt and told him that he had "shot Williams and killed him" as "he knew that Williams had had his money" (R7). Upon investigation of the shooting and reported killing, Sergeants McDonald and Dyson, and Corporal Williams found Private C. P. Williams outside the barracks lying "face downwards" in a pool of blood (R12,19). There were no firearms in the vicinity of the fallen man(R19). He was taken to the hospital, arriving there about 3:30 am, 1 February 1945 and was pronounced dead upon arrival (R12-14). His death was due to hemorrhage and shock from the gunshot wounds he had sustained. An autopsy disclosed that the deceased had been shot in the back five or six times. Wounds were apparent in the back of the neck, beneath the ribs, behind the right shoulder, in the head and in the back of the right leg(R14,16).

Three days after the shooting, accused was interviewed by the investigating officer who "read the material in the Manual of Courts-Martial" to him and explained to him that he did not have to make a statement. Accused then made a voluntary sworn statement admitting killing C.P. Williams. Later the investigating officer again interviewed accused and told him that he had not at that time submitted the statement to higher authority and that he did not need to make any statement if he did not desire to do so. Accused stated, however, that he did not wish to change his statement. This statement was received in evidence, without objection by the defense (R17,18; Pros.Ex.1). It reads in pertinent part as follows:

> "We were shooting craps in our quarters at 465th Quartermaster Laundry Co,Thionville, France the night of 31 January 1945 between 2200 and 2330. I lost some money about $30.00 shooting craps. After that I missed my pocketbook and was told afterwards by Pvt James Hunt that Williams had my pocketbook. As far as I know I had about $20.00 in the pocketbook. I argued with Williams to return the pocketbook. He denied having it. I had been drinking Cognac and was 'pretty full.' After that I got my rifle (Carbine)

> and went outside. I saw someone coming in the gate and I said, 'Williams, is that you'? He answered, 'C.P.' I let him have it. I think I shot three shots. I took my rifle back in the house and told S/Sgt McDonald that I had shot C.P. Sgt McDonald said, 'Where is he'?. I replied out in the walk way. Lt Sirkin our CO then came and took me to the MP Headquarters. The reason I shot Williams is because he stole my pocketbook and because he had threatened to kill me a few weeks ago. Williams was a new man in our outfit and was known by all of us to be a crooked gambler".

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R24). The defense produced three witnesses, Private James D. Witherspoon and Sergeant Earl McDonald, both members of accused's organization, and Captain Hugh K. O'Donnell, the company commander. Witherspoon testified that accused seemed "pretty teed up" all the evening in question and that he was not acting completely normal (R22). McDonald testified that he heard a lot of noise in the barracks at the time he was getting ready to go to bed and that upon investigation he found a "crap game" in progress and accused present and participating therein. Accused had been drinking and McDonald took him to his room "to keep down confusion" and told him to go to bed (R21). Captain O'Donnell rated accused's efficiency as a soldier as "satisfactory" and his character as "excellent" (R24).

5. Competent, uncontradicted evidence conclusively establishes that accused shot Private Charles P. Williams at the time and place alleged and that this soldier died as a result of the gun shot wounds thus inflicted. There is no question concerning the commission of the homicide or the identity of accused as the perpetrator. These facts are admitted by accused. The only question for consideration by the Board of Review is whether the homicide constitutes the crime of murder.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, par. 148a, p.162).

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

The term 'malice' "does not necessarily mean hatred or personal ill-will toward the person killed * * *. It is sufficient that is exist at the time the act is committed" (MCM, 1928, supra), and it is implied "where no considerable provocation appears and all the circumstances show an abandoned and malignant heart"(26 Am. Jur. sec.41, p.186).

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par. 112a, p.110).

In the instant case the defense offered evidence tending to show that accused was in such a state of intoxication on the evening in question that he was incapable of entertaining a specific intent to kill and that there was thus an absence of any deliberation or malice aforethought in the commission of the crime.

> "It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it /such condition/ may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense"(MCM, 1928, par. 126a, p.136).

Various witnesses testified concerning accused's condition as follows: Private Witherspoon, accused's roommate, stated that he "seemed to be pretty teed up" during the evening and not acting completely normal. Sergeant McDonald, who saw accused about 1:00 o'clock in the morning before the killing, testified that although accused had been drinking he was not drunk. Corporal Williams, who also saw accused during the early hours of the morning, corroborated the fact that he was not drunk. Private Hunt, who participated in the dice game with accused, testified that he did not notice any "thickening or slurring" of his speech and that he had no difficulty in standing. Private Mitchell, the guard who talked with him immediately prior to the fatal shooting expressed the opinion that he had been drinking but that he was not drunk. He stated that he walked and talked naturally and "seemed about the same as always". These facts form a body of substantial evidence, supporting the findings of the court, that accused's intoxication was not of such a severe or extreme degree as to render him incapable of possessing the requisite/essential to establish his guilt of the offense malice aforethought of murder (CM 237782, Prentiss, 24 B.R.111 (1943); CM 238389, Kincaid, 24 B.R.247 (1943); CM 238470, Ledbetter, 24 B.R.257 (1943); CM ETO 1901, Miranda; CM ETO 6229, Creech; CM ETO 8691, Heard).

Except for accused's statement that the deceased stole his

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pocketbook, the record is devoid of any offer of proof of provocation. Even if true, this accusation would not constitute such provocation as to legally justify the commission of the crime.

> "Persons laboring under a sense of wrong, public or private, real or imaginary, must apply to the law for redress. If there is opportunity to apply for such redress, he who supposes himself aggrieved is guilty of a criminal offense if he undertakes to inflict violent punishment; and he is guilty of murder if he deliberately and cooly kill the person by whom he supposes himself aggrieved" (1 Wharton's Criminal Law, 12th Ed, 1932, sec.590, p.810).

The circumstances of the killing characterize the homicide as deliberate, cold-blooded and unjustifiable. Accused's acts were determined and premeditated. He stated to the guard prior to the shooting, "He got my money, I'll get him", and it was not until he coolly ascertained deceased's identity that he fired the fatal shots. Approximately an hour elapsed between the end of the crap game and the shooting.Bullet wounds on the body of the victim evidenced that he was shot from behind at least five times. The statement made by accused after the killing, "I got him, that son-of-a-bitch Williams * * *" indicates that accused well knew what he was doing when he fired the fatal shots. The evidence establishes beyond a reasonable doubt accused's guilt of the crime of murder as charged.

The question concerning the degree of intoxication was essentially one for the determination of the court and its findings, where supported by substantial evidence, will not be disturbed by the Board of Review on appellate review (CM ETO 1065, Stratton; CM ETO 1953, Lewis; CM ETO 3932, Kluxdal; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer and authorities cited therein).

6. The charge sheet shows that accused is 38 years of age and was inducted 22 June 1943, at Fort Bragg, North 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).

Judge Advocate

Judge Advocate

Judge Advocate

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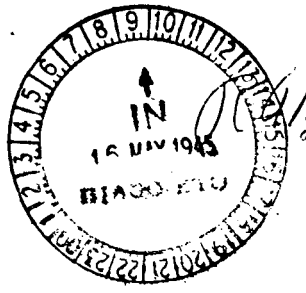
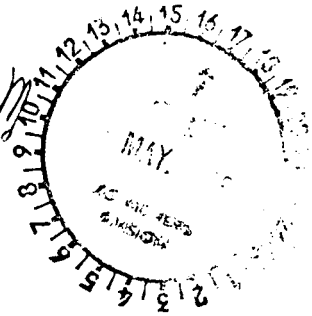
AG 201 - McCARTER, William J. (Enl)MPE 2nd Ind. /jh
Hq European Theater of Operations, APO 887, U. S. Army 14 May 1945

TO: Assistant The Judge Advocate General, Branch Office of The Judge Advocate General with the European Theater of Opns, APO 887, United States Army.

2 Incls:
#1 Record of Trial GCM, McCarter
#2 GCMO 138, this hq 12 May 45 (12 cys)





Received
16 MAY 1945 1700 hrs.
Board of Review
BOTJAG-ETO

1st Ind.

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

1. In the case of Private First Class WILLIAM J. McCARTER (34675988), 465th Quartermaster Laundry Company, attention is invited to the foregoing holding by the Board of Review, that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 9294. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9294).

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

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

(Sentence ordered executed. GCMO 138, ETO, 12 May 1945).

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

BOARD OF REVIEW NO. 3

16 JUN 1945

CM ETO 9301

U N I T E D S T A T E S	)	84TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Homberg, Germany, 18 March 1945. Sentence:
Private First Class CHARLES C. FLACKMAN (39271470), Company E, 334th Infantry	)	Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private First Class Charles C. Flackman, Company E, 334th Infantry, did, at Homberg, Germany, on or about 6 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Else Kamps.

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

Specification: In that * * * did, at Homberg, Germany, on or about 6 March 1945, wrongfully fraternize, with a German civilian, in violation of Memorandum, 84th Infantry Division,

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dated 23 November 1944, Subject: Fraternization, by having sexual intercourse with Else Kamps.

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

Specification: In that * * * did, at Homberg, Germany, on or about 6 March 1945, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of Else Kamps, one gold ring, mounted with a purple stone, the property of Else Kamps, value of over twenty dollars ($20.00).

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

3. The evidence shows that on the morning of 5 March 1945, American troops entered the town of Homberg, Germany (R36,39). Witnesses for the prosecution testified that at midnight on the same date, accused appeared in a bunker or bomb shelter where about thirty German civilians were seated on benches (R7,23). The place was dimly lighted by small petroleum lamps suspended from the ceiling (R17,70). Accused carried a pistol and a flashlight (R8,28). The latter he shined on the occupants of the bunker as he walked among them. He stopped before the prosecutrix, her parents, her sister, and a female cousin, and inspected them with the aid of a flashlight (R8,23). As he was standing directly under a hanging lamp, they were able to see him distinctly enough for prosecutrix, her sister and her cousin each to identify him later (R25-26). He gestured to the prosecutrix to rise and unbutton her coat. After she had done so, he left her for a few minutes. On his return he indicated that she should accompany

him (R8,23,28). Prosecutrix weighed "about 140" (R17). Accused was smaller and shorter than she, the top of his head reaching about the level of her eyes. She was a clerk for a health benefit concern and accustomed to dealing with "all sorts of people" (R71). They left the bunker together and walked side by side along the street for several blocks. She was too upset to know whether or not he still had his pistol in his hand. Finally, they entered the cellar of a building through a back door. She followed accused - "he was in front since I did not know the house" - upstairs to a bedroom. "I believe it was quite dark", she testified, "He always used his pocket lamp". In the bedroom "he gestured several times with his hand that I should sit down and then he left for a few minutes" (R9). She made no attempt to leave while accused was gone, explaining that "I did not know where I was in the house and I was certain he would come after me anyway"(R15). When he returned

> "he gestured several times that I should undress. I believe at this time he also had his pistol in his hand. Then I finally took my coat off and I thought that was enough but he kept gesturing indicating he wanted me to undress more. I had on this pullover. I kept on undressing because I was afraid he would hurt me. I also kept thinking of my mother and sister. I had to undress until I was entirely unclothed save for my stockings, and through a gesture he indicated that I should lie down. Then I started crying and I asked him why I should have to undress myself. I said I was cold and that I wanted to go back home" (R9-10).

The only thing she said in English, however, was, "'I go to house'. The rest I said in German, that my mother would be crying and I also indicated this with my hands". While she was removing her clothing, accused did not touch her in any way (R10). She testified that she did not resist "because I was afraid he eventually could do something to me since I had elderly parents and had to work for them. I was afraid he would hurt us in some way". The trial judge advocate thereupon inquired if that was all she was afraid of, eliciting the response that "I was also afraid since he had the pistol there that he could shoot me" (R14). She testified that

> "he used me once, and all this time I tried to push him away and cried. I did not scratch him or anything like that, but I kept pushing him away and insisting I wanted to go home" (R10).

She did not know where his pistol was at this time.

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"I kept crying that I wanted to go to my mother and he finally let me get up, and I immediately got dressed again" (R10).

She was not sure whether he used a contraceptive and was "too upset to be certain" whether the act of sexual intercourse was completely accomplished, adding "I don't believe it /was/ because I'm still regular". She later testified however that penetration was complete (R11).

While she was dressing, she "believed" he had his pistol in his hand again.

"Then he gestured again that I should sit down, and he gestured that I should show my hands. I had to take my ring off and my watch off.
* * *
I took the ring off because he gestured that I should take it off (R11).
* * *
Then I could go out. He went out with me in the street. He gestured with his pistol that I could go. Then at midnight I went all alone back to the bunker.
* * *
When I went back I did not tell them exactly what had taken place. There were some thirty people there and I simply told them he took my jewelry as I was ashamed to relate the incident" (R12).

The following morning, when she was alone with her mother and sister, she told them what else the accused had done to her. She also told the civilian Burgomeister (R12-13). A German woman who overheard her was very shocked and frightened and later related "some of the incident" to an American officer who visited the bunker. "I believe", the prosecutrix testified, that "she mentioned my name", adding

"I assumed from that the story would go further and I personally wouldn't have to bother about it. I wouldn't have bothered myself about it further. * * * /However/ the woman insisted that I should go to the military government with her. She said I had to go" (R14).

So, on 11 March, five days after the occurrence, prosecutrix

accompanied this woman to the military governor and reported the matter to him (R13-14).

In the meantime, "right around the 7th of March" a soldier in accused's regiment purchased the ring in question from accused, paying him $22.50 in marks therefor, and giving him in exchange a pistol to boot (R29-30).

4. The evidence for the defense shows that accused was on guard from 2200 to 2400 hours 5 March 1945 (R37,55,59). T/5 Malcolm F. Ellis saw him around midnight at the motor pool, looking for a drink. "He had just come off guard and was going to bed" (R72-73). He was also seen after midnight in the cellar where he slept and where another witness cautioned him "not to speak too loud because the other ones were asleep. It was quite late" (R64). Ellis remembered going with him into the basement of a house adjoining the motor pool, but was not certain of the day. They found a pair of field glasses and a couple of broken watches, but the witness did not remember that either of them found a ring (R73-74).

5. After having his rights fully explained to him, accused elected to testify under oath substantially as follows:

On the night in question he was relieved from guard duty at midnight and immediately went to the motor pool and had a drink with Ellis, remaining about five minutes. He then went to the message center where everybody was asleep. He proceeded to another building and remained there for 20 or 30 minutes in conversation with another enlisted man; thence immediately to the guardhouse and to bed (R37-38). He found the ring, of which he was accused of robbing the prosecutrix, in a basement which he entered from an adjoining house occupied by the men of battalion headquarters company. Ellis was with him. They also found a pair of field glasses which they turned over to S-2 (R35-36). On the occasion of his identification by prosecutrix, her sister and cousin, prosecutrix seemed particularly interested in a ring he was wearing (not the ring in question) whereas neither of the others noticed it (R34).

6. "Consent, however reluctant, negatives rape; but where the woman * * * ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary that there should be force enough to create "reasonable apprehension of death.

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But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance" (1 Wharton's Criminal Law (12th Ed., 1932), sec.701, p.942,943) (Underscoring supplied).

> "It is submitted that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance. * * * /It follows that/ the guilt of the accused must depend upon the circumstances as they appear to him" (ibid. n.9, pp.943-944, citing Roscoe, Crim.Ev.1878 ed. p.648; Hunter v. State (1892, 29 Fla.486, 10 So.730; Walton v. State (1890), 29 Tex.App.163, 15 SW 646).

The prosecutrix' testimony shows that she accompanied accused from the air-raid shelter, walked beside him along the dark street, and followed him into the house up the stairs, and into the bedroom; further, that, when he left her alone there, she awaited his return. She undressed at his suggestion and lay down on the bed. The most that her weeping and mild protestations, delayed until then, could have reasonably charged him with notice of, was the reluctance of the consent which her docility seemed to demonstrate. She was larger than he and accustomed to dealing with all sorts of people. He did not at any time threaten her, although she believed, on several occasions, that he had his pistol in his hand. Her uncertainty as to whether he had or not may not lawfully be resolved against him. The court cannot know more than the witness. Moreover, at no time did she testify that he used his pistol in a threatening manner. Neither did he strike or lay hands on her. Her conduct was not such as to lead accused to believe that their intercourse was without her reluctant consent, or that such consent was induced by fear of death or other great bodily harm, with neither of which had he either expressly or impliedly threatened her. Admitting that accused's status as a member of the conquering forces added, to his knowledge, some degree of persuasive force to his unconscionable demand, such knowledge and demand alone will not support the inference that accused intended or threatened to use ultimate force if necessary to achieve his purpose. If this were the case, every successful solicitation of a German woman to sexual intercourse by an American soldier (certainly by any armed American soldier) would lay him liable - depending on

the subsequent disposition of the woman to assert she consented through fear - to prosecution for rape. Moreover, in rape cases, to negative consent in the absence of resistance, the woman's fear, induced by conduct on the part of the accused reasonably calculated to inspire it, must be of death or great bodily harm. The prosecutrix testified that she took off her clothes because she was afraid accused would eventually do something to her since she had elderly parents and had to work for them; that he would harm her and her family in some way. It is true that, following this testimony, the trial judge advocate elicited the further testimony that she was also afraid "since he had the pistol there that he could shoot me" - could not would, be it noted! And could was doubtless used advisedly, as she had testified to no threat or indication on the part of the accused which might have given her reasonable cause to believe that he would have shot her, had she refused to submit. Had she, indeed, been of a mind to submit willingly, it is hardly conceivable, under the circumstances, that she would have conducted herself very differently. Such half-hearted protests as she testified to, expressed only at the eleventh hour, when she was taking and had taken off her clothes, are of a type which might be expected from almost any consenting female in the situation shown. Accused's persistence despite them presents no basis for inferring that he intended to complete his purpose regardless of all resistance.

While the delay of the prosecutrix in reporting the alleged rape to her family was explained by her as motivated by a sense of shame, her testimony that she would never have "bothered" about reporting the occurrence to the authorities except for the subsequent insistence of an unrelated German woman is incompatible with the sense of outrage which might reasonably be expected from the victim of such a crime. She hoped that she personally "wouldn't have to bother about it" and, but for the insistence of the other woman, "wouldn't have bothered myself about it further".

The evidence presents a case of fraternization by having sexual intercourse, an offense incompatible with rape, and of which accused was also found guilty on the identical facts. The record of trial thus supports the findings of guilty of Charge II and its Specification, but is legally insufficient to support the findings of guilty of the Specification and Charge I. The maximum penalty for fraternization, constituting as it does, disobedience of a standing order, is confinement at hard labor for six months (CM ETO 6203, Mistretta).

The Specification, Charge III alleges robbery by force, violence and putting in fear.

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"While [in robbery] there must be a felonious taking of property from the person of another, either by actual or by constructive force, consisting of the application of threatening words or gestures; yet, if force be used, fear is not an essential ingredient" (Wharton's Criminal Law, 12th Ed., sec.1087, p.1381).

"Any threat calculated to produce terror is sufficient" (ibid., sec.1088, p.1385).

"To extort money under threat of charging the prosecutor with an unnatural crime has in many cases been holden to be robbery; even where it appeared that the prosecutor parted with his money from fear merely of losing his character or situation by such an imputation" (ibid., sec.1089, p.1386).

Resistance of the victim is generally immaterial in robbery, the degree of force required is less than is necessary to constitute sexual intercourse rape, and the menace or threat involved need not be to cause death or other great bodily harm. Accused's actions im exploiting his status as an armed member of the conquering forces to induce prosecutrix to accompany him to an unoccupied house at midnight, and there, after indulging in sexual intercourse with her reluctant consent, demanding her ring as an implied prerequisite to permitting her to leave, sufficiently constituted application of constructive force and implied threat to render his unlawful taking robbery.

7. The charge sheet shows that accused is 35 years eight months of age and that, with no prior service, he was inducted at Fort MacArthur, California, 26 December 1942.

8. The court was legally constituted. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to support the remaining findings of guilty, and only so much of the sentence as adjudged dishonorable discharge, total forfeitures, and confinement at hard labor for ten years and six months.

9. Penitentiary confinement upon conviction of robbery is authorized by Article of War 42 and section 284 of the Federal Criminal Code (18 USC 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

(SICK IN HOSPITAL) Judge Advocate

Malvern C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 3

4 MAY 1945

CM ETO 9304

U N I T E D S T A T E S v. Captain BEN G. SUITT, JR. (O-422438), Battery B, 838th Antiaircraft Artillery Automatic Weapons Battalion (Mobile).	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Southampton, Hampshire, England, 26 January 1945. Sentence: Dismissal.

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

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

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

CHARGE I: Violation of the 95th Article of War.
(Disapproved by Confirming Authority)

Specification: (Disapproval by Confirming Authority)

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

Specification 1: In that Captain Ben G. Suitt Jr., Battery B, 838th Anti-Aircraft Artillery Automatic Weapons Battalion (Mobile) was, at Wimborne, Dorset, England, on or about 24 December 1944, drunk and disorderly in uniform in a public place, to wit, the King's Head Hotel.

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Specification 2: In that * * * did, at Wimborne, Dorset, England, on or about 24 December 1944, wrongfully strike Technician Fifth Grade Norman T. Henley on the face withhis fists.

Specification 3: In that * * * did, at Wimborne, Dorset, England, on or about 24 December 1944, wrongfully grab Technician Fourth Grade John F. Borgardt by the field jacket with his hands and violently shove Technician Fourth Grade Borgardt backwards.

Specification 4: In that * * * did, at Wimborne, Dorset, England, on or about 24 December 1944, wrongfully strike Private Herbert Taylor, British Army, on the face with his fists.

Specification 5: In that * * * did, at Wimborne, Dorset, England, on or about 24 December 1944, wrongfully strike William Strange in the face and on the body with his fists.

Specification 6: In that * * * did, at Wimborne, Dorset, England, on or about 24 December 1944, wrongfully strike Harry George Hunt onthe body with his arms and hands.

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. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence, describing it as inadequate punishment for the offenses involved, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of guilty of the Specification of Charge I and of Charge I, confirmed the sentence, though deemed inadequate punishment for an officer convicted of such grave offenses, 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:

At about 2100 hours, 24 December 1944, accused was observed by the manager of the King's Head Hotel, Wimborne, Dorset, England, in the service corridor of the hotel. He was drinking whiskey from a bottle. Approximately ten minutes later,

he was found in a public corridor leading to the residential part of the hotel where he was holding on to the handle of a WAAF's handbag. The WAAF was holding the other handle and asked the hotel manager to recover the bag for her. Accused at first refused to relinquish it, but after the manager had talked to him for a few minutes, finally did. Meanwhile, the manager had sent for the military police. Upon his arrival, Technician Fourth Grade John F. Borgardt, Battery C, 838th Antiaircraft Artillery Automatic Weapons Battalion, sergeant of the military police, found accused in the hotel bar drinking beer, and asked him to behave himself more suitably or to leave. Accused said he was going to leave. Half an hour later, Borgardt found him in the hallway, blocking the passage and refusing to allow anyone through without a pass. Borgardt told him the management was complaining and again asked him to leave. Accused demanded that Borgardt show his pass and after a few minutes conversation, grabbed hold of him by the chest and threw or pushed him back. Throughout this period, accused was in uniform and appeared to be drunk, his speech being loud, his walk unsteady, and his behavior "ridiculous" and "foolish" (R7-9,25,30,33-36).

A little later, accused was seen in front of the hotel arguing with William Strange, a cab driver, and some civilians who were passengers in the cab. Accused wanted Strange to take him to Merley, but Strange said he was filled up and drove away. A couple of enlisted men jumped on the rear bumper, and accused chased the cab down the street. Strange stopped after turning a corner and asked the men to get off the bumper. As he stepped out of the car, accused struck him on the right side of the face, causing his glasses to fall off and giving him a black eye (R9-11, 13-18,21,25). Harry George Hunt, a civilian, attracted by the commotion, approached the group and asked one of the soldiers what the difficulty was. While standing there, he was suddenly struck in the back by accused, the blow being severe enough to knock him out into the road (R11-13,19,23-24). At about the same time, Borgardt and another military policeman, Technician Fifth Grade Norman T. Henley, came to the scene of the disturbance. While attempting to stop two enlisted men from brawling, Henley was struck over the left eye by accused. The blow caused bleeding near the eye and it was necessary to take him to the aid station (R10-11, 17,24,29). A little later, Private Herbert Taylor, Pioneer Corps, British Army, was walking in the vicinity when accused, without warning or provocation, struck him on the lips and nose. Taylor reported the attack to the police (R19,23,29-32). At the time these events occurred, accused was in uniform and was intoxicated (R18,20,22,27,29).

4. Accused, after being warned of his rights by the law member and after consultation with his counsel, elected to remain silent (R42-43).

Evidence introduced for the defense included testimony of the battalion officer of the day to the effect that he saw accused shortly after the disturbance, at which time he did not appear to be drunk, answered questions distinctly, and was steady on his feet and in proper uniform (R37). An officer of accused's command testified that he saw him at the hotel during the evening and that he had been drinking, but was not drunk (R39-40). There was also testimony as to accused's previous good record and his efficiency in the command of his battery, and there was introduced in evidence a letter signed by many members of the battery acknowledging appreciation for the "splendid manner" in which accused had commanded the organization (R38-39,41,42; Def.Ex.A).

5. This case presented no legal questions of any substance. The evidence shows that accused was drunk and disorderly in uniform both within and immediately outside the hotel, and while some evidence was introduced by the defense to the effect that he was not intoxicated, an issue of fact was thereby created, determination of which was within the exclusive province of the court. Since the court's findings on the issue as approved, are supported by substantial and competent evidence, they will not be disturbed (CM ETO 4640, Gibbs; CM ETO 5451, Twiggs; CM ETO 1621, Leatherberry). With respect to the five assaults, the evidence of the prosecution is uncontradicted and is sufficient to sustain the findings of guilty. In this connection, the drunkenness of accused is immaterial inasmuch as no specific intent is required to be shown in offenses of this kind (CM ETO 7585, Manning).

6. The charge sheet shows that accused is 24 years and six months of age and was commissioned as a reserve officer 16 July 1941. He had no prior service.

7. The court was legally constituted and had jurisdcition 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 as approved and the sentence.

8. Dismissal in the case of an officer is authorized as a penalty for violation of Article of War 96.

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Dewey Jr. Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Captain BEN G. SUITT, JR. (O-422438), Battery B, 838th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 9304. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9304).

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

(Sentence ordered executed. GCMO 152, ETO, 14 May 1945).

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

BOARD OF REVIEW NO. 3

11 JUN 1945

CM ETO 9305

U N I T E D S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private WILLIE JOHNSON (38270465), 3984th Quartermaster Truck Company	)	Trial by GCM, convened at Granville, Manche, France, 27 January 1945. Sentence: To be hanged by the neck until dead.

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

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

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie Johnson, 3984th Quartermaster Truck Company, did, on or about 24 August 1944, at or near Equilly, Normandy, France, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Madame Julien Fontaine, a human being, by driving over her body with a gasoline tank truck.

He pleaded not guilty to and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the

Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy 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, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

At about 2030 hours on 23 August 1944, Madame Julien Fontaine (the deceased), Madame Therese Souillet, and Mademoiselle Denise Fontaine set out on foot from Rennes, France, en route to Antrain, France, their home. As they reached the outskirts of Rennes they flagged down a passing gasoline tank truck and asked for a ride. When the driver, who was the accused, indicated that he was going in their direction, all three women got in the cab of the truck and the group then proceeded on toward Antrain (R21, 24,25). As they neared Antrain, accused began repeatedly to place his hand on the knees of both Madame Souillet and Mademoiselle Fontaine. Both women sought to prevent these advances by brushing his hand aside. Upon reaching Antrain, the women asked accused to stop in order that they might get out but he ignored their requests and continued on (R21,25). All three women began to scream and Madame Souillet attempted unsuccessfully to bring the vehicle to a stop by taking hold of the steering wheel (R22,25). About one kilometer past Antrain, accused slowed down and stopped, grasping Madame Souillet's arm as he did so (R25,27). Mademoiselle Fontaine immediately jumped out of the truck and Madame Fontaine also started to alight but paused on the running board to search for a small bag which she had had with her (R22,25-27). Meanwhile, Madame Souillet managed to free herself from accused's grasp and also started to get out. She was impeded, however, by Madame Fontaine's presence on the running board and before either of the two women could step on the ground accused started the truck in motion. Both women rode on the running board for a time until Madame Souillet, hearing something about a revolver, jumped from the moving vehicle. When Madame Souillet last saw Madame Fontaine, the latter was still standing on the running board (R26-28).

On the morning of 24 August 1944 the dead body of Madame Fontaine was found lying in the road near Equilly, France, some 30 kilometers from Antrain. M. Jean Bodiles, of the Gendarmerie Nationale, who was called to the scene, testified that the body was

more or less at a right angle to the road with its feet at the outer edge, that the head was "broken", that the calves of the legs were "completely crushed", and that there were what appeared to be tire marks across the legs but none in the region of the head. Although a stream of blood more than a meter in length had flowed from the injured head, the "legs must have been crushed after death because there was no blood gushing from them". He observed that the dead woman's pants and undershirt were torn. When asked by a member of the court to explain further his statement that the legs must have been crushed after death, he stated, "Because if there (sic) were done while she was still alive, blood would have flowed from the crushed legs, and there was no blood there". He indicated that, in addition to the rather large quantity of blood which had flowed from the head, there was also a "spot of blood" several meters from the corpse. The body had apparently not been moved subsequent to the time the bleeding from the head took place (R29-31).

A prolonged investigation eventually pointed to the accused as the man who had driven the gasoline tank truck in which the three French women had ridden on the night of 23 August. On 9 October, after questioning, accused made a statement to the agent of the Criminal Investigation Division who had conducted the investigation. On the basis of testimony that accused was not improperly influenced in any way and was fully advised of his rights prior to the time the statement was taken, the prosecution offered this statement in evidence. The defense opposed its admission on the ground that it amounted to a confession and had not been voluntarily made. Accused took the stand for the limited purpose of testifying as to the circumstances surrounding the taking of the statement and testified that threats of physical violence were employed to force him to speak. Defense counsel sought to bolster his contention that accused's statement was not a voluntary one by introducing into evidence a report of the proceedings of a board of medical officers convened on 23 January 1945 for the purpose of inquiring into the sanity of the accused (R42; Def.Ex.1). This report showed that accused had a mental age of eight years and that, while legally sane, he was mentally abnormal because of "mental deficiency, psychopathic personality, and possible encephalopathy". On the basis of this report, the defense made the additional contention that accused did not have sufficient intelligence fully to understand the warning given him with respect to his rights under Article of War 24. The agent who took the statement was recalled as a witness and reaffirmed his previous testimony that no improper influences had been employed to induce accused to make a statement. He also testified that before he took the statement, he very carefully explained to the accused his rights under Article of War 24 and was satisfied that accused understood the warning thus given (R42,43). The law member then overruled the objection of the defense counsel that the statement was not voluntarily made and admitted it into evidence.

Accused's statement recites that about ten miles beyond where Madame Souillet jumped from the truck, Madame Fontaine jumped from the moving vehicle as well. When she did so, he stopped, picked her up, and placed her back in the truck. He stated that her head was bleeding at the time and that she "moved around some as I put her back" but thereafter remained quiet. After driving on for some two and one-half hours he again stopped, so arranged the injured woman that her left leg was on the seat and her right leg was near the brake pedals, and violated her. After about five minutes of intercourse, which was unsatisfactory, he heard her "groan some". Deciding to keep her from "telling anybody", he dragged her out into the road and placed her in front of the right rear wheel. At this time he "did not know whether she was alive or not, but she was warm". He thereupon drove over her with the truck and shortly thereafter drove back to his organization (R43; Pros.Ex.C).

4. For the defense, accused's company commander testified that he had never had any occasion to discipline the accused and his platoon sergeant testified that both his character and military efficiency were excellent. On cross-examination, these witnesses testified that accused had the ability to understand orders and had always appeared capable of carrying out normal military duties and responsibilities (R44,45). An enlisted man of accused's organization testified that accused seemed peculiar, did not mix well with the other men of his squad, and liked to be alone. However, as far as this witness knew, he carried out his duties in a satisfactory manner (R46).

5. Accused was charged with murder by running over his victim's body with a gasoline tank truck. Since much of the evidence bearing upon the commission of this crime is contained in accused's statement, it is proper first to consider whether such statement was properly admitted into evidence. The record presents no real question in this connection. There may be some doubt whether the statement constituted a confession or merely extremely damaging admissions against interest (Cf: CM ETO 4945, Montoya) but, assuming it to be a confession, it was here satisfactorily shown that it was voluntarily made and it is equally clear that there was independent proof of the corpus delicti. These requisites for admissibility having been met, the confession was properly admitted into evidence (CM ETO 5805, Lewis and Sexton; CM ETO 4055, Ackerman; MCM, 1928, par.114a, p.115). Given the admissibility of the confession, the only other question of any substance presented by the record of trial is whether there was a causal connection between the victim's death and accused's act in running over her with the truck. As bearing upon this question it should be remembered that

"The law declares that one who inflicts an injury

on another and thereby accelerates his death shall be held criminally responsible therefor. It is said in this connection that if any life at all is left in the human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being" (26 Am.Jur., sec.49, p.192).

and that

"It is equally well settled that the consequences of an act which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the pre-existing physical condition of the person killed, at the time the act was done, or by his low vitality, which rendered him unable to withstand the shock of the wound inflicted, and without which predisposed condition the blow would not have been fatal, if a causal connection between the blow and the fact of death is made to appear" (26 Am. Jur., sec.52, p.195).

Even under the broad rules stated above, accused could of course not be held guilty under the Specification as framed if his victim was already dead at the time he ran over her with the truck. The gendarme who viewed the body the following morning expressed the opinion that this was the case. However, as to this fact he was esentially a lay witness and his opinion was based upon the circumstance that, although a stream of blood over a meter in length had flowed from the head of the corpse at the time he examined it, no appreciable amount of blood had flowed from the crushed legs. However, it is manifest that the court did not reach a similar conclusion, and, if its finding to the contrary is supported by substantial evidence, such finding cannot be disturbed by the Board of Review. As tending to prove that she was alive when run over are the facts that the victim was heard to groan shortly before she was placed in the road and that she was still warm at the time. The accused, who was the only man who had direct knowledge of the facts surrounding the homicide, stated that his reason for putting his victim in the road and running over was to prevent her later disclosure of his unconscionable acts, and this statement, despite his expression of doubt on the question, indicates that he believed her to be alive at the time. While the prosecution should have adduced expert medical testimony with respect to the conclusion to be drawn from the circumstance that a pronounced amount of blood had flowed from the head and little or none from the legs, this circumstance may be accounted for even in the absence of expert testimony in at least two ways consistent with the conclusion

that the victim was alive when the truck passed over her. It is more or less lay knowledge that a crushed wound does not necessarily bleed profusely and, especially in view of the fact that the victim was already semi-conscious and in a weakened condition, it is easily possible that she remained alive for some time after being run over but bled little from the legs despite the bleeding from the head. A second analysis, under the facts here shown, is that although the victim was alive immediately before the truck ran over her, the additional injuries thereby received instantly caused death with the result that no further bleeding took place except a draining of previously accumulated blood from the injured head. Thus, despite the testimony of the gendarme, the court could properly reach the conclusion that the victim was alive at the time she was run over by the truck. If this was true, it can scarcely be contended that the severe injuries occasioned thereby did not at least accelerate or hasten her death. It is accordingly concluded that, under the rules set forth above, there was sufficient evidence of the causal connection between the accused's act and his victim's death to justify the court's finding that she was killed in the manner alleged.

The other questions in the record require but little discussion. There can be no suggestion in this case that the homicide was legally justifiable or excusable and it is equally clear that the court properly could find that accused acted with the requisite malice aforethought to constitute his offense that of murder (MCM, 1928, par.148a, p.163). While there was evidence that he was of low intelligence, there also was evidence that both at the time of the offense charged and at the time of trial he had the ability to determine right from wrong and to adhere to the right and to conduct his defense and cooperate with his defense counsel within the limits of the intelligence compatible with his mental age. Thus, there was here no showing that he was not legally responsible for his acts (CM ETO 6685, Burton; CM ETO 739, Maxwell). The court was therefore warranted in finding accused guilty as charged.

6. The charge sheet shows that the accused is 23 years and 11 months of age and was inducted on 12 October 1942 at Fort Sill, Oklahoma. 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).

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Levey Jr Judge Advocate

(Sentence ordered executed. GCMO 218, ETO, 21 June 1945).

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

BOARD OF REVIEW NO. 1

20 AUG 1945

CM ETO 9306

U N I T E D S T A T E S	)	26TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 26, U. S. Army, Grosbous, Luxembourg, 1,2 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private BILLY H. TENNANT (35646460), Headquarters Company, 104th Infantry	)	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Billy H. Tennant, Headquarters Company, 104th Infantry did, at Grosbous, Luxembourg, on or about 24 December 1944, forcibly and feloniously, against her will, have carnal knowledge of Nellie Metz.

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 by special courts-martial for absence without leave for one, two and three days, respectively, 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 hanged by the neck until dead. The approving authority, the Commanding General, 26th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but owing to special circumstances in the case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 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.

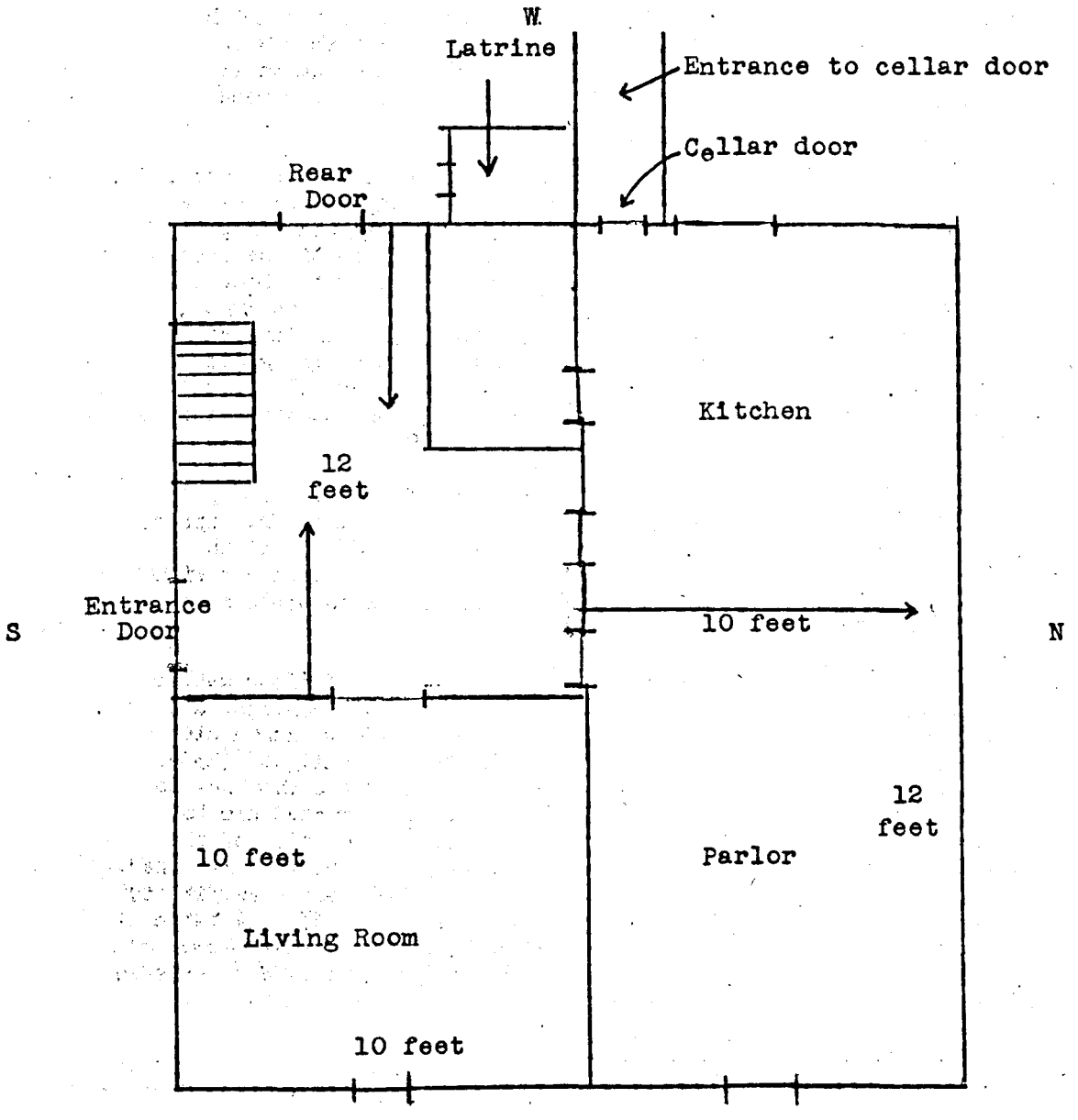
3. The findings of guilty are based solely upon evidence introduced by the prosecution which proved the following ultimate facts:

On 24 December 1944, at about 2 pm, a reconnaissance patrol of the 104th Infantry arrived at Grosbous, Luxembourg. (R9,10,38). The patrol was under the command of First Lieutenant James H. Bailey and was composed of the following named fifteen soldiers selected from the regiment: Technical Sergeant John P. Bombard, Sergeant Richard E. Szymanski, Staff Sergeant Thomas Ragland, Privates First Class Robert Cregg, Frederick Lusk, Phillips Lounsbury, Edward J. Limes, Ralph L. Dicken, John J. Pepsin, and Justin Unido, and Privates Milton L. Sonstegard, Dolphus Roy, Paul H. Shea, Rubin Hoit and accused (R10,11,28,29, 51). Upon the arrival of the patrol in the village the members thereof, including its commanding officer, were billeted in the home of Herr and Frau Joseph Metz, whose dwelling was designated as House Number 40 (R9,10). The Metz family consisted of the husband and wife (Theresa) and two daughters, Yvonne, age about 14 years and Nellie of the age of six years, nine months (R11,29,45,56).

The dwelling house of the Metz family includes a basement, first and second floors and an attic (R8,9; Pros.Exs.A,B). In shape it approximates a square. Its exterior dimensions are 20 feet north and south by 22 feet east and west. The exterior north, south and east walls of the house are bordered by a narrow cement walk. The house stands approximately 25 feet from the front street line. The second floor is divided into three bedrooms representing the first, third and fourth quadrants of a square; the second quadrant is the hall from which there are doors into each bedroom and in the hall the stairway from the first floor terminates and a stairway to the attic commences. The bedroom in the southeast corner of the house (hereinafter designated "south-east bedroom") has a measurement of ten by ten feet. The entrance doorway to this room faces the stairways and is about eight feet from the top step of the stairs ascending from the first floor. There is also a door from the south-

east bedroom to the adjoining bedroom in the northeast corner of the house (Pros. Exs.A,B).

The location of the rooms on the first floor and their relationship to each other are highly important factors in this case. An intelligent understanding of the evidence requires that it be read against the background of the following plan of the first floor of the house (Pros.Ex.A):



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The patrol members ate their supper about 6 pm. The entire patrol was present at this time. A number of the men ate in the kitchen and the remainder consumed their food in the living room. Immediately after the conclusion of the meal Cregg and Lounsbury left the house for the purpose of obtaining the personal mail of the patrol members. They returned about 7:30 pm and for the remainder of the evening until assembled in the living room by Lieutenant Bailey as hereinafter narrated, they remained in the parlor (R10,11,17,39,40-44), except that Cregg left the room for one and a half minutes to see Lieutenant Bailey and then returned (R40). At approximately 7:30 pm, Bombard and Unido left the house to visit friends in Company G of the 104th Infantry, which was billeted in the near proximity. They were absent during the entire evening and returned about 1 am on 25 December. Upon departure and return the two soldiers reported to Lieutenant Bailey (R10,18,157,158).

After supper was served, Ragland, Szymanski, Hoit, Limes, Pepsin, accused, Herr and Frau Metz, Yvonne and Nellie were seated in the kitchen (R11,22,29). Accused, Ragland, Herr Metz and probably other soldiers in the kitchen during the course of the evening drank "schnapps" which the soldiers had brought with them. About 8 pm Lieutenant Bailey went into the kitchen and observed accused, who was then "feeling good from the effects of liquor". Herr Metz was definitely under its influence. The entire group in the kitchen engaged in singing Christmas carols (R17,19,20,27). During part of this time the baby, Nellie, sat upon accused's lap (R54).

At about 7:30 Pm, Herr Metz took Nellie upstairs and put her to bed in the southeast bedroom (R29,45). He removed her apron, outer skirt, shoes and stockings. She remained clad in a cloth petticoat, knit petticoat and knit underpants. He covered her with a sheet and "bed puff" (R45). At that time she had no bruises on her body (R46).

Approximately one hour or one hour and a half after Nellie had been put to bed (R30), accused asked Hoit for a flashlight and explained that he intended to go to the latrine. Hoit "asked him why he needed a flashlight as there was plenty of moonlight" (R30). Nevertheless Hoit handed him a flashlight. Accused was then seated at a table. Hoit pointed to the kitchen door and directed him to go out of the front door and then "go right around the side on the walk, keep on, make a right turn and you bump right into the latrine". Hoit believed the rear door (through which the route was more direct) was locked (R30). Accused then left the kitchen (R30,37). A batch of French fried potatoes was cooked and a second batch was in course of cooking between the times accused left and Lieutenant Baily entered the kitchen as hereinafter related (R26).

In the living room were Sonstegard, Roy, Lusk, Shea, Dicken and Lieutenant Bailey. The officer was engaged in letter writing (R11,68,76). The Metzs had placed in this room a clock with a loud and disturbing chime. Exactly at 10 pm Lieutenant Bailey, annoyed by the sound of the clock, stopped it (R11,68,73,76). About 10:20 or 10:30 he left the living room and went to the kitchen where he saw Herr and Frau Metz, Yvonne, Ragland, Szymanski, Hoit, Pepsin and Limes. The child, Nellie Metz, was not present in the kitchen and neither was accused (R12,18). Accused did not return to the kitchen after he had left to go to the latrine and prior to Lieutenant Bailey's entrance (R23), and none of the other soldiers departed between the time accused left and Lieutenant Bailey's arrival (R24). Ten or 15 minutes after Lieutenant Bailey entered the kitchen (Yvonne Metz fixed the time of approximately 10:30 pm) Herr Metz and Yvonne left the kitchen. They were followed by the officer, who intended to keep them under observation. Yvonne left the house through the rear door and went into the latrine (R12,57). She heard no one in the yard or in the vicinity of the house (R52). Her father stood in the rear doorway. Lieutenant Bailey walked to the main entrance door, opened it and stood on an outside step before the door. He looked out into the night. The moon shone brightly and the sky was clear. Snow covered the ground and it was very cold. He saw no one except Herr Metz. A few minutes later the officer re-entered the house, closed the front door and walked toward the kitchen door (R13,18). As he opened the kitchen door he heard the loud cry of the baby, Nellie, coming from the upstairs. Standing in the kitchen doorway, he turned to Hoit (who spoke and understood the German language) and directed him to inform Frau Metz that her baby was crying (R13,18,24,32). Hoit complied with the officer's request. Frau Metz came to the kitchen door, listened and upon hearing the child's cry, ascended the stairway to the second floor and entered the southeast bedroom (R57,58). The room was dark. The mother touched the bed with her hand and "felt that a soldier was lying on it" (R58). "I had a feeling that it was a soldier" (R65). She believed "he was lying at the foot of the bed", but could not identify him (R58). The man jumped from the bed quickly, ran from the room and was followed by Frau Metz. She called to her husband (R46,47,52,58) and then returned to the bedroom (R58). When Frau Metz called to her husband, he and the daughter, Yvonne, stood by the rear door on the first floor. Yvonne had just returned from the latrine where she had been for four or five minutes (R52). Upon hearing Frau Metz call, Yvonne ran up the stairs to the second floor. On the stairway she collided with the man who had fled from the bedroom (R47,53). He went quickly down the stairs. Yvonne could neither identify nor describe him. She "immediately thought it was a soldier; I had that feeling" (R53). She passed her mother before she entered the bedroom (R53). Herr Metz followed Yvonne up the stairs and passed .

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the man who bumped into her (R47), but could not see him (R50). He did not hear the front door open and close after he passed this man (R47). A few seconds later Frau Metz descended the stairs to the lower floor (R48). At this time the hall was illuminated by moonlight which came through a small window. Only the first step on the stairs was lighted (R37).

Meanwhile, after Frau Metz's departure Lieutenant Bailey went into the kitchen and closed the door. The men were engaged in frying potatoes. Accused had not returned to the kitchen at this time (R33). Three or four minutes later Frau Metz "burst" into the kitchen. She was very excited and talked rapidly in the German tongue to Hoit who interpreted her remarks to Lieutenant Bailey (R14,15,25,34,35,155). It was approximately at this time that accused entered the living room. Lusk, Roy, Shea, Sonstegard and Dicken were then in that room. Accused sat down and picked up a cigarette from the table. Five or ten seconds later, Frau Metz entered the room and pointed and spoke--"fast * * * and loud"--to accused (R68-71,73,74,77). Accused did not appear disheveled, excited or nervous (R75). As a result of the information received from Hoit, Lieutenant Bailey entered the parlor and secured his gun and flashlight. Only Cregg and Lounsbury were in the room (R15,35,40,43). Accused stood in the doorway of the living room, when Lieutenant Bailey emerged from the parlor with his gun and flashlight. He joined the officer and went upstairs with him, Pepsin and Frau Metz (R19,21).

Upon arriving on the second floor, Lieutenant Bailey and Frau Metz entered the southeast bedroom and there found Herr Metz, Yvonne and the baby, Nellie, who lay upon a bed. When the mother entered the room she removed the bed covers from the child. The mattress protector (R61; Pros.Ex.C) had blood upon it. Frau Metz, in describing the condition of the mattress protector (Pros.Ex.C) prior to this time, commented:

> "No, I believe it wasn't then soiled. It had been freshly cleaned, but there were always Americans lying on that bed" (Underscoring supplied (R62).

The child's nose was bleeding; there were marks on the left side of her face and blood on her thighs between her legs. She exhibited extreme fright and whimpered. She wore no underpants (R15,35,48,49, 54,59).

With respect to the occurrences in the southeast bedroom, the child, Nellie Metz, testified that when her father placed her in bed she wore her petticoat and underpants and that she went to sleep after Herr Metz left the room. Thereafter the "uncle" came to her bed and awakened her. She did not see his face. He "pushed"

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the bed cover aside and "pulled back" her underpants. She laid on her back and the man laid on top of her (R100). "His belly was on mine" (R101). He then moved around on top of her. Her hands were under the bed covers and the man held them together. He hurt her on the nose and on the "hind part". She yelled and the man placed his hand over her mouth and slapped both sides of her face (R101). After the man hurt her, she heard her mother coming up the stairs and heard her mother's voice. The man then removed himself from her body and was "at the other end of the bed" when Frau Metz entered the room. He then "got up". She did not remember whether the man had a light and upon a flashlight being exhibited to her stated she had never seen one like it (R102). The word "uncle" according to Luxembourg custom is used by children in describing a man who is a stranger (R168).

After discovering the child's condition, Lieutenant Bailey returned downstairs, assembled the patrol in the living room at about 11:10 pm, and ordered a search of the premises. Accused was present at this time as he had come downstairs with the officer (R21). Only two members were missing (Bombard and Unido) (R16,28,152). The entire house was then searched, but nothing was discovered of an incriminating character (R16,19,21). After Lieutenant Bailey concluded his search he reassembled his men in the living room and questioned them (R152).

Ragland accompanied accused into the living room when the patrol was reassembled. At that time accused

> "told me (Ragland) to tell the officer that he had been with me all afternoon. He told me when I went in before the officer with him, all afternoon, all night, all the time we had been in the house" (R152).

Ragland testified that accused had been with him the entire evening except for the period of time elapsing between accused's departure from the kitchen and the entrance of Ragland and accused into the living room on the occasion of the second assemblage of the men— a period which he estimated was of about 20 minutes duration (R153-154).

Pepsin saw accused leave the kitchen after inquiring of Hoit the location of the latrine (R154). He next saw accused about 15 minutes later after Frau Metz had come downstairs and talked with Lieutenant Bailey (through Hoit as interpreter). Accused then stood at the foot of the stairway talking to Frau Metz (R155,156). Later as accused passed Pepsin to enter the living room where he had been called by Lieutenant Bailey, accused said to him,

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"Don't forget I was with you every second" (R156).

Thereafter, while Pepsin stood guard over accused the latter inquired of the former as to who was being guarded. Upon being informed that he was under guard,

"He said he would get even with us" (R155).

Staff Sergeant Drummond Maxwell, Special Agent Counter Intelligence Corps, was called to the Metz house at about midnight, 24-25 December, and there interrogated accused (R160). Maxwell testified that accused informed him that he (accused) had been to the latrine (R160) and that

> "I told him that you are aware what's happened tonight, and he said, yes. I said you have been put under suspicion, and could he give me the names of three people whom he had been with every minute of the time since he got here, and he said, yes. He named three people. * * * Staff Sergeant Ragland, another soldier by the name of Pepsin, and the one they call the Chief, the Indian. Those three people" (R160).

Unido was commonly called "Chief" or "Wampum" (R157). After Maxwell's conversation with accused he interrogated Ragland and Pepsin in accused's absence and Unido in accused's presence. As a result of said interviews of the three named soldiers, Maxwell again spoke to accused and conveyed to him their statements. In response, accused "still insisted they were with him all the time" (R160,161).

Resultant upon the investigation Lieutenant Bailey placed accused under arrest and guard (R103,112,116,118,119).

In response to a message from Lieutenant Bailey, conveyed by Szymanski (R110), Captain Benedict Albert Cusani, Medical Corps, of the 104th Medical Detachment, 26th Infantry Division, arrived at the Metz house at approximately 11:35 pm. He made an examination of Nellie. The child was non-cooperative and the examination was a visual one. Upon the area of the labia majora and the inner aspects of the thighs was fresh clotted blood. She was nervous and sobbing and withdrew when Captain Cusani attempted to touch her (R79,80). A half tablespoon of blood adhered to the child's labia majora (R84).

Captain Cusani also examined the genitalia of accused but found no traces of blood. He looked at his clothing superficially at a distance of approximately twelve inches but could detect no blood stains. He expressed the opinion that if the victim, Nellie Metz, bled after the initial trauma, no blood would appear on her assailant's clothing and genitalia. If the bleeding occurred at the time of the

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initial trauma it would have been possible for blood to adhere to his clothing or genitalia (R79,80,83).

On the morning of 25 December, Captain Herrick M. Thomas, Medical Corps, 104th Infantry, examined Nellie Metz (R84). There were a bruise on the left side of her face, small lacerations on the base of her nose and bruises and scratches on the inner surface of her thighs. Her whole vulva region was swollen and red, the external and internal lips were bruised and there were several small lacerations on the labia. The vaginal orifice was swollen and red with small lacerations on the anterior portion of the pudendum. The hymen was swollen and red but intact. The last above mentioned laceration extended from the external opening of the urinary tract forward to the point where the lips join in front. It was about 1/8 of an inch long (R85). In the opinion of Captain Thomas, the condition of the child's genitalia could have been produced by pressure of an object upon her external genital organs without penetration of the vulva (R86). He was also of the opinion that the condition could have been produced by the introduction of the male penis within the lips of the child's vulva (R87).

Lieutenant Colonel Philip J. Smith, Medical Corps, 26th Infantry Division, examined Nellie on 29 December. He found that there was swelling and redness about the entrance of the vagina and the hymen was also swollen. There was a small scar, in the process of healing at the lower quadrant of the hymen, whidh blocked the vaginal orifice (R88). In response to a hypothetical question based upon a statement of facts which summarized the evidence of the condition of Nellie's genitalia as stated by the three medical witnesses (R88,88½), Colonel Smith expressed the opinion that

> "This conditioh could be the result of the forcible introduction of an object or objects presented against the vulva, with pressure against the vaginal orifice and the hymen * * * From an anatomical standpoint it (the object) would have to pass the labia majora and minora into the vaginal opening" (R88½).

The following colloquy between the witness and the trial judge advocate is pertinent:

> "Q. Where, with reference to the vaginal orifice, is the hymen located?
> A. Almost immediately inside; it is practically part of the opening, one-eighth of an inch posterior to the orifice.

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"Q. In your opinion could the penis of an adult male have been an object competent to produce these physical findings?
A. Yes, sir" (R88½)

He further expressed the opinion that the physical condition of the girl's genitals could not have been produced by a man's fingers and that he believed Nellie Metz had been raped (R94). Upon cross-examination by defense counsel, he was asked:

"Could the findings you made on examination have been caused by any object other than a man's penis?"

He replied:

"Possibly; I can't offhand think of any object, but it is a possibility, remotely possible" (R95).

Accused, while confined at the 104th Infantry guard house on 30 December 1944, removed from his person the OD shirt, trousers and underwear he then wore and delivered them to the investigating officer (R90). After being informed of his right to remain silent, he stated that "he had these clothes on for an indefinite period of time and that they were clean" (R90). Testimony of soldiers who had guarded accused from the time Lieutenant Bailey placed him in arrest early in the morning of 25 December to the time the investigating officer received the articles of clothing above described formed a substantial body of proof that the clothing thus received was the identical clothing worn by him on the night of 24-25 December (R90,104,106,110,111,114,116,118,120,122,123,125,127,133,134,140). The trousers, which were received in evidence (R142,143; Pros.Ex.D), were subjected to a benzedrine test at 101st Evacuation Hospital, then located at Arlon, on 30 December, for the determination of the presence of hemoglobin. Lt. Colonel Phillip J. Smith supervised and was present at the test (R144-146), which revealed the presence of a small blood spot near the fly of the trousers (R147,148), but it could not be determined whether it was animal or human blood nor its age (R149,150). It possibly could have been six months old. Washing of the trousers by a Quartermaster Laundry would have removed the hemoglobin stains, but ordinary washing with cold water would probably leave some blood on the trousers (R150). Upon cross-examination of Ragland, as a prosecution witness, he testified that accused smashed one of his fingers on the afternoon of 24 December while "he was putting a cover over the house". There was blood on his finger but nothing was done to care for it (R154).

4. The accused, after receiving in open court an explanation of his rights, elected to remain silent. No evidence was introduced by the defense (R169).

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5. Substantial and convincing evidence was presented to the court which proved beyond doubt that a mature man had carnal knowledge of the child, Nellie Metz, on the night of 24 December 1944 as she lay on her bed.

> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge* * * The offense may be committed on a female of any age" (MCM, 1928, par.148h, p.165).

The evidence of the injuries sustained by the child's genital organs and the medical testimony pertaining thereto were of such substantial character as not only to authorize the inference, but also to compel the conclusion that a male penis had entered beyond the lips of the girl's vulva. There was thus a penetration of her genital organs within the legal definition of rape (CM ETO 3375, Tarpley; CM ETO 5869, Williams).

Nellie was six years, nine months of age at the time of the brutal, savage attack upon her. The law therefore presumes that she was incapable of consenting to the act (Winthrop's Military Law and Precedents (Reprint 1920) p.678). Regardless of the application of such principle, the evidence is uncontradicted that carnal connection with her was obtained by the male by use of force and violence. She was awakened from sleep, pinioned in bed by the ravisher and when she cried for succor the hand of the attacker muffled her mouth. She was then violently struck in the face by him. The injuries inflicted upon her head and genital organs are mute objective witnesses of the violence visited upon her. A mere baby, she resisted by the use of the only means available to her—the cry of the young for its mother. There was no consent. All of the elements of the crime of rape were proved by substantial evidence (CM ETO 8837, Wilson; CM ETO 4194, Scott).

6. Preliminary to discussion of the question involving proof of identity of the rapist, it is necessary to consider whether the testimony of Frau Metz that she

> "felt that a soldier was lying on it (the bed)" (R58)and "I had a feeling that it was a soldier" (R65)

and the testimony of Yvonne Metz with respect to the person with whom she collided on the stairway that she

> "immediately thought it was a soldier; I had that feeling" (R53)

were admissible in evidence. These statements were admitted without objection by defense. However, in view of the extremely narrow evidentiary basis upon which the decision in the case depends, the

Board of Review believes that in justice to both the prosecution and defense the admissibility of such evidence should be passed upon, even in the absence of objection, in consonance with the spirit of the rule of Federal civil courts that it will upon appellate review.

> "notice and correct, in the interest of a just enforcement of the law, serious errors in the trial of their cases * * * although these errors were not challenged or reserved by objections * * *" (Lamento v. United States (CCA 8th, 1925), 4F (2nd) 901, 904)

(see CM ETO 1554, Pritchard, III Bull. JAG 191 (1944), Dig. Op. ETO p.530, for discussion and application of the practice in the administration of military justice).

The statements of the two witnesses were their conclusions which were the direct result of observation through their senses. They were not the result of a course of reasoning from collateral facts. Strictly speaking, both the mother and sister of the victim testified as to facts in the form of a "composite statement or shorthand rendering of collective facts" (16 CJ, sec.1532, p.749). They therefore did not intrude into the field of the court as a fact-finding agency. Their statements are in substance identical with the statements of the witnesses, Lopez and Owens, in CM ETO 3200, Price, Dig.Op. ETO p.407, and for the reasons set forth in the holding in said case, the Board of Review concludes that the statements here involved were admissible in evidence against accused.

7. The crucial and difficult question in the case is whether there is substantial competent evidence in the record of trial to support the finding that accused was the rapist of Nellie Metz. It is with respect to that question that the Board of Review has devoted painstaking study. The findings of the court that accused was the ravisher of Nellie Metz depend entirely upon evidence of the facts and circumstances which surrounded the commission of the offense and of accused's conduct and activities at the time and place thereof. Such evidence is circumstantial as that term is used in legal parlance.

> "Circumstantial evidence is the inference of a fact in issue which follows as a natural consequence according to reason and common experience from known collateral facts" (Underhills' Criminal Evidence (4th Ed. 1935) sec.15, p.16).

There was no direct evidence presented which identified accused as Nellie Metz's assailant.

The Board of Review has heretofore approved of the following statement of the rules of law which govern the situation involved in the instant case:

> "The vital question in this case is the identity of accused as the perpetrator of the crimes. As the only substantial evidence on the issue of identification is circumstantial, the following standards of proof, which are well established in our jurisprudence, must be met if the findings of guilty are to be sustained. The rules are probably best stated in two decisions which have frequently been cited by Boards of Review in their consideration of the legal sufficiency of circumstantial evidence (see CM ETO 3200, Price).
>
> In Buntain v. State, 15 Texas Criminal Appeals 490, the court held that evidence of opportunity to commit a crime is alone insufficient to uphold a verdict of guilty. The court stated:
>
> 'While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt.* * * It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen.
>
> This defendant may be, and most probably is, guilty, as found by the jury, but in our opinion the evidence tending to establish that guilt does not fill the measure of the law.'

In People v. Razezicz (1912), 206 N.Y. 249, 99 N.E. 557, proof of the defendant's guilt was largely premised on the circumstance that previous to the homicide, which was committed by the use of a bomb, he had exploded a bomb of the same kind. The only evidence of the defendant's participation in the explosion of the bomb on the prior occasion was circumstantial. While the proof of the inculpating circumstances in the instant case is itself in some measure direct rather than circumstantial, nevertheless the principles in the Razezicz case are of extreme importance herein. The New York Court of Appeals confirmed its former holding in People v. Harris, 136 N.Y. 423, 429, 33 N.E. 65,67, in which the court used the following language:

'All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.'

The court continued in the Razezicz case:

'There is no one fact or series of facts that point inevitably to the defendant's guilt. The facts shown by the people singly and combined are consistent with the defendant's innocence * * * Circumstantial evidence as has been frequently remarked is unsatisfactory, inconclusive and dangerous, or satisfactory, conclusive and safe according as it points to a certain result, and is not inconsistent (sic) with any other result or conclusion.

* * *

In a criminal case circumstantial evidence to justify the inference of guilt must exclude to a moral certainty every other reasonable hypothesis. Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will accouht for all the facts proven.

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> Much less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery. * * * The inferences from the facts shown are not sufficiently conclusive * * * to exclude all other inferences and to justify the judgment obtained against him [the defendant]. The testimony as a whole is consistent with the defendant's innocence' (99 NE at 565-566; underscoring supplied)" (CM ETO 7867, Westfield).

It has previously applied the foregoing principles in CM ETO 2686, Brinson and Smith, and CM ETO 3200, Price, supra. In the Westfield case the findings of guilty were set aside but in the Brinson and Smith and Price cases they were sustained. All of these cases pertained directly to the question of the identity of the accused.

The evidence, summarized above, points the finger of suspicion at accused, but convictions cannot be sustained on suspicions alone (20 Am. Jur., sec.1217, p.1070). There must be evidence that is sufficient to exclude every reasonable hypothesis except the one of accused's guilt (Buntain v. State,, supra). Does the evidence in this record meet this standard of proof? Weighing against accused is the evidence that opportunity was afforded him to commit the crime, but

> "Mere proof that the persons accused had an opportunity to commit the homicide, without proof excluding an opportunity by any one else to commit it, is not sufficient" (41 CJS, sec.321, p.38; 23 CJS sec.920, p.192).

(see also CM 195705, Tyson, 2 BR 267 (1931), Dig. Op. JAG 1912-40, sec.395(9), p.204; CM 197408, McCrimon, 3 BR 111 (1932); CM 216004, Roberts and Miller, 11 BR 69,71 (1941); CM 237075, Auvil and Beeman, 23 BR 255 (1943), II Bull. JAG 311). Accused's whereabouts from a time between 8:30 and 9 pm to approximately 10:45 pm, during which period the crime was committed, remains unexplained. It forms a preliminary basis for his inculpation but alone it is insufficient. The evidence must furnish other incriminating circumstances. The prosecution attempted to supply them by proof of the following facts:

a. Accused's absence from the kitchen during the critical period and sudden reappearance in the living room after the flight of the assailant from Nellie's bedroom.

b. Herr Metz' statement that he did not hear the front door open and close immediately following the flight of the unidentified man down the stairs, although the front door offered easy exit from the house.

c. Yvonne Metz' declaration that while visiting the latrine, she heard no one in the yard or vicinity of the house.

d. Lieutenant Bailey's assertion that while he was at the front door he saw only Herr Metz.

e. The impressions and feelings of Frau Metz and Yvonne that the assailant was a soldier.

f. The existence of a blood spot near the fly of accused's trousers.

g. The testimony that Frau Metz when she entered the living room immediately after accused, pointed to him and talked "fast * * * and loud" and that she and accused were seen in conversation after she returned to the first floor.

h. Statements of accused to Ragland and Pepsin and his assertion to the special agent Maxwell that Ragland, Pepsin and Unido were completely exculpatory witnesses when in truth their statements afforded but partial alibi.

As against the above circumstances and facts which serve in some degree to clothe the suspicion that accused was the culprit with habiliments of judicial proof, are certain cogent facts which project themselves into the reviewer's mind upon analyzing the evidence and which serve to mitigate or explain the above stated facts which tend to incriminate accused:

a. Although a flashlight was exhibited in court, the trial judge advocate did not offer in evidence and no explanation of any kind was offered as to whether Hoit recovered his flashlight or if and where it was found. Hoit was a witness and he was asked only to describe his flashlight and nothing more.

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (Graves v. United States, 150 U.S. 118, 121; 37 L.Ed.1021,1023 (1893)) "Silence then becomes evidence of the most convincing character" (Interstate Circuit v. United States, 306 U.S. 208,226, 83 L.Ed.610,620 (1939)).

b. Accused injured his finger during the afternoon of 24 December and there was blood thereon but it did not receive medical attention. The blood spot near the fly of accused's trousers could have been on the trousers for at least six months although washing by the Quartermaster Laundry would have removed it. It was not

identified as human blood nor were tests made to classify it within the blood group of Nellie Metz.

c. Although the overall testimony produces the inference that accused left the kitchen at a time fixed between 8:30 and 9 pm and was not seen until he entered the living room at approximately 10:45 pm, Ragland stated the period of accused's absence was 20 minutes and Pepsin fixed it as 15 minutes. Limes testified that cold grease had been delivered by Frau Metz to the men in the kitchen immediately prior to the time accused left the kitchen. The grease was heated and one batch of potatoes had been cooked and a second batch was in process of cooking at the time Lieutenant Bailey entered the kitchen at approximately 10:30 pm. However, Limes further testified that no longer than 15 minutes elapsed between the time accused left the kitchen and when the witness next saw him in the living room (R27). The prosecution made no attempt to explain or reconcile these discrepancies in its own evidence.

d. The evidence exhibits the effort of the prosecution to fix the position and location of the members of the patrol in the house during the evening prior to the time Nellie's cries were first heard by Lieutenant Bailey and to show that except for accused they remained in one place. Bombard and Unido may be eliminated from consideration as they were absent from the house during the relevant period. There is evidence that the men did not remain permanently in one room as Hoit went to the latrine (R38), Cregg left the parlor and returned (R40,43), the soldiers who were in the kitchen did not remain there continuously but moved about (R49), Hoit also left the kitchen and went into the living room (R68) and Dicken went from the living room to the kitchen (R69). Under this factual situation the inference is just as reasonable that there were other movements of the men not in evidence as that the movements in evidence were the only movements. An officer not a member of the patrol visited the house that evening. The inference that there were movements of the men not disclosed by the evidence received was corroborated by Frau Metz when, in describing the condition of the coverlet on Nellie's bed, she said:

> "No, I believe it wasn't then soiled. It had been freshly cleaned, but there were always Americans lying on that bed" (Underscoring supplied) (R62).

e. The "feelings" of the two Metz women with respect to the criminal being a soldier is as consistent with accused's innocence as guilt. There were 12 other American soldiers in the house and "Americans were always lying on that bed".

f. Accused's attempt to shield himself from suspicion or accusation by soliciting exculpatory statements from Ragland and Pepsin and his mistaken designation of them and Unido as alibi witnesses are not actions on his part which exclusively attribute to him a guilty conscience. He knew he had been absent from the kitchen during the crucial period and his reaction although suspicious was not abnormal. Many innocent men have entangled themselves with the law because of silly actions or even falsehoods in their endeavor to prevent suspicions being directed at them.

g. Herr Metz' testimony that he did not hear the front door open and close after the assailant passed him on the stairs is relevant only as tending to exclude, not as excluding, some outsider or intruder as the criminal; it does not exclude the possibility that the rapist was one of the other 12 members of the patrol. There is not a line of evidence as to the opening or closing of the rear door, nor is it conclusively shown that the front door was not opened or closed. The evidence simply shows that Herr Metz did not hear it opened or closed. This is but nebulous, inclusive testimony. Every reason existed in the excitement for Herr Metz not to hear the opening or closing of the front door. Obviously his attention was directed to the call of Frau Metz for help.

h. Evidence that Frau Metz pointed to accused and talked to him "fast * * * and loud" when they met in the living room after discovery of the crime is robbed entirely of any probative value in view of the fact that as a witness for the prosecution she not only did not identify accused as her daughter's assailant, but also there is not even a suggestion in her testimony that this episode between her and accused involved any accusation of accused.

While the facts and circumstances above, set in opposition to the inculpatory evidence, do in most instances create an issue of fact which the court resolved against accused (and such findings are binding on the Board of Review) they not only demonstrate the shadowy uncertainty of the prosecution's evidence but also they show clearly that the inculpatory evidence does not exclude every reasonable hypothesis except guilt. In almost every instance the facts shown in incrimination of accused offer an alternative explanation.

> "In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt" (16 CJ sec.1568, p.763).

(See Leslie v. United States (CCA 10th, 1930) 43 F (2d) 288, for a valuable collection of Federal authorities in support of above principle).

A study of the evidence reveals the obvious fact that the prosecution's theory of the case was premised on the hypothesis that the rape was committed by one of the 15 patrol members. Its process of trial was therefore to eliminate, either by direct evidence or inference based on substantial evidence the probability that any soldier except accused committed the crime. Had the evidence shown the basic premise, to wit that the criminal was one of a closed group of suspects the situation would have presented an entirely different problem. The weakness in the prosecution's case as presented is that it failed to close the group of suspects. With the evidence complete there remained the reasonable hypothesis that the rapist was a man not a member of the patrol -- an outsider, a marauder, an intruder -- who clandestinely entered the house and attacked the child, and then in the confusion, resultant upon discovery of her plight, effected his escape.

Under this state of the evidence it is as reasonable and logical to conclude that accused was not the rapist as it is to conclude that he was. While the facts resolved against him by the court create the suspicion that he was the responsible agent for Nellie's rape, there is nothing above the quality of suspicion in the case. The inculpatory facts, whether considered separately or cumulatively, fail to meet the standard of substantiality upon which verdicts of guilty must be based. Accused entered the court clothed in the presumption of innocence and

> "the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime" (Davis v. United States, 160 U.S. 469,487,40 L.Ed.499, 505 (1895)).

The prosecution failed to sustain the burden cast upon it. It proved circumstances which created a suspicion of guilt but it did not exclude the reasonable hypothesis of innocence. The fact that the "evidence in the case will leave the crime shrouded in mystery" (People v. Harris, supra) however tempting, affords no reason to sustain the findings of guilty.

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.

8. The charge sheet shows that accused is 22 years nine months of age and was inducted 23 January 1943 at Huntington, West Virginia, to serve for the duration of the war plus six months. His service period is governed by the Service Extension Act of 1941. No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offense. For the reasons hereinabove stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as commuted.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 25 AUG 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private BILLY H. TENNANT (35646460), Headquarters Company, 104th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as commuted, 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 9306. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9306).

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

9306

(300)

AG 201 Tennant, Billy H. (GP)AGPE 2nd Ind.
Hq, U.S. Forces, European Theater, (REAR) APO 887. 1 October 1945.

To: The Assistant Judge Advocate General, Branch Office The Judge Advocate General, with U.S. Forces, European Theater, APO 887.

1. Returned herewith is holding by Board of Review, together with 12 copies of the General Court-Martial Orders, and final corrective action by the Theater Commander for inclusion in the record of trial, in the case of Private Billy H. Tennant, 35646460, CM ETO 9306.

2. Subsequent to action under Article of War 50½, and in conformity with the holding of the Board of Review in this case, the Commanding General, United States Forces, European Theater, pursuant to paragraph 87b, Manual for Courts-Martial, 1928, signed the attached final corrective action on 19 September 1945, wherein he recalled his original action of 29 March 1945, vacated the findings of guilty and the sentence as commuted, and restored all rights, privileges and property of which the accused had been deprived by virtue of the sentence so vacated.

FOR THE THEATER COMMANDER:

E. C. DAVIES,
Maj., A.G.D.,
Asst Adj Gen.

(Findings and sentence (previously commuted) vacated. GCMO 439, ETO, 19 Sept 1945).

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

BOARD OF REVIEW NO. 3 19 MAY 1945

CM ETO 9333

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
V.	)	Trial by GCM, convened at Ahrweiler, Germany, 13 March 1945.
Private FRANK ODOM (18041561), Company H, 38th Infantry	)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private (then Staff Sergeant) Frank Odom, Company H, 38th Infantry, did, at 56th General Hospital, APO 350, U.S. Army, on or about 11 January 1945, desert the service of the United States by absenting himself without proper leave from his place of duty, and did remain in desertion until he was apprehended at Paris, France, on or about 31 January, 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his place of duty at Camp Elsenborn, Belgium, from about 15 December, 1944, to about 30 December 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for wrongfully appearing in Liege, Belgium, without a pass in violation of Article of War 96. Three-quarters of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was a member of Company H, 38th Infantry. On 12 December 1944, while the organization was at Camp Elsenborn, Belgium, the company members were ordered to pack their duffle bags and were told that the company was to begin an attack in the general direction of some dams which constituted the division's objective. Accused was found to be absent and a check of the area failed to reveal his whereabouts. His absence was without permission and he did not return to his company prior to the time of trial (R7-10). On 14 December 1944, by which time his company had "moved up to the line", accused returned to Camp Elsenborn. The company duffle bags had been left there in charge of a guard and accused with his aid appears to have found his equipment. He departed again the next day (R11-12).

In an oral statement to the investigating officer, after being warned of his rights, accused described his move-

ments during the period of his absence from the company. He said that after leaving Camp Elsenborn on 15 December 1944, he hitchhiked to Liege and from there to a town in Holland where he remained until about 30 December. He then returned to Liege and entered the 56th General Hospital for treatment for syphillis from which he was discharged for duty on 11 January 1945. Instead of returning to his company, he met a friend who had been waiting for him and hitchhiked to Paris. He was apprehended there by the military police on 31 January 1945 (R13-14).

4. Accused, after being warned of his testimonial rights, elected to remain silent. No evidence was introduced in behalf of the defense (R14-15).

5. Accused has been charged with absence without leave from 15 December 1944 to 30 December 1944 (Charge II and Specification) and with desertion based upon a period extending from 11 January 1945 to 31 January 1945 (Charge I and Specification). Presumably the time during which he was absent from his company was divided into these two periods for purposes of the charges and specifications because of his sojourn in a military hospital between 30 December 1944 and 11 January 1945. Whether this constituted a return to military control in a sense necessitating the division of the period of absence thus effected is problematical (See SPJGA 1944/13317, IV Bull. JAG, p.10). However, inasmuch as the specifications have been framed in this manner, the Board of Review need consider only whether accused has been properly found guilty as charged.

The record of trial clearly is legally sufficient to support the finding of guilty of Charge II and its Specification since the absence without leave therein specified was amply proved, not only by accused's admissions to the investigating officer, but by independent evidence as well. For the same reasons, a finding of guilty of absence without leave for the period described in the Specification to Charge I could be legally sustained.

The only question therefore is whether the record of trial is legally sufficient to support the finding of guilty of desertion as alleged in Charge I and its Specification. Since there is no adequate evidence of intent to avoid hazardous duty or shirk important service at the time

the absence in question began, it is necessary to determine whether the proof is sufficient to justify an inference of intent not to return. On this score, the absence charged was of 20 days' duration, a period not in itself sufficient to support such an inference (CM ETO 8631, Hamilton). The evidence, however, shows various other factual elements from which the necessary intent may properly be inferred. Thus, it appears that accused originally absented himself on 12 December 1944 and returned to his company area on 14 December 1944. His company was then on the line, a fact which he may reasonably be presumed to have known in view of his conversation with the guard in charge of the company baggage. He made no effort to return to the company, however, and next day resumed his absence without leave. Two weeks or more later, he appears to have found it necessary to obtain medical treatment and accordingly entered a military hospital at Liege. There is no indication that he revealed his status as an absentee to the hospital authorities and he was "discharged for duty" on 11 January 1945. No attempt was made by him to rejoin his company at this time, but instead, he met a friend who had been waiting for him and hitchhiked to Paris, some 300 miles away. Despite the number of military installations at which he could have surrendered himself both in Paris and en route thereto, he remained absent without authority in Paris until 31 January 1945 when he was apprehended by the military police. It is the opinion of the Board of Review that this course of conduct adequately supports the inference drawn by the court that accused, when he left the hospital, had no intention of returning to his organization and was therefore a deserter. Although the two absences were separately charged, it is apparent that as far as accused was concerned his sojourn at the hospital represented a mere interruption of what he obviously intended as a permanent absence from his company. This is illustrated not only by his failure to disclose his true status to the hospital authorities, but by his admission that upon his departure from the hospital, he had a friend awaiting him with whom he proceeded to journey several hundred miles in a direction opposite to that in which he must have known his organization to be located. These circumstances, coupled with his failure to surrender himself to constantly accessible military authority and the ultimate termination of his absence by apprehension, are sufficient to support the finding of guilty of desertion reached by the court (See MCM, 1928, par.130a, p.144).

6. The charge sheet shows that accused is 24 years of age and enlisted 18 December 1940 at Houston, Texas. He had no prior service.

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

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

Benjamin R. Sleeper Judge Advocate

Malcolm C. [illegible] Judge Advocate

S. H. Kaye Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

18 MAY 1945

CM ETO 9341

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 36, 19 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain CHARLES E. WILLIAMS (O-1684718), Medical Corps, Medical Detachment, 143rd Infantry	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Charles E. Williams, MC, Medical Detachment, 143rd Infantry, did, at Riquewihr, France, on or about 17 December 1944, conspire to conceal a criminal act, to wit: unlawful homicide by reporting on an Emergency Medical Tag (Form 52b MD) that one Technician Fifth Grade Peter J. Keane, Medical Detachment, 143d Infantry, had

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been "KIA - LAC - Sv - Scalp - Due to shell blast 17 Dec 44 at Riquewihr, France at 0300 hours".

Specification 2: In that * * * did, at Riquewihr, France, on or about 17 December 1944, with intent to deceive the United States, officially report on an Emergency Medical Tag (Form 52b MD) that one Technician Fifth Grade Peter J. Keane, Medical Detachment, 143d Infantry, had been "KIA - LAC - Sv - Scalp - Due to shell blast 17 Dec 1944 near Riquewihr, France, at 0300 hours", meaning, and intending to mean that the said Technician Fifth Grade Peter J. Keane, was killed in action as a result of shell blast, which report was then known by the said Captain Charles E. Williams to be untrue, in that the said Technician Fifth Grade Peter J. Keane had been killed by the criminal act of another, and said fact was then known by the said Captain Charles E. Williams.

Specification 3: In that * * * did, at Riquewihr, France, on or about 17 December 1944, having knowledge of a criminal act, to wit: unlawful homicide of a member of his command, by one Corporal James E. Trogden, fail to take any action thereon.

Specification 4: (Nolle Prosequi)

He pleaded guilty to and was found guilty of, the Charge and Specifications 1, 2 and 3 thereunder. Evidence was introduced of one previous conviction for one day's absence without leave, applying to his own use and benefit an army vehicle and visiting Naples without a special pass in violation of a Fifth Army circular, in violation of Articles of War 61, 94 and 96 respectively. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General,

36th Infantry Division, approved the sentence and forwarded the record for trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, reduced the period of confinement to two years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that, on the night of 17 December 1944, accused, a battalion surgeon, witnessed a brief argument between two enlisted men of his detachment which terminated when one of them, Corporal James E. Trogden, struck the other, Technician Fifth Grade Peter J. Keane, causing him to fall against the stove, whence Trogden and accused carried him into the nearby aid station where accused "did all he could to try to bring him back" (R7). Keane died at about three o'clock that same morning. Accused thereupon caused an enlisted technician on duty at the aid station to prepare an Emergency Medical Tag for deceased, inscribed as follows: "KIA - LAC - Sv - Scalp - Due to shell blast 17 December 1944 at Riquewihr, France, at 0300 hours"; meaning that deceased was killed in action, laceration severe in the scalp at three o'clock in the morning near Riquewihr" (R7-9). Accused signed the tag which was received in due course of business by the regimental surgeon at regimental headquarters. The tag constituted accused's official report of Keane's death and accused's diagnosis of the cause of it. Accused made no report to the regimental surgeon that there had been an unlawful homicide of a member of his command (R18-20). Thereafter, having been duly warned, accused made a voluntary statement to the officer investigating the charges in this case, admitting that he falsely filled out the emergency medical tag in question in order to "protect" deceased's family "by indicating to the family that /deceased/ was killed in action, when he had not been killed in action". He gave as his reason for changing his statement from false to true his belief that the investigating officer knew from other witnesses that his (accused's) original statement was false (R21-22).

4. For the defense, Major Robert L. O'Brien, Jr., a witness for the prosecution, testified that formerly, in Italy, accused had performed a very creditable job as surgeon for a task force which suffered very heavy casualties

in performing its mission (R22). The regimental surgeon also testified that he had had occasion to observe accused's work since May 1944 and would rate it as excellent. In connection with the task force mentioned above, accused handled a great number of casualties "very expertly almost to the point where he was giving out physically and another medical officer had to come and help him. * * * His work has always been outstanding. When we had a great number of casualties he has always done his work excellently" (R23).

5. After his rights were explained to him accused testified under oath substantially as follows:

His intimate association for approximately 11 months with the eight or nine enlisted men under his command had resulted in an extremely close relationship. As well as the men themselves, he knew, from frequent conversations with them, their families and their family histories. They looked upon him not only as their commanding officer but as one of them, which he really was in combat. He was thinking of Keane's family when he prepared the tag showing Keane killed in action. "I thought if I had a family back home and was killed over here, they would rather hear I was killed in action than by somebody else". Not thinking of the consequences, he would have said his action was right at the time that he falsified the tag. "As a doctor you try to save people all the misery you can. It's inherent and has been drummed in to you". He realized, the next day, that he had done wrong "but it was too late then" (R24).

On cross-examination he admitted knowingly making the false report charged, with an awareness that its effect would be to conceal the true facts of the case; and that, although Trogden's superior officer, he took no action with reference to the unlawful homicide which he - accused - had witnessed (R24-25).

6. Specification 1 of the Charge, to which accused pleaded guilty, alleges that he conspired to conceal a criminal act, to wit: unlawful homicide, by reporting on an emergency medical tag that one Keane had been killed in action due to shell blast. Since the essential element of unlawful combination is wholly omitted, the specification is fatally defective as an allegation of conspiracy

(vide 15 CJS, secs. 35-38, pp.1057-1062). However, aside from its ambiguous and ineffective undertaking to charge conspiracy, the specification contains language reasonably susceptible of being construed as charging accused with reporting Keane killed in action in order to conceal his unlawful homicide, thus stating an offense in violation of Article of War 96 (CM ETO 3740, Saunders, et al).

Specifications 2 and 3 of the Charge also allege offenses prejudicial to good order and military discipline in violation of Article of War 96, to which accused pleaded guilty and his commission of which is adequately shown by the uncontradicted evidence.

7. The charge sheet shows that accused is 28 years of age, and that he was commissioned by direct appointment 10 June 1942 and entered on active duty 7 July 1942. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed. Dismissal and confinement of an officer are authorized upon conviction of a violation of Article of War 96.

Benjamin R Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

B K Keeley Jr. Judge Advocate

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1st Ind.

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

1. In the case of Captain CHARLES E. WILLIAMS (O-1684718), Medical Corps, Medical Detachment, 143rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 9341. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9341).

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

(Sentence ordered executed. GCMO 215, ETO, 16 June 1945).

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

BOARD OF REVIEW NO. 2

3 MAY 1945

CM ETO 9342

U N I T E D S T A T E S	2ND AIR DIVISION
v.	Trial by GCM, convened at Army Air Force Station 104, 2 February 1945. Sentence: Dismissal.
Second Lieutenant GEORGE S. WELLS (O-714237), 707th Bombardment Squadron (H), 446th Bombardment Group (H)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that 2nd Lieutenant George S. Wells, 707th Bombardment Squadron 446th Bombardment Group, AAF Station 125, APO 558, did, at AAF Station 125, APO 558, on or about 28 October 1944, feloniously take, steal, and carry away one (1) Watch, Master, Navigational, Hamilton serial number #AF 42-32157, value about twenty-nine dollars and forty-five cents ($29.45, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was foundguilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the

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Commanding General, 2nd Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence though stating it to be wholly inadequate punishment for an officer guilty of such a grave offense and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Accused was a co-pilot in the crew of Lieutenant Raymond J. Goeddel (R31) in October 1944 (R37) and lived in B barracks (R8,14,16, 18) Army Air Force Station 125, with some 24 other officers (R11,18) including Second Lieutenant Edward M. Maxwell and First Lieutenant Franklin C. Bobb (R7,12). Dressers, usually shared by two officers were placed between the bunks against the barracks wall. Accused shared a dresser with Flight Officer Victor Bovell (R11,33). Lieutenant Maxwell testified that sometime in the latter part of October, 1944 (R10), he was lying on his bed in the barracks when he saw a watch which he identified as a navigation master watch, fall onthe floor (R8) from some pants laying on a bed (R9). He knew that Lieutenant Bobb, navigator in his (witness') crew had lost his watch, so he examined and wrote down the serial number of the watch he had seen fall to the floor. Later that day witness found the box that Bobb's master watch had come in on which was written the same serial number that was on the watch he had found on the floor of B barracks.

First Lieutenant Franklin C. Bobb testifiedthat he was a navigator and identified a watch shown to him and designated in the record oftrial as Prosecution's Exhibit 1 as a (R13) Hamilton, navigator's (R22) master's watch issued to him at Hondo Field, Texas, in the "States", numbered AF-42-32157 being the kind of watch issued to all navigators. They were not issued or used by any other crew members. Witness had missed his watch about 1 October (R13). He ordinarily kept it in a case in his barracks with his other navigational equipment on a shelf over his bed (R14,16,18) and had authorized no one to take it (R14,16). He learned that accused had the watch and asked him if he had a navigator's watch and accusedproduced it from his pocket after having first denied that he had one. Accused stated the watch had been issued to him at Caspar Field, Wyoming (R19,26-27). Accused asked if it was witness' watch and later offered to give it to witness (R21). Witness was sure it was his watch, both by the serial number and its plexi-glass crystal he had had put on in the states (R15,20). He had never seen a similar watch witha plexi-glass face (R17). He also produced a cardboard box, the case the watch came in (R15), with the serial number of the watch written on the outside (R23), which serial number was also recorded in his 201 file (R16,27). Captain Morton Nesmith, depot supply officer, testified that the cost price of the watch to the government was $28.00 (R28), and that the watch was Air Corps property of a class not for sale (R40-41).

4. Accused was sworn as the only defense witness. He testified that he had been in the army two years and three months (R35) and overseas since 28 June 1944 (R37) and had flown 35 missions. Lieutenant Bobb approached him while he was shaving and asked if he had a master watch. Never having heard the watch referred to as a master watch but

only as a chronometer, he answered no. Bobb then said a watch was seen to fall from accused's pocket and he (accused) produced the watch in question which Bobb examined and handed back. Another in the room informed him when Bobb left, that Bobb's watch was missing. Bobb had not mentioned this so accused went back to the barracks and asked him the serial number and offered to return the watch "as it was plain it was not mine". Bobb referred him to Major Fowler who took possession of the watch. He told Bobb he bought the watch at Caspar, Wyoming (R32) and deniedhe took the watch from Lieutenant Bobb's shelf. He kept the watch (R33) for which he had paid $40.00 (R35) in the unlocked top drawer of his dresser (R33) and started carrying it when hisother watch was broken. He explained his possession of the watch in question by saying someone had evidently exchanged it for the watch accused had (R34). On questioning further, he stated that he bought the watch in the bar of the "114 Club" from an unknown second lieutenant in phase training in Caspar, Wyoming. It was a Hamilton, identical withthe watch in question but he did not remember the serial number or whether it had a plexi-glass or celluloid crystal (R35). He had lived in the barracks about two months but had not heard of a missing watch (R36), knew of no one who had seen the watch he bought in Gaspar in his possession (R37), nor has this watch been found.(R38). Lieutenant Goeddel has returned to the "States" (R34). Lieutenant Bobb bailed out over France and was gone from the last of October 1944 until the 15th or 20th of January 1945 (R39).

5. "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par.149g, p.171).

To prove the larceny there must be shown:

"(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods"--- (Ibid. p.173).

The evidence shows that the watch in question was kept on a shelf over the bed of Lieutenant Bobb to whom it had been issued for his use as

an Army Air Force navigator and it was therefore accessible to accused who slept in an adjoining bed in the same barracks, and from whose trousers pocket it was seen to fall. Unexplained possession of recently stolen property is evidence of guilty (Underhill's Criminal Evidence (4th Ed. 1935), par.514, pp.1040-1042; CM ETO 1607 Nelson). It is true that accused did attempt an explanation by saying that he had bought it or one similar to it of an unknown officer in a bar room in Caspar, Wyoming. However, he denied having such a watch until he learned it had been seen in his possession, he claimed to have paid a price considerably in excess of its cost price, he knew neither its serial number or the kind of crystal on the watch and although living in a barracks with twenty or more flying officers for some considerable time, he was unable to name anyone who had seen the watch in his possession. His explanation that some one must have taken Lieutenant Bobb's watch as well as that of accused, leaving Bobb's watch in place of his is without further explanation, certainly fantastic andunworthy of belief for if there actually were two such watches, no reason appears for leaving one watch in place of another when if accused's story can be believed, they were so similar that he did not discover their difference. The inference from the circumstances shown is compelling that accused took the watch as alleged and carried it away. His continued possession for approximately a month and his denial that he had sucha watch when asked about it, indicate the fraudulent intent to deprive the owner permanently of the watch. While the possession of the watch was in Lieutenant Bobb, it was clearly shown to be an issue watch, the property of the United States, furnished and intended for the military service thereof. The evidence shows the cost price of the watch to the government to be $28.00. The evidence in support of the court's findings of guilty is substantial.

6. The charge sheet shows accused to be 22 years and seven months old. Without prior service he was commissioned a second lieutenant 12 March 1944 at Altus, Oklahoma.

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. Dismissal of an officer is authorized upon conviction of a violation of Article of War 94.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant GEORGE S.WELLS (O-714237), 707th Bombardment Squadron (H), 446th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and the indorsement. The file number of the record in this office is CM ETO 9342. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9342).

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

(Sentence ordered executed. GCMO 144, ETO, 15 May 1945).

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

BOARD OF REVIEW NO. 2

CM ETO 9343

27 JUN 1945

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at St. Trond, Belgium, 6 January 1945. Sentence: Dismissal and total forfeitures.
	)	
First Lieutenant CLINTON A. STANLEY (O-1577889), 900th Ordnance Heavy Automotive Maintenance Company	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Clinton A. Stanley, Nine Hundredth Ordnance Heavy Automotive Maintenance Company did, at Verviers, Belgium, on or about 15 October 1944, wrongfully borrow Five Hundred (500) francs, lawful currency of the government of Belgium, of the exchange value of about Eleven and 40/100 ($11.40) Dollars, lawful money of the United States, from Technical Sergeant James H. Yarborough, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

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Specification 2: In that * * * did, at Verviers, Belgium, on or about 18 October 1944, wrongfully borrow One Thousand (1000) francs, lawful currency of the government of Belgium, of the exchange value of about Twenty-Two and 80/100 ($22.80) Dollars, lawful money of the United States, from Technician Fourth Grade Lloyd V. Dover, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

Specification 3: In that * * * did, at Verviers, Belgium, on or about 25 October 1944, wrongfully borrow One Thousand (1000) francs, lawful currency of the government of Belgium, of the exchange value of about Twenty-two and 80/100 ($22.80) Dollars, lawful money of the United States, from Private Thurman Harsin, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

Specification 4: In that * * * did, at Verviers, Belgium, on or about 28 October 1944, wrongfully borrow Five Hundred (500) francs, lawful currency of the government of Belgium, of the exchange value of about Eleven and 40/100 ($11.40) Dollars lawful money of the United States, from Private Thurman Harsin, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

Specification 5: In that * * * did at Verviers, Belgium, on or about 28 October 1944, wrongfully borrow Five Hundred (500) francs, lawful currency of the government of Belgium, of the exchange value of about Eleven and 40/100 ($11.40) Dollars, lawful money of the United States, from Technician Fifth Grade Frank Beneditti, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

Specification 6: In that * * * did, at Verviers, Belgium, on or about 28 October 1944, wrongfully borrow One Thousand (1000) francs, lawful currency of the government of Belgium, of the exchange value of about Twenty-two and 80/100 ($22.80) Dollars, lawful money of the United States from S/Sgt Ed. J. Dolan, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

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Specification 7: In that * * * did, at Verviers, Belgium, on or about 28 October 1944, wrongfully borrow One Thousand (1000) francs, lawful currency of the government of Belgium, of the exchange value of about Twenty-two and 80/100 ($22.80) Dollars, lawful money of the United States from Technician Fifth Grade William J. Griffith, Nine Hundredth Ordnance Heavy Maintenance Company, an enlisted man of the United States Army.

Specification 8: In that * * * did, at Verviers, Belgium, on or about 17 October 1944, wrongfully gamble and bet at dice with Technician Fifth Grade Edgar H. Young and Technician Fifth Grade Alexanderia M. Reher, both of the Nine Hundredth Ordnance Heavy Automotive Maintenance Company, enlisted men of the United States Army.

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

Specification: In that * * * having purchased, as Post Exchange Officer for the Nine Hundredth Ordnance Heavy Automotive Maintenance Company, Post Exchange merchandise from the United States Exchange Service for the sum of Six Thousand Four Hundred and Twenty-six (6426) Belgium francs, of the exchange value of One Hundred Forty-Six and 80/100 ($146.80) Dollars, did, at Verviers, Belgium, during the period 17 October 1944 to 25 October 1944 wrongfully and unlawfully sell such merchandise to the officers and enlisted men of the Nine Hundredth Ordnance Heavy Automotive Maintenance Company at a profit of Four Thousand Four Hundred Seventy-Four (4474) Belgian francs, of the exchange value of One Hundred Two and 21/100 ($102.21) Dollars.

He pleaded not guilty to, and was found guilty of, all the 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, First United States Army, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing its execution pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that accused is a first lieutenant, 900th Ordnance Heavy Automotive Maintenance Company, and had served with that organization for 26 months. At the time in question he was company supply officer and since 2 October 1944 post exchange officer. The incidents alleged in the several specifications occurred during the month of October, 1944, Vervier, Belgium (R7,9,25,37,38). Shortly after 2 October, accused asked his company commander for permission to purchase beer from a civilian concern for resale to the men of the organization. This request was granted and he announced to the enlisted men at a formation that he would sell them beer at a profit of one franc per bottle, the profits to be used for free beer (R20,21,38). The men did not care for the beer and after 180 bottles had been sold this sale of beer was discontinued (R39). Evidently, at that time, the company was having difficulty in obtaining Army Post Exchange supplies. About 13 or 14 October accused saw his company commander and told him Army Rear Post Exchange had a surplus of items and that he would be able to buy for the men there. According to the testimony of both the company commander and the first sergeant, the former told accused "it would be all right to buy these items for resale to the men at no profit" (R8,38). It seems the company commander had heard of accused's announcement "to the company that he was going to sell the beer at profit" and that was what prompted him "to tell him specifically that there would be no profit made on the PX supplies" (R9). Thereafter, accused made two bulk purchases from the Army Post Exchange which were resold. The first transaction occurred about the middle and the second about the 25th of October. The items were resold at prices higher than that for which they had been bought. The supply sergeant conducted the resales over the counter in the supply room. The merchandise offered for sale and the prices he was to and did charge were itemized by accused on memoranda which he furnished the sergeant. The prices were posted to the right of the sales counter (R10,12-13,15-18,21; Pros.Exs.3,4,5,6). The proceeds of the first sale amounted to 1956 francs of which 328 francs was profit (R16,17; Pros.Ex.5); and the proceeds of the second sale aggregated 8653 francs on which the profit was about 3853 francs (R17; Pros.Ex.6). The proceeds of both sales were delivered to accused excepting for 4000 francs which sum the supply sergeant had advanced to accused to help finance "the purchase of PX supplies". Subsequently, probably referring to a further sale, accused told the supply sergeant "that he would see about getting PX supplies later on" (R22). As a result of complaints made regarding the increased price charged for these supplies, the company commander commenced an investigation the day after the second sale about 25 or 26 October (R8,11,18,21,24,40,41). Although none of these complaints were addressed to accused, accused announced at reveille formation on 30 October that he had a written statement of moneys made on "that PX deal" and that this statement would be posted on the bulletin board; and he "asked for any suggestions of what might be done with the money. He got no suggestions" (R21,39,40).

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The prosecution showed, further, that the accused borrowed money from enlisted men of his organization as follows:

18 October 1944, from Yarborough	500 francs,
18 October 1944, from Dover	1000 francs,
25 October 1944, from Harsin	1000 francs,
28 October 1944, from Harsin	500 francs,
28 October 1944, Beneditti	500 francs,
28 October 1944, Dolan	1000 francs,
28 October 1944, Griffith	1000 francs

(R19,25,27,29,32-33,54,55).

During this period, about 17 October, accused joined "a crap game going in the squad room". There were from five to eight playing. Two of the participants testified. They were enlisted personnel. According to one of these witnesses the stakes "ran from 100 francs up". Accused rolled the dice and covered bets (R34,36).

4. By cross-examination of prosecution witnesses the defense showed: Accused's commanding officer testified that accused had been a member of his company for 26 months and had been rated "satisfactory", "excellent" and "superior" (R9). "At this time", in October 1944, a fund was being maintained in the orderly room for the benefit of the enlisted men (R10,31,39). Before accused sold the beer, he told the men in formation that a profit would be made and a fund set up for the men (R10,20,31). Accused told his driver after they had picked up the first rations that the profits made "was supposed to go into the slush fund", a fund set up for the men (R30,31). The company first sergeant who had accumulated the complaints against accused and had gone with them to the company commander never talked to accused about the complaints prior to the formation on 30 October at which accused announced and discussed the disposition of the accumulated profits nor did he ever see accused present at any sort of an investigation (R40,41).

Each of the enlisted men who loaned accused money testified that his respective loan was repaid by the following pay day or earlier, just as expected. The circumstances surrounding the loan made by Dolan indicates that it was for 500 rather than 1000 francs (R21).

The two enlisted men with whom accused gambled said that they were surprised to have accused join the game as they had never seen him gamble with the men before. One of these witnesses fixed accused's participation in the game as lasting about 15 or 20 minutes. Another enlisted man, a prosecution witness, who had been in the same company with accused for over a year, said he had never seen accused gamble (R28,35,37).

One of the enlisted men of accused's organization testified for the defense that he had been in accused's quarters one evening "right after the PX was sold". Accused was counting some money. With accused was another officer who lived in the same room. He heard accused answer an inquiry made by this officer, saying that the money was "from the PX rations" and that it belonged to a "slush fund for the boys" (R42). Accused's assistant, a warrant officer, testifying on accused's behalf, said that his reputation among the other officers was good, that his performance of duty was very good, and that he secured the cooperation of his men (R52,53). It was stipulated that if one of the officers (identified) of accused's company were present and sworn as a witness he would testify to the "excellence" of accused's duty performance and reputation; and also that the battalion supply officer, under the same circumstances, would testify that he had "found his [accused's] work at all times to be above reproach" (R53,59).

Accused, after stating that he understood his rights (as a witness), testified under oath. He first told of his gambling with the enlisted men. He was making a tour of inspection, "nonchalantly" stopped and watched a dice game, and the next thing he knew one of the men asked him if he wanted to cover a bet. He replied "Sure", "unconsciously" - he was not thinking. After that he rolled the dice two or three times. He was taken by surprise, he had gambled with officers before. Then it dawned on him that he had done wrong. He was in the game only 15 minutes. Cross-examined as to this, he said he had not lost very much. He was in the game such a short time and had only "shot the dice" about twice (R43).

With respect to his resale of the post exchange merchandise, he told of purchasing the various items and of having them sold at a profit. He said that he had spoken to his captain about selling the beer at a profit to set up "a slush fund for the benefit of the men", and that the captain had expressly consented to that profit-making venture for that purpose. He contended that when he spoke to the captain about procuring post exchange rations for the men they having been restricted for four months and unable to buy rations, that the captain had said "Buy any damn thing you can get as long as you get something for the men", and that there was at that time no mention about the price at which it would be resold. He sold of keeping accurate accounts of purchases, sales and profits. He placed in evidence original accounts, records, which he had made after each sale. The money representing the profits, he said, "was in his possession" [Attached to the record is an empty envelope, marked "P.X.Fund, 4655 Belgian Francs"] (R44,46; Def.Exs.A,B,C). Prosecution's Exhibits 5 and 6, itemized all the items of merchandise with resale prices prepared by him for use at the sales, were returned to him by the supply sergeant, and were retained by him in his possession until he turned them

over to the investigating officer. The total profit was around 4600 francs (R46,47). Accused was then asked and he answered several pertinent questions, as follows:

"Q And what did you do with the money?
A That money was -- Well, around the latter part of October, I don't remember the exact date, I drew up a balance sheet for the amount of profit which had been derived from the three proceding sales. I presented the voucher and the money to Capt. Barnes, our CO, and told him -- I said, 'Now, at the present we have accumulated so many thousand francs profit'. There was supposed to be a monthly statement by me on that and it wasn't done with this money and he refused to accept it. I couldn't understand and he said, 'Well, I don't know a thing about it. You are PX officer.'

Q Now, what was your intention as to the ultimate disposition of this profit when it was made?
A It was to be created into a slush fund. That was the purpose that it was originally explained to the captain, and also to the men, to be used by them as they wanted to; throw a dance or a party or any way they wished to spend it.

Q Did you, at any time, use any of this money for your own personal use?
A Well, at first the rations didn't amount to so much and then I had to go around and ask contributions from the men to have the money to go up there to buy the rations for it, so in my capacity I increased the price of it to accumulate enough profit so that we could have enough to keep the fund going. Once we built up a capital they could either -- like I put it to the men -- they could either keep it around 5000 francs or so I wouldn't have to go out and procure money and take up a collection. I had to borrow money to pay for the rations a couple of times because I didn't have enough. So I set the prices up on it and once we accumulated that much capital I was going to put it to the men whether they wanted to keep that much capital or they wanted gratuitous rations and it was their money" (R47).

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On cross-examination, accused said that the first time he showed his captain his accounts was on the 28th or 29th of October after he had checked upon army regulations about sale of PX items; and that he held the company formation for the first time and told of the "profit from the PX" on 30 October. He explained that his "particular impression" was that the men knew a profit was being made since "I originally told them that when I sold them that if any other occasion arises; that it was a condition of that fund" (R49,50).

5. a. Specifications 1-7, inclusive of the Charge: - Borrowing from enlisted men.

It was proved that accused borrowed the money from the enlisted men, respectively, at the time and place, and in the amount, as alleged in the aforementioned Specification, with one exception. Properly construed, the loan mentioned in Specification 2 of the Charge was for 500 francs rather than 1000. The variance in the amount, due to the nature of the offense, is under the circumstances immaterial. Accused did not deny making these loans. The only explanation offered is his rather clear intimation that he was borrowing this money not for himself but for the company "slush fund" (which obviously was for the benefit of the enlisted personnel and not himself); that the objective was the accumulation of 5000 francs as a working capital; that he did not have the money to finance the purchases; and that he had to go to enlisted men for this financing. The evident purpose of this contention was to show that accused was not borrowing for his own benefit, and to bring the facts within the case of CM 230938, Carvill where such a borrower was held not culpable for borrowing from an enlisted man. An analysis of the facts rebuts accused's contention, in this respect. Careful analysis of all the evidence which bear on this point clearly indicates that the loans effected were not for the purpose of financing these purchases. The evidence leads to but one conclusion, inescapable despite the fact that all borrowings were promptly repaid, that in these borrowings accused violated Article of War 96, as charged (CM 230736, II Bull. JAG 144).

b. Specification 8 of the Charge: Gambling with enlisted men.

This Specification was proved by two of the enlisted men who played in the game with accused. Accused admitted the facts. The Specification's every allegation was proved. The conduct so established has long been recognized as prejudicial to good order and military discipline in violation of Article of War 96, the Article under which this Charge was laid (Winthrop's Military Law and Precedents (Reprint, 1920), p.727).

c. Specification of Additional Charge: Resale of post exchange merchandise.

Accused bought merchandise from the United States Exchange Service and resold it, to army personnel, at prices higher than that which he paid. The Specification alleges that this resale was wrongful and unlawful and this conduct is charged as a violation of Article of War 96. The accused freely admitted all the details of his purchase and sale of the merchandise. He contended that the profit realized was not intended for his personal gain, but for the men of the company. In proof of his good faith he produced complete records of all transactions. It may also be assumed that he produced the money representing these profits. The resale of merchandise purchased at retail by military personnel is prohibited by Army Regulation (par.13f, Changes No.4, AR 210-65, 19 Nov. 1943). The only exception to the prohibition against such sale found therein is to permit military personnel to receive "actual reimbursement without profit for merchandise purchased at an exchange as a matter of economy, convenience, or necessity as agent for other members of the military forces". Accused here of course bought as agent for members of the military forces. It might at first be argued that if accused did not use any of the profit for himself but held it intact for the purchasers that he came within the permissive scope of the pertinent paragraph of this Army Regulation, inasmuch as he merely reimbursed himself without profit to himself. The language of the regulation in making this exception is flat in its declaration that the resale must not include profit. In any event this resale by accused at a price in excess of that paid constituted a violation of instructions given him by his commanding officer, a military offense prejudicial to good order and military discipline under the Article of War 96.

6. The charge sheet shows the accused is 29 years old. He was commissioned second lieutenant 14 August 1942 at Quartermaster Officer Candidate School, Camp Lee, Virginia, after having served as an enlisted man from 2 April 1941 to 13 August 1942 inclusive.

7. Attached to the record of trial is a communication in writing, addressed to the reviewing authority and signed by each member of the court who sat at the trial, in which clemency is recommended.

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

9. A sentence of dismissal is authorized upon conviction of an officer of violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

9343

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant CLINTON A. STANLEY (O-1577889), 900th Ordnance Heavy Automotive Maintenance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, 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 9343. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9343).

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

(Sentence ordered executed. GCMO 259, ETO, 10 June 1945).

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

BOARD OF REVIEW NO. 1

8 MAY 1945

CM ETO 9345

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Nancy, France, 24 November 1944. Sentence as to Captains HAUG and FREDERIX: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Sentence as to GOLDSTEIN: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for three years. Loire Disciplinary Training Center, Le Mans, France.
Captain FRED HAUG (O-1591180), Captain (formerly First Lieutenant) ARTHUR C. FREDERIX (O-1031484), and Technician Third Grade FRANK K. GOLDSTEIN (34500368), all of Headquarters Third United States Army	

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

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

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

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

Specification: In that Captain Fred Haug, First Lieutenant Arthur C. Frederix, now Captain and Technician Third Grade Frank K. Goldstein, all of Headquarters Third U. S. Army, acting jointly and in pursuance of a common intent, did, at or near Fresnes-en-Woevre, Meuse, France, during the period from about 20 September 1944 to about 28 September 1944, knowingly and willfully apply to their own use and benefit a ¼ ton 4 x 4 truck and trailer, of a value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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

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

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

Specification 3: (Finding of guilty disapproved by confirming authority).

Specification 4: In that * * * acting jointly and in pursuance of a common intent, did, in an active theater of operations, at or near Fresnes-en-Woevre, Meuse, France, during the period from about 20 September 1944 to about 28 September 1944, wrongfully engage in commercial transactions for personal gain, to wit, purchasing and reselling at a profit approximately 362 bottles of champagne to M. Albert Clement, operator of the Hotel Clement, Madame Jeanne Rodrique, operator of the Cafe de la Poste, and Madame Georgette Thirion, operator of the Cafe Tabac.

Each accused pleaded not guilty to and was found guilty of both charges and all specifications thereunder. No evidence of previous convictions was introduced as to either accused. Each was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing

authority, the Commanding General, Third United States Army, approved the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, as to each accused, disapproved the findings of guilty of Specifications 1, 2, and 3 of Charge II, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Technician Third Grade Frank K. Goldstein, Headquarters Third United States Army, also named in the foregoing specifications, was tried jointly with accused Captains Haug and Frederix. Specifications 1, 2 and 3 of Charge II were as follows:

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

Specification 1: In that Captain Fred Haug, First Lieutenant Arthur C. Frederix, now Captain and Technician Third Grade Frank K. Goldstein, all of Headquarters Third U. S. Army, acting jointly and in pursuance of a common intent, did, at or near Fresnes-en-Woevre, Meuse, France, during the period from about 20 September 1944 to about 28 September 1944, wrongfully sell to a French civilian, to wit, M. Albert Clement, operator of the Hotel Clement, about 60 bottles of champagne at a price of about 225 francs per bottle which price was in excess of legal prices established by the French Republic.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at or near Fresnes-en-Woevre, Meuse, France, during the period from about 20 September 1944 to about 28 September 1944, wrongfully sell to a French civilian, to wit, Madame Jeanne Rodrique, operator of the Cafe de la Poste, about 200 bottles of champagne at a price of about 225 francs per bottle which price was in excess of legal prices established by the French Republic.

Specification 3: In that * * * acting jointly and in pursuance of a common intent, did, at or near Fresnes-en-Woevre, Meuse, France, during the period from about 20 September 1944 to about 28 September 1944, wrongfully sell to a French civilian, to wit, Madame Georgette Thirion, operator of the Cafe Tabac,

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about 102 bottles of champagne at a price of about 225 francs per bottle which price was in excess of legal prices established by the French Republic.

He pleaded not guilty to and was found guilty of both charges and all specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence 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 as to Goldstein were published in General Court-Martial Orders Number 20, Headquarters Third United States Army, APO 403, 11 January 1945.

4. The prosecution's evidence, material to the Specification, Charge I, and Specification 4, Charge II, is substantially as follows:

About 20 September 1944, a group of American officers dined at the Hotel Clement at Fresnes-en-Woevre, France (R8-9,63). After dinner they asked for champagne, which the proprietor, Albert Clement, was unable to supply. One of the officers stated that his unit had bought a quantity of champagne and offered to sell some of it to Clement, who agreed to buy the same (R9). Two or three days later, about 25 September, the officer, accompanied by a noncommissioned officer in a jeep, delivered 60 bottles of Heidseick champagne, bearing the stamp "Monopole", to Clement who paid 225 francs cash per bottle therefor (R10-12).

About 20 September Madame Jeanne Rodrique, operator of the Cafe de la Poste at the same town, purchased 100 bottles and two-three days later another 100 bottles of the above brand of champagne from an American officer for 225 francs cash per bottle (R18-19,63). A small vehicle with a trailer were used to deliver the champagne (R20).

About 20 September Madame Georgette Thirion, operator of the Cafe Tabac at the same town, purchased 72 bottles, and between five and eight days later, 30 more bottles of the above brand of champagne from an American officer, accompanied by an American soldier in an American vehicle, for 225 francs cash per bottle (R14-16,64).

Each of the three purchasers, all of whom testified for the prosecution, was unable to recognize the officer in the courtroom (R10,15,19), and Clement could not recognize the noncommissioned officer who engaged in the transaction with him (R12).

The three accused were members of two prisoner-of-war interrogation teams of the Field Interrogation Detachment attached to the Third United States Army. Each team was furnished with a quarter-ton truck and a trailer of a combined value of about $1000. Between 20 and 28 September they were not authorized to use such transportation for the purpose of transporting champagne from Reims, France, to Fresnes-en-Woevre (R23-24,26). Following a period of intense work during which accused officers performed their duties in an excellent manner, the amount of work in the detachment was greatly decreased during the period from 20-30 September, when there was always sufficient interrogation personnel available therefor (R25-26).

Agents of the Criminal Investigation Division testified that each of the three accused made a voluntary written sworn statement (R28-30; Captain Frederix: R31-35, Pros.Ex.2; Captain Haug: R35-39, Pros.Ex.3; Goldstein: R40-47, Pros.Ex.4). The names of persons other than the maker were left blank in each statement as read to the court, and the law member cautioned the court that each should be considered only in so far as it affected its maker. In essence, the following facts were shown by the three statements:

About 8 September 1944, the accused officers purchased three cases of champagne from Heidsieck and Company (Monopole), Reims, for the purpose of distribution to officers and enlisted men without profit. Subsequently, due to unavailability of champagne in cafes at Fresnes-en-Woevre, they decided to supply them with the same. During the period from 20-27 September, with Goldstein as driver, they made three trips to Reims in a jeep and trailer assigned to prisoner-of-war interrogation teams, and purchased a total of approximately 426 bottles at prices ranging from 93-125 francs per bottle. Captain Haug financed the transactions. Captain Frederix made the purchases and, with the aid of Goldstein, the truck and the trailer, effected deliveries to the Hotel Clement and the Cafe de la Poste as well as a third cafe. The sales prices ranged from 200-225 francs per bottle. The officers divided the proceeds of the first transaction, and all three divided the proceeds of the last two transactions, on an equal basis.

5. The following evidence was introduced in behalf of the defense:

Chief Warrant Officer Walter R. Ward, before whom the statement of each accused is stated thereon to have been subscribed and sworn to, testified that no formal oath was administered (R51-52), but that accused officers each had their right hands raised (R50) and witness asked all accused if they knew what their statements contained, whether they were true and if they were signed by them, to which questions they replied in the affirmative (R49).

Captain Bernard E. Van Dam, attached to the G-2 Section, Headquarters Third Army (R52), testified that he worked with accused officers and would rate them "superior". During the latter half of September there was very little work in the interrogation of prisoners of war and it was customary for officers and men to leave, taking with them organic equipment belonging to the team (R52-54).

Lieutenant Colonel Bernard Carter, G-2 Section, Third Army, testified that accused officers were excellent interrogators (R54). They worked long hours in early August, but during the period in question there was far less work and they were occasionally allowed a half-day off. They were entitled to use organic transportation within limits, but not for trips from Fresnes-en-Woevre to Reims. Witness recommended the promotion of both officers to captain and would have liked them to continue in their then duties (R55-56).

Staff Sergeant John Mendheim, G-2 Section, Headquarters Third Army (R56), testified that Goldstein was considered an efficient soldier, and that accused officers at times gave champagne for the benefit of the enlisted men (R57).

After their rights were explained, each accused elected to make an unsworn statement (R61-63).

Captain Haug stated that in his opinion his written confession was definitely not voluntary as the agents used the same methods which were used with stubborn prisoners of war. Definite promise was made that if accused made sworn statements it would probably help at the trial and they were told it was always customary. Captain Haug neither swore to the statement nor raised his hand, but identified his signature thereon. Neither did the warrant officer raise his hand. As in the case of prisoners of war, he was "just tricked into it more or less" (R61-62).

Captain Frederix stated through his counsel that he was told by one of the agents that it did not make the slightest difference if he swore or not, and that he did not raise his hand. The agents told him that

"While we have the facts against you anyway, you are just better off if you make a statement. Furthermore we can present you with so many witnesses that if you deny, it cannot do you any good whatsoever" (R62-63).

Goldstein, stated that he was informed by Captain Haug in the presence of two investigators:

"'The jig is up and you might as well confess like we did that we three got these things and that you were paid seventy-five dollars for the trip'. He said 'go ahead and sign'. I never swore to this confession" (R62).

6. a. Specification, Charge I: Accuseds' confessions, corroborated by testimony establishing the corpus delicti of each of their joint offenses, show that during the period and at the place alleged they knowingly and willfully applied to their own use and benefit a ¼-ton 4 x 4 truck and trailer which they used to transport champagne without authority for the purpose of sale. The evidence shows that the value of the vehicles was well in excess of $50.00 and that they were property of the United States, furnished and intended for the military service thereof. The findings of guilty of a violation of Article of War 94 are supported by competent and substantial evidence (CM ETO 5666, Bowles, et al, and authorities therein cited).

b. Specification 4, Charge II: The three accused were jointly charged with wrongfully engaging, in an active theater of operations and over a period of about eight days, in commercial transactions for personal gain, to wit, purchasing and reselling at a profit approximately 362 bottles of champagne to certain named civilian operators of public places, in violation of Article of War 96. The question arises whether the Specification stated an offense in violation of Article of War 96. Army Regulation 600-10, WD, 8 July 1944, paragraph 2e, provides in pertinent part:

"(1) * * * (b) Officers of the Army will not engage in or permit their names to be connected with any activity incompatible with the status of an officer of the Army.

(2) There are limitations upon the activities of officers and other personnel subject to military law. The general principle underlying such limitations is that every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected

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with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War".

The activities alleged are not only incompatible with the status of accused Captains Haug and Frederix as officers of the Army, but are of such nature as to tend to interfere with and hamper the full and proper discharge of their duties in this active theater of operations and certainly to give rise to the reasonable inference that they would have that effect. Failure to comply with Army Regulations has long been recognized as an offense in violation of Article of War 96 (CM ETO 1872, Sadlon, and authorities therein cited). The Specification manifestly stated such offense.

Testimony of the purchasers of the champagne established the corpus delicti of each of the joint offenses alleged and accuseds' confessions proved their guilt thereof beyond doubt. The evidence that the amount of prisoner-of-war interrogation work was greatly decreased during the period of accuseds' activities and that sufficient personnel were available therefor was introduced for the evident purpose of establishing that such activities did not interfere with or hamper their discharge of their duties. Such fact, however, is immaterial under the terms of the above quoted Army Regulations where, as here, the activities tended toward such interference and hampering and would be likely to have that effect. The Board of Review is of the opinion that the findings of guilty of the Charge and Specification 4 thereof are fully supported by the evidence.

7. Specifications 1, 2 and 3, Charge II (Goldstein). As indicated above (par.2), these specifications were disapproved as to accused officers by the confirming authority. The defense stipulated "to the contents" of a letter, dated 7 November 1944, signed by the "Departmental Director of the General Service of Prices of Bar-le-duc", "as to the prevailing prices of champagne at that time" (R21). The letter stated in part as follows:

"The legal prices in Fresnes for a bottle of Champagne 'Heidsieck' Monopole ½ dry, are including all taxes:

Wholesale price	87 fcs 10
Retail price to consume on the place	211 fcs
Retail price to carry away	102 fcs 50"

(R22; Pros.Ex.1).

It was further stipulated that the foregoing letter

> "expresses his [the director's] opinion of the ceiling prices in his district, the Meuse District, as of September 1944, pursuant to the French laws of 1942 which fixed the champagne prices as of the 1st of September 1939" (R64).

The due and legal constitution of the authority under which "the French laws of 1942" were promulgated is not shown in the letter or supplied by the stipulations and, particularly in view of the hostile occupation of the district in question at the time under consideration, certainly may not be presumed or judicially noticed. Moreover, the letter and stipulation show only "prevailing prices of champagne" on 7 November 1944, well over a month after the termination of the period during which the sales were effected, and the opinion of the official, whose authority is not proved and may not be presumed or judicially noticed, of ceiling prices in the district in question as of 1 September 1939. In the opinion of the Board of Review there was thus a failure of proof that the prices listed were the "legal prices established by the French Republic" in effect during the period and at the place alleged, which failure could not be cured by mere acquiescence on the part of the defense. It is thus unnecessary to consider or decide the questions whether the specifications stated offenses in violation of Article of War 96 and whether, if such "legal prices" were proved, the evidence otherwise proved such offenses. The record does not support the findings of guilty of accused Goldstein of Specification 1, 2 and 3, Charge II.

8. Evidence was adduced by the defense for the purpose of establishing that, notwithstanding the recitals on accuseds' confessions, the same were not sworn to in fact. Even had the court determined the factual issue thus raised in the negative, the admission in evidence of the confessions was free from error in view of the evidence that accused stated that they knew the contents thereof, that they were true and that they were signed by them. There is no requirement in the law that a confession be sworn to in order to be admissible. Evidence was also adduced to the effect that the confessions were made under such circumstances that they were not voluntary. Accused Goldstein made an unsworn statement at the trial to the effect that accused Captain Haug told him in the presence of two investigators:

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"'The jig is up and you might as well confess like we did that we three got these things and that you were paid seventy-five dollars for the trip' and told him to 'go ahead and sign'"(R62).

It is well settled that a confession will not be excluded because of mere "casual remarks or indefinite expressions" which "need not be regarded as having inspired hope or fear" (MCM, 1928, sec.114a, p.116; CM ETO 72, Jacobs and Farley, and authorities therein cited). A clear issue of fact as to the voluntariness of the confessions was presented for the exclusive determination of the court. In view of the experience of accused and the other substantial evidence as to voluntariness of the confessions, the Board of Review upon appellate review will not disturb the court's determination of the issue against accused (CM ETO 4791, Minnetto, and authorities therein cited).

9. The charge sheet shows the following: Captain Haug is 30 years 11 months of age and was commissioned a second lieutenant, Quartermaster Corps, 30 April 1943, at Camp Lee, Virginia. Captain Frederix is 35 years six months of age and was commissioned a second lieutenant, Cavalry, 21 January 1943, at Fort Riley, Kansas. Goldstein is 24 years seven months of age and was inducted 16 December 1942. No prior service is shown for any accused.

10. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused officer to support the findings of guilty as modified by the confirming authority and the sentence, and as to accused Goldstein, legally insufficient to support the findings of guilty of Specifications 1, 2 and 3 of Charge II, and legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 4 thereof, and the sentence.

11. A sentence of dismissal, total forfeitures and confinement at hard labor is authorized upon conviction of an officer of an offense in violation of Article of War 94 or 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

The sentence as to accused Goldstein is legal (MCM, 1928,

par.104c, p.100). The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr. Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec. 1944, par.3).

B. Franklin Ritter Judge Advocate

Wm. F. Summers Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(340)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain FRED HAUG (O-1591180) and Captain (formerly First Lieutenant) ARTHUR C. FREDERIX (O-1031484), both of Headquarters Third United States Army, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty as modified by you 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 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 9345. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9345).

3. As the offenses, if any, alleged in Specifications 1, 2 and 3, Charge II, do not involve moral turpitude, the Board's opinion that the record of trial is legally insufficient to support the findings of guilty of those specifications as to accused Technician Third Grade FRANK K. GOLDSTEIN, does not necessitate further action by you with respect to him under paragraph 5 of Article of War 50½. (Memorandum for the Secretary of War, April 13, 1923, Ops. JAG 250.404, signed by W. A. Bethel, Judge Advocate General, and subsequently approved by the Secretary of War). It would be appropriate, however, to consider whether remission should be made of any part of his term of confinement in view of the invalid conviction of these three specifications.

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

(As to accused Haug and Frederix sentence ordered executed. GCMO 157, ETO, 21 May 1945).
(As to accused Goldstein, unexecuted portion of sentence , suspended. GCMO 288, ETO, 7 April 1945).

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

BOARD OF REVIEW NO. 3

CM ETO 9365

19 JUN 1945

U N I T E D S T A T E S)	95TH INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Ameln, Germany, 25 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class MARTIN P. MENDOZA (38608575), Company B, 378th Infantry)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Martin P. Mendoza, Company "B", 378th Infantry, did, at or near Rheinhausen, Germany, on or about 10 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private William E. Grimes, a human being, by shooting him with a rifle.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the 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 10 March 1945, Company B, 378th Infantry, of which company accused was a member, was stationed in the town of Rheinhausen, Germany (R6,7,23). Accused's platoon was billeted in a house the second floor of which was assigned to his squad. On this floor were several rooms used as sleeping quarters and a kitchen which the squad "always used to get warm in and heat food and such" (R9,13). Early in the afternoon of 10 March a number of the members of the squad, including accused, were drinking and playing cards in the kitchen. Three bottles of wine were consumed during the game and accused had a "good bit of each one of them" (R15,18,19). Toward the middle of the afternoon the game broke up when several of the men left to go to the company command post. One of the men who left, Corporal J. C. Smithers, returned to the billet approximately one half hour later and met accused, armed with his Browning Automatic Rifle, drunkenly coming down the stairs on his way out of the house. He was staggering to such an extent that he found it necessary to steady himself by holding on to the banister in order to keep from falling. Fearing that he would get into trouble if he left the billet in his drunken condition, Smithers quickly enlisted the aid of a Private Byrd and together the two men undertook to prevent him from leaving. They took his BAR away from him, told him to go back upstairs and go to bed and, when he insisted that he was going to leave and started out a gateway in front of the house, they prevented his departure. Accused then "swung" at Smithers and in so doing fell over a

low fence near which the three men were standing. When Smithers and Byrd jumped over the fence and attempted to pick him up, he "came up swinging", and, in the resultant exchange of blows, either was knocked down or again fell, hitting his head on the concrete paving of the courtyard when he did so. He remained prone after he fell, since, as Smithers put it, he was "out * * * from being drunk and falling on the concrete" (R7). The two men then picked him up, carried him upstairs, and put him to bed. Smithers stated that he was "quite limber" when carried upstairs and both men testified that he was unconscious at the time (R7-10).

Almost immediately thereafter, Private First Class Clelland W. Haymond, who at the time happened to be entering the kitchen, looked around and saw accused coming out of the room into which he had been put to bed carrying an M1 rifle "like advancing in attack". Upon hearing him operate the safety mechanism of the rifle, Haymond shouted "Mendoza's got a gun" and stepped quickly into the kitchen, partially closing the door as he did so (R7,13). At about this time Private First Class Waller P. Jones glanced out of his room opposite the kitchen and saw accused standing in the hall with two rifles one of which was slung and the other of which he was holding in "the hip-firing position". Before Jones could take any action, accused fired a shot through the partially closed kitchen door. His rifle did not appear to be operating properly and he was forced "to pull back the cocking handle to get it to eject". After doing so, he fired a second shot and then started into Jones' room. Jones grappled with him and shouted for others to come to help him in disarming the accused (R15).

The first shot fired by accused grazed Private First Class William J. Zelinki and hit Private William C. Grimes, entering his body about an inch above the navel and emerging from his back (R10,17,18,20,22). Grimes fell and the other men who were in the kitchen, four in number, hastily climbed through the kitchen window and slid to the ground by means of a drain pipe (R13,17,20). A first aid man attached to Company B was summoned and, upon reaching the billet, found Grimes "laying on the floor shot through with the main artery

in the back severed". Before Grimes could be removed from the house, he died from the severe bleeding caused by the wound (R22). In the meantime, accused had been subdued and disarmed, and was later placed under guard (R15,21).

No ill will existed between accused and the deceased; in fact, they were "the best of friends" (R11, 14,17,19). One witness testified that at the time the shots were fired the door leading into the kitchen was open about two feet and that accused "could see straight in probably but not to his right or left" (R18). Other witnesses testified that the door was closed to such an extent that accused probably could not have seen into the room (R11,16,17). Accused's condition as to sobriety on the afternoon in question was variously described as "too drunk to go out" (R7), "drunk" (R10), "drinking pretty heavily" (R18) and "pretty drunk" (R21). Shortly after Grimes was shot, accused appeared to be "quite sober" but he "staggered a bit" when taken under guard to the evening meal (R12).

4. After accused's rights as a witness were explained to him, he declined to testify or to make an unsworn statement because "I don't know nothing - I can't say anything either because I don't remember anything about it" (R23). No evidence was introduced in his behalf.

5. From the evidence outlined above it is clear that accused was guilty of an unlawful homicide. The evidence is such,however, that a substantial question is presented whether his offense was murder or merely that of manslaughter. In this connection it is well to point out that although most of the states have divided the crime of murder into degrees depending upon the heinousness of the offense and have prescribed a lesser punishment for the lesser degrees of murder, no similar amelioration of the common law rule has taken place in military law (1 Wharton's Criminal Law (12th Ed. 1932), sec.502, p.727); Miller, Handbook of Criminal Law, (1934), sec.87, p.262-263; MCM, 1928, par.148a, p.162-164). In military law, as at common law, all unlawful killings with malice aforethought, without regard to varying degrees of culpability, are classified as

murder (AW 92; MCM, 1928, par.148a, p.162-164, supra). This being true, the Board of Review has taken the position that, where murder is charged, the prosecution will be held to a high standard of proof, especially with reference to the element of malice aforethought (CM ETO 10338, Lamb; CM ETO 6074, Howard).

The element of malice aforethought necessary to constitute a homicide murder may of course be supplied by proof that accused had knowledge that his act would "probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not" (MCM, 1928, par.148a, p.163,164). In the instant case, accused fired two shots through the partially closed door of a kitchen in the house where he and other members of his squad were billeted and there was evidence from which the court could find that he knew the room to be occupied at the time. Under these circumstances, if nothing else had been shown, the court would have been justified in finding that accused, who was an infantryman and as such certainly familiar with the lethal qualities of a service rifle, had knowledge that his act probably would cause the death of or grievous bodily harm to one of his fellow squad members and hence acted with malice aforethought. In fact, the manual expressly provides that malice is presumed from the use of a deadly weapon (MCM, 1928, par.112a, p.110; and see CM 237641, Brackins, 24 B.R. 71). However, this is a presumption of fact, not of law, and the inference of malice to be drawn from the use of a deadly weapon is obviously weaker in a case where a homicide is committed by a combat infantryman to whom the use of a rifle is commonplace than it is where a homicide is committed in a settled, peaceful community where the very possession and use of firearms is more or less extraordinary. In any event, the use of a deadly weapon is only one piece of evidence bearing upon the question of malice and the presumption or inference arising from this fact may be rebutted by the other facts and circumstances surrounding the homicide. In other words, it is a more accurate statement of the rule to say that malice, if it exists, is to be inferred from all the facts and circumstances of the case, of which the method by which the homicide was committed is only one (United States v. King (CC, EDNY, 1888), 34 F.302; 40 CJS, sec.25, p.874).

Although it was here shown that accused used a deadly weapon, it was also shown that he was extremely drunk at the time. While intoxication is no defense to homicide, it may be operative to reduce murder to manslaughter if sufficiently extreme to render the accused incapable of entertaining malice aforethought (MCM, 1928, par.126a, pp.135,136; Winthrop's Military Law and Precedents (Reprint, 1920), p.293; 1 Wharton's Criminal Law, sec.407, p.599; 26 Am.Jur., secs.116-119, pp.233-238; 12 ALR 861; 79 ALR 897). All the evidence in the instant case points to the fact that accused's drunkenness was well advanced. The pronounced state of his intoxication shortly before the homicide occurred is shown not only by his actions but by the attitude and action of his fellow squad members in thwarting his purpose to leave the billet. His mental capacity was undoubtedly further impaired by the severity of the blow he received when he fell on the concrete paving of the courtyard at the culmination of his struggle with Smithers and Byrd, which, either alone or in conjunction with his drunkenness, rendered him at least temporarily unconscious. His act in shooting through the door of the kitchen, resulting in the death of one of his best friends, was without motive or reason and in and of itself is some indication that he was unaware of his surroundings and his activities at the time. In declining to testify or to make an unsworn statement, he stated that he could remember none of the events which resulted in Grimes' death. Taking all these facts and circumstances into consideration, the Board of Review is of the opinion that the record of trial does not contain substantial evidence that accused acted with malice aforethought and hence is legally sufficient to support a conviction of manslaughter only (Cf: CM ETO 9162, Wilbourn; CM ETO 10916, Colon).

There remains only the question whether accused's offense constitutes voluntary or involuntary manslaughter. Upon first examination it might seem that if accused was so intoxicated as to be incapable of entertaining malice aforethought, he could not have sufficient mental capacity to commit voluntary manslaughter and hence that his offense must be that of involuntary manslaughter. However, it should be remembered (a) that while voluntary manslaughter is an intentional killing without malice aforethought, a specific intent is not a necessary element of the offense and (b) that although drunkenness may be considered as affecting mental capacity to entertain a specific intent, it is not regarded in the law as a defense to those crimes

which require for their commission a general criminal intent only (see authorities hereinabove cited). Thus even though it be conceded that accused was too drunk to commit murder, it does not necessarily follow that he was incapable of committing voluntary manslaughter. Yet, in order that his offense be voluntary manslaughter rather than involuntary manslaughter, an intentional killing without malice must be shown. However, this intent need not necessarily be an actual or express intent to take life; a constructive intent will suffice. And the very drunkenness which operates to negative the existence of malice aforethought necessary to constitute a homicide murder will, if voluntarily incurred, supply in law the requisite intent for voluntary manslaughter. Stated a little differently, while extreme drunkenness may operate to expunge from an unlawful homicide the element of malice aforethought, it goes no further than this, and operates only to reduce the crime to voluntary manslaughter (see 29 CJ, sec.147, pp.1161,1162; 40 CJS, sec.65, p.930).

It will be noted that the Table of maximum punishments prescribes the punishment only for the type of voluntary manslaughter which occurs when there is an intentional killing upon a sudden quarrel or heat of passion. However, by analogy, the maximum punishment set forth for the type of voluntary manslaughter there specifically dealt with will be deemed controlling here (Cf: CM ETO 82, McKenzie).

6. The charge sheet shows that accused is 25 years of age and was inducted 31 January 1944 at Lubbock, Texas. He had no prior service.

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

8. Confinement in a penitentiary is authorized upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The Federal Reformatory, Chillicothe, Ohio, should be designated as the place of confinement (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended).

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1

APR 1

CM ETO 9393

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CLARENCE J. REED (20746606), attached unassigned, 180th Reinforcement Company, 39th Reinforcement Battalion	Trial by GCM, convened at Etampes, France, 27 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. The record shows (R1,6) that the trial took place two days after the charges were served on accused. Neither accused nor his counsel made any objection to trial at that time. In the absence of indication that any of accused's substantial rights were prejudiced, the irregularity may be regarded as harmless (CM ETO 5004, Scheck and authorities therein cited).

3. 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.

Judge Advocate

Judge Advocate

Judge Advocate

9393

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

BOARD OF REVIEW NO. 3

29 MAY 1945

CM ETO 9396

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luxembourg, Luxembourg, 10, 11 February 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private MORGAN ELGIN (38315799), 3199th Quartermaster Service Company	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Morgan Elgin, 3199th Quartermaster Service Company did at or near Sprinckange, Luxembourg, on or about 13 January 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class George Hamm, 3199th Quartermaster Service Company, a human being, by shooting him with a rifle.

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

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

On 13 January 1945, accused and some 25 to 35 other members of his organization were billeted in the third floor of a house in Sprinckange, Luxembourg. The room in which they were quartered consisted of an attic and was reached by a stairway from the lower floors opening directly into it. At about 2200 hours, Private First Class George Hamm, who was quartered on the floor below, appeared in the attic. Although not intoxicated, he had been drinking and was in "one of those annoying moods". He walked over to a group of men sitting around the stove and had a slight argument with one of them, the argument arising out of Hamm's having snatched a pipe from the other man's mouth. He returned the pipe and went over to accused who was seated near the radio which was on a table about two feet from the door. They talked together for a few minutes, apparently having something of an argument although not of a serious character. Accused's M 03 rifle was lying on his bunk. Hamm then started out the door saying goodnight. No one replied and he pushed the door open saying "It looks like nobody wants to say goodnight to Ponto" (Hamm's nickname). Someone told him to "Get on downstairs" and an argument ensued between him and accused, the latter telling him to "Get downstairs or I will throw you downstairs". Hamm apparently started down and accused was seen standing in the doorway. Hamm said something like "You aren't going to push me downstairs; nobody is going to push me downstairs". The argument continued and Corporal Wilfred L. Phillips, noticing the expressions on their faces, went past accused and down the steps, suggesting to Hamm, who was halfway down the stairs,

that he accompany him. Hamm refused and Phillips, thinking he would follow him, went further down. When he turned around, he saw accused standing in the doorway with an .03 rifle in his hand pointed toward them. He was holding the gun at his hip. Almost immediately a shot was fired. Phillips dropped to the ground and crawled up the stairs past accused and into the attic. As he passed, he heard Hamm's body fall and accused fired two more shots. Hamm had been carrying a carbine slung across his shoulder with muzzle upward. During the time he was on the stairs, Phillips saw no attempt on Hamm's part to move the carbine from his shoulder and he definitely observed that the weapon was still in a slung position when he turned around and saw accused with his gun (R7-10, 17-28, 30-34,36,39-40,42-49).

Immediately thereafter, accused ran over to his duffle bag, reloaded his gun and put some cartridges in his pocket. He then put out the lights and backed into a corner (R10,34). A few moments later, First Sergeant Eugene A. Holmes, having heard the three shots, left his quarters on the first floor and went upstairs to investigate. As he reached the second floor, the lights went out. He paused there for several seconds and when the lights came on again, started upstairs. On a landing between the second and third floors, he saw Hamm's body. Accused was standing in the doorway with gun pointed down the stairs. He stepped back and Sergeant Holmes proceeded on into the attic, asking accused "What he was shooting about; who did he shoot?" Accused replied "Yes, I shot him; yes, I killed him". He appeared to fear action by the other men and started downstairs. Sergeant Holmes followed him, but stopped to examine Hamm's body. It showed no sign of life and way lying on its right side. The butt of his carbine was broken, and the strap was still over the right shoulder with the muzzle pointing toward the head. There was blood on the right side of the body. The sergeant then left to report the matter to the company commander (R10-11,34,52-54,65-68,70-71,75-76,78-81).

Accused meanwhile quitted the building and went to the quarters of Captain Henry Feinstein, the company commander. He had his rifle in his hand and as he entered the captain's quarters said "I just killed Ponto". Since accused apparently feared retaliation by some of the company members, the captain put him in charge of one of the company officers and proceeded to the billet. On the way, he met Sergeant Holmes, who

returned with him. When they reached the billet, Hamm's body was still there and the captain directed that it be taken to the dispensary at once. This was done and upon arrival at the dispensary, Hamm was found to be dead as the result of a gunshot wound in the chest (R11-12,55,83-84,88-89,91,92, Pros.Ex.1).

4. Accused, after being warned of his rights by the law member, elected to testify under oath (R97-98).

He stated that he had been in his quarters throughout the evening of 13 January 1945 and had done no drinking. He was at the radio when Hamm came in. He paid little attention to him and had no conversation with him, although he did overhear an argument between him and one of the other men. A little later, he went to the door intending to go to the latrine which was located outside the building. As he approached the door, it was pushed open by Hamm who apparently had previously left the room. Hamm asked him whether he had come to throw him downstairs, to which accused replied in the negative. Hamm was carrying a carbine on his right shoulder. A "pretty hot" argument ensued, each cursing the other, and Corporal Phillips came between them, suggesting to Hamm that they go downstairs. Accused walked away and took his rifle from the bed. He had loaded the gun and placed a shell in the chamber some time before Hamm had come into the attic. The safety was on. He returned to the door, again with the intention of going to the latrine, pulled it open and saw Phillips and Hamm a few steps down. He had not expected to see them, since he thought Phillips had taken Hamm below. On seeing accused, who had his rifle in his right hand, Phillips ran up the stairs into the room. Hamm was taking his gun off his shoulder and had it upside down with the chamber down toward the floor. Thinking he was going to shoot, accused released the safety on his gun with his thumb and "started blasting". He fired three shots. Hamm fell to the ground and accused stepped back and turned out the light fearing that Hamm might return his fire. When he heard the first sergeant coming up the stairs, he turned on the light and told him that he had done the shooting, but didn't know whether he had killed him. He then went to the company commander's quarters (R100-102,104,106-117,124).

Accused further testified that no blows were struck and that he and Hamm had never previously had any fights or arguments. Earlier in the evening, however, there had been

some fighting on the floor below in which he believed Hamm was involved. He said that Hamm and various of his associates used marijuana and that there was some ill feeling in the company between the northerners and southerners over preference shown the former in the matter of promotion, occasional fights resulting from such feeling. It was the practice of the men of the company to take their rifles withthem when they went outside to the latrine because of rumors of German spies in the vicinity. When he started for the latrine the first time, he had intended to take his rifle, but decided he didn't need it since "my mind told me I didn't at that time". He admitted knowing that it was a violation of company orders to have loaded firearms in the billets, but stated that the rule was "greatly violated" (R102-103,111-112, 117-118,119-121,122).

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

As for the issue of provocation, neither the prosecution's evidence nor that of the defense contains any indication that the quarrel or argument between accused and the deceased was of a character adequate "to excite uncontrollable passion in the mind of a reasonable man" and hence to provide the provocation necessary to render the killing voluntary manslaughter (See MCM, 1928, par.149a, p.166). All that is shown by either side is an ordinary dispute arising out of the annoying conduct of the deceased and his more or less intoxicated condition. While efforts were made by the defense to show hostility between the northern and southern members of the company, serious difficulty on this score was denied

by the prosecution's witnesses (R13-14,39,62,88), and in any event, there is no proof that such rancor, if it existed, had any direct connection with the quarrel out of which the killing arose. The same may be said of the accused's testimony relative to deceased's use of marijuana which likewise received no corroboration from any of the other witnesses (R21-22,37, 69-70,87-88).

With respect to the matter of self-defense, accused testified that when he went to the door the second time, he was again en route to the latrine and had his rifle with him pursuant to the practice in the company of carrying a weapon on such occasions. He further said that he shot the deceased only when the latter took his gun from his shoulder and held it in such a manner as to cause him to fear that deceased was about to shoot him. While the prosecution's evidence contains some corroboration of accused's testimony as to the practice of carrying weapons to the latrine (R48,60), accused's version of the circumstances surrounding the actual shooting is at complete variance with the prosecution's evidence as to the position of the deceased's gun immediately following the affair, as well as with the testimony of Corporal Phillips who was with deceased at the time the shots were fired. An issue of fact was thus raised on which the court's determination, supported as it is by substantial competent evidence, will not be disturbed (CM ETO 4640, Gibbs; CM ETO 5451, Twiggs; CM ETO 1621, Leatherberry).

It is considered therefore, that the record of trial justifies the court's conclusion that accused, in killing the deceased, acted with ill will and animosity engendered by a minor personal dispute and with a degree of violence completely unjustified by any immediate or remote provocation or by any reasonable fear for his own safety. Such a killing constitutes murder within the meaning of Article of War 92, and the finding of guilty of such offense is therefore proper (CM ETO 5745, Allen; CM ETO 6159, Lewis; CM ETO 438, Smith; CM ETO 422, Green).

6. The charge sheet shows that accused is 23 years and two months of age and was inducted 3 November 1942. He had no prior service.

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

8. The penalty for 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).

Benjamin P. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

2 AUG 1945

CM ETO 9406

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters, IX Air Force Service Command, APO 149, U. S. Army, 5 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CHARLES B. SULLIVAN (18069477), Headquarters and Headquarters Detachment, 1585th Quartermaster Group (Aviation)	

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

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

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

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

Specification: In that Pvt. Charles B. Sullivan, Hq & Hq Detachment, 1585th QM Group (Avn), did at St. Leger en Yvenlines, France, on or about the 12th day of September 1944 desert the service of the United States of America by quitting his organization and did remain absent in desertion until he was apprehended at St. Cloud, France, on or about the 5th day of December 1944, except for the period 4 November to 6 November 1944, at which time said Sullivan was in confinement. (As amended at trial)

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

Specification: In that * * * having been duly placed in confinement on or about 3rd day of November 1944 did at or near Rennes on or about the 7th day of November 1944 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * * did at St. Leger en Yvenlines on or about the 12th day of September 1944 take and use without authority a motor vehicle to wit: a 1/4 ton #20337592 military property belonging to the United States and issued for use in the military service and of a value of more than $50.00

Specification 2: In that * * * did at La Boissiere, France on or about the 4th day of October 1944 wrongfully take and use without authority a motor vehicle to wit: a 6 x 6 2½ ton truck #4233885, loaded with 240 jerricans containing about 1200 gallons of gasoline, being property belonging to the United States and issued for use in the military service thereof, and being of value of more than $50.00.

Specification 3: In that * * * on or about 4 October 1944, at Paris France unlawfully sell barter or otherwise convey to diverse French Civilians whose names are unknown 240 five gallon jerricans of gasoline property of the United States Government and as such intended for use in the military service and at a time when such gasoline was necessary and vitally needed such action being of a character impairing the war effort.

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

Specification 1: In that * * * on or about 4 October 1944, did feloniously take, steal, and carry away 240 five gallon jerricans of gasoline 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, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by general court-martial for illegal use and wrecking of a Government vehicle in violation of Articles of War 93 and 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, IX Air Force Service Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case commuted the same to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of accused's natural life,

designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Charge I and Specification: The evidence clearly showed that accused left his organization on 12 September 1944 and was confined on 4 November 1944 in Brittany Base Section Guardhouse No. 1 (R5,6). He was therefore under military control on that date and his period of absence was thereby terminated (CM ETO 10331, Hershel W. Jones). He was therefore absent from his organization for 52 days during which time he lived with a prostitute in Paris and engaged in criminal enterprises directed primarily against the United States Government. In addition, he abandoned his Army uniform and attempted to disguise himself by wearing civilian clothing. The evidence was of such substantial nature as to justify the inference that he intended to absent himself permanently from the military service (CM ETO 1629, O'Donnell; CM ETO 10713, Clark; CM ETO 10331, Hershel W. Jones, supra; CM ETO 10741, De Witt Smith). The record of trial is legally sufficient to sustain so much of the findings of guilty as involves a finding that accused deserted the service of the United States on 12 September 1944 and did remain absent in desertion until apprehended at Avaranches, France on 4 November 1944.

4. Charge II and Specification: Accused was placed in confinement in Brittany Base Section Guardhouse No. 1 on 4 November 1944 (R5,6). Without authority he escaped therefrom on 7 November 1944 (R7). The offense was fully proved (CM ETO 1549, Copprue, et al; CM ETO 2753, Setzer, et al).

5. Charge III, Specifications 1 and 2: The evidence established beyond all doubt that accused at the times and places alleged in the specifications took and used without authority two motor vehicles, property of the United States, described in the specifications (CM ETO 6383, Wilkinson).

6. Charge III, Specification 3: Evidence independent of accused's confession adequately established the fact that accused wrongfully disposed of about 240 jerricans containing approximately 1200 gallons of gasoline, property of the United States furnished and intended for the military service thereof (R20,31,32,37,41,42) of a value in excess of $50.00. Accused's confession was thereby corroborated and rendered admissible in evidence. The overall evidence in the case proved beyond all reasonable doubt that accused wrongfully disposed of the jerricans and gasoline in violation of the 9th paragraph of the 94th Article of War (CM ETO 11075, Chesak; CM ETO 11076, Wade). The evidence failed to establish the greater offense under the 96th Article of War of wrongful diversion of military supplies during a critical period of combat operations (CM ETO 8234, Young, et al). The case exhibits the same defects in proof in this respect as CM ETO 6226, Ealy, and CM ETO 7506, Hardin, but is legally sufficient to sustain a finding of guilty of the lesser included offense under the 94th Article of War.

7. Charge IV and Specification: Accused's theft of the above-mentioned jerricans and gasoline, property of the United States furnished and intended for the military service of a value of more than $50.00 was proved beyond reasonable doubt (CM ETO 6268, Haddox; CM ETO 11497, Boyd; CM ETO 11936, Tharpe, et al).

8. The charge sheet shows that accused is 24 years 10 months of age. He enlisted 9 January 1942 at Denver, Colorado to serve for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and the offenses. Except as herein stated, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support so much of the findings of guilty of Charge I and Specification as involves a finding that accused did at St. Leger en Yvenlines, France, on or about the 12th day of September 1944 desert the service of the United States of America by quitting his organization and did remain absent in desertion until he was apprehended at Avaranches, France, on 4 November 1944; legally sufficient to support the findings of guilty of Charge II and Specification, Specifications 1 and 2 of Charge III and Charge III and Charge IV and Specification; legally sufficient to support so much of the findings of guilty of Specification 3, Charge III, as involves a finding that accused did at Paris, France, unlawfully dispose of about 240 jerricans and approximately 1200 gallons of gasoline, property of the United States furnished and intended for the military service thereof of a value in excess of $50.00 in violation of the 94th Article of War, and legally sufficient to support the sentence as commuted.

10. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42; upon conviction of larceny of property of the United States furnished and intended for the military service thereof of a value in excess of $50.00 by Article of War 42 and section 35 (amended), Federal Criminal Code (18 USCA 82); upon conviction of wrongfully and knowingly disposing of property of the United States furnished and intended for the military service thereof of a value in excess of $50.00 by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87 (See CM ETO 1764, Jones and Mundy)) and upon conviction of wrongfully taking and using a motor vehicle by Article of War 42 and Title 22, section 2204 (6:62) of the District of Columbia Code (1940). The designation of United States Penitentiary, Lewisburg,

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 2 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private CHARLES B. SULLIVAN (18069477), Headquarters and Headquarters Detachment, 1585th Quartermaster Group (Aviation), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support so much of the findings of guilty of Charge I and Specification as involves a finding that accused did at St. Leger en Yvenlines, France, on or about the 12th day of September 1944, desert the service of the United States of America by quitting his organization and did remain absent in desertion until he was apprehended at Avaranches, France, on 4 November 1944; legally sufficient to support the findings of guilty of Charge II and Specification, Specifications 1 and 2 of Charge III and Charge III and Charge IV and Specification; legally sufficient to support so much of the findings of guilty of Specification 3, Charge III, as involves a finding that accused did at Paris, France, unlawfully dispose of about 240 jerricans and approximately 1200 gallons of gasoline, property of the United States furnished and intended for the military service thereof of a value in excess of $50.00 in violation of the 94th Article of War, and legally sufficient to support 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 9406. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9406).

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

(Sentence as commuted ordered executed. GCMO 418, ETO, 8 Sept 1945).

CONFIDENTIAL

9406

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

BOARD OF REVIEW NO. 2 19 MAY 1945

CM ETO 9410

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville, France, 6 March 1945.
Corporal FRED T. LORAN (34292193), 424th Engineer Company (Dump-Truck)	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Fred T. Loran, 424th Engr Co DT, did, at Golbey, France, on or about 14 January 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Bert Sons, a human being by shooting him with a pistol.

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 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 is substantially as follows:

Madame Madeleine Frey testified that prior to 14 January 1945 both accused and Sergeant Bert Sons the deceased, had on several occasions visited her home at Golbey, France (R5,6,22). On the evening of 14 January 1945 accused, another sergeant Robert and two women friends of the witness were visiting at her home (R6). Her eight-year-old son was also present (R6). About 9:15 pm Sergeant Bert Sons arrived at her home (R6), and about 10:00 pm the other sergeant and the two lady friends departed (R7). Madame Frey's home consists of two rooms (R6), a bedroom and a kitchen, and these people were visiting in the kitchen, which is four meters square (R7). After the others left, Madame Frey told accused to go home and he refused. She again asked him to leave but he remained seated (R7). He and deceased were seated face to face, with a table between them (R7). The deceased spoke to the accused (R7), after which he (deceased) rose from the table (R8), leaned on it and pushed it a little. Accused got up and pushed the table back. They began to talk very loudly, with gestures, and witness took her little boy into the bedroom. She was away from the kitchen for one minute and when she returned accused and deceased were arguing very loudly. They separated, the deceased going over against a stove in the corner of the kitchen and the accused was near the kitchen door (R8). At this juncture, deceased started to speak to Madame Frey but never did as accused then shot him with a large pistol (R8,9). Accused was facing deceased when he fired the shot, about two to two and a half meters from him, and witness was standing about two feet to the right of deceased, who was not armed nor did he make any movement towards accused. After the shooting accused was still in front of the open kitchen door (R9). She asked him, "Fred, what have you done", and, motioning with the revolver, he told her to go (R9). She took her son into the other room and together

they left the building through the bedroom window (R9,10). She left her son with a neighbor and went to find a doctor. Returning with the military police she found deceased's body outside in the snow, about 10 meters from her house. Neither the deceased nor the accused was intoxicated (R10).

On cross-examination she testified that accused had been at her house about twenty times and deceased about ten times. The former had never slept at her house but the latter had about four times (R11). On the night in question, accused came uninvited whereas she had invited the deceased, who was going to sleep there that night (R12). She saw deceased shove the table towards accused (R12), but he (accused) was not knocked down nor did anything fall out of his pocket (R13). The argument was over and there was no conversation at all for one minute before the shot was fired (R13,14). During this minute accused pulled the weapon from his back pocket, lifted it up to a position in front of his chest and fired (R14). Deceased was standing near the stove on the other side of the table, which was about one meter wide, and accused fired over it (R14).

A medical officer testified that on 17 January 1945 he examined the body of deceased and his examination indicated deceased had died with the preceding period of from 24 hours to five days (R22). Death was caused instantly by hemorrhage due to a gunshot wound that involved the chest, upper abdomen, heart perforatory and the abdominal aorta (R22,23).

4. After his rights as a witness were fully explained to him, accused made an unsworn statement substantially as follows:

Immediately before the shooting, deceased asked him how long he had been coming to this house. He answered two or three months and then deceased told him, "you have to leave nigger". He said "yes" but deceased came up, pushed the table and the gun fell out of his (accused's) pocket. As he picked up the gun and tried to get up, deceased had "the table up in front" of accused. Deceased was chasing him as he went for the door. He did not succeed in getting to the door leading to the outside because deceased was coming after him. He was backing up out of the corner, with the gun on deceased, begging him to stop. The deceased kept coming and he shot him (R26,27).

5. The court called Madame Frey's eight-year-old son as a witness and, after preliminary questioning as to his understanding of an oath and the consequences of lying, he was allowed to testify with the express consent of defense counsel and without being sworn. This procedure was clearly error but as his story was simply corroborative of that of his mother and the other evidence is clear and compelling as to the guilt of accused, it is not believed that accused was seriously prejudiced thereby (CM ETO 1201, Pheil; CM ETO 1693, Allen; CM ETO 2195, Shorter; CM ETO 6522, Caldwell). Punishment was not increased by the erroneous testimony for a sentence of death or life imprisonment is mandatory on conviction of murder and accused was given the lesser sentence.

That accused shot Sergeant Bert Sons at the time and place alleged is conclusively shown both by the admission of the accused and competent, uncontradicted evidence. Unchallenged evidence was also presented to establish the victim's death as a result of the gunshot wound thus inflicted. With the commission of the homicide by the accused so clearly proved, the sole question for consideration by the Board of Review is whether there is competant and substantial evidence to support the court's finding that the homicide constituted murder.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, par.148a, p.162).

It thus appears that if the homicide herein described was committed with malice aforethought and without legal justification the findings of the court must be sustained.

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a, p.110).

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, etc." (MCM, 1928, par.148a, p.163).

There is ample evidence to support the court's conclusion that this homicide was committed by the accused with malice aforethought. An eyewitness testified that accused deliberately drew a pistol from his pocket and shot the unarmed and defenseless victim at a time when the deceased was not making any movement towards him and one minute had elapsed since any conversation had been exchanged between them. The use of a deadly weapon under such circumstances is sufficient alone to warrant an inference that the killing was deliberate and with malice aforethought. Accused's repeated refusal to leave the house when told to do so by Madame Frey and the deceased indicates what motivated his actions. By its verdict the court has determined that accused did kill Sergeant Sons with malice aforethought and this determination, since it is supported by substantial and compelling evidence, will not be disturbed by the Board on appellate review (CM ETO 3042, Guy; CM ETO 4497, De Keyser).

The issue of self-defense is raised by accused in his unsworn statement. His account of the events of that evening is not at all convincing, when it is considered that he was armed, deceased was not and there was a door through which he could have retreated. An eyewitness testified deceased was not making any movement in the direction of counsel at the time the shot was fired. The question whether accused acted in self-defense was one of fact for the court's determination and such determination against accused was fully supported by the evidence (CM ETO 4640, Gibbs).

7. The charge sheet shows that accused is 29 years and two months of age and was inducted 24 April 1942. He had no prior service.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized uponconviction 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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

11 JUN 1945

CM ETO 9418

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Corporal GEORGE A. THOMPSON, Jr. (34610165), and Privates LEO BEDELL (34160974) and HERMAN GIBBS (34320542), all of 3689th Quartermaster Truck Company	Trial by GCM, convened at Le Mans, France, 28 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

THOMPSON

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal George A. Thompson Jr., 3689 Quartermaster Truck Company, APO 350, US Army, did, at Valframbert, France, on or about 3 September 1944, forcibly and feloniously against her will, have carnal knowledge of Madame Lucie Trottet.

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BEDELL

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Leo (NMI) Bedell, 3689 Quartermaster Truck Company, APO 350, US Army, did, at Valframbert, France, on or about 3 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Lucie Trottet.

GIBBS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Herman (NMI) Gibbs, 3689 Quartermaster Truck Company, APO 350, US Army, did, at Valframbert, France, on or about 3 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Lucie Trottet.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced as to either of accused Thompson and Gibbs. Evidence was introduced of one previous conviction by special court-martial as to Bedell for breach of restriction and absence without leave for five days in violation of Articles of War 96 and 61. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, as successor in command, approved the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, as to each accused, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence, including the sworn testimony of the three accused at the trial, is clear and undisputed that at the time and place alleged each accused had carnal knowledge of Madame Lucie Trottet. The sole question of fact raised in the evidence is whether

these acts were against the consent of Madame Trottet.

The evidence of the prosecution on this issue of consent was substantially as follows:

Madame Trottet testified that at 1900 hours on 3 September 1944, while she was alone in her house, the three accused came to the house and, at their request, she gave them each a glass of cider. One of accused offered her a cardboard box, containing preserves and a cake of soap, but she said "no" (R9). She then testified:

> "One gets up and shut the door. When I saw that the door was shut, I kept to my mind what they wanted. The three soldiers took me and put me on the bed, the leg falling down. One was holding me by the arms on the bed, the other took my pants off, and the other was holding me in respect with his rifle, the edge of the rifle close to my throat. Then a colored soldier took his pants off and then he induced his penis into my body. Seeing that he could not succeed easily, they took me one by the feet the other by the arms, took the comforter from the bed, put the comforter on the ground and put me on the comforter. Then, when I was on the bed, they put on my mouth a handkerchief. I asked for help when I was in bed - called for help and they put a pillow on my head and I was crying louder and louder for help and a colored soldier put two knocks on my face. Then I was quite unconscious. They put the comforter down to the ground, they put it to the ground, they put me on and as they saw I was not very comfortable there, they put a pillow under my head. Then the 1st soldier who has tried first, continued when I was on the comforter. And meanwhile the first soldier gets into me, one was kneeling and has put the blade of his knife close to my throat. When he has finished, another one came and started. Meanwhile, there was a soldier in the house but I didn't know what he was managing there. When the second has finished, the third one came and did the same job. When the last one was on top of me, two colored soldiers went to my bedroom, opened the wardrobe, took a bottle of white wine and the watch of my husband which was on the dresser" (R10).

She heard her parents returning to the house and she said, "Mother, Mother, come quick". Her parents entered the house, and, when her father ordered one of accused, who held a knife in his hand, to get out, he "made a sign to threaten" her father. While the three were having intercourse with her, she was not quite unconscious, but as she had received "two shocks on the face, I was kind of dizzy. I tried to resist them but I couldn't succeed" (R12). While the third man was having intercourse, he had his knife close to him where she could not reach it. When she was struck on the cheek by one of accused, her lip was cut and her eye was black (R12). She did not willingly go to the bedroom with the first soldier, and while he was having intercourse, she defended herself "the most as I could" and "I always defended myself" (R42).

The mother of the victim, Madame Lucie Timonnier, testified that when she and her husband arrived at the house, she found her daughter with three colored soldiers, one of whom, Bedell, "presented" his knife to her and her husband and forced them to leave before he did. Her daughter's hair was in bad order (R14-15). A neighbor testified that, after the three accused had left the house, Madame Trottet's condition was as follows: Her hair was not in order. Her face was "all red" and "tumefied". She was weeping and her eyes were swollen. She had scratches on her body, especially on her arms and face. Her dress was "creased". She was wiping her lips, which were bleeding, with a handkerchief (R18,19).

A physician who examined Madame Trottet the next day testified that he found only some redness in the genital organs with no ulceration, but he found a bruise about the nasal region (R29).

An agent in the Military Police Criminal Investigation Section testified that each accused voluntarily made and signed a statement after an explanation of his rights under Article of War 24 (R20-28).

Thompson in his pre-trial statement asserted that after they had drunk the cider, Gibbs twice said to the woman "zig-zig" but she replied each time that she did not understand. Bedell snatched up Gibbs' carbine and shut the door. Gibbs then took hold of the woman, who yelled "no,no". Gibbs tried to put her on the bed but she continued to yell, so a pillow was put over her face. Gibbs and Thompson started to put her down on the floor but she wouldn't lie down until after Bedell "drew back on her" with the carbine (Pros.Ex.5). The statements of Bedell and Gibbs were substantially similar (Pros.Exs. 4 and 6).

4. Each accused, after his rights as a witness were explained to him, elected to make a sworn statement (R30-31).

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Thompson testified that they were "practically drunk" when Gibbs went over to the woman, "put his right arm between her left arm" and they then went over to the bed. She laid the pillow and comforter on the floor and lay down upon it, and later he, Thompson, had intercourse with her. The rifle was used only in a purely personal argument between himself and Bedell. He admitted swearing to the statement about which the agent had testified, but averred that it was made under the agent's threats and was not true (R36-38).

Bedell testified that after Gibbs "asked her for some zig-zig", she said neither "yes" nor "no". Gibbs then took her by the arm and led her to the bed. After the woman and Gibbs had had intercourse, she asked Thompson, "You zig-zig?" and Thompson replied, "Oui". Later he, Bedell, had intercourse with the woman, after getting her consent. No force was used. The rifle was used only to tease Thompson. He, Bedell, threatened no one with a knife. His statement before the agent was a true statement (R39-41).

Gibbs testified that he asked the woman for "zig-zig", and she repeated something that he didn't understand. Then he went over to her and at that moment Bedell jumped up from the table, took the rifle, and closed the door. He, Gibbs, took her by the arm and she went to the bed and lay down across it. He put the comforter on the floor and she lay down upon it. While they had intercourse, she was yelling something like "Good Monsieur". He escorted her to the bed, but she neither cried out nor resisted at all. Some parts of the statement he swore to were not true and were not what he had told the agent. The statement was made under threats (R32-34).

Except for the testimony of each accused, no evidence was introduced in behalf of any accused.

5. a. Although the record fails to show affirmatively that the appointing authority directed that the three accused be tried together or that accused consented thereto, the defense failed to object and stated that none of accused had any special pleas or motions. Upon an examination of the entire record, the Board of Review is of the opinion that no error injuriously affecting the substantial rights of accused resulted from trying the accused together (Cf. CM 195294, Fernandez et al, 2 B.R.205 (1931); CM ETO 4589, Powell et al; CM ETO 6148, Dear and Douglas, and authorities cited therein).

b. The record shows that a copy of the charges against Bedell was served upon him on the day before the trial. Under the circumstances of this case, the Board is of the opinion that his substantial rights were not injuriously affected by such service

(Cf. CM ETO 4564, Woods). Service upon the other two accused was 25 days in advance of trial.

c. The court was appointed by the Commanding General, Loire Section, Communications Zone, European Theater of Operations, and the actions were signed by the Commanding General, Brittany Base Section, Communications Zone, who is shown by an order attached to the record to have succeeded to the command. The Commanding General, Brittany Base Section, was the proper reviewing authority in this case (Cf. CM ETO 4054, Carey et al; CM ETO 4249, Little).

6. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par. 148b, p. 165).

The evidence in the record, in the opinion of the Board of Review, strongly sustains the findings against each accused of rape under Article of War 92.

Madame Trottet's testimony that each accused had carnal knowledge without her consent and through the use of dangerous weapons and physical violence, was supported by the testimony of her parents, the neighbor, and the physician, as well as by the pre-trial confessions of accused. In their testimony at the trial, however, each accused maintained that she indicated her consent in her actions or her words. Here was a question of fact for the sole determination of the court. As the finding is supported by competent substantial evidence, this finding will not be disturbed by the Board of Review upon appellate review (CM ETO 4194, Scott; CM ETO 7977, Immon, and authorities cited therein).

It was similarly within the exclusive province of the court to determine whether the confessions of accused were made voluntarily. The agent testified that they were, two accused testified that they were not. The court's finding in this respect, being supported by competent substantial evidence, will not be disturbed upon appellate review (CM ETO 1606, Sayre).

7. The charge sheet shows that Thompson is 24 years nine months of age and was inducted 18 December 1942 at Camp Shelby, Mississippi; Bedell is 26 years of age and was inducted 3 October 1941 at Fort McClellan, Alabama; and Gibbs is 26 years nine months of age and was inducted 18 April 1942 at Camp Forrest, Tennessee. Each accused was inducted to serve for the duration of the war plus six months. None had prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

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

1. In the case of Corporal GEORGE A. THOMPSON, Jr. (34610165), and Privates LEO BEDELL (34160974) and HERMAN GIBBS (34320542), all of the 3689th 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 each accused 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 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 9418. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 9418).

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

(AS to accused Gibbs, sentence as commuted ordered executed. GCMO 230, ETO, 28 June 1945).
(As to accused Thompson, sentence as commuted ordered executed. GCMO 231, ETO, 28 June 1945).
(As to accused Bedell, sentence as commuted ordered executed. GCMO 232, ETO, 28 June 1945).

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

9 MAY 1945

BOARD OF REVIEW NO. 2

CM ETO 9419

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U.S. Army, 3 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor: Hawthorne and Fecteau, for life and Komara, for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class DANIEL J. HAWTHORNE (36581196) and Privates EDWARD KOMARA (33511752) and RONALD E. FECTEAU (6152722), all of Company A, 13th Infantry	

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

1. The record of trial in the case of the 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 withthe European Theater of Operations.

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

HAWTHORNE

CHARGE: Violation of the58th Article of War.

Specification: In that Private First Class Daniel J. Hawthorne, Company A, Thirteenth Infantry, did, in the vicinity of Kleinhau, Germany, on or about 13 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty, to wit: combat duty against an armed enemy of the United States, and did remain

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absent in desertion until he was apprehended at Eupen, Belgium, on or about 10 January 1945.

KOMARA

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Edward Komara, Company A, Thirteenth Infantry, did, in the vicinity of Kleinhau, Germany, on or about 13 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty, to wit: combat duty against an armed enemy of the United States, and did remain absent in desertion until he was apprehended at Eupen, Belgium, on or about 10 January 1945.

FECTEAU

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ronald E. Fecteau, Company A, Thirteenth Infantry, did, in the vicinity of Kleinhau, Germany, on or about 13 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty, to wit: combat duty against an armed enemy of the United States, and did remain absent in desertion until he was apprehended at Eupen, Belgium, on or about 10 January 1945.

Each accused stated in open court that he did not object to being tried with the other two accused (R2). Each pleaded not guilty and three-fourths of the members of the court present when the vote was taken concurring, Hawthorne and Komara were found guilty of the Charge and Specification preferred against each of them respectively, and all of the members of the court present at the time the vote was taken concurring, Fecteau was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced as to Hawthorne and Komara. Evidence was introduced of one previous conviction by special court-martial against Fecteau for absence without leave for 75 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, Hawthorne and Komara 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. All of the members of the court present at the time the vote was taken concurring, Fecteau was sentenced to be shot to death with

musketry. The reviewing authority, the Commanding General, 8th Infantry Division approved the sentence of Hawthorne, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½. In the case of Komara, the reviewing authority approved only so much of the findings of guilty of the Charge and Specification as involved a finding of guilty of absence without leave from 13 December 1944 until apprehended at Eupen, Belgium, on 10 January 1945, in violation of Article of War 61, approved the sentence but reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action, pursuant to Article of War 50½. The reviewing authority approved the sentence of Fecteau, forwarded the record of trial for action under Articles of War 48 and 50½, and recommended that the sentenced be commuted to confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence of Fecteau, but, owing to special circumstances in this case and the recommendation of the reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 ofWar 50½.

3. The evidence for the prosecution shows that on 12 December 1944 Company A, 13th Infantry, was located near Kleinhau, Germany (R8). At about noon on that day, the acting company commander issued orders to all officers and platoon sergeants that the company was to move out at 1400 hours the next day, and directed the officers and noncommissioned officers to see that the men had their basic load of ammunition and that they had their equipment and ammunition ready to move out.(R8) On 13 December 1944 around noon, he issued the order of movement to the platoon leaders. The company, however, did not actually move out until 1600 hours (R9). At 2210 hours the company arrived near Brandenburg, Germany, where the company was on the line, with the enemy located about 150 yards southeast of their position. In that position they received mortar and sniper fire (R10).

The three accused were members of Company A, 13th Infantry at the times and places involved. Hawthorne and Komara were in the second squad of the first platoon (R17), and Fecteau was a member of another squad (R13).

At about 1900 hours on 12 December 1944, Fecteau's squad leader received the movement order from the acting company commander

and personally told Fecteau that they were moving out and would attack the next day. At the time this information was given him, Fecteau was in a hole in a pillbox area with two other members of his squad (R13,14). The next day, just before dinner, his squad leader received an order from the platoon sergeant that they were moving out in the afternoon, andthe squad leader around 1200 hours told Fecteau that they were moving out "any time now" and were going forward (R14,15). Fecteau was missing from the company area at about 1315 or 1330 hours, and his equipment was lying around the hole (R15).

Although Hawthorne and Komara were members of the second squad of the first platoon, the leader of the first squad of that platoon testified that the first platoon occupied an area of about 50 yards on 12 December 1944 and that the second squad was approximately 15 yards from the first squad. At about 1200 hours on 13 December 1944, he gave orders to the first squad to roll their packs and be ready to move, and each man in his squad started rolling his pack. It was common knowledge among the men of the first platoon that they were moving out that afternoon to the front (R18,19). Hawthorne and Komara did not move out with the witness (R20).

The three accused were absent from their organization from 13 December 1944 to about 25 January 1945 (R9,11,12,15,20,22). They had no permission to be absent (R9,13, 20,21).

On 9 January 1945 a counter-intelligence officer apprehended the three accused in a house in Eupen, Belgium, which was about 25 Kilometers from the front lines at the time (R23).

4. An explanation was made to each accused of his rights as a witness. Komara and Fecteau elected to remain silent. Hawthorne elected to make a sworn statement, and testified that he left the company without permission at approximately 1330 hours and arrived at Eupen, Belgium, saying:

> "I was there until I was picked up on January 10. About that time I thought about turning myself in, and my reason for such action was that I can't stand the front lines any longer. I've been with the outfit for quite some time myself and I just couldn't stand squeezing the trigger any longer" (R26).

Hawthorne further testified that on 13 December 1945 the acting company commander stated to the whole company "that if anyone is too yellow to make an attack, he could get them off lightly with 20 years" (R26).

A witness for the defense testified that Fecteau had been a very good soldier (R25).

No other evidence was introduced on behalf of any accused.

5. In the opinion of the Board of Review, the evidence in the record is sufficient to support the findings of guilty as to each accused, as approved by the reviewing authority.

The absence without leave of each accused from their organization for the period alleged is clearly proven by the testimony of the commissioned and noncommissioned officers of the organization.

That Fecteau had the intent to avoid hazardous duty at the time he absented himself, is a natural inference from the testimony of his squad leader that he told Fecteau shortly before, that they were about to move out into the attack (R14,15).

That Hawthorne had the same intent when he absented himself, is shown by the evidence of the circumstances existent at that time, in conjunction with the admissions made in his sworn statement (R26).

6. The charge sheet shows that accused Hawthorne is 21 years and 10 months of age and was inducted on 8 March 1943, that accused Komara is 19 years and seven months of age and was inducted 24 June 1943, and that accused Fecteau is 24 years and two months of age and enlisted 25 June 1940. None of accused had any prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58), and for absence without leave such punishment, other than death, as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD,14 Sept.1943,sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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(384)

1st Ind.

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

1. In the case of Private RONALD E. FECTEAU (6152722), of Company A, 13th 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 9419. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 9419).

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

(Sentence as commuted ordered executed. GCMO 151, ETO, 18 May 1945).

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