E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 3162
CM ETO 3869

VOLS. 9-10

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 10 B.R. (ETO)

CM ETO 3482 -CM ETO 3859

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 10 B.R. (ETO)

including

CM ETO 3482 - CM ETO 3859

(1944)

Office of The Judge Advocate General

Washington : 1946

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB 1952

CONTENTS OF VOLUME 10 B.R.(ETO)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

29 SEP 1944

CM ETO 3482

UNITED STATES	1st BOMBARDMENT DIVISION.
v.	Trial by GCM, convened at AAF Station 167, England, 3 August 1944.
Corporal ROGER W. MARTIN (13040880), 533rd Bombardment Squadron (H), 381st Bombardment Group (H).	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Corporal Roger W. Martin, 533rd Bombardment Squadron (H), 381st Bombardment Group (H), did, without proper leave, absent himself from his station at AAF Station 167, APO 634, U. S. Army, from about 8 December 1943 to about 9 March 1944.

ADDITIONAL CHARGES

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

Specification: In that * * * did, without proper leave, absent himself from his station at AAF Station 167, APO 557, from about 13 April 1944 to about 7 June 1944.

(2)

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

Specification: In that * * * having been duly placed in confinement in the Guardhouse, AAF Station 167, APO 557, on or about 9 June 1944, did, at AAF Station 167, APO 557, on or about 16 June 1944, while under guard in the Station Sick Quarters, AAF Station 167, APO 557, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, at U. S. Army Depot G-65, APO 555, U. S. Army, on or about 4 June 1944, wrongfully wear an officer's uniform and a First Lieutenant's insignia of rank.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent uncontradicted evidence established conduct on the part of accused as attributed to him in the various specifications at the times and places therein alleged. The only issue presented was the sanity of accused.

(a) Before pleading to the general issue, the defense entered a special plea in bar of trial on the ground that accused was insane both at the time of the commission of the alleged offenses and also at the time of the trial. In support of this special plea, Major Ernest Gaillard, Station Surgeon, testified that he had obtained a case history from accused and that in his opinion accused was a "constitutional psychopathic inferior" - a social misfit characterized by "inadequacy of emotional content", of a type which frequently does not learn from punishment "though it might be severe" (R2-3). Witness' physical examination of accused disclosed undescended testicles, an infantile penis, and an absence of pectoral hair. This physical underdevelopment was, in the witness' opinion, "all a part of the same picture" (of constitutional inferiority). Accused's own statements and those of others indicated that he was a pathological liar addicted to "wilful lying out of all proportion to the expected gain" (R4). His reasoning powers were normal (R8); his judgment appeared to be good in some cases, in others extremely poor (R7). According to his own statement accused was impulsive, but Major Gaillard was of the opinion that actually he was not (R8). His constitutional psychopathic inferiority

"existed prior to his entry into the Service, and the circumstances surrounding Army life probably precipitated, to some degree, at any rate, his conflict with the Authorities; but whether or not that would have happened in civil life it is impossible to say. It is quite likely that it would have. It is the usual story" (R9).

On cross-examination, Major Gaillard testified that accused "would be of average intelligence", was not insane, and knew the difference between right and wrong (R7).

(b) The plea in bar having been overruled, there was duly entered a plea to the general issue of not guilty by reason of the insanity of accused at the time of the commission of the offenses. In support of this plea defense presented, in addition to Major Gaillard's testimony summarized above, evidence that in April and May 1944, while absent without leave from his organization, accused masqueraded originally as a second lieutenant, subsequently as a first lieutenant. While so masquerading, he represented to Captain John P. Coen, Ordnance Department, that he - accused - had recently participated as an observer in a flight to North Africa, and that he was undergoing treatment for wounds received in combat. He solicited suggestions from Captain Coen as to civilian clothing which he indicated that he - accused - would need as "M.I.D. man". Later he represented to Coen that he had been given a discharge "due to injuries received in combat prior to that" (R31-32). After his second apprehension on 9 June 1944, accused wrote a suicidal note to the Police and Prison Officer in charge of the guardhouse where he was confined requesting him to "send my personal articles home to my mother". At about the same time accused "stabbed himself in the back of the hand with a lead pencil", as a result of which he bled profusely and was transferred under guard to the hospital, whence he escaped the following morning (R33-36; Def.Ex.A).

Accused's statement to the investigating officer dated 20 June 1944 - with reference to which the prosecution, when offering it in evidence, stated "that the document contains matter which is foreign to the issues in this case, and that the T.J.A. would be happy to stipulate that only such matter as is pertinent to this case be read to the Court" - was read to the court in full at the insistence of defense counsel who refused the proffered stipulation (R15,30; Pros.Ex.3). In addition to admitting his guilt and relating relevant circumstances attendant on each offense charged, the statement described other admitted derelictions on the part of accused, including the theft and wearing of an officer's uniform, the unauthorized wearing of decorations and insignia, forging discharge papers, procuring false passes in the feigned capacity of an army intelligence officer, and the actual carrying on of an investigation for army authorities in that assumed role. The statement also asserted that, during the period covered, accused acted impulsively in response to inner urges and that he suffered headaches and lapses of memory; that on 15 June 1944 he was feeling depressed and attempted to commit suicide by opening a blood vessel. It asserted further that

(4)

"While I was wearing an officer's uniform I really thought I was an officer. When I had the M.I.D. cards made I thought I was an M.I.D. agent. Each time I assumed a role I actually thought I was that person" (Pros.Ex. 3).

4. The question of accused's sanity was clearly and properly raised by the plea in bar and the plea to the general issue.

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

"The court may at its discretion give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense (Ibid., par.75, p.59).

A person who is insane to the extent of not having the "mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense * * * should not be tried" (MCM, 1928, par.63, p.49).

The record discloses a careful inquiry into the mental status of accused. The medical testimony supports the court's determination that accused, concerning the offenses charged, could distinguish right from wrong and was capable of adhering to the right. In this connection it will be noted that the experts' opinion was clearly and unequivocably expressed that accused's inpulsiveness was feigned. The expert testimony and the record of the proceedings themselves tend to show accused's capacity to understand the proceedings at the trial and intelligently to cooperate in his own defense. The court had the benefit, moreover, of observing accused's appearance, conduct and demeanor during the trial. The record is legally sufficient to support the court's decision that accused was mentally responsible at the time he committed the offenses charged and that he had the mental capacity to understand the nature of the proceedings against him and to cooperate intelligently in his own defense.

5. The charge sheet shows that accused is 25 years of age, and that, with no prior service, he enlisted 6 January 1942 at Pittsburgh, Pennsylvania, for the duration of the war and six months thereafter.

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

Judge Advocate

Judge Advocate

Judge Advocate

(6)

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 29 SEP 1944 TO: Commanding General, 1st Bombardment Division, APO 557, U. S. Army.

1. In the case of Corporal ROGER W. MARTIN (13040880), 533rd Bombardment Squadron (H), 381st Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3482. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3482).

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

(7)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

27 SEP 1944

CM ETO 3494

UNITED STATES	AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private PEDRO MARTINEZ (38372450), Eighth Air Force Replacement Depot.	Trial by GCM, convened at AAF Station 586, APO 633, 11 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Pedro Martinez, Casual Pool, Eighth Air Force Replacement Depot, ASC, US Strategic Air Forces in Europe did, at AAF-586, APO 633, on or about 19 July, 1944, with intent to do bodily harm, commit an assault upon Sergeant Charles E. Boerner by attempting to cut the said Sergeant Boerner with a dangerous weapon, to wit: a pocket knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court for an "attempt to strike a fellow soldier on the body with an axe, drunk and disorderly in quarters", in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may

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

3. Evidence introduced by the prosecution shows that on 19 July 1944, accused was a private, Replacement Depot, Air Service Command, stationed at Army Air Force Station 586. At that time and place (R5, 6,23-25; Pros.Ex.2), he was on a work detail loading and scattering gravel under the command of Chief Warrant Officer Claude B. Batchelor and Sergeant Charles E. Boerner, both stationed at Army Air Force Station 586 (R5,16). Present on this detail was Private First Class Donald R. Knoll (R20). Batchelor, Boerner and Knoll testified for the prosecution. During the course of the work, Boerner noticed accused was not doing anything. He picked up an idle shovel and offered it to accused, telling him to "do something or throw some gravel" (R6,16). Accused was cleaning his nails with a knife (R6). He replied that he did not want to do any heavy work as he had strained himself and had just been released from the hospital (R6-7,16). Batchelor came over and talked to accused, after which he turned away to find some light work for him. In the meantime, Boerner had walked off a few paces and laughed at a remark made by someone in a group working there (R7,17,21,23). Accused heard Boerner laughing, walked over and charged the sergeant with laughing at him. This Boerner denied, but accused hit him with his left hand, the knife was still in his right hand, and the sergeant returned the blow (R7). Then accused said, "You son of a bitch, I will kill you" (R7,17,21). Accused "went on to him like he was fighting him". Boerner started backing up (R17). Accused had a knife in his right hand (R7,18). He made a swing at Boerner, did not hit him "very bad", but caught the side of his jacket. "One of the other fellows stopped" accused (R7,18,21). Boerner testified that accused swung at him with the knife from five to seven times. Witness exhibited to the court the jacket which he wore at the time, Prosecution's Exhibit 1, and pointed out a "cut" and "a little clean hole like a jab" made by accused (R8,9,13; Pros.Ex.1). Accused cut at Boerner's "left side and front or hip". He used the small blade of a pocket knife (R15).

4. Accused was advised of his rights and took the stand as a witness in his own behalf. He testified that he was 22 years old and was born in Mexico. He said he did not intend to hurt Boerner, that he was "trying to scare him". He related that before the fight he had told Sergeant Boerner that he had been in the hospital for a strain and the sergeant started to laugh at him. He told him that it was not funny. The sergeant hit him first and made him mad. He had no chance to think. He had a knife in his hand but put it away before the scuffle stopped. He could have cut the sergeant had he wished since the two were pretty close, but he did not wish to use the knife. He had had the knife in his hand cleaning his nails (R26-28).

5. Accused was recalled to the stand as a prosecution witness. Such procedure was highly irregular. However, under the circumstances herein, it cannot be said that the substantial rights of accused were prejudiced thereby. The court had improperly curtailed the right of the prosecution to cross-examine accused while on the stand as a witness in his own behalf. The prosecution evidently desired to pursue the line of inquiry which the court had ended. On this second examination of accused, he testified only with respect to a pocket knife, exhibited to him in open court (but not offered in evidence), exactly as he had testified with respect to the knife while on the stand as a witness in his own behalf.

6. Accused is alleged in the Specification to have committed an assault with a pocket knife on Sergeant Boerner on 19 July 1944, at Army Air Force Station 586. As to this, the evidence is undisputed. Whether accused's intent was to do bodily harm and whether the pocket knife was a dangerous weapon, as further alleged, were both questions for the court to decide on all the evidence. "Weapons are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm" (MCM, 1928, par.149m, p.180). The intent itself may be inferred from all the circumstances (Dig.Ops.JAG, 1912-1940, sec.451(10), p.313, CM 193085, 193449 (1930)). The court by its finding determined that the intent and the character of the weapon were as alleged. The threat of accused to kill the sergeant when he advanced on him with the knife and the fact that the field jacket was actually cut, amply support these allegations of the Specification. When determination of facts by the court is fully supported by competent evidence, such determination will not be disturbed by the Board on appellate review (CM ETO 1953, Lewis).

The allegations of the Specification, thus proved, constitute an offense under Article of War 93, the article under which the Specification was laid: "Assault with intent to do bodily harm with a dangerous weapon, instrument or other thing" (MCM, 1928, par.149m, p.180). The act of accused was not provoked. There was competent evidence to show that accused struck the first blow and that, although the sergeant returned the blow, accused pressed the attack, employing his knife, and that the sergeant was retreating during this critical phase. Nor did the laughter of the sergeant, even if directed at accused, justify accused in striking the first blow nor constitute legal provocation for what followed. Winthrop's Military Law and Precedents, Second Edition, Reprint, says, page 675:

> "To determine whether an act of homicide is murder or voluntary manslaughter, the main test is the quality of the provocation by which the act was induced. Mere words, however gross or insulting, will not justify

(10)

taking life, and where a homicide is committed under no other provocation than irritating language, the killing will be murder in law. The same is true of gestures, unless they be of a character manifestly threatening to life as where a pistol or other deadly weapon is evidently attempted to be drawn and used; in such case the crime committed may be reduced to manslaughter. In any case where the provocation, though material, is not excessive, as where a bare trespass is committed on property other than a dwelling, or where the person is assailed but not seriously, or where a more considerable battery is committed but by a party not accountable - as a drunken man, - the law will in general hold the killing to be not manslaughter but murder."

If mere words, "however gross or insulting", will not justify taking life or reduce a killing from murder, mere laughter will not justify or excuse an attempt to do bodily injury with a dangerous weapon.

7. Accused is 22 years old. He was inducted at Abilene, Texas, on 22 March 1943, for the duration of the war and six months. There was 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. Confinement for three years is authorized for a violation of Article of War 93, assault with intent to do bodily harm with a dangerous weapon. 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 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind. (11)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 SEP 1944 TO: Commanding General, Air Service Command, United States Strategic Air Forces in Europe, AAF Station 586, APO 633, U. S. Army.

1. In the case of Private PEDRO MARTINEZ (38372450), Eighth Air Force Replacement Depot, 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 3494. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3494).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

12 SEP 1944

BOARD OF REVIEW NO. 1

CM ETO 3499

U N I T E D S T A T E S v. Private JAMES E. BENDER (37727298), Private First Class FRANK N. OWSLEY (35646020), and Private CECIL M. HENDERSON (35710108), all of Company C, 1306th Engineer General Service Regiment.	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS successor in command to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at 36th Station Hospital, Exeter, Devonshire, England, 8,9 June 1944. Sentence, AS TO EACH ACCUSED: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

BENDER

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private James E. Bender, Company C, 1306th Engineer General Service Regiment, did, at Whimple, Devonshire, England, on or about 13 May 1944, forcibly and feloniously, against her will, have carnal knowledge of Maud Phillips.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * * did at Whimple, Devonshire, England, on or about 13 May 1944, commit the crime of sodomy by feloniously, forcibly and against the order of nature having carnal connection per OS with Maud Phillips.

Specification 2: (Disapproved by Reviewing Authority).

OWSLEY

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private First Class Frank N. Owsley, Company C, 1306th Engineer General Service Regiment, did, at Whimple, Devonshire, England, on or about 13 May 1944, forcibly and feloniously, against her will, have carnal knowledge of Maud Phillips.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at Whimple, Devonshire, England, on or about 13 May 1944, with intent to do him bodily harm, commit an assault upon Raymond Maher, by wilfully and feloniously striking the said Raymond Maher in and about the head with his fists.

HENDERSON

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private Cecil M. Henderson, Company C, 1306th Engineer General Service Regiment, did, at Whimple, Devonshire, England, on or about 13 May 1944, forcibly and feloniously, against her will, have carnal knowledge of Maud Phillips.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at Whimple, Devonshire, England, on or about 13 May 1944, with intent to do him bodily harm, commit an assault upon Raymond Maher, by wilfully and

feloniously striking the said Raymond Maher in and about the head with his fists.

Each pleaded not guilty, and three-fourths of the members of the court present when the votes were taken concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced against any of the accused. Three-fourths of the members of the court present when the votes were 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, as to accused Bender, disapproved the finding of guilty of Specification 2, Charge II, but approved the sentences of each accused and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each. The record of trial was forwarded for action pursuant to the provisions of Article of War 50½.

3. Each accused consented in open court to be tried jointly with the other accused (R2,3).

4. Prosecution's evidence summarizes as follows:

Mr. Raymond Maher, a British civilian, of Hillside, Talaton, Exeter, Devonshire, England, and Miss Maud Phillips, a member of the Women's Land Army, who resided and was employed at Rewe Farm, Devonshire, visited the New Fountain Inn in Whimple, Devonshire, on the night of 13 May 1944 (R15,34). Maher consumed two pints of beer and Miss Phillips drank a glass of cider (R15,34,84). They left the inn at about 10:00 p.m. (R15) and walked on a public highway toward Rewe Farm (R15,33). Miss Phillips pushed a bicycle owned by Maher (R16,35). At the Hand and Pen cross roads where the road from Whimple to Exeter crosses the Honiton main road, at about 10:40 p.m., they encountered the three accused (R15,16,34,36) who made inquiry as to the location of a dance. Maher informed them that one was being held at Talaton (R17,34). They then asked where women were to be found and Miss Phillips explained that there would not be any out at that time of night (R17,35). Maher and Miss Phillips resumed their journey (R17,36). When about two or three hundred yards distant from the three men, one of them called to the couple and ran towards them (R17,35). Maher turned back to the men and conversed with them for a moment, but Miss Phillips continued down the road with the bicycle (R17,25). Maher returned to Miss Phillips. As the couple turned to depart, accused Bender shouted, "We are coming. We know where you are staying" (R22,37).

He approached Miss Phillips and forcibly took the bicycle from her (R37). The girl ran screaming down the road (R32,37,87), pursued not only by Bender but also by Owsley and Henderson. Overtaking her, Bender grabbed her (R38). With one hand on the girl's arm and the other over her mouth, he forced her to accompany him along the road in the direction of the cross-roads (R39,86). Maher attempted to protect the young woman from Bender but was struck by Owsley (R17). Owsley and Henderson then joined in an attack on Maher. They beat him unmercifully, which violence resulted in the infliction of severe injuries upon him (R18,38). He finally escaped from his assailants and ran to the farm cottage owned by Henry George Bolt (R20,66). Maher was covered with blood and asked Mr. Bolt to secure the police and a doctor (R66). The doctor who examined Maher at about 1:00 a.m. on 14 May 1944 at the Bolt cottage described his condition at that time thus:

> "He was very shakey, definitely suffering from a good deal of shock and badly cut about the face; there was a big cut over the right eye on the eyelid; he had a big cut on the left cheek and he had blood all over his face; he had a cut on his tongue, and there were bruises on his ribs. The shock and facial injuries attracted my attention at once." (R62).

While Owsley and Henderson were beating Maher, Bender forced Miss Phillips to accompany him into an adjoining field. He had both of his arms about her (R41). She resisted, cried and endeavored to loosen his hold on her (R38,54,88). He said to her, "You know what I want off of you" (R41,88) and informed her he would hit her if she did not stop crying (R43). When the couple reached the middle of the field (about 270 feet from the nearest house (R59) Bender pushed the girl to the ground and pulled up her skirt (R42,54,55,56). Buttons came off her knickers (R42,55). He then placed himself on top of her and engaged in intercourse with her (R42), during which time he threatened that if she did not keep quiet he would hit her (R43). She was scared and cried (R42,43) but did not scream nor bitenor kick her assailant because she thought he would kill her (R42,58). She struggled to free herself but was physically unable to do so (R49). Upon completion of the act of intercourse Bender held her to the ground and ordered her to disrobe but she refused. He removed her coat,

but she unbuttoned her blouse (R43), which he pulled off her body. In doing so he broke the straps of her cami-knickers (R43,55). He then pulled her skirt from her body, which process resulted in the removal of all of her clothing except her stockings, leaving her nude. At this stage he forced his penis into her mouth, which sickened and nauseated her (R43,50). He threatened her further by stating "If you don't, you would get what the other one got" (R44,50,56). She was in pain and felt "something running down her legs" (R44). Bender then called to his companions, Owsley and Henderson (R45,56). The victim had arisen to her feet by the time of the arrival of the latter two men at the scene (R46,56), and had put on her skirt. Bender held her but when Owsley arrived he (Owsley) pushed her to the ground and with force had intercourse with her (R45,46,57). She cried and attempted to resist but had no strength (R46,56). She engaged in the sexual act with Owsley because he employed force upon her and because she feared he would kill her (R46). When Owsley had completed the act of copulation he arose and Henderson placed himself on top of the girl and engaged in intercourse with her. By this time her physical strength was exhausted. When Henderson completed the act Miss Phillips gained her feet, picked up her clothing and fled across the field (R47). Bender pursued her and overtook her. He solicited her for further intercourse, but she refused. He pushed her to the ground and for the second time engaged in the sexual act. She was scared, was in pain and thought Bender would kill her (R48). Upon conclusion of the act she ran to the Bolt cottage where she encountered Bolt and found Maher unconscious, with blood "pouring away from his face" (R48,67). At that time "she was very distressed and was crying" (R67,68).

Miss Phillips was examined by Dr. Francis Hasmyth Sidebotham at 8:00 a.m. on 14 May 1944 (R60-61). His findings were:

> "On the right upper lip a small bruise; on the left upper arm in the bicep region, a small bruise; blood stains on her blouse on the front and back; scratches on the left and right side of her back in the region of the ribs; (witness indicating place on his own body) there was a contusion over the right scapula; a scratch on the right shoulders; blood stains on the upper part of her cami-knickers; blood stains very pronounced at the lower end of the cami-knickers and stockings; a considerable amount of blood around by the Mons-Veneris Valva and between the thighs and on the inside of her legs; there was a small

tear about a quarter of an inch long at the lower end of the valva in the perinaeal area; there was a marked bruising of the vagina immediately inside the valva." (R61).

Dr. Sidebotham was of the opinion that Miss Phillips could not have engaged in a normal act of intercourse and that her vagina had been roughly penetrated (R62). He concluded that she had been assaulted (R61).

Pursuant to Maher's request, Bolt secured the services of Dr. Sidebotham and notified the police (R66). Sergeant Arthur Henley, of the Devonshire Constabulary, arrived at the Bolt home at sometime after 11:40 p.m. on 13 May. He there saw Maher and Miss Phillips and as a result of his conference with Maher he instituted a search for the assailants. At 12:55 a.m. on 14 May, accused were apprehended by Henley on a lane leading into the road to the Exeter airport, at a point about two miles distant from the scene of the assaults on Maher and Miss Phillips (R68). They had blood on their clothing and upon being questioned by Henley asserted that they had been engaged in a fight at a public house (R69). The three men were sober, although they smelled of alcohol (R68). Henley took them into custody, escorted them to the airport and delivered them to American military authorities (R69).

At about 4:00 a.m., 14 May, Captain Guy S. Peterson, Medical Corps, made a physical examination of the three accused (R76). Bender had the odor of alcohol on his breath, but talked normally and possessed his senses. He had blood on his penis and scrotum, in the region of his genital organs (R76) and on his hands. He was very apprehensive. Owsley talked in a brazen manner and was disrespectful to those who questioned him. He was sober and was well oriented, although there was the odor of alcohol on his breath. There was blood on his penis and scrotum and scratch marks on his nose (R77). Henderson had a scratch on his ear. His penis and scrotum were clean but bore evidence of being freshly washed. He had the odor of alcohol on his breath but was sober and well oriented (R78).

Captain Peterson participated with Dr. Sidebotham in the examination of Miss Phillips (R78). His report of her condition was confirmatory of Dr. Sidebotham's findings above summarized (R74).

Agent Richard G. Barr, Investigation Division, Provost Marshal's Office, interviewed each of the accused on 14 May 1944. In the interviews neither force nor persuasion were exerted nor were promises of any kind made to them. Each man spoke freely and voluntarily, after having been fully informed of his right to remain silent (R90-94). Over objections of defense the statements were admitted in evidence: (Bender R91; Pros.Ex.S; Owsley R95; Pros.Ex.T; Henderson R94; Pros.Ex.U). Each of the statements recited highly inculpatory facts which in substance agree with the prosecution's evidence hereinabove summarized and are corroborative of the same. It is unnecessary to set forth the statements herein.

During the course of the trial the clothing worn by Miss Phillips on the night of the attack upon her was identified and introduced in evidence (R50-52; Pros.Exs.A,B,C,D,E,F). Likewise the clothing of the three accused worn by them on the occasion herein described was identified and received in evidence (Bender R69,70; Pros.Exs.G,H.I.J; Owsley R71,Pros.Exs.K.L.M.N; Henderson R72,73;Pros.Exs.O,P.Q.R).

5. Each accused elected to remain silent and no evidence was introduced by the defense.

6. Consideration will be given to certain questions pertaining to the admission of evidence which arose during the course of the trial:

(a) The defense objected to the admission in evidence of the statements of Bender (Pros.Ex.S), Owsley (Pros.Ex.T) and Henderson (Pros.Ex.U) on the ground that the same were not voluntary statements, in that each accused had not been permitted to obtain sleep prior to the interviews during which the statements were obtained. The evidence was substantial that the statements were freely and voluntarily given, and therefore, the court's determination on this issue will not be disturbed on appellate review (CM ETO 3469; Green and authorities therein cited).

(b) It will be assumed that the statements (Pros.Exs.S.T.U) of the accused are confessions and not merely admissions against interest: (CM ETO 292, Mickles; CM ETO 804, Ogletree, et al). Each confession contained declarations which incriminated not only the maker thereof but also each of his two co-accused. They were identified in evidence with the precautionary declaration of the Trial Judge Advocate in each instance, that each confession was to be considered only against the accused making the same and was not evidence against the co-accused. The admission of confessions of co-accused under similar circumstances and with like cautionary declarations to the court has been approved by the Board of Review (CM ETO 1052, Geddies et al). There was no prejudicial error in this instance.

(c) The defense objected to the admission in evidence of the accuseds' clothing (Pros.Exs.G to R, inclusive) because there was no showing when the blood marks on the clothing were made and "where they are" (R72,73). The objections were wholly without merit. Each item of clothing was positively identified as belonging to the accused and there was testimony that they were in the same condition as when they were taken from them (R74).

7. Owsley and Henderson were each charged with committing an assault upon Maher with intent to do him bodily harm by striking him about the head with their fists (Owsley: Charge II and Specification; Henderson: Charge II and Specification). The elements of the offense are described as follows:

> "This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured."
> Proof--(a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person." (MCM, 1928, par. 149n,p.180).

The evidence clearly and without contradiction shows that Owsley and Henderson administered to Maher at the time and place alleged a terrific beating. There was not only an assault but a battery. The extent of Maher's injuries testify as to the severity of the beating inflicted upon him by the two accused in pursuit of their plan to secure the body of Miss Phillips for the gratification of their lustful desires. Both accused were active, violent participants in the unprovoked, inexcusable assault upon Maher. It was not necessary for the prosecution to prove that each accused personally struck and beat Maher. All that was necessary was proof that Owsley and Henderson participated in a joint attack on Maher. Each accused was responsible not only for his own illegal acts but also for all illegal acts committed by his co-actor in pursuance of the common purpose of inflicting bodily harm upon thairvictim (CM ETO 804, Ogletree, et al; CM ETO 895, Davis, et al; CM ETO 2297, Johnson and Loper). The specific intent of each accused to inflict bodily harm upon Maher may be gathered from their conduct immediately prior to and during the

assault (CM ETO 2297, Johnson and Loper, supra). The finding of guilty is supported by an abundance of substantial evidence (CM ETO 531, McLurkin; CM ETO 1595, Houseworth).

8. Bender's guilt of the crime of sodomy per os upon the person of Miss Phillips was proved beyond reasonable doubt. Prosecution's evidence was supported by Bender's confession. The question of penetration of the girl's oral cavity was one of fact for the court and its finding is supported by substantial competent evidence (MCM 1928, par. 149k, p. 177; CM ETO 24, White; CM ETO 339, Gage; CM ETO 612, Suckow; CM ETO 1743, Penson; CM ETO 2380, Rappold).

9. Prosecution's evidence corroborated by the confession of each accused supports the findings that Bender, Owsley and Henderson each raped Miss Phillips (Charge I and Specification as to each accused) at the time and place alleged. Sexual intercourse was obtained by the ravishers by physical violence and threats of severe injury. The evidence clearly and without contradiction establishes that Miss Phillips on each occasion was overpowered. Against her resistance and protests and without her consent her assailants accomplished their purposes. Penetration in each episode was not only proved by the prosecution but was also admitted by each accused. All of the elements of the crime were completely established (CM ETO 3469, Green and authorities therein cited).

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

Bender is 22 years 11 months of age. He was inducted 20 November 1943, at Fort Leavenworth, Kansas;

Owsley is 21 years four months of age. He was inducted 30 December 1942, at Huntington, West Virginia.

Henderson is 32 years seven months of age. He was inducted 23 September 1943, at Evansville, Indiana.

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

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

12. Imprisonment for life is an alternative mandatory sentence for the crime of rape (AW 92). Confinement in a penitentiary is authorized for the crime of rape by AW 42 and Sec. 278, Federal

Criminal Code (18 USCA 457) and for the crime of sodomy by District of Columbia Code, Secs. 24-401 (6:401) and 22: 107 (6:7) (CM 171311, Stearns; CM 187221, Sumrall). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir. 229, WD, 8 June 1944, Sec. II, pars. 1b (4) and 3b).

B. Franklin Riley Judge Advocate

Edwood K. Sturgis Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 SEP 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Private JAMES E. BENDER (37727298), Private First Class FRANK N. OWSLEY (35646020) and Private CECIL M. HENDERSON (35710108), all of Company C, 1306th Engineer General Service Regiment, attention is invited to the foregoing holding of the Board of Review, that the record of trial is legally sufficient to support the findings and the sentence as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The publication of the general court-martial order and the order of execution of the sentences may be done by you as the successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being as provided by Article of War 46.

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 3499. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3499).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

(25)

BOARD OF REVIEW NO. 2

12 SEP 1944

CM ETO 3507

UNITED STATES v. Private SEYMOUR S. GOLDSTEIN (11011571), 872nd Army Postal Unit.	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor in command to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Fremington, Devonshire, England, 3 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

---

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

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

CHARGE: Violation of the Ninety-sixth Article of War.

Specification: In that Private Seymour S. Goldstein, 872nd Army Postal Unit, did, at Camp Heath, Cardiff, Glamorgan County, South Wales, on or about 25 April 1944, while entrusted with the United States mail of Army Post Office 872, willfully and unlawfully abstract, with intent to steal and carry away, from various packages out of the United States mail, sundry items, to wit: One flashlight, a jack knife, a package of cheese, and a fountain pen.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor,

3507

at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence introduced by the prosecution showed that on 25 April 1944, accused was a private in the 872nd Army Postal Unit at "Camp #5 APO 872", Glamorgan County, South Wales, and was on that date charge of quarters in the post office sorting room (R7,8,10,11,14,15; Pros.Ex.A).

There were but two witnesses for the prosecution. Other witnesses were "overseas" (R10).

First Lieutenant Thomas R. Mitman, Infantry, 18th Replacement Depot, testified that on the night of 25 April 1944, he was in the guard house on duty as camp provost marshal and that a Lieutenant Kath came in with two enlisted men, one of whom was "identified * * * as the charge of quarters at the post office on the camp. * * * the accused in this case". The other enlisted man was "Lloyd Marshall", the sentry on the post which included the post office. Lieutenant Kath told this witness that he had been informed by the sentry that he (the sentry) had been watching accused through the window and had seen him open packages in the post office (R7,8,10). Lieutenant Mitman ordered accused searched. Lieutenant Kath "presented" (to this witness) "material evidence"; a brick of cheese, a jack knife, the blade of which "was marked 2.75 as if it was the price", a fountain pen and a flashlight, which Lieutenant Kath had found on accused's cot in the post office. This property was received in evidence. The sergeant of the guard who had been ordered by witness to search accused produced "a ring in a leatherette gift wrapper", also received in evidence, and he said it had "been found on the person of the accused * * *" (R7,8,11,13,14; Pros.Exs.B,C,D,E,F). At this point the sentry told Lieutenant Kath that he had observed accused putting in the stove wrappings of parcels he had opened. Accused was sent to the guard house, and Mitman went to find Lieutenant Clawson, commanding officer of the army postal unit, and with him returned to the sorting room and inspected the inside of the stove. There was a fire in the stove but the identified paper was reduced entirely to ashes. Visible on it were traces of return addresses. * * * * two things were identifiable. One apparently was a gum sticker with which addresses were fixed to presents with a colored ink border. * * * The other place was the initials 'PVT' and it seemed to be the beginning of a return address on a parcel". Accused was then sent for and brought to the post office. Clawson said to accused: "'What is this I hear about you rifling the mail'". Accused answered: "'It is true sir * * * This is the first time sir'", and said he had opened five packages. Some time later, Clawson told accused: "'I have prepared a statement here which I want you to sign'". Lieutenant Ennis had written this statement. It stated that on the date and at the place in question accused had "maliciously" opened and extracted "contents of packages of United States Army mail". Accused

3507

signed it. Lieutenant Mitman witnessed it. This statement was received in evidence and marked "Prosecution's Exhibit A" (R7-11). However, accused had not had Article of War 24 read to him (R10), before he signed this statement (R11); accordingly, Lieutenant Ennis, the next morning, prepared another statement (not identified nor received in evidence) which, Lieutenant Ennis informed this witness, accused signed after Article of War 24 had been read to him (R10,11). Lieutenant Mitman could not remember which statement of Lieutenant Kath or of the sentry, Marshall, to which he testified, had been made to him in the presence of accused (R10-12).

First Lieutenant Grear O. Clawson, Jr., commanding officer 872nd Army Postal Unit, testified that he was told by Lieutenants Kath and Mitman that accused "had been caught" rifling mail. He sent for accused, asked him, in effect, if he had been rifling the mail and received from accused the reply: "'It is true sir'". Accused also said that he had thrown the wrappers in the fire. "The wrappers were burned to such an extent they could not be identified". When accused was searched nothing was found on his person (R14-16). Witness remembered accused signing a statement prepared by him and Lieutenant Ennis and the fact that before signing accused had been told "it was voluntary on his part" (R16) * * * * and given the idea it would be used against him later on" (R17). Defense counsel made no objections to the repeated hearsay testimony and announced "no objection" to the admission in evidence of the various prosecution exhibits.

4. Accused was advised of his rights as a witness on his own behalf and elected to remain silent. The defense introduced no evidence (R17).

5. As noted, accused pleaded guilty. The court then asked accused if he understood that by his plea of guilty the court, upon finding him guilty, might impose a sentence of dishonorable discharge and forfeiture of all pay and allowances, failing to advise him that the sentence might include a term of confinement. The accused said that he understood, and upon being asked if he wished at that time to change his plea he replied that he did not. Thereafter, the court made findings of guilty and imposed a sentence which, in addition to dishonorable discharge and total forfeitures, included confinement at hard labor for five years.

When the law member, explaining to an accused the effect of his plea of guilty, erroneously states the maximum punishment that may be adjudged to be less than the maximum punishment authorized and the accused is convicted upon his plea of guilty, no evidence being introduced, the punishment imposed may not exceed that so stated by the court in its explanation. (Dig.Op.JAG, 1912-1940, sec.378(2), p.188, CM 144220 (1921)).

(28)

However, in the present case the prosecution introduced substantial competent evidence to establish accused's guilt, independent of accused's plea of guilty. Much of the testimony was hearsay. But the corpus delicti was sufficiently established to support a confession; and it was shown that accused, on being questioned, promptly admitted his guilt and later signed a written confession. Although the confession was made to a superior officer and there is some question as to whether accused had been advised of his rights at the time, the evidence is clear that his oral and written statements were voluntary within the meaning of paragraph 114a, Manual for Courts-Martial, 1928.

Lieutenant Clawson talked to accused right after the occurrence of the offense. Accused at that time admitted, immediately, that he had been rifling the mail (at the army post office) and that he had opened five parcels, the wrappers of which he said he had thrown in the fire. Just prior to this admission, Lieutenant Mitman had looked in the stove at the post office. In the fire, he saw the ashes of burned paper. Visible and "identifiable" were: "a gum sticker with which addresses were fixed to presents with a colored border" and also "the initials 'PVT' and it seemed to be the beginning of a return address on a parcel." These wrappers, found in a post office, identified in this manner, could have come only from mail. Under these circumstances, it was proper to show that accused said that he had put the wrappers from the parcels in the fire (MCM, 1928, par.114, pp.114, 115). This statement served to further identify the parcels as mail matter. All of this occurred late at night. Deliveries were not being made to soldiers and parcels were not being unwrapped in the post office by the addressees at that time. But the proof is that wrappers were being burned late at night in the post office. Fire is commonly used to destroy evidence of crime. It was shown that accused worked in that army post office. He had both "access" and "opportunity". One of the articles alleged in the Specification to have been stolen bore all the earmarks of a gift, such as would be found in gift packages sent by mail. The same can be said with respect to the ring which was introduced in evidence. The knife and the ring were both new and unused. The knife bore the original price mark on its blade. Thus, there was sufficient proof by competent evidence of the corpus delicti to support the oral admission of guilt made by accused and the written confession which he later signed; CM ETO 1588, Mosseff; CM ETO 1737, Mosser.

6. The act of accused was not charged as larceny but rather as conduct prejudicial to good order and military discipline in violation of Article of War 96. The specification did not attach any specific value to the property in question. However, the question presented as to sufficiency of proof of larceny does not arise (CM ETO 1191, Acosta). The offense as alleged and proved involved the willful and unlawful abstraction of various packages of United States mail from

an army post office by a soldier assigned there to duty. His relation and obligation with respect to the mail at that army post office were similar to those of a United States Postoffice Department employee with respect to the mail under the control and authority of that department.

No punishment is provided for this offense in the Table of Maximum Punishments. The penalty of the statute for the protection of the United States mail in the case of postal employees (sec.318, Title 18, USC) or the statute for mail protection generally (sec.317, Title 18, USC), each providing a maximum period of confinement of five years, is applicable (MCM, 1928, par.104c), except that penitentiary confinement is not authorized (AW 42).

7. Accused is 24 years old. He enlisted 6 November 1940 at Providence, Rhode Island, to serve three years extended for the duration of the war plus six months. There was no prior service.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors prejudicial to 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 legally sufficient to support the sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for five years in a place other than a penitentiary, Federal reformatory or correctional institution.

(On Leave) Judge Advocate

Judge Advocate

Judge Advocate

3507

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3510

28 SEP 1944

UNITED STATES	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at First Army
	)	Stockade, near Formigny, France, 31
Private JAMES B. FURLONG (32722154), 3168th Quartermaster Service Company.	)	July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James B. Furlong, 3168th Quartermaster Service Company, did, at Saint Germain du Pert, Normandy, France, on or about 20 June 1944, with intent to commit a felony, viz, rape, commit an assault upon Paulette Demaine by willfully and feloniously seizing the said Paulette Demaine, striking her and tearing away her clothing.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for about 35 hours, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 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 the provisions of Article of War 50½.

3510

3. Evidence introduced by the prosecution showed that accused was a private, 3168th Quartermaster Service Company, stationed with his company, on 20 June 1944, about one mile from Saint Germain du Pert, Normandy, France (R7). On that date, between 10 o'clock and noon, Paulette Demaine, who lived at Saint Germain du Pert, encountered accused in that neighborhood. She was accompanied by two little boys and one little girl (R8). She had seen accused twice before that day. On one occasion he had shown her a purse sticking out of his pocket (R13,14). After she saw accused that morning, 20 June, she went into a tavern, accused followed her, and she left for her home, about one kilometer away. Accused followed her and called to her. He showed her "a little blue booklet", and pointed out the phrase, "I won't hurt you", at the same time placing his hands together against his right cheek and bending his cheek to the right. He also indicated the grass. The girl said, "No". Accused who was carrying a rifle fired one shot. The children ran away and he fired one shot in their direction (R8,9,12). Accused then took Paulette Demaine, holding her by the clothes, by her hips, and waist, toward a path leading into a little park. "He wanted to drag her" and she said she went because she could not defend herself. Before reaching the path, "Pierre Gillain" came along. She asked him to "protect" her, but accused pointed his gun at the Frenchman and the latter continued his walking (R9,10). When accused reached the path with the girl, she shouted and tried to get away. He attempted to force her to the ground. She tried to escape. Her clothes "were torn to pieces". He struck her on the legs with his fist and slapped her face. At this point Paulette was able to get away. She had hold of his rifle with both hands and threw it away. When accused went to regain his rifle, she ran away. She went to a little house followed by accused. There was an "old woman" at the house whom accused intimidated and frightened away. "She left and was shouting for her house". Accused followed the girl into the house, took her in his arms and tried to lift her, to force her onto a bed. She "gave him a good punch", hit him in the face. He did not get her all the way onto the bed, because she was defending herself. She was shouting all the time. Accused's gun was lying on the bed at this time. When he tried "to get hold of his rifle", she "escaped at that moment and * * * rushed out" (R10-14). She went to her "cousin's" who lives nearby. Accused did not follow her. At her cousin's she met some Americans in a car. She talked to one who spoke French. Within a few minutes, about five minutes "perhaps" after she had escaped from accused, "accused came in" with some American soldiers (R14,15). The Americans were the "Battery Commander" of Battery A, 467th Anti-Aircraft Artillery Battalion, who did not testify, his First Sergeant Chester E. Gutowsky, and Technician Fifth Grade Ernest B. Ferrata, who spoke French, of the same organization. They had been driving in a jeep in the vicinity about this time, checking gun positions. Passing through the village, they heard "quite a commotion". Upon making inquiry they received information as a result of which they proceeded on a little farther down the road. Then they met the prosecu-

trix. Ferrata talked to her in French. While he talked to the girl, Gutowsky proceeded "down a little lane" and met accused "coming back". Then they were all there before Paulette, including accused. Paulette stated that accused, whom she then identified, had tried to rape her. She was nervous and crying. Accused at that time said he had not been drinking (R16-21).

4. Accused was advised of his rights as a witness and elected to remain silent. No evidence was offered by the defense.

5. It is unnecessary to recapitulate the evidence further than to state that accused, at the time and place alleged in the Specification, armed with a rifle which he fired in the presence of the girl for the purpose of intimidation, employing superior physical strength, dragged this girl, Paulette Demaine, a female not his wife, off a road toward a park, where he hit her with his fists and tried to throw her on the ground. She escaped and he pursued her into a nearby house where, after cowing and driving out an aged occupant, he again attacked the girl and tried to lift her onto a bed. Fortunately she again escaped him. Almost immediately some Americans came up to her. She made complaint of the attack to one American, and accused was located by another and accompanied to the presence of the girl who identified him as her assailant. The assault alleged in the Specification is fully established. The Specification further alleges, with respect to this assault that it was committed with intent to commit a felony, viz, rape.

> "This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * * The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person" (MCM, 1928, par.149 1, p.179).

On the question of accused's intent to commit rape, that is, his intent to have sexual relations and his purpose to accomplish that intent by the use of force, the evidence is eloquent of that intent and purpose. His suggestions of sleeping with the girl in the grass, concurring with his statement that he would not harm her, her refusal, his taking her off the road to a place where he would be unobserved, and his attempts to force her to the ground and later onto a bed, show that his purpose was sexual intercourse. His use of force prove that he intended to accomplish his unlawful purpose by force. There is no question that the girl refused at all times to accede to his wishes. There is no question in this case of the identity of accused, that he was her assailant. The of-

fense of assault with intent to commit rape, in violation of Article of War 93, as charged, was fully established. The evidence was competent and was uncontradicted.

6. Accused is 20 years old. He was inducted at Fort Dix, New Jersey, 25 January 1943. There was no prior service.

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

8. Penitentiary confinement for 20 years is authorized for the offense of assault with intent to commit rape (AW 42; sec.276, Federal Criminal Code (18 USC 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

3510

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 SEP 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

I. In the case of Private JAMES B. FURLONG (32722154), 3168th 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 and this indorsement. The file number of the record in this office is CM ETO 3510. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3510).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

7 OCT 1944

CM ETO 3553

U N I T E D S T A T E S	VIII CORPS.
v.	Trial by GCM, convened at Brecon, Brecknockshire, Wales, 9 and 10 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Staff Sergeant LEROY McDOUGAL (34111347), Battery "A", 969th Field Artillery Battalion	

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

---

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

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

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

Specification: In that Staff Sergeant Leroy McDougal, Battery "A", 969th Field Artillery Battalion, APO 308, US Army, did at Penrhiw Isaf, Llanddeusant, Wales, on or about 17 May, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Janet Davies, Penrhiw Isaf, Llanddeusant.

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

Specification: In that * * * did at Maesgwyn Cottage, Trecastle, Wales on or about 19 May, 1944 with intent to do her bodily harm, commit an assault upon Mrs. Margaret Tanner, Maesgwyn Cottage, Trecastle, Wales - by grasping her and threatening and menacing her with a dangerous weapon, to-wit: a knife.

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 the 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 this 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. It was shown by the prosecution that accused was, at all times mentioned in the specifications, a Staff Sergeant in Battery A, 969th Field Artillery Battalion, stationed in the general neighborhood of Llandovery, Trecastle and Talsarn, Wales (R6,7; Pros.Ex.1). He was detailed as motor sergeant of his battery and it was his duty to obtain water and gasoline for the battalion (R12). The relative location of the various places, involved in the occurrences alleged in the two specifications, is most easily comprehended by visualizing a rough rectangle, the lower left-hand corner of which is defined by Talsarn, the upper left-hand corner by Llandovery, the upper right-hand corner by Dixie's Corner, and the lower right-hand corner by Trecastle. The sides of the rectangle were approximately six and one-half miles in distance and its base and top approximately seven and one-half miles.

On 17 May 1944, accused and his battalion were camped at Dixie's Corner, and on 19 May at a point on the base of the rectangle about midway between Talsarn and Trecastle. Oil and water were obtained at Llandovery. There was no direct road to Llandovery from Dixie's Corner. To go from Dixie's Corner to Llandovery, it was necessary to go first to Trecastle and then to traverse the rectangle from the lower right to the upper left corner or to go first to Talsarn and then turn right and go up to Llandovery. The latter route was substantially longer (Pros.Ex.1).

Mrs. Janet Davies, the victim mentioned in the Specification of Charge I, lived at Penrhiw Isaf, a farm, about three-quarters of a mile from Talsarn, on the road from Talsarn to Llandovery (R58). Close to Penrhiw Isaf, on a somewhat parallelling road, about the same distance from Talsarn, was Cefn Gareg, another farm (R58; Pros.Ex.1). Mrs. Mary Ann Davies (not the prosecutrix) and two of her children lived at Cefn Gareg. She and her children testified; as did also Mary Margaret Lewis, proprietress of Cross Inn, a "pub" located close to Talsarn and to Penrhiw Isaf. Mrs. Margaret Tanner, the victim of the assault mentioned in the Specification of Charge II, lived at Maesgwyn Cottage near Trecastle on a transverse road from Trecastle to Llandovery (R20,31,40,50,108; Pros.Ex.1). When going for gas or water, accused used a jeep and pulled a trailer loaded with cans or water tins (R150,152,153,159,171,175,176,199,200). The back of the trailer

was marked by letters and numbers about six inches high: "969 F" (R176, 190). Accused had a gold tooth, a gold crown on the left of his upper two front teeth (R177,189). Accused is five feet seven inches tall and weighs 138 pounds. He described himself as brown skinned (R187,188). On the days in question, the customary uniform was field uniform: fatigues, leggings, harness, field helmet, including a belt and side arms; accused wore a pistol holster and pistol (R11,261).

Mrs. Janet Davies testified that on 17 May 1944, at 4:00 p.m., or shortly thereafter, she was in the vicinity of her home, on the road between Talsarn and Llandovery, and was passed by a jeep with a water "carrier", driven by a lone colored soldier going toward Myddfai, on the road to Llandovery. This soldier offered her a "lift". She refused. He drove on and she remembered that among four letters or numbers on the back of the vehicle were the numbers "96". As she walked in the direction taken by the jeep she saw a soldier, whom she recognized as the jeep driver, coming back toward her on foot. After speaking to her about road directions, he drew a knife from his pocket and walked toward her. She backed away and ran. He pursued her with the knife held in an upright, striking position. He caught her, pulled her down on a steeply sloping bank, opened her clothes, "undid himself", and put his private parts in hers and had an orgasm inside her (R56-69). She was "choked with fright", in fear of her life, and unable to defend herself, physically incapable of doing anything about it because of being nervous. She was not "willing" and would have shouted if she had thought it would help. The description given by Mrs. Davies of her assailant was that of a colored sergeant in field uniform, wearing a leather case which she suspected of containing a revolver. This soldier, according to her, had a gold tooth on the upper right-hand side of his jaw (R70-72). The following day, Mrs. Davies again saw this soldier sitting next to the driver in a group of six soldiers in a truck passing her house (R82,83,85). At the trial, Mrs. Janet Davies selected accused out of a group of nine colored boys as the "colored boy" who attacked her (R56,57).

On 19 May 1944, Mrs. Margaret C. Tanner was in her home, situate as above described, with her two small children. A little after 3:30 p.m. a colored soldier wearing dungarees and a pistol holster came to the door and into the kitchen. She told him to stand by the door. He grabbed her by the hand and said "Why the hell should I stand by the door". There was more said and then this soldier mouthed something about "I will knife you" and Mrs. Tanner saw a knife coming toward her, held in his right hand. She and the children screamed and the soldier ran from the house toward Llandovery. Mrs. Tanner said this soldier wore sergeant's chevrons and had a gold tooth on the right-hand side of the upper jaw. From a line-up of nine soldiers in the court room, she identified accused as her assailant (R108-115).

4. The testimony of Mrs. Janet Davies established the commission of the offense of rape, as alleged in the Specification of Charge I, in violation of Article of War 92 (MCM, 1928, par.148b, p.165; CM ETO 3740, Sanders, Wilson and Anderson, and authorities therein cited).

5. The testimony of Mrs. Tanner justified a finding that she was assaulted with a dangerous weapon, in violation of Article of War 93, as alleged in the Specification of Charge II (MCM, 1928, par.149m, p. 180). Whether Mrs. Tanner's assailant intended to do her bodily harm and whether the knife was a dangerous weapon, elements of the offense alleged under Charge II, were both questions for the court to decide from all the evidence (CM ETO 1953, Lewis; CM ETO 3494, Martinez).

6. The only issue raised by the defense was as to the identity of the offender under the two charges. It was denied that accused was the culprit. Accused, after being advised of his rights, testified in his own behalf. He denied that he was the assailant of Mrs. Davies and of Mrs. Tanner. He said that he had not gone for water on the afternoon of 17 May until between 4:30 and 5:00 (R154). If this were true, he could not have committed the rape at about 4:00 p.m. at a spot at least thirteen miles from where his battalion was bivouacked. He said that he was driven that afternoon by Technician Fifth Grade Anderson Mitchell, of his battalion (R152-154). Accused said he never saw Mrs. Janet Davies on 17 May (R 156). Mitchell verified this; said he was never separated from accused that afternoon until after their return to the battalion about 5:30 p.m.; and that at no time that afternoon were they near the old bivouac area or Cross Inn (R197-213). Accused called numerous other members of his organization who testified with more or less certainty to facts which, if true, would place accused in his battalion area at about 4:00 p.m., or a little later, on the afternoon of 17 May (R259-260).

Evidence offered by the prosecution conflicted with the alibi presented by accused for the afternoon of 17 May. Prosecution witness, Mary Margaret Lewis, who resided at Cross Inn and was serving the bar there on 17 May, testified that a colored sergeant and a private came to Cross Inn between 2:00 and 3:00 that afternoon and were served with beer. The private picked up and read a paper which had not been delivered until about 11:30 a.m. These two soldiers arrived in a jeep with a water carrier behind. The sergeant was dressed in field uniform and had a gold tooth on the upper left part of his mouth near the front. He wasn't very tall and was of medium build, not as dark in color as colored soldiers usually are. She saw him the next day in a 3/4 ton truck with about four other soldiers and a driver, in front of her inn. They wanted to know "if the pub was open". Upon being told that it was not time for it to be open, they drove off. This witness then selected accused out of a line-up of nine soldiers in the court room as the sergeant she thought was in the Cross Inn on 17 May (R20-27). The Cross Inn is a short distance from Talsarn, which is about half-way from Cross Inn to the home of Mrs. Janet Davies. Cross Inn is also only a short distance from Cefn Gareg, which, in turn, is close to the home of Mrs. Janet Davies (Pros.Ex.1). It was to Cefn Gareg, where Mary Ann Davies lived with her children Daniel and Mary Augusta, that a colored soldier drove a jeep with a water trailer at about 3:45 p.m. on 17 May. He asked for a "drop of water". This soldier had three stripes on his sleeve, a gold tooth in the upper left center of his

mouth, and was of medium build and "not very black". The three members of this Davies family did not otherwise identify their visitor of that afternoon. He was given a cup of tea and left about 3:50 p.m. (R31-54). Accused denied that he had ever seen Mary Ann Davies or her two children prior to the identification line-up (R163).

Accused on direct and cross examinations said that he had been to Cross Inn in a 3/4 ton truck on 18 May between 5:00 and 5:30 p.m. With him were two other soldiers and the driver. Accused was sitting on the right-hand side in the driver's seat. At the Cross Inn they were told by "the lady" that she was not open, but would be open at 5:30. After that this party drove to Talsarn, turned left, and passed the home of Mrs. Janet Davies, going "considerably slower" than usual because the road was winding and went through the yard of her house (R157,158,172-175). This admitted trip of accused on 18 May corroborated the testimony of the prosecutrix, Mrs. Janet Davies and of Mary Margaret Lewis. It tended to strengthen their identification of accused as the soldier they said they had seen in the vicinity of Talsarn on the day previous where and when the rape had occurred.

With respect to the afternoon of 19 May, accused's battalion was back in its regular bivouac area midway between Talsarn and Trecastle. Accused said that he left the bivouac area between 3:00 and 3:30 p.m. Mitchell was driving for him. By mistake Mitchell went the wrong direction, the longer route, toward Trecastle instead of Talsarn. Accused did not notice Mitchell's mistake until too late to turn back. They were on the way to Llandovery for water, which he admittedly knew was forbidden to use, and they took the Old Roman Road which turns off to Llandovery a little over a mile before reaching the other road that went to Llandovery by way of Mrs. Tanner's home. In taking the first turn off to Llandovery, accused was about two miles from Mrs. Tanner's. He said that he did not pass her house, did not stop there, and had never seen her prior to the identification line-up (R159-161,163). Mitchell fully corroborated accused in his denial of having been near the home of Mrs. Tanner on 19 May (R201-203).

Captain R. C. Coddington, commanding officer, Battery A, 969th Field Artillery Battalion (R6), testified that he had told accused, immediately after lunch, on 17 May, that they would have to have water that afternoon (R12). He did not see accused leave (R13), but said that accused reported to him, at approximately 3:00 p.m., that he and Mitchell were leaving for water (R260). Accused returned between 5:30 and 6:00 p.m. He asked accused why he was so late and accused said that there was only one pump at the water point (R13). Accused denied that he had told his captain that he was late because some of the pumps were broken (R170-171). Accused insisted that they had not left their bivouac area until between 4:30 and 5:00 p.m. and had taken between 45 minutes and one hour to make the round trip (R154,155).

(42)

The battery commander and three other officers of accused's organization testified to his excellent character, initiative and quality of service (R140-144).

From the foregoing, it is the opinion of the Board of Review that there was substantial competent evidence on which the court was fully justified in rejecting the alibis offered by accused and his witnesses and in accepting the identification of Mrs. Janet Davies and Mrs. Tanner of accused as their assailant. The issue of fact as to whether accused was the assailant alleged in the Specification of each of the two charges was a question for the determination of the court and since there was substantial competent evidence to support the determination made by the court with respect to this issue, the findings of guilty may not be disturbed by the Board on appellate review (CM ETO 1065, Stratton; CM ETO 3200 Price).

7. Accused is 22 years old. He enlisted at Fort Bragg, North Carolina, on 16 April 1941 for the duration of the war plus six months. There was no prior service.

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

9. The mandatory penalty for rape is death or life imprisonment, as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of rape (AW42; secs.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 (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON LEAVE) _____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 OCT 1944 TO: Commanding General, VIII Corps, APO 308, U. S. Army.

1. In the case of Staff Sergeant LEROY McDOUGAL (34111347), Battery "A", 969th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3553. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3553).

B. FRANKLIN RITER,
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General.

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1 22 SEP 1944

CM ETO 3570

U N I T E D S T A T E S	V CORPS
v.	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, near St. Martin Don, Department of Manche, Normandy, France, 16 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private NOAH M. CHESTNUT (14013545), Company C, 1340th Engineer Combat Battalion	

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

---

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

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

CHARGE I: Violation of the 96th Article of War.
Specification 1: In that Private Noah M. Chestnut, Company "C", 1340th Engineer Combat Battalion, did, at or near Balleroy, Normandy, France, on or about 26 July 1944, commit an assault and battery upon Marie Tillare, by striking her on the throat and face with his hands.
Specification 2: In that * * * did, at or near Balleroy, Normandy, France, on or about 26 July 1944, willfully,

wrongfully, and unlawfully destroy some dishes of some value, property of Marie Tillare.

CHARGE II: Violation of the 65th Article of War.
Specification 1: In that * * * did, at or near Bieville, Normandy, France, on or about 1 August 1944, strike Staff Sergeant James L. [redacted]-Commissioned Officer, who was then in the execution of his office by hitting him on the arms and chest with his fist.
Specification 2: In that * * * did, at or near Bieville, Normandy, France, on or about 1 August 1944, use the following insubordinate and disrespectful language toward Staff Sergeant James L. Reese, a Non-Commissioned Officer, who was then in the execution of his office, "You're a chicken shit son-of-a-bitch. You damned bastard, you have never liked me and never wanted me in this platoon", or words to that effect.

CHARGE III: Violation of the 61st Article of War.
Specification: In that * * * did, without proper leave, absent himself from his organization at or near Bieville, Normandy, France, from about 2300 hours, 1 August 1944 to about 1745 hours, 2 August 1944.

He pleaded not guilty to Charges I, II and their specifications, guilty to Charge III and the Specification thereunder, and was found guilty of all charges and specifications. Evidence was introduced of four previous convictions: three by special court-martial for (a) absence without leave and giving a false name to a superior officer, in violation of Articles of War 61 and 96, respectively; (b) escape from confinement, in violation of Article of War 69; (c) violating a standing order by being in a certain place without proper authority, in violation of Article of War 96; and one by summary court for absence without leave for six hours, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, ordered it executed, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement.

3. The reviewing authority in his action ordered the sentence executed and the proceedings were published in General Court-Martial Orders No. 29, Headquarters V Corps, APO 305, 28 August 1944. Accused pleaded guilty to absence without leave in violation of Article of War 61. He pleaded not guilty to Specification 1, Charge II (striking a noncommissioned officer, in violation of Article of War 65), for which offense the maximum limitation of punishment imposable is dishonorable discharge, total forfeitures, and confinement at hard labor for one year (MCM, 1928, par. 104c, p.98). Paragraph 3 of Article of War 50½ provides, in part, that:

> "Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty." (Underscoring supplied).

The sentence to dishonorable discharge was not, therefore, based solely "upon findings of guilty of a charge or charges and a specification or specifications to which accused has pleaded guilty." As the reviewing authority in his action did not suspend execution of that portion of the sentence adjudging dishonorable discharge until accused's release fron confinement, the sentence could not be ordered executed prior to the holding by the Board of Review and the approval of The Judge Advocate General required by paragraph 3 of Article of War 50½. The general court-martial order, therefore, possessed no legal efficacy.

4. Competent, substantial evidence fully supported the findings of guilty of assault and battery, and the wrongful and unlawful destruction of property, in violation of Article of War 96 (Charge I and Specifications 1 and 2 thereof)(R23-24). The evidence is also legally sufficient to support the findings of guilty

of striking and using insubordinate and disrespectful language toward a noncommissioned officer who was in the execution of his office, in violation of Article of War 65 (Charge II and Specifications 1 and 2 thereof) (R9-10,13,15,17-18). Although there was evidence that accused was somewhat intoxicated (R10-11, 14,17-18), his speech was intelligible, he realized what he was doing, and there is no doubt that he recognized the noncommissioned officer (R10-11,13,17,18,19), who was in the execution of his office at the time (R9,13,16-17). The offense of absence without leave for the period alleged, in violation of Article of War 61, was also clearly established by the evidence (Charge III and its Specification) (R21;Pros.Exs.1,2).

5. The charge sheet shows that accused is 25 years three months of age and enlisted at Jacksonville, Florida, 10 August 1940 to serve for three years. 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. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec. VI, as amended).

_____ Judge Advocate

(Absent on leave) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, V Corps, APO 305, U. S. Army.

1. In the case of Private NOAH M. CHESTNUT (14013545), Company C, 1340th Engineer Combat 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. For the reasons stated in the holding, General Court-Martial Orders No. 29, which was published on 28 August 1944, possessed no legal efficacy. A new general court-martial order, dated after this action, must issue showing compliance with the provisions of Article of War 50½.

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 3570. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3570).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

(51)

BOARD OF REVIEW NO. 2

CM ETO 3575

- 9 SEP 1944

U N I T E D S T A T E S	CENTRAL BASE STATION, COMMUNICATIONS ZONE (formerly designated CENTRAL BASE SECTION, SERVICES OF SUPPLY), EUROPEAN THEATER OF OPERATIONS.
v.	
Second Lieutenant RICHARD W. HART (O-1057092), 10th Replacement Depot.	Trial by GCM, convened at London, England, 27 July 1944. Sentence: Dismissal and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Second Lieutenant Richard W. Hart, 10th Replacement Depot, ETOUSA, did, without proper leave, absent himself from his organization at Litchfield, England, from about 21 June 1944, to about 27 June 1944.

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

Specification 1: In that * * * did, at London, England, on or about 27 June 1944, wrongfully and without proper authority impersonate a Superior Officer, to wit: A Colonel in the Army of the United States.

(52)

Specification 2: In that * * * did, at London, England, on or about 27 June 1944, wrongfully and without proper authority wear and display a silver star, purple heart ribbon, South Pacific Theater ribbon with five stars, and the soldier Medal.

He pleaded guilty to and was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by general court-martial for absence without leave from 1 April 1944 to 20 April 1944, in violation of Article of War 61. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, Central Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution shows that as First Lieutenant Edward J. Sims and Second Lieutenant Thomas F. Pitt, both of the 504th Parachute Infantry, 82nd Airborne Division, were sitting in the Lyons Corner House, London, between three and four o'clock in the morning of 27 June 1944, their attention was called to an officer who came in wearing colonel's eagles. At the trial, each identified accused as the officer so observed by them. One of the things attracting their attention was the number of ribbons he was wearing, including the parachute wings and the insignia of an anti-aircraft unit, on his left shoulder (R5,9). Each identified a blouse, admitted in evidence as Prosecution Exhibit 4, as the "jacket" the officer wore, complete except for the "colonel's eagles on the shoulders". The decorations on the blouse were identified as the Silver Star, the Legion of Merit, the Purple Heart with bronze leaf cluster, the Soldier's Medal, the pre-Pearl Harbor medal, the European Theater of Operations ribbon, and the Pacific Operations ribbon, with five combat stars on it. The Lieutenants, being parachutists, went over and introduced themselves to him and asked to what unit he belonged (R6,9-10), as they could not identify his insignia as any known to them (R10). Accused introduced himself to them as Colonel Hart of the 14th Anti-Aircraft attached to the 82nd Airborne, and they knew no such outfit had at any time been attached to their division (R7-8,10). Accused (Colonel Hart) told them the "jump class" he went through, which happened to be the same one Lieutenant Pitt had gone through (R7). While they were inquiring whether he knew different officers who had gone through this same class, Technician Third Grade Fred L. Hawekotte, Criminal Investigation Detachment, Head-

quarters Central Base Section, stationed in London (R11), who was also in Lyons Corner House, Coventry Street, at this time, had his attention drawn to the argument going on between accused and the lieutenants. He heard the questions asked and the answers of accused. The two lieutenants seemed to doubt the authenticity of accused being a colonel. Their questions seemed sensible and accused's answers made Hawekotte suspicious and he asked all three into a little office, phoned his commanding officer for instructions and was directed to bring all of them to the office of the Provost Marshal, where it was discovered that "Lieutenant Hart was wanted for being AWOL", and he (accused) was placed in confinement (R12). At first, accused stated that he was a full colonel but when confronted with the information obtained said he was a captain. Hawekotte identified the blouse (Pros.Ex.4) worn by accused when arrested by his initials "F.L.H." placed and found in the label of the blouse, together with the insignia and shoulder patch. Only the "colonel's wings on the shoulder" were missing (R13).

Captain Guy Penton, 787th Military Police Battalion, London, during the course of his investigation of the charges against accused, on 18 July 1944, after having first duly warned accused of his rights therein, took accused's sworn written statement, admitted in evidence as Prosecution Exhibit 5, and reading:

> "I state that I am unauthorized to wear the silver star, soldier's medal, legion of merit, purple heart and So West Pacific TO Ribbon On 27 June 1944, when I was apprehended I was wearing these ribbons while not authorized to wear them" (R15).

Also admitted in evidence, by consent, were Prosecution Exhibit 1, a stipulation that Prosecution Exhibit 2 be received in evidence as though it were a duly authenticated copy of the records kept by the War Department; Prosecution Exhibit 2, a telegram from the Adjutant General's Department, Washington, giving accused's service record, in substance, and stating he was entitled to none of the decorations and ribbons displayed by him, excepting only the American Defense Service Medal and that of the European Theater; Prosecution Exhibit 3, extract copy of the morning report of "Cas Det No 51, 10th Repl Depot", showing accused as of 24 June 1944, "fr dy to AWOL 1200 hrs 21 June 1944"; and Prosecution Exhibit 6, an extract copy of form 66-1, relating to Second Lieutenant Richard W. Hart (0-1057092), arm "CAC", component "AUS", appointed Second Lieutenant 8 July 1943.

4. In addition to pleading guilty, and admitting in writing his unauthorized wearing ofthe decorations, accused is conclusively proven guilty of all offenses charged.

(54)

5. The charge sheet shows accused to be 26 years 11 months of age. He was commissioned 8 July 1943, at Camp Davis, North Carolina, and has been on active duty since that date. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal and confinement is authorized upon conviction of an officer for a violation of Articles of War 61 and 96.

7. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir.210, WD, 14 Sep 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. - 9 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RICHARD W. HART (O-1057092), 10th Replacement Depot, ETOUSA, attention is invited to the foregoing holding of the Board of Review that the record 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. Lieutenant Hart was convicted 25 May 1944, by general court-martial for an unauthorized absence of 20 days and sentenced to be dismissed the service. The approving authority "in view of this officer's excellent combat record" recommended that execution of the sentence be suspended and "owing to special circumstances in this case", the confirming authority followed this recommendation. It has since developed that there was no "excellent combat record" and that the representations so made were false. No clemency is recommended.

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 3575. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3575).

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

(Sentence ordered executed. GCMO 75, ETO, 28 Sep 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3577

23 SEP 1944

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated, WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Second Lieutenant JOHN C. TEUFEL (O-1580409), Transportation Corps.)	Trial by GCM, convened at 34 Cleveden Drive, Glasgow, Lanarkshire, Scotland, 7 August 1944. Sentence: Dismissal.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 85th Article of War.
Specification: In that 2nd Lieutenant John C. Teufel, Transportation Corps, 5th Port, APO 506, United States Army, was at Glasgow, Lanarkshire, Scotland, on or about 15 July, 1944, found drunk while on duty in the Operations Division, 5th Port, United States Army.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed from the service. The reviewing authority, the Commanding Officer, Western 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 execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

On 15 July 1944, the 5th Port, Transportation Corps, was under the command of Lieutenant Colonel John D. Allen (R17). The accused was assigned to the Cargo Operations section of the Water Division (R15). The chain of command from the Port Commander was through the Cargo Operations Officer, Major Francis G. Donahue to the officer in charge of the pier, Major Charles A. Duffy (R17). The Port Commander held exclusive authority to relieve officers from duty. Neither the Cargo Operations Officer (Major Donahue) nor the Pier Officer (Major Duffy), was authorized without the commanding officer's consent or direction to relieve any officer from duty (R17,18). Officers were maintained in the division for troop and freight movements and if there were no cargo operations the officers assigned to the Cargo Operations section were subject to other duties (R16).

Between 8:00 a.m. and 12:00 m. on July 15 accused was on duty at Princess Dock in Glasgow (R9). He was assigned to assist Captain Danielson in the unloading of berths one and two (R10), but worked under the direction of Major Duffy (R10). The work of unloading continued until 9:00 p.m. of that date (R11). Late in the morning, after consultation with Major Donahue, who had arrived at Princess Dock, Major Duffy informed accused that he was released from his work in which he was then engaged at 12:00 m. and ordered him to report to Major Donahue "after 1 o'clock". The exact time he was to report was not specified, but the words contemplated "any time after 1 pm" (R11).

At 1500 hours accused reported in the ante-room of Building 4 to Major Donahue and apologized for his tardiness (R9,11,15). He saluted in proper form (R13,14), but appeared dazed and gave no justifiable explanation for his late report. He spoke with hesitation. He was untidy and his face was unclean. His eyes "squinted". "He was acting like an intoxicated man". Major Donahue directed accused to wait while he consulted Lieutenant Colonel Allen (R14). The latter officer then interviewed accused in the hall of Building 4 soon after 1500 hours. Accused was then unsteady on his feet. He was ordered by Colonel Allen not to leave the building and he indicated he understood the order (R17).

Colonel Edward C. Forsythe, the medical officer arrived about thirty minutes later (R21). Accused was directed by Lieutenant Colonel Allen to proceed to the back room of the building where an examination was conducted. Accused walked unsteadily, his voice was thick and his replies to Colonel Forsythe's questions were slow and hesitating (R17). Asked by the medical officer why he did not report until 1500 hours, he replied, "I was not available." Colonel Forsythe pursued the matter, "Why were you not available?" Accused after a pause said he could not explain (R18). The following colloquy occurred in the re-direct examination of Colonel Allen:

> "Q What was the condition of accused when you saw him at 1500 hours?
> A In my opinion he was drunk otherwise I would not have charged him." (R18).

At approximately 3:00 p.m. on 15 July 1944, Major Frederick J. Kraschel, Adjutant General of the 5th Port, saw accused on Cleveden Drive in Glasgow as he approached the officers' mess building. He was unsteady and staggering and was experiencing difficulty in lighting a cigar. Major Kraschel "more or less" spoke to accused, but received no recognition (R19). In Major Kraschel's opinion accused was drunk (R20).

Captain Theodore C. Spritzer, Medical Corps, made an examination of accused about 4:30 p.m. on 15 July for the purpose of determining his sobriety (R21). He was given the "Romberg", the "tip of the finger to the nose", the "coin picking", the "patellar" and "walking heel to toe" tests. In all of said tests the accused registered a positive condition of intoxication. His breath was alcoholic; his pupillary reflexes were sluggish and his eyes were blood-shot (R22).

A sample of accused's blood was examined for determination of alcoholic content at the 112th General Hospital at 5:35 p.m. The analysis showed "113 mgs. of alcohol per 100 cc" (R23,27; Pros.Ex.A). On the basis of this test accused's intoxication was "mild" (R23). However, by the time the blood test was made some of the alcoholic content of the blood would have been dissipated (R25).

4. Accused elected to remain silent and offered no evidence in his defense (R27).

5. Certain irregularities occurred at the trial which were subject of comment by the Staff Judge Advocate and Theater Judge Advocate in their reviews. None of them prejudiced the substantial rights of accused (AW 37) and require no further consideration.

6. (a) The evidence established accused's intoxication at the time and place alleged. Was he "drunk" within the purview of the 85th Article of War?

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

He was subjected to the recognized sobriety tests. All of them registered positive condition of intoxication. His blood sample taken at 5:35 p.m. contained an alcolholic content which bespoke a "mild intoxication." The abnormality of his physical reactions and appearance was of such degree as to cause his fellow officers to believe he was drunk. The issue of drunkenness was one of fact for the determination of the court. As substantial competent evidence supports the court's finding, it must be accepted upon appellate review (CM ETO 1065, Stratton).

(b) The vital issue in the case revolves about the question whether accused was "found drunk on duty" at the time and place alleged.

3577

Article of War 85 in relevant part provides:

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; * * *"

The following excerpt from the Manual for Courts-Martial, 1928, is pertinent:

> "Under this article it is necessary that accused be found to be drunk while actually on duty, but the fact that he became drunk before going on duty while material in extenuation is immaterial on the question of guilt. A person is not found drunk on duty in the sense of this article, 'if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all.' (Winthrop). But the article does apply although the duty may be of a merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.
>
> The term 'duty' as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. (Winthrop).
>
> The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers, or of enlisted men, the term 'on duty' relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as off duty.' (See Davis.)
>
> In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article." (MCM, 1928, par.145, pp.159-160).

There is no evidence that accused was under the influence of liquor at the time he was "relieved" from duty at the Princess Dock at 12 o'clock noon on 15 July. He was seen by Major Kraschel at approximately 3:00 p.m. in a condition which bespoke intoxication and soon thereafter he reported to Major Donahue in such condition. The inference is fair and just that in the interim between 12 o'clock noon and 3:00 p.m. he imbibed intoxicants and became drunk. He was specifically ordered by Major Duffy to report to Major Donahue "after 1 o'clock." The evidence does not show specifically the reason for the order nor the purpose for which accused was to report. However, it was shown that officers were maintainnd in the division for troop and freight movements and that if there were no cargo operations, officers assigned to the Cargo Operations section were subject to other duties. They worked until 9:00 p.m. that evening. Major Donahue had the responsibility of assigning officers "to other duties." Accused was relieved from the work of unloading the vessel after a consultation between Major Duffy, the pier officer, and Major Donahue. It is therefore reasonable to conclude that Major Donahue desired accused to perform "other duties" when he was directed to report to him (Donahue). Accused performed no "other duties" that day by reason of his self-imposed disability.

Accused's release from work at the Princess Dock was therefore not such action by his superior officer whereby it was intended that he should

> "occupy the status of leisure known to the service as 'off duty'" (MCM, 1928, par.145, p.159).

It was only an administrative direction whereby he was transferred from one work detail, viz: unloading operations at the pier to some other type or kind of work within the section which was to be designated and defined by Major Donahue. It would be unrealistic and a denial of the factual situation to conclude that Major Duffy's order to accused removed him from a "duty status" and temporarily placed him on an "off duty" status <u>until</u> he received further orders from Major Donahue, which would serve to restore him to a "duty status." Oppositely the evidence compels the conclusion that he remained "on duty" during the interval. Consequently the principle that an officer

> " * * * discovered to be drunk, when ordered, or otherwise required to go upon the duty, upon which, because of his condition, he does not enter at all"(Winthrop's Military Law & Precedents - Reprint, p.612)

is not "on duty" within the purview of the 85th Article of War is entirely inapplicable.

Accused was manifestly "found drunk". The Board of Review is of the opinion that he remained "on duty" during the interval following his release from his unloading work at the Princess Dock and he was "on duty" when he appeared before Major Donahue three hours later. He was therefore

(62)

"found drunk on duty in the Operations Division, 5th Port, United States Army" as alleged (CM ETO 1065, Stratton; CM 240207, Biggs (25 B.R. 385,389).

The Manual for Courts-Martial, 1928, states:

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

The foregoing principle received consideration by the Board of Review (sitting in Washington) in CM 230201, Eubanks; Bull.JAG, Vol.II, No.4, April 1943, sec.443, p.142; (17 B.R. 311,323). In the instant case the Board of Review (sitting in the European Theater of Operations) does not believe it is necessary to base the guilt of accused upon the foregoing doctrine. The factual situation presented by the evidence placed accused on duty at the time of his drunkenness whether or not the 5th Port was "in a region of active hostilities."

7. The charge sheet shows the accused is 38 years and nine months of age and that he was commissioned a second lieutenant, Army of the United States, 16 October 1942, to serve for the duration of the war plus six months. No prior service was shown.

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

9. A sentence of dismissal from the service is mandatory under Article of War 85 upon conviction of any officer of the offense of being found drunk on duty in time of war (CM 255639 (1942), Bull.JAG, Vol.I, No.5, Oct 1942, par.443, p.275).

B. Franklin Riter — Judge Advocate

(ABSENT ON LEAVE) — Judge Advocate

Edward L. Stevens, Jr. — Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant JOHN C. TEUFEL (O-1580409), Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 3577. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3577).

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

(Sentence ordered executed. GCMO 87, ETO, 11 Oct 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

(65)

BOARD OF REVIEW NO. 2

CM ETO 3583

2 OCT 1944

U N I T E D S T A T E S	)	XX CORPS
	)	
v.	)	Trial by GCM, convened in the vicinity
	)	of La Ferte, Bernard, France, 15 August
Private O. K. ODOM (38306027),	)	1944. Sentence: Dishonorable dis-
Battery D, 551st Anti-Aircraft	)	charge (suspended), total forfeitures,
Artillery Automatic Weapons	)	and confinement at hard labor for five
Battalion (Mobile).	)	years. Federal Correctional Institution,
	)	Danbury, Connecticut.

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private O. K. Odom, Battery "D", 551st Anti-Aircraft Artillery Automatic Weapons Battalion (Mobile), did, near Fierville in Normandy, France on or about 0010, 3 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation attempt to murder one Private Theodore Gonzales, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence was introduced of one previous conviction by summary court for absence without leave for eleven and a half hours, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of ten years. The review-

ing authority approved only so much of the findings of guilty of the Specification as involves conviction of attempted voluntary manslaughter, and only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for five years, suspended until the soldier's release from confinement the execution of that portion thereof adjudging dishonorable discharge, and designated the "Federal Correctional Institution, Danbury, Connecticut, U. S. A.", as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 6, Headquarters XX Corps, dated 30 August 1944. The case is considered as though received by the Board of Review under authority of the first sentence of the third paragraph, Article of War 50½.

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. The Federal Correctional Institution, Danbury, Connecticut, is not now available for the confinement of military prisoners sentenced to confinement in a Federal institution (Cir.229, WD, 8 June 1944, sec.II). Moreover, while places of confinement in the United States may be designated for general prisoners under sentence of dishonorable discharge not suspended (Cir.72, Hq. ETOUSA, 9 Sept 1943), there is no authority in the European Theater of Operations for their designation in cases of suspension of the dishonorable discharge. In view of the suspension, in the instant case, of that portion of the sentence adjudging dishonorable discharge, the 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England, should be designated as the place of confinement (AG 252 OpGA, Hq. ETOUSA, 12 April 1944).

_____ Judge Advocate

_____ Judge Advocate

(On Leave) Judge Advocate

1st Ind. (67)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 OCT 1944 TO: Commanding General, XX Corps, APO 340, U. S. Army.

1. In the case of Private O. K. ODOM (38306027), Battery D, 551st Anti-Aircraft 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 and the sentence, which holding is hereby approved.

2. It will be necessary, however, for you to publish a corrected General Court-Martial order, changing your designation of the place of confinement to 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England, in order to comply with the pertinent authorities cited in paragraph 4 of the foregoing holding.

3. When copies of the corrected 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 3583. For convenience of reference, please place that number in brackets at the end of the corrected order: (CM ETO 3583).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1.

CM ETO 3585

16 SEP 1944

U N I T E D S T A T E S v. Private BENJAMIN PYGATE (33741021), 960th Quartermaster Service Company.	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Tidworth, Wiltshire, England, 15 July 1944. Sentence: To be shot to death with musketry.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 Benjamin (NMI) Pygate 960th Quartermaster Service Company did at Drill Hall Camp, Westbury, Wiltshire, England, on or about 17 June 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private First Class, James E. Alexander, a human being, by stabbing him in the throat with a knife.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence was introduced of previous convictions. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot with musketry. The reviewing authority, the Commanding General,

Southern 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 execution thereof pursuant to the provisions of Article of War 50½.

3. The facts of this case as shown by the prosecution's evidence are as follows:

On 17 June 1944 the 960th Quartermaster Service Company was stationed at Drill Hall Camp, Wiltshire, England. Accused, deceased (Private First Class James E. Alexander) and the other soldiers immediately concerned in the homicide were members of said company (R13,22). At that camp there was evidently a room or hut set aside for recreational purposes where beer was served. The witnesses designated the place as a "pub". On that evening accused, deceased, Private First Class J. M. Blackwell, Privates Roy Easley, Jr., A. L. Graves, C. A. Dempsey and other colored soldiers of said company were in the recreation hall, "drinking beer" (R9,13,19). A soldier named Booker acted as bartender. Deceased requested Booker to sell him beer. Booker announced it was closing time. The deceased replied, "If I come in again and can't get any beer I will turn the place out" (R13). There then arose an argument between Dempsey and deceased, but Easley joined in and became involved with Dempsey (R13,14,19). Deceased left the room and went outside and finally to his barracks, hut #2. Easley followed him and went to hut #2 where he also lived (R13,17,18,19). All of the men then left the recreation hall and assembled before hut #2 (R13,15,19). Easley and deceased came out of the hut and stood in front of its doorway. Easley held a bottle behind his back (R13,15). The deceased stood on Easley's right, about two feet away (R11,17,21). Accused stood about three feet to the right of Easley, thereby placing deceased between accused and Easley (R21-22).

The door of the hut opened to the exterior, and at that time was swung back against the front wall of the structure. Its hinge was on the left hand of a person entering the hut (R11,17, 21). Dempsey was in the group and carried a stove poker (R20). All of the soldiers were engaged in noisy argument but Easley and Dempsey were the most vociferous (R10,11,19). Deceased attempted to quiet the argument (R17). Accused said to him "Get back in that hut before I kill you" (R17,18). He then stepped past deceased, reached behind Easley and took the bottle which Easley then held in his right hand (R9,11,13,14,15). As accused stepped back he kicked deceased in the right groin. Deceased

backed against the open door and then bent forward in pain (R9,11,12,14,16,19,20). Accused pulled a knife from the right rear pocket of his trousers (R19). He grabbed the knob of the door with his left hand and commenced to close it (R9,10,16,17). He then held the knife in his right hand (R10,11,17). He raised it and plunged it into the lower front surface of deceased's neck (R9,14,16,19,20,25). As the knife entered the throat there was a sound like crumpling of stiff paper (R20). Deceased commenced to fall forward (R20,21). Accused pushed him into the hut, slammed the door (R12,13,21), placed his knife in his pocket and walked around the corner of the hut (R9,14). He was later apprehended in hut #7 and taken into custody (R23).

Deceased immediately came out of hut #2. He bled profusely from the knife wound and held his hand to his throat (R13,14,17,21). He was taken to the camp dispensary and died soon thereafter (R26). The death report (R25; Pros.Ex.1) showed the nature of the wound as follows:

> "e. Diagnosis: Wound, penetrating, slightly triangular in shape, with apex down; one and one-half inches long, one inch above suprasternal notch, penetrating to the posterior aspect of the trachea; caused by a sharp instrument, such as, possibly, a knife, poker, broken glass bottle, bayonet, etc....."

An autopsy was performed on body of deceased at 216th General Hospital at 0900 hours 18 June 1944. The autopsy protocol (R27; Pros.Ex.2) recited the following pertinent facts:

> "CLINICAL DIAGNOSIS
>
> Wound, punctured, of neck.
>
> PATHOLOGICAL DIAGNOSES
>
> 1. Wound, punctured, of neck, with severance of inferior thyroid veins, and with wound, punctured, of trachea.
>
> 2. Hemorrhage, external, severe; aspiration of blood into both lungs; swallowing of blood into stomach."

4. The evidence for the defense summarizes as follows:

Private First Class Burton Lucas, 960th Quartermaster

Service Company, returned from pass on the night of 17 June 1944 and as he passed the recreation hall, he heard sounds of an argument therein. He entered the hall as a group of soldiers rushed out. Dempsey, who was in the group, held a poker (R28). Easley came out of the door of another hut and held something behind his back (R28,30). Deceased stood at Easley's right hand. Easley and Dempsey exchanged words and Dempsey indicated a desire to fight Easley (R28). Lucas saw Dempsey strike at deceased but he hit the door with the poker. He did not see accused strike anyone (R29). Accused said "I wouldn't fight if I were you" (R28); then turned to Easley and deceased and said "You bad so-and-so, get back in." He pushed them into the hut, closed the door and put his right hand in his pocket (R28,29,30) but witness did not see him withdraw a knife (R31). After deceased was pushed into the hut he tried to come out (R29). He finally succeeded in his effort and was then bleeding (R30).

Accused elected to be sworn and to testify in his own behalf. His testimony was as follows:

He was in the recreation hall (called by accused a "pub") on the night of 17 June 1944. Deceased, Private First Class Blackwell, Privates Dempsey, Graves, and Easley were present and were engaged in an argument. The men left the hall and accused followed them. They stopped in front of hut #2 and continued the argument. Accused approached the group and said "You fellows all in the same company should be friends" (R32). Deceased made a remark to Dempsey who was going into his barracks to get something. Dempsey made a reply. Another man held a bottle, which accused took from him (R32,34). From that time forward accused did not know what happened. He did not remember how he reached his barracks (R34). While he was engaged in fixing his shoes, Private First Class Wilson entered the barracks and restricted the men. Accused was then "just coming to his senses." He went to the latrine at the back of the barracks and was then ordered by Sergeant Phillips to report to the orderly room. He denied that he had a knife on the night in question and asserted that he had not owned a knife since he joined the organization (R32). He had suffered from similar lapses of memory two or three times previously. A box fell on his head earlier in the year which left a scar (R32).

Captain George Schwartz, Medical Corps, testified that on 25 April 1944 he treated accused for a large scalp wound which required ten stitches. It healed properly, leaving only a scar, and in witness' opinion there was no brain injury. It was possible,

but not probable that the injury would cause lapse of memory (R36,37).

It was stipulated that on 17 June 1944 accused's right trousers pocket was inspected but no blood stains were visible (R37).

5. Accused stabbed his fellow soldier, Alexander, in the neck with a knife, and thereby inflicted an injury upon him which resulted in his death within a short period of time. The only question requiring consideration is whether the homicide constituted murder or manslaughter.

The important element of murder, to wit, "malice aforethought" has been analyzed by authorities as follows:

> "The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense', in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, 'a heart regardless of social duty, and fatally bent upon mischief.' The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either 'express' or 'implied'; express, where the intent, - as manifested by previous enmity thereto, the absence of any or of sufficient provocation, etc.-- is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death; implied, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person***." (Winthrop's Military Law & Precedents (2nd Ed) sec. 1041,pp. 672-673).

> "Malice or malice aforethought is the element which distinguishes murder at common law and, commonly, under the statutes defining murder, from other grades of homicides.***" (29 C.J., sec 60, p. 1084).

The distinction between murder and voluntary manslaughter is stated as follows:

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought." (1 Wharton's Criminal Law, 12th ed., sec. 423, p.640).
>
> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary." (MCM, 1928, sec. 149, p. 165).
>
> "At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden affray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment." (29CJ, sec. 115b, p. 1128).
>
> "The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of

murder and manslaughter." (Stevenson v. United States, 162 U.S. 313, 320; 40 L. Ed. 980, 983) (Cf. Wallace v. United States, 162 U.S. 466, 40 L. Ed. 1039; Brown v. United States, 159 U.S. 100, 40 L. Ed. 90).

The evidence discloses that accused and deceased were members of a group of colored soldiers who had been consuming beer at their camp recreation hall during the evening. When the hour for closing arrived the soldier who acted as bartender refused to serve beer to the deceased who assumed a threatening attitude. It is not clear whether the refusal of the bartender to serve beer was the primary cause of the quarrelsome argument which simultaneously arose among the soldiers but the existence of such argument was clearly established. Easley, Dempsey and deceased appear to have been foremost in the disorder. Deceased and Easley left the hall and went to their barracks, hut #2. Easley possessed himself of a bottle and in company with deceased left this hut and stood outside thereof in front of the doorway. In the meantime, the other soldiers left the recreation hall and gathered in front of hut #2. They continued the noisy argument. Dempsey carried a poker. Violent words passed between him and Easley and there were indications that a fight might ensue between them. Accused prior to this time had evidently been inactive. He stood on deceased's right hand; Easley stood to deceased's left. At this juncture accused said to deceased "Get back in that hut before I kill you." He then stepped past deceased, took the bottle from Easley, turned and kicked deceased violently in the right groin. As deceased fell back against the door and then bent forward as a result of the kick he received from accused, the latter pulled a knife from the right rear pocket of his trousers and plunged it into deceased's neck, inflicting the fatal wound.

From the foregoing it is impossible to discover any evidence that accused and deceased had been involved in a personal disagreement of any degree of violence. The nearest approach to a physical combat between the men arose when accused said to deceased, "Get back in the hut before I kill you," and this exhibits a threatening belligerent attitude on the part of accused. Deceased failed to respond to the threat. Within a matter of seconds accused had taken the bottle from Easley, kicked deceased in the groin and driven a knife into deceased's neck. Therefore, the rule that a homicide arising out of sudden combat may be manslaughter and not murder (CM ETO 72, Jacobs and Farley) is inapplicable.

Further, there was no evidence of a provocative act or acts on the part of deceased, nor proof of any facts from which provocation may be implied. Neither is there any evidence that accused was acting under heat of passion or anger sufficient to dethrone his reasoning faculties. He acted in "cold" blood. His acts bespeak deliberate purpose. There are lacking both of the essential elements necessary to reduce a homicide from murder to manslaughter:

> "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been an adequate provocation." (1 Wharton's Criminal Law, 12th Ed. sec. 426, pp. 655,656).

Conversely, the uncontradicted and unequivocal evidence shows that accused without any genuine cause or provocation first kicked deceased and then stabbed him. The proven facts disclose an act of homicidal violence which inherently is of such vicious, brutal savagery as to carry within itself proof of malice aforethought and thereby irrefragably stamp the offense as murder and not manslaughter (CM ETO 268, Ricks; CM ETO 422, Green; CM ETO 438, Smith; CM ETO 739, Maxwell; CM ETO 1901, Miranda; CM ETO 1922, Forester and Bryant; CM ETO 2007, Harris; CM ETO 3180, Porter; CM ETO 3042, Guy).

6. The charge sheet shows the accused to be 35 years four months of age. He was inducted 5 May 1943 at Washington, D.C. 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. Death is an authorized punishment for the crime of murder under the 92nd Article of War.

B. Franklin Riter Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

3585

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S.Army.

1. In the case of Private BENJAMIN FYGATE (33741021), 960th 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 3585. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3585).

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.

1 Incl.
Record of Trial.

(Sentence ordered executed. GCMO 111, ETO, 22 Nov 1944)

(79)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

2 OCT 1944

CM ETO 3614

UNITED STATES	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade IRA DAVIS (36790149), 4001st Quartermaster Truck Company (TC)	Trial by GCM, convened at Plymouth, Devonshire, England, 26 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that T/5 Ira (NMI) Davis, 4001st QM Trk Co. (TC), did at Camborne, Cornwall, England, on or about 7 June, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Peter J. Tamborini, a human being, by striking him with a weapon or other instrument.

He pleaded not guilty to and was found: "Of the Specification of the Charge: Not Guilty. Of the Charge: Not Guilty, but Guilty of the violation of the 93rd Article of War, Specification: In that T/5 Ira (NMI) Davis, 4001st Quartermaster Truck Company, (TC), did at Camborne, Cornwall, England, on or about 7 June 1944, willfully, feloniously and unlawfully kill one Peter J. Tamborini a human being by striking him on the head with his fist". No evidence was introduced of previous

convictions. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows: That accused was the driver of a truck carrying soldiers on pass from their camp into the town of Camborne, Cornwall, and return, on the night of 7 June 1944. When he returned to town (R7), about 10:30 that night (R12), to bring the soldiers back to camp, he had picked up part of them (R7) and then stopped the truck when he saw two white soldiers and got out, together with several of the other colored soldiers in the truck. They started after the white soldiers (R15) who ran, pursued by the colored soldiers (R9), all halting when they met two colored officers who stopped their jeep (R7) and talked to the men. While this was going on, accused walked up behind (R10) and at the side of one of the white soldiers and struck him (R15) with his right hand (R16), back of and below the ear (R15). The white soldier fell on his back (R16) on the black tar pavement (R17). Accused was not seen to have anything in his hand at the time (R10). A stipulation was entered into in open court between the prosecution and the defense, accused consenting thereto, that Peter J. Tamborini, the man allegedly struck, and the man examined at the post mortem were the same persons (R17).

Captain Chauncey L. Royster, Medical Corps, 314th Station Hospital, performed an autopsy on Peter J. Tamborini. He found that death was caused by an extensive fracture of the skull which could have been caused by a fairly severe blow or possibly by a fall (R12-13). The ear showed "evidence of a violent force" and there was a small abrasion above and behind the left ear (R14).

4. The defense produced no evidence and accused, on being informed by the court of his rights as a witness, through defense counsel, announced his desire to remain silent (R18).

5. Accused was charged with the murder of Peter J. Tamborini "by striking him with a weapon or other instrument", in violation of Article of War 92, and was found not guilty of this Charge but guilty of "willfully, feloniously and unlawfully killing him" by striking him on the head with his fist, in violation of Article of War 93. While the findings of the court were not couched in the usual legal phraseology, it is plainly evident that the intention of the court and the legal effect of its findings and sentence were to acquit accused of murder and to find him guilty of manslaughter (CM 165268 (1925), Dig. Ops.JAG, 1912-1940, sec.450(2), p.310). The evidence produced gives not the slightest suggestion that accused used anything other than his fist in striking the blow.

> "Since death is not the natural or probable result of a blow with the hand, it seems that no intent to kill will, under ordinary circum-

stances, be presumed, though death results from the assault thus committed" (People v. Crenshaw, 298 Ill.412; 131 N.E. 576, 15 ALR 671-675).

Death unintentionally happening from a mere assault is manslaughter (1 Wharton's Criminal Law, 12th Edition, secs.449,450, pp.687,688). Manslaughter is a lesser included offense in the charge of murder (MCM, 1928, par.148a, p.162), and is either voluntary or involuntary. It is voluntary manslaughter when the act causing death is committed in the heat of sudden passion caused by provocation. Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony nor likely to endanger life (MCM, 1928, par.149a, pp.165-166). The assault by accused with his fist was an unlawful act not amounting to a felony nor likely to endanger life and is plainly within the definition of involuntary manslaughter. The findings that accused struck Tamborini with his fist as the proof shows and not with a "weapon or other instrument", as charged, is here an immaterial variance contained in the lesser included offense of manslaughter which was favorable to accused and in no way prejudicial to his rights.

6. The charge sheet shows accused to be 28 years and four months of age. He was inducted at Chicago, Illinois, 6 July 1943, to serve for the duration plus six months.

7. The maximum period of confinement imposable upon a conviction of involuntary manslaughter is three years (Table of Maximum Punishment, MCM, 1928, par.104c, p.99).

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 so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a term of not more than three years.

9. Confinement in a penitentiary is authorized by AW 42 and sec. 275, Federal Criminal Code (18 USCA 454). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

(82)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 OCT 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Technician Fifth Grade IRA DAVIS (36790149), 4001st Quartermaster Truck Company (TC), 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 so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a term of not more than three years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I particularly invite your attention to the fact that the period of confinement, in the approved sentence, is excessive. Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to three years, which reduction will be recited in the general court-martial order.

3. The publication of the general court-martial order and the order of execution of the sentence may be done by you as successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being, as provided by Article of War 46.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3614. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3614).

B. Franklin Riter

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1 2 OCT 1944

CM ETO 3628

U N I T E D S T A T E S v. Private HENRY W. MASON (18089293), Casual Pool, Squadron A, 18th Replacement Control Depot.	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE. Trial by GCM, convened at AAF Station 594, APO 635, 18 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 1
SARGENT, SHERMAN 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 93rd Article of War.
Specification: In that Private Henry W. Mason, Casual Pool, Squadron A, 18th RCD, ASC, USSTAF, AAF Sta 594, APO 635, did, at Crabmarsh Bank, Newcastle-Eccleshall Road, Eccleshall, Staffordshire, England, on or about 16 July 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Hilda Mary Herriman, three (3) one pound English bank notes, the property of Hilda Mary Herriman, value about $12.10.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification, except the words "and by putting her in fear," not guilty of the excepted words, and guilty of the Charge. Evidence was introduced of two previous convictions, one by summary court for absence without leave for 23 days, and one by special court-martial for absence without leave for 12 days, both in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence (stating that by virtue of the provisions of Title 10, 1508 USC (Sec. 1, 41 Stat.794, 4 June 1920), the omission of the words "at hard labor" from the sentence was deemed legally ineffective, the legal result of the application of the statutes being the same as though the court adjudged the confinement to be at hard labor), 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 prosecution's evidence shows that at about 11 p.m. 16 July 1944 (R6,11), Mrs. Hilda Mary Herriman, 26 years of age, was pushing her bicycle, with her handbag on the handlebars, up Crabmarsh Bank, near Eccleshall, Staffordshire, England (R5-6,8). Accused approached her, briefly conversed with her and then struck her about the face two or three times with his hand with sufficient force to cut her over the eye, knock out some of her upper teeth and daze her (R7,10,12,20). When she regained her senses accused was gone and her small black purse, containing three one-pound notes, five receipts, a counterfoil for a postal order and a shopping list, was missing from her handbag (R8-10; Pros.Ex.1). A police constable, after being informed of the crime, questioned accused at the military camp at Nelson Hall, at about 1 a.m. the next morning (R20-21). At the constable's request, accused removed from his pockets the foregoing papers and 13 one-pound notes (R21).

Accused's identity as the assailant was further shown by the positive identification of him at the trial, both by the victim (R5) and by a farmer who saw him near the scene of the crime arranging his clothing and placing something in his pocket (R16); by his identification at a parade by both the victim and the farmer (R10, 16,38); by the presence of blood upon accused's clothing (Pros.Ex. 2) of the same relatively rare type as that of the victim, a type different from his own (R19,20,23); and by his dishevelled appearance (R21).

4. After his rights were explained to him, accused testified in his own behalf in denial of his guilt, and in explanation of his

possession of the inculpatory evidence and the presence of blood on his clothing (R28-36).

5. (a) Robbery is defined as

> "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation * * *. The violence or intimidation must precede or accompany the taking. The violence must be actual violence to the person, but the amount used is immaterial. It is enough where it overcomes the actual resistance of the person robbed. * * * there is sufficient violence * * * where a man is knocked insensible and his pockets rifled. * * * Robbery includes larceny, and the elements of that offense must always be present " (MCM, 1928, par. 149f, pp. 170-171).

(b) Evidence that accused was found in possession of recently stolen property is not only admissible but may also raise a presumption that he stole the property, and possession of part of the stolen property justifies the inference of theft of all thereof (CM ETO 1486, MacDonald and MacCrimmon, p. 13, Vol. III, No. 6, June 1944, sec. 395 (10) pp. 227-228, and authorities there cited). Evidence of accused's possession of the papers contained in the victim's purse together with 13 one-pound notes justified the inference that he stole the three one-pound notes contained in the purse.

(c) There is competent substantial evidence that accused at the time and place alleged, by force and violence, stole three one-pound English bank notes from the person and presence of the owner thereof, Mrs. Merriman. The issues of fact raised by accused's denial of his identity as the robber and his attempted explanation of inculpatory evidence were for the determination of the court, whose findings of guilty are supported by competent, substantial evidence and will not be disturbed upon appellate review (CM ETO 1621, Leatherberry).

(d) The court in its findings of guilty excepted from the Specification the words "and by putting her in fear," and found accused not guilty of the words so excepted. Such action was appropriate in view of the evidence that when accused took the victim's purse from her she was in a dazed rather than an intimidated condition as a result of accused's vicious assault upon her. It is elementary that robbery may be committed either by violence or by putting the victim in such fear that he is warranted in making no resistance (MCM, 1928, par. 149f, p.170).

All the elements of the crime of robbery were clearly established (CM ETO 78, Watts; CM ETO 1621, Leatherberry, supra; CM ETO 2744, Henry; CM ETO 2779, Ely et al).

6. As indicated by the reviewing authority in his action, the omission of the words "at hard labor" following the word "confined" in the sentence was legally ineffective in view of the authorization for the requirement of hard labor in conjunction with confinement in that portion of the Table of maximum punishments in the Manual for Courts-Martial, 1928 (paragraph 104c, p.99) fixing the punishment for robbery (AW 37; Cf. CM ETO 515, Edwards).

7. Evidence of a previous conviction of accused by summary court for absence without leave for 23 days (10 June - 3 July 1943), in violation of the 61st Article of War, was improperly admitted (R41; Pros.Ex.3), as it related to an offense committed more than one year prior to the date of the commission of the offense charged herein (16 July 1944), excluding from the computation of such year periods of unauthorized absence as shown by the evidence of previous convictions (MCM, 1928, par. 79c, p.66). In view of the proper admission of another previous conviction for a similar offense and of the clear evidence of accused's guilt of the Charge and Specification, however, it is manifest that the improper admission referred to could not have injuriously affected his substantial rights within the purview of Article of War 37. Also the period of confinement was considerably less than the maximum period of confinement imposable for the offense alleged, namely ten years. (CM ETO 3118, Prophet and authority there cited).

8. The charge sheet shows that accused is 30 years five months of age and enlisted 27 January 1942 at Fort Bliss, Texas, in the grade of private to serve for the duration of the war plus six months. He had no prior service.

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

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

10. The maximum punishment for robbery is dishonorable discharge, total forfeitures and confinement at hard labor for ten years (MCM, 1928, par. 104c, p.99). Confinement in a penitentiary for the crime of robbery is authorized by AW 42 and Sec. 284, Federal Criminal Code (18 USCA 463). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec. II, pars. 1a(1), 3a).

Edwood N. Sargent, Judge Advocate

Malcolm C. Sherman, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 OCT 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private HENRY W. MASON (18089293), Casual Pool, Squadron A, 18th Replacement Control Depot, 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 3628. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3628).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3634

2 OCT 1944

U N I T E D S T A T E S)	EIGHTH AIR FORCE
)	
v.)	Trial by GCM, convened at AAF Station
)	234, 24 August 1944. Sentence: As to
Privates JOHN M. PRITCHARD)	each accused: Dishonorable discharge,
(16045000), 13th Photographic)	total forfeitures, and confinement at
Reconnaissance Squadron; and)	hard labor for two and one-half years.
FRANK HERRERA (38003192), 27th)	2912th Disciplinary Training Center,
Photographic Reconnaissance)	Shepton Mallet, Somersetshire, England.
Squadron, both of 7th Photo-)	
graphic Group Reconnaissance.)	

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

P R I T C H A R D

CHARGE: Violation of the 86th Article of War.

Specification: In that Private John M. Pritchard, 13th Photographic Reconnaissance Squadron, 7th Photographic Group Reconnaissance, being on guard and posted as a sentinel, at AAF Station 234, APO 634, U.S. Army, on or about 9 August 1944, was found sleeping upon his post.

H E R R E R A

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Frank Herrera, 27th Photographic Reconnaissance Squadron, 7th Photographic Group Reconnaissance, being on guard and posted as a sentinel, at AAF Station 234, APO 634, U.S. Army, on or about 9 August 1944, was found sleeping upon his post.

3634

Each accused stated in open court that he did not object to being tried with the other co-accused. Each pleaded not guilty to and was found guilty of the respective Charge and Specification against him. No evidence was introduced of previous convictions of Pritchard. Evidence was introduced of one previous conviction of Herrera by special court for wrongfully striking a woman in the face with his fists, in violation of Article of War 96. 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 two and one-half years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, APO 545, U. S. Army, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Uncontradicted competent evidence shows that while on guard together, at the time and place alleged, accused failed to challenge the officer of the day and the sergeant of the guard in the area which they were guarding (R6-7,10-12,16-17). A search revealed both accused lying on a piece of canvas on the ground (R12, 16-17). One's carbine was about six feet from where they were lying, the other's closer to them on the ground. Both weapons were secured by the officer of the day and the sergeant of the guard before accused arose (R12,15-16). Although neither witness saw the face of either accused before they arose to their feet, both appeared to be sleeping (R13-14,17). Although guards were permitted to lie down on the post which accused were guarding, while on duty and frequently did so during the hours of challenging, they were required to challenge whether or not they were lying down (R14-15).

4. The defense offered no evidence. The rights of each accused were explained to him, and each elected to remain silent (R24).

5. The evidence clearly supports the inference that accused were asleep (MCM, 1928, par.112b, p.111).

6. The charge sheets show that accused Pritchard is 22 years four months of age and that, with no prior service, he enlisted 16 January 1942, at Flint, Michigan, to serve for the duration of the war and six months thereafter, and that accused Herrera is 25 years four months of age, that he enlisted at Fort Bliss, Texas, 30 October 1941, to serve for a period of three years, that his service was extended by the Service Extension Act of 1941, and that his only prior service - from 14 October 1941 to 29 October 1941 - was terminated by discharge for the convenience of the Government.

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. Death or such other punishment as a court-martial may direct is authorized upon conviction of a sentinel found sleeping upon his post in time of war (AW 86). The designation of 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England, as the place of confinement, is proper (Cir.72, Hq. ETOUSA, 9 September 1943, sec.II, par.8c).

_____ Judge Advocate

_____ Judge Advocate

(Absent on Leave) _____ Judge Advocate

(92)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 OCT 1944 TO: Commanding General, Eighth Air Force, AAF Station 101, APO 634, U. S. Army.

1. In the case of Privates JOHN M. PRITCHARD (16045000), 13th Photographic Reconnaissance Squadron; and FRANK HERRERA (38003192), 27th Photographic Reconnaissance Squadron, both of 7th Photographic Group Reconnaissance, attention is invited to the foregoing holding of the Board of Review that the record of trial as to each accused, 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 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 3634. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3634).

E. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

3634

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

BOARD OF REVIEW NO. 1

4 NOV 1944

CM ETO 3639

U N I T E D S T A T E S	)	XV CORPS
	)	
v.	)	Trial by GCM, convened at Chateau de St. Vincent, Northwest of Chateauneuf en Themerais, Eure et Loir, France, 19,21 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private W. D. McABEE (38436876), Headquarters Company, XV Corps.	)	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 W. D. McAbee, Headquarters Company IV Corps, did, at Headquarters XV Corps, Rear Echelon, about two and one-half miles Southeast of Avranches, Normandy, France, on or about 7 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one 1st Lt Ernest J. Bartos, a human being, by shooting him in the chest and abdomen with a firearm.

He pleaded not guilty, and was found guilty of the Specification, except the words "with malice aforethought", "deliberately", "and with premeditation", not guilty of the excepted words and not guilty of the Charge, but guilty of a violation of the 93rd Article of War. 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 ten years. The reviewing authority approved the sentence, 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 shows that during the evening hours of 7 August 1944 at the mess hall of Headquarters Company, XV Corps, in the vicinity of Avranches, Normandy, France (R10), accused (R43), First Lieutenant Ernest J. Bartos (the deceased), and others, including "all the cooks", were present (R44). They were drinking cognac and cider (R44). It was not shown how much either accused or Lieutenant Bartos drank, but at about 11:30 p.m. (R19), accused was escorted by Technician Fourth Grade Clyde N. Mason to the shelter tent which accused shared with Private J. L. Webb (R22;"Govt"Ex.2). Accused was staggering and was drunk (R19,20,25,26,65,66). Webb helped him into a foxhole a few feet from the shelter tent and "covered him up" (R22; "Govt" Ex.2). Webb remained outside talking with Private Roy L. Davis. Accused came out of his foxhole and Webb "got him to go back" (R22). About five or ten minutes later Lieutenant Bartos approached (R19,23). He also was drunk (R19,26), "staggered like McAbee", "stumbled over McAbee's tent and knocked part of it down"(R20). Webb testified that "he (deceased) come up and called McAbee and McAbee answered him and he went over to the foxhole and McAbee raised up and he caught him by the arm and he got out and they went into the tent * * * McAbee's and mine" (R23). All this time the "Germans was overhead" (R18) and there was "a lot of anti-aircraft fire" (R14,27). Webb heard deceased say "son of a bitch" and accused came out and ran to "where me and Davis was" (R23). He "kind of squatted down" and was still drunk. Deceased called accused "to come back in" "more than one time" (R26). Because "they were dropping those flares" and Webb and Davis told accused to go back, he did (R23,26). Webb and Davis crawled into their respective foxholes (R20,23) and Davis went to sleep (R20). A short time later Webb saw accused leave the shelter tent and run towards the dispensary tent (R23; "Govt".Ex.2). His trousers were unbuttoned and he did not answer when Webb called to him (R23). Private David Green from his slit trench (R30; "Govt"Ex.1) saw accused coming up with the words, "Gurdus, give me your gun" and "I'm a nice fellow but don't ever pull a trick like that on me."

A little later he heard some shots (R30). Webb saw accused with a gun "standing up at that tent pretty close to it" and "heard a bolt click on the gun". Webb "raised up" and hollered "McAbee", but accused "didn't do nothing but shoot" into the side of the tent occupied by deceased (R24). Enlisted men and officers began to arrive at the place of the shooting and accused gave voluble utterance to such declarations and demands as "Go ahead and shoot me", "You can't go down on me"; "If you don't believe it you can look at my cock" (R20), "Look under the tent, he's dead" (R21), "Don't look in there. He's a dead son of a bitch" (R30), "Anybody that would pull a trick like that on me is no good" (R33), "No cock sucker is going down on me like that" (R45), and "I killed him, I killed him. He's dead". Accused further declared "He bit his prick and he could prove it" (R46). Accused was agitated, nervous and distraught (R15,16,20,33,36,38,44,45,47,49,50,63). Corporal Abraham Gurdus, who knew the accused well (R63), had

> "never seen him excited as he was that night. He was mumbling words. He was a scared boy. I had never seen him in that state of mind before. He looked different" (R64).

He was not drunk at that time (R36,49,50,53,54). Several empty .30 caliber carbine shells found in the vicinity of the "pup tent" (R40; "Govt" Ex.5) and a .30 caliber carbine No. 1830852 taken from accused at the scene of the shooting (R39, "Govt" Ex.4), were admitted in evidence and later withdrawn. Accused stated to Second Lieutenant Wallace E. Rounsavell immediately after the shooting that he "had shot Lieutenant Bartos and that he was glad that he had done it" (R37). Later in the day, after the 24th Article of War had been explained to him by First Lieutenant Melvin F. Hargett, accused signed a statement in substance in accordance with his sworn testimony hereinafter set forth (R13, "Govt" Ex.3).

At about 2:00 o'clock on the morning of 7 August 1944, Captain Curtis S. Stitts, Medical Corps, 55th Medical Battalion, on temporary duty with Headquarters Company XV Corps, with the aid of a flashlight, examined and identified the body of Lieutenant Bartos; he knew the deceased and further identified him by his identification tags. He checked his pulse, respiration and heart beat and found him dead. The examination showed a bullet hole directly over the heart. His diagnosis of the cause of death was "multiple gunshot wounds of the chest and abdomen" (R56; "Govt" Ex.6). The body was lying near a foxhole

behind the tent (R57; "Govt" Ex.2). The deceased had "been dead" within an hour of the examination. Captain Stitts also examined the accused at 9:00 o'clock on August 7th. He was sober and talked coherently (R57). At the accused's request, the captain examined his penis which "showed some swelling of the head * * * with a few small excoriations * * Accused appeared to him "more or less normal at that time" (R58) and was, in his opinion,"sane" (R60).

It was stipulated between the prosecution and defense that if Lieutenant Hargett, commanding officer of Headquarters Company XV Corps, rear echelon, were present, he would testify from Form 20 of accused "that paragraph 8 shows classification - illiterate, that paragraph 15 shows the IQ test VC - 1 taken 4/22/43, to have a grade of 4 and a score of 43" (R67).

4. After being properly advised of his rights, accused elected to be sworn and testified, in substance, as follows: He was in the military service and a member of Headquarters Company, XV Corps. His home was in Caddo Mills, Texas, and he used to do farm work and worked in a cotton gin "for a good while". He went to school for about four years, and was then 22 years of age and unmarried. He believed he had been in the army around 19 months. On 6 August 1944, he was "around" the kitchen of the enlisted men of XV Corps rear headquarters (R68). He saw Sergeant Mason and "quite a few other boys. He had seen the deceased before, but "didn't know his name until that night" (R69). Asked if he recalled Sergeant Mason taking him down to his tent or foxhole that evening, he replied, "I don't really know, sir" (R69). Asked to tell about the evening of 7 August 1944, when Lieutenant Bartos came to his foxhole, he stated:

> "Well, whenever he called me I started to get up. Then he got hold of my arm and helped me get up on the bank and planes were coming over and big guns shooting at the time. I thought he had come down to talk to me. I told him to get in my tent. I got in there and he started feeling around. We talked for about three or four minutes and then he started feeling around. I told him I didn't do such things to get somebody else. He told me that he had to have it and I couldn't believe he was that kind of fellow. So I called Webb."

He then went outside where Webb and Davis were, but when "planes came back over and dropped flares and Webb told me to get back in there until it died down", he went back (R69).

> "That is when it really started. He got my britches undone somehow, I don't know how he got down that far, I pulled loose twice and finally got away from him. Outside I started to the dispensary to get the Captain."

Asked why he was going to get the Captain, he replied, "He was a higher ranking officer than Lieutenant Bartos, sir, to get him away from me". He did not go to the dispensary because he

> "started, I don't know, somehow and turned around and come back and run over the rifle and don't remember what happened then."

Asked what he did after he ran over the rifle, he answered,

> "I don't know, sir. It must have come into my mind to pick it up and shoot him. I don't know." (R70).

Upon cross-examination accused testified that when he came out of the tent, he didn't see Webb or hear him holler. He heard Green testify that he asked Corporal Gurdus for his rifle but whether or not he did, he testified, "I don't really know, sir" (R70). He did not remember Webb hollering at him at the time accused had a rifle, as testified by Webb. Asked, "When you got back to the tent and to your fox hole that night, did you have your carbine rifle with you?", accused answered, "Sir, I don't remember". He did not remember shooting the rifle, he did not intend to kill anybody, he never told anybody he intended to kill anybody, he did not remember how many times he shot, taking the magazine out, or looking for another clip (R71). He did not remember getting out of his foxhole and talking with Green, Webb and Davis before Lieutenant Bartos came down and he did not remember saying, "I shot him. I hope he's dead". He remember Green's "testifying here not to look into the tent because he's a dead son of a bitch", but whether he said that he replied, "I don't know, sir. I don't think so" (R72). He did not remember seeing Lieutenant Bartos after he shot him (R73), or telling Colonel Sweger on the morning of the 7th of August while it was dark that when he came out of the tent "I had it in my head to kill him". Asked, "When you shot

into the tent, what did you intend to do?", accused answered, "I don't really know, sir". Asked, "Did you know who was in the tent?", accused said, "I guess I did or I wouldn't have shot into it" (R77).

Accused was examined at length by the court upon matters previously adduced upon direct and cross-examination (R77-82). The last question and answer were as follows:

> "Q. When you came back with the carbine you knew exactly where Lieutenant Bartos was in the tent?
> A. I didn't know for sure, sir. I just fired at the tent" (R82).

5. The law member sustained a defense objection to the admission in evidence of the statement made by accused to officers from the Inspector General's Department, XV Corps, on the ground that accused "could not have had mental comprehension sufficient to understand the situation" within 45 minutes to an hour after the incident occurred (R48-49).

> "a confession should not be rejected merely because it was made under great excitement or mental distress, or fear, where such state of mind was not produced by extraneous pressure exerted for the purpose of forcing a confession, but springs from apprehension due to the situation in which accused finds himself" (Wharton's Criminal Evidence, 11th ed. sec. 613, p.1029).

> "It has been held that evidence tending to establish that a confessor was in an hysterical condition and therefore not in full possession of his faculties at the time he confessed his guilt, does not affect the admissibility of the confession, but bears on the weight and effect to be given the confession" (Ibid., sec.631,p.1057).

The Board of Review is of the opinion that the law member's ruling was erroneous and that the statement was admissible. However, this ruling favored accused and no substantial right of accused was thereby injuriously prejudiced.

6. The evidence shows clearly that on 7 August 1944, near Avranches, Normandy, France, accused, armed with a loaded rifle, fired several shots into a shelter tent where he knew First Lieutenant Ernest J. Bartos to be, killing him almost instantly. Accused had been drinking but understood what he was doing for he stated directly after the event that he "had shot Lieutenant Bartos and that he was glad that he done it". It was shown clearly that the irrational and uncontrolled conduct of accused was provoked by the deceased, who, without any encouragement, had committed upon accused an act of homosexuality, sodomy per os. The deceased was the superior officer of accused and accomplished his purpose by arousing accused from a foxhole, where he was sleeping or resting in a drunken condition and taking him to a nearby shelter tent. The shooting followed within a few minutes the revolting act above mentioned, and while accused's mind was instilled with resentment, surprise and indignation. The state of his feelings immediately after the shooting was best portrayed by Corporal Gurdus who "knew him well". He said,

> "At that time I hadn't never seen him excited as he was that night. He was mumbling words. He was a scared boy. I had never seen him in that state of mind before. He looked different."

Accused was not drunk at the time of the shooting.

> "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not" (1 Wharton's Criminal Law, 12th Ed., sec. 422, pp.637-640).

> "The characteristic element of voluntary manslaughter is that it is committed upon a sudden heat of passion, aroused by due provocation, and without malice. The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent

> thought and reflection, and formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time * * *" (1 Wharton's Criminal Law, 12th Ed., sec. 426, pp. 645, 646,647).
>
> "Even in those jurisdictions in which an insane irresistible impulse is recognized as a defense, as considered in the preceding section, an alleged irresistible impulse arising from wicked propensities, depravity or high temper, and not from mental disease or similar defect, is insufficient to absolve one from responsibility for an offense. It is the settled rule of all jurisdictions that mere heat of passion, by whatever name it may be called, is not insanity excusing one from criminal responsibility" (22 C.J.S. 129; Guiteau's Case, 10 Fed.161, 12 D.C. 498, 47 Am.R.247;16 C.J.104 and cases cited).

It is therefore clear that accused's killing of Lieutenant Bartos was not justifiable. The findings of the court are supported by substantial evidence that accused acted under the heat of passion and, in the opinion of the Board of Review, was properly found guilty of voluntary manslaughter, in violation of Article of War 93, and not guilty of murder, in violation of Article of War 92. The fact that deceased might have been a moral degenerate or that even he was a menace to the social well-being of his community is no legal justification for his death under the circumstances revealed in the record. "A murder is not excusable merely because the person murdered is a bad man" (Underhill's Criminal Evidence, 4th Ed., sec. 562, p. 1111).

7. The charge sheet shows that accused is 21 years 11 months of age and was inducted at Camp Walters, Texas, on 22 April 1943. 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. Confinement in a penitentiary is authorized upon a conviction of voluntary manslaughter by AW 42 and sec. 275, Federal Crciminal Code (18 USCA 454). However, prisoners under 31 years of age and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir.229, WD, 8 June 1944, sec. II, par. 1a (1), 3a).

B. Franklin Riley, Judge Advocate

Edwood K. Borgson, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 NOV 1944 TO: Commanding General, XV Corps, APO 436, U. S. Army.

1. In the case of Private W. D. McAbee (38436876), Headquarters Company, XV Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3639. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3639).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3641

11 OCT 1944

U N I T E D S T A T E S	35TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Headquarters 35th Division, Ladon, France, 27 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private MARTIN ROTH (32992486), Company B, 137th Infantry.	

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

---

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Martin Roth, Company B, 137th Infantry did, at Val De Vire, Normandy, France on or about 31 July 1944, without leave quit his organization and place of duty with the intent to avoid hazardous duty to wit: combat with the enemy, remaining so absent from his organization and place of duty until apprehended by the military police at or near Val De Vire, France about 2 August 1944.

He pleaded guilty to the Specification except the words "quit his organization and place of duty with the intent to avoid hazardous duty, to wit: combat with the enemy" and "apprehended by," substituting therefor respectively, the words "absent himself from his organization and place of duty" and "he surrendered himself to," of the excepted words, not guilty, of the substituted words, guilty, and not guilty to the Charge, 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. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, stating that it was grossly inadequate, ordered it executed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, designated the 2912th Disciplinary Training Center, U.S. Army, as the place of confinement pending shipment to the United States and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The undisputed evidence, confirming accused's plea, showed that accused was absent without leave from his organization in the vicinity of Val De Vire, Normandy, France from 31 July 1944 to 2 August 1944 (R5,6; "Govt." Ex.A). About 0600 on 31 July 1944 his company received an attack order (R7,8,10) and its platoon leaders relayed the order to the subordinate leaders. Accused was present when the order was given his squad (R8-10,12), understood that his company was going to be part of a mechanized task force and that the mission was dangerous (R11,20-21; "Govt." Ex.B). In accordance with the attack plan accused's platoon moved forward from the company area at about 1200 hours (R7) at which time it was found that he was missing (R8). His platoon leader searched for him in the platoon area, the company area and the "medic's area and they didn't know anything about him" (R13). About 2 or 3 August 1944 Staff Sergeant Howard Deputy, a member of accused's company, was taking an injured officer to the company field kitchen situate about "a mile behind the company" and about four miles south of St. Lo. He saw accused, stopped the "beep I saw him in" and asked him

> "if they knew where they were going and they said they were going back because they couldn't stand it any longer and they said they were going to give themselves up to the MPs, and the next day they were in the company" (R15).

After accused's return to his organization about 2 August 1944 and after being properly warned of his rights, he signed an unsworn statement which was admitted in evidence, the defense stating that it had no objection (R16; "Govt." Ex.B). It was as follows:

> "The day before I left the company I was told along with the rest of the unit that we were to be a mechanized task force to ride trucks into any future attack. I didn't mind that until the next day, when I left, they told us that we would go into an attack on foot to cover the area to our objective. I didn't

think about it too much until the column halted for some time and I started thinking about what might happen in such an attack so after about an hour I took off towards the rear of the platoon which was in the direction of the enemy. That is when another Pvt. followed me. We didn't plan on going anywhere in particular except to the company field kitchen which was near St.Lo. During the course of the day we got a lift in a beep which took us back to the Hqs of the 29th Div where we reported to an officer. He suggested that we sleep there over-night and report to an M.P. in the morning. That morning we did so. He (M.P.) took us to his Hqs (509th) and the officers there furnished transport to St.Lo where we were in turn, turned over to 35th Div M.P.'s who brought us to Regimental Hqs and from there to battalion where we were told to stay over-night. During this time we were under arms. We stood sentry duty at battion (sic) that same night. In the morning we went to our kitchen and the mess sergeant reported us to the company C.O. when he took hot dinner to the field. The captain ordered us to stay at the kitchen and we were ordered to reported to duty at a later date when the battalion was in reserve and the kitchen was set up in the company area.

The reason why we reported to the M.P's voluntarily was because we had realized what we had done and we didn't want any more trouble than we had already gotten into."

After being warned of his rights (R17), accused elected to testify in his own behalf. He described his early service after his induction at Camp Upton, New York in July, 1943. He then joined the 35th Infantry Division on 29 January 1944, volunteered "to become a mountain climber" and was sent to Seneca Mountain School in West Virginia. He completed the course and was chosen as a "sniper," the reward given to the "highest private in each platoon". Between 11 July and the end of July 1944 he was in the rest area of his Division Headquarters and his company kitchen area for two and a half days suffering from "combat exhaustion" (R17-18). On 31 July 1944 he left the vicinity of his platoon at about 0900 hours. He did not go through an aid station because

"Well, actually, it wasn't anything wrong with me. I was very nervous. I had been back and forth, and I don't know what I figured" (R19).

He described his movements after leaving his platoon until two days later, when he returned to the company area (R20), in substance in accordance with his statement made to the investigating officer ("Govt." Ex.B, supra).

Cross-examined by the prosecution, accused admitted that on the morning of 31 July 1944 he was told that "we were to contact and attack the enemy on foot" (R20), that he left his organization after the attack order was given, that he

> "just got scared or something, thinking about it, and there were a lot of other things running through my mind when the column halted, and I lost control of myself, I guess" (R21).

4. All the elements of the offense of desertion with intent to avoid hazardous duty are fully established by competent, substantial evidence (CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt and cases cited therein).

5. The charge sheet shows that accused is 19 years of age and was inducted 29 July 1943. No prior service is shown.

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

7. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

Edward V. Sayles, Judge Advocate

Malcolm C. Sherman, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 OCT 1944 TO: Commanding General, 35th Infantry Division, APO 35, U.S. Army.

1. In the case of Private MARTIN ROTH (32992486), Company B, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 3641. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3641).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3642 11 OCT 1944

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Ladon, France, 27 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private BONAVENTURE COLLURO (32988676), Company B, 137th Infantry.	)	

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

---

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Bonaventure Colluro, Company B, 137th Infantry did, at Val De Vire, Normandy, France on or about 31 July 1944, without leave quit his organization and place of duty with the intent to avoid hazardous duty to wit: combat with the enemy, remaining absent from his organization and place of duty until apprehended by the military police at or near Val De Vire, France about 2 August 1944.

He pleaded to the Specification of the Charge, "Guilty, except the words 'quit his organization and place of duty with the intent to avoid hazardous duty, to wit: combat with the enemy' and 'apprehended by', substituting therefor, respectively, the words 'absent himself

(110)

from his organization and place of duty' and 'he surrendered himself to'; of the excepted words Not Guilty, of the substituted words, Guilty; To the Charge: Not Guilty, but Guilty of a violation of the 61st Article of War". He was found "Of the Specification of the Charge: Guilty, except the words 'quit his organization and place of duty with the intent to avoid hazardous duty, to wit: combat with the enemy' and 'apprehended by', substituting therefor respectively the words 'absent himself from his organization and place of duty' and 'he surrendered himself to'; of the excepted words Not Guilty, of the substituted words Guilty; Of the Charge: Not Guilty, but Guilty of a violation of the 61st Article of War". 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 ten years. The reviewing authority, though he found it grossly inadequate, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused's plea of guilty of the lesser included offense of absence without leave, in violation of Article of War 61, as well as competent uncontradicted evidence adduced upon the trial, amply support the findings of the court. The evidence warranted a finding of guilty as charged. 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. Since accused is a general prisoner who will be returned to an eastern port from an overseas station, designation of United States Disciplinary Barracks, Fort Leavenworth, Kansas, is unauthorized and should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

3642

(111)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 OCT 1944 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private BONAVENTURE COLLURO (32988676), Company B, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 United States Disciplinary Barracks, Greenhaven, New York, as the appropriate institution nearest the port of debarkation, should be designated in place of the United States Disciplinary Barracks, Fort Leavenworth, Kansas. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3642. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3642).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3643

5 OCT 1944

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Cambridge, Cambridgeshire, England, 1 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private LeROY BOYLES (16018769), Headquarters and Headquarters Squadron, 40th Air Depot Group.	

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

---

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

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

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

Specification: In that Private LeRoy Boyles, Headquarters and Headquarters Squadron, 40th Air Depot Group, AAF Station 548, APO 636, U. S. Army, did, without proper leave, absent himself from his station, AAF Station 595, APO 636, U. S. Army, from about 1830 hours, 30 April 1944, to about 1530 hours, 15 August 1944.

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

Specification: In that * * * did, at the Green Dragon Public House, Water Street, Cambridge, Cambridgeshire, England, on or about 4 August 1944, feloniously take, steal, and carry away a bicycle, value about ($14.00) Fourteen dollars, the property of

the British Government and issued for use to Warrant Officer Louis Mitchell, Royal Air Force, 54th Maintenance Unit, Newmarket Road, Cambridge, Cambridgeshire, England.

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

Specification: In that * * * did, at Cambridge, Cambridgeshire, England, on or about 4 August 1944, wrongfully appear wearing Technical Sergeant Chevrons and an Aviation Badge, "Aerial Gunner", without proper authority.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of two previous convictions by special courts-martial for absence without leave for 18 days and 31 days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority disapproved so much of the findings of guilty of the Specification, Charge III, as reads "and an Aviation Badge, 'Aerial Gunner'", approved the sentence, designated the Eastern Branch, UnitedStates 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 prosecution showed that on 30 April 1944, accused, a private, Headquarters and Headquarters Squadron, 40th Air Depot Group, Army Air Force Station 548, Army Post Office 636 (R6,7,46), was absent from his then station, Army Air Force 595, without leave and remained absent until about 14 August 1944. A search was made for him on 30 April in his billet and through his organization area and he could not be found. Subsequent searches failed to locate him and he was not seen before 14 August 1944 (R6-11,13-17,28,29; Pros.Ex.1).

On 4 August 1944, during lunch time, Warrant Officer Louis Mitchell, Royal Air Force, of Cambridge, England, had stolen from his custody at Cambridge, a bicycle loaned to him by the British Government. The bicycle was worth between about $14 and $16. It bore the "frame" number 87580. He had left the bicycle in the yard of the Green Dragon Public House where he had gone for a drink. Accused was at the public bar at the time, but left before Mitchell. About 2:45 p.m., 4 August, accused sold this same bicycle to Albert E. Leeds, a civilian of Cambridge for two pounds (about $8.00) (R36-38,40-44; Pros. Ex.4). Accused was arrested on 14 August 1944 by a member of the Military Police in Cambridge. He was at that time wearing Technical Sergeant's stripes on his uniform (R28-33; Pros.Ex.2). He was not a Technical Sergeant; he was a private (R15,19,26).

4. After being advised of his rights, accused elected to make an unsworn statement with respect to Charge I and its Specification, and to remain silent with respect to the remaining charges and specifications. He said that he had been tried in America for absence without leave and then shipped to England on the understanding that upon arrival his court-martial and fine were to be dropped. Thereafter, he received his current pay but never received his back pay. While he was working under a "Major Lees", his feet bothered him. He did not receive proper treatment and he became involved in further difficulties through inability to discharge his duties. Because of an unjust restriction he missed a meal. Shortly after he went absent without leave.

5. It is proved that accused was absent without leave, in violation of Article of War 61, as alleged in the Specification of Charge I.

There can be no question that accused stole the bicycle, as alleged in the Specification of Charge II. He was present at the location where and about when it was stolen. Within an hour or two he had it in his possession and sold it. This possession and sale, unexplained by accused, together with proof that he had the opportunity to steal the bicycle, raises the presumption of accused's guilt of the theft (MCM, 1928, par.112a, p.110). This conduct was a violation of Article of War 93, as charged in Charge II.

Accused was not shown to have wrongfully, that is, without authority, worn "an Aviation Badge, 'Aerial Gunner'", as alleged in the Specification of Charge III. The finding of guilty of this allegation was disapproved by the reviewing authority. However, this Specification also alleged that accused did wrongfully appear wearing "Technical Sergeant Chevrons". This allegation was proved and since this conduct was a violation of Article of War 96, the article under which this offense was charged, the findings of guilty of Charge III and its Specification, excepting the allegation "and an Aviation Badge, 'Aerial Gunner'", were authorized.

6. Accused is 25 years old. He enlisted at East Saint Louis, Illinois, 17 July 1941 for the duration of the war plus six months. There was 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.

(116)

8. The offense of absence without leave, in violation of Article of War 61, is punishable as a court-martial may direct. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

(Absent on Leave) _____ Judge Advocate

1st Ind. (117)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 OCT 1944 TO: Commanding General, VIII Air Force Service Command, AAF Station 506, APO 636, U. S. Army.

1. In the case of Private LeROY BOYLES (16018769), Headquarters and Headquarters Squadron, 40th Air Depot Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3643. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3643).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3644

5 OCT 1944

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND.
v.	Trial by GCM, convened at Andover Court House, Andover, Hampshire,
Technician Fifth Grade ROBERT G. NELSON (39238603), 13th Replacement Control Depot (formerly of 219th Medical Dispensary (Avn), IX Tactical Air Command).	England, 4 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
SARGENT, SHERMAN 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 93rd Article of War.

Specification: In that Technician Fifth Grade Nelson, Robert G, 13th RCD, formerly 219th Medical Dispensary (Avn), IX TAC, did at or in the vicinity of Andover, Hants, England, on or about 6 July 1944 with intent to commit a felony, to wit, rape, commit assault upon Geraldine Shirley Secker, a female person under age of 12 years, by willfully and feloniously striking said Geraldine Shirley Secker about her face and body with his hands, feet, and legs, and placing his hands and fingers in and about her vagina and body and by attempting to insert his penis in her vagina.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay

and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen 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. The evidence for the prosecution shows that at about 5:30 p.m., 6 July 1944, Geraldine Secker, a girl 11 years and ten months of age (R6,24), left her home in Andover, Hants, England, to go for a walk with her baby sister, age two and a half years, and two cousins, Margaret and Leslie Henbest, ages eight and four years respectively. A short walk brought the children to a cornfield where they encountered accused. He asked them how he could get to the Salisbury High Road and the children gave directions. He said he could not make it out, scratched his head and suddenly pushed Geraldine to the ground. "Take off your knickers", he said. "I won't", replied Geraldine. Upon her continued refusal, he took off her knickers and removed and threw aside a sanitary napkin then worn because of her menstrual period (R6-7,9,14,23,24). She tried to get up but accused pushed her and punched the little girl's face several times, as he knelt beside her, holding her down by one shoulder. He unbuttoned his trousers, displayed his penis and asked, "You have never seen one of these before, have you? What about it?". "No, no", said Geraldine. She was then lying on the ground with accused "kneeling on top of me" and her dress and petticoat pushed up to her chest (R7,9-13). Geraldine testified "then I think he put his finger in my private" (R7,11,13), and that she believed he also tried to insert his private part into her own (R13).

Meanwhile, Margaret and Leslie had hurried away, Margaret promptly reporting to Geraldine's mother, Mrs. Jessie Secker, that "a Yank had Geraldine and was killing her" (R16-17,24). This information quickly brought Mrs. Secker to the field, uttering screams as she sought to locate her child (R8,23,24). As her cries came within hearing, accused abandoned Geraldine and left the vicinity. The child arose, put on her knickers, picked up her sanitary pad and gathered up the baby who had been wandering about in the field. She noticed that "there was a lot of blood over the dress and my petticoat and vest" (R7-8, 10-11). She went to her mother and, in response to the question "what had happened", said that a soldier had attacked her (R23). Mrs. Secker observed that she was "covered with blood and looked very dazed, that her face was swollen and that she "was hysterical" (R23).

At the Andover Police Station at 11:00 p.m. the same day (R26,28) accused was identified in a parade of about 12 soldiers as Geraldine's assailant by both Geraldine (R8) and Margaret (R16). At that time he was drunk, according to the testimony of P. J. Sullivan, Agent of the Criminal Investigation Division, Provost Marshal's Office (R30). Sullivan warned him of his rights and, with others, questioned

him intermittently from 11:00 p.m. until 3:00 a.m. (R26,29-31). Accused gave various contradictory stories regarding his movements on 6 July 1944 (R32-33), his last being in substance as follows: After he consumed a certain amount of beer in the afternoon at pubs in Andover, he was walking on a road approximately one mile out of town and a young girl accompanied him. She agreed to do a "hand job" and he gave her ten shillings. They went into bushes by the side of the road where she refused either to accommodate him or return his money. In struggling with her to get his ten shillings, his hand went underneath her dress and he noted that her private part was bloody. He fell down and she ran away (R26-27).

The following clothes worn by the accused when he arrived at the Andover Police Station (R18) were received in evidence (R41):

British combat jacket (Pros. Ex.G-A) with faint blood stain on outer surface of right cuff;
Cotton undershirt (Pros. Ex.G-B) showing faint blood stain on front inner surface;
Cotton drawers (Pros. Ex.G-C) carrying a blood and seminal stain on the inner surface near the fly opening;
Cotton khaki tie (Pros. Ex.G-D) with blood splashed down the front;
Woolen shirt (Pros. Ex.G-E);
Wool trousers (Pros. Ex.G-F) showing blood stains and splashing down the outer surface of the fronts of both legs;
Khaki wool socks (Pros. Ex.G-G) with blood stains on the ankle of one sock (R21).

The following clothes worn by Geraldine at the time of the alleged attack (R22) were received in evidence (R41):

Blue knickers (Pros. Ex.G-H), torn and showing extensive blood stains with an area of seminal staining on the outer surface in the region of the fork;
Pink silk dress (Pros. Ex.G-I) showing extensive blood stains on front (R21).

On the day of the alleged attack Geraldine was examined at 6:45 p.m. by Arnold Benjamin Simmons, a medical practitioner, who found her suffering "a little from shock" and "a good deal of early bruising" on both sides of the face. There was no apparent damage to the vulva, which had a certain amount of blood on it, "probably due to menstruation". He observed "extensive straining of blood on the upper front of dress, also on lower part of petticoat, face, neck, arms and legs" (R37). There was no place from which the blood could have emanated except from the vagina since he observed no scratches or wounds (R38,39).

His examination showed that the girl was then a virgin (R37).

4. The only evidence for the defense was a stipulation that if present and sworn as a witness, Technician Fourth Grade Kates of the 219th Medical Dispensary (Avn), AAF Station 449, would testify that on 4 and 5 July he had bandaged a cut on accused's left thumb, which was bleeding at the time (R41). After his rights were explained to him, accused elected to remain silent (R42).

5. Competent and substantial evidence fairly tended to establish every element of the offense alleged. The testimony of the victim was amply corroborated by the testimony of Margaret Henbest and by circumstantial evidence in the case, including the victim's immediate complaint to her mother and her physical and nervous condition shortly after the assault. The admissibility of such evidence is not open to question (CM ETO 3375, Tarpley and authorities there cited). While accused's statement to Sullivan did not constitute a confession, it contained such damaging admissions against interest that it removed any doubts that might otherwise exist. Although the statement was made by accused when he was tired and sleepy, the circumstances do not indicate that he was induced to tell a false story (MCM, 1928, par.114b, p.117).

6. Both Geraldine, age 11 years, and Margaret, age 8 years, were subjected to a voir dire examination by the trial judge advocate to determine their competency as witnesses prior to their being sworn. Their voir dire examination and subsequent testimony demonstrated their intelligence and understanding despite their youth and compels the conclusion that each of them possessed "a sufficient knowledge of the nature and consequences of an oath" (Wheeler v. United States, 159 U.S. 523,524,525, 40 L.Ed.244,247) to qualify them as witnesses. The Board of Review, without reservation, is of the opinion that the competency of each of the young girls as a witness was fully established (CM ETO 3375, Tarpley).

7. The record was not examined and initialed by the defense counsel because of his departure for the United States prior to its completion. The provision that the defense counsel "will examine the record of the proceedings of the court before it is authenticated" (MCM, 1928, par.45b, p.35) is directory rather than mandatory, procedural rather than jurisdictional and the failure to comply therewith was an irregularity that did not injuriously affect accused's substantial rights (CM ETO 2205, Fountain).

8. The charge sheet shows that accused is 37 years and three months of age and was inducted 9 May 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

10. Confinement in a United States penitentiary is authorized upon conviction of the crime of assault with intent to commit rape 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 authorized (Cir.229, 8 June 1944, sec.II, par.1b(4),3b).

Edward V. Long Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(124)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 OCT 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Technician Fifth Grade ROBERT G. NELSON (39238603) 13th Replacement Control Depot (formerly of 219th Medical Dispensary (Avn) IX Tactical Air Command), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3644. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3644).

B. Franklin Riter

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

11 OCT 1944

CM ETO 3649

U N I T E D S T A T E S v. Private JOHN P. MITCHELL (38290072), Company E, 354th Engineer General Service Regiment.	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Tidworth, Wiltshire, England, 26 July 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
SARGENT, SHERMAN and STEVENS, Judge Advocates

---

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private John P. Mitchell, Company "E" 354th Engineer General Service Regiment did, at Whitchurch, Hampshire, England, on or about 1 July, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one James E. Harris, Private, Company "E", 354th Engineer General Service Regiment, a human being, by stabbing him with a knife.

CHARGE II: Violation of 96th Article of War.
Specification: In that * * * did, at Whitchurch, Hampshire, England, on or about 1 July, 1944, unlawfully, and in violation of standing orders carry a concealed and illegal weapon, viz, a knife whose blade length was greater than three inches.

CHARGE III: Violation of 61st Article of War.
Specification: In that *** did, without proper leave absent himself from his station at Whitchurch, Hampshire, England, from on or about 1930 hours, 1 July, 1944 to about 2100 hours, 1 July, 1944.

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

3. Immediately following the arraignment the defense moved for a continuance "on the grounds that it has not had time to properly prepare its case. The case has been in its hands less than twenty-four hours." The prosecution stated that the charges were served on accused 21 July 1944 (five days prior to the convening of the court, as confirmed by the charge sheet), that defense counsel examined the file "about four days ago" and that trial on 26 July was required by military necessity. The court denied the motion (R8). The granting or denying of a motion for continuance is within the sound judicial discretion of the court and, as there is nothing herein showing abuse of that discretion, the court's action in denying the motion will not be disturbed upon appellate review (CM ETO 895, Fred A. Davis et al; CM ETO 1249, Marchetti).

4. Evidence in chief for the prosecution was as follows:

On 28 June 1944 accused, a colored soldier, who was serving a six-month sentence by special court-martial for absence

without leave for three days (par. 2, supra), was released from the unit stockade pursuant to the suspension of his sentence (R40; Pros.Ex.5).

On 1 July 1944 he was a member of Company E, 354th Engineer General Service Regiment, stationed at Cowdown Copse, near Whitchurch, Hampshire, England. According to the testimony of his company commander, Captain Ralph S. Marino, accused was not authorized to be absent from the camp during any part of that day (R8-9). Without objection by the defense, Captain Marino testified that standing orders "in the regiment," with which he was acquainted, provided that no man should

> "go on pass with a knife whose blade is over three inches in length. It has been a practice of the company that no man went on pass with any knife whatsoever. Before being given a pass the Duty Officer searches the man" (R9).

Likewise without objection by the defense, First Lieutenant Lee M. Lange, also of Company E, (R9) testified:

> "It is a standing order and policy of this organization to search all men going on pass" (R10).

Asked whether the standing orders were in writing, Lange testified:

> "None that I know of except SBS instructions we have had and AGO letter" (R10).

About 1600 hours deceased, Private James E. Harris, also of Company E (Pros.Ex.3), applied to Lange, who was evidently Duty Officer at the time, for a pass. Lange searched him, discovered no weapon as a result of his search and issued him a pass effective until 2300 hours 1 July (R9-10).

About 8:00 p.m. on 1 July deceased, accused, a Mrs. Rogers, who was accused's "girl", and several other soldiers were in the public barroom of the Builders Arms Public House, Whitchurch. Upon the invitation of one of the other soldiers, accused, Mrs. Rogers, and Privates Anderson Land and Talmadge Eames, of accused's organization, proceeded to the lounge, a private room adjoining the public barroom. Thereafter there were about eight people in the private room (R11-13,19,21). Deceased was drinking beer in the public barroom but did not appear to be drunk (R12,19). About three or four minutes later deceased came from the public barroom to the

private room, proceeded to the corner and commenced talking, "making some noise" (R11,14). During part of the time, deceased was speaking in a foreign language (which deceased said was French) to Mrs. Rogers, who answered in the same language (R13). Accused, who was not drunk, told him to stop the noise and asked him "to get out." Deceased returned to the barroom (R12,14). Accused looked "very stern" at one witness who entered the room, "as though expecting someone else" (R20). Deceased later re-entered the private room and "started again." Accused again told him "to get out" (R14-15). Deceased had his back to the wall partly on the jamb of the door of a store room off the private room. Accused was facing him, with his left arm across deceased's chest. The chests of the two men were nearly in contact but their stomachs were apart. Accused had a dagger with a "very shiny" blade in his right hand (R20,24; Pros.Ex.X), which he held behind him, pointing downward (R21,24). Deceased had both hands upraised, his left hand in a "bent position" and his right hand closed (R20,24). The two men thereupon engaged in a scuffle (R11,15,20,24). Eames heard a sound "like hitting on this tent" on the raincoat which deceased was wearing when the men were about two feet from the door. Accused was not wearing a raincoat (R11,12,14). At this point "the attack had got under way. They both were in action" (R11). Accused placed his left hand on deceased's collar or shoulder, turned him around and pushed him out through the door into the public barroom. Accused's right hand was down by deceased's side (R12,13,15,20). Both of deceased's feet were on the floor at this time and the force exerted by accused in pushing him evidently forced him to walk (R13). Accused was "manhandling him out of the room" (R12). While going out through the door of the private room, accused with his right hand put the knife into his own right hip pocket. He thereupon put both hands "high up" on deceased and pushed him through the public barroom to the entrance of the public house (R15,18;Pros.Ex.X). No words were heard between the two men during the scuffle (R24) and no one attempted to interfere with them. No knife was seen in deceased's possession at the time (R17,22). Accused was not seen to strike deceased with the knife (R19,23).

When the two men reached the entrance doorway to the public house, Technician Fifth Grade Ed Jackson, also of Company E, met them on his way inside (R15,18,25). He grasped the hand of deceased, who was "moving fast" about four paces ahead of accused (R25) and asked him what the trouble was. Deceased said "Stop Mitchell," went out the door and "up the hill," whereupon Jackson stepped inside the door (R25,27), with both hands grasped accused at his waist and asked him "what was the matter." Accused, who then was coming up about a pace behind deceased, said "Let me loose" and, placing his left hand across Jackson's chest, shoved himself free of his grasp and went out the door behind deceased (R25-27). Accused's right hand was still behind his back (R26). In about two minutes accused returned to the

barroom (R16,20,21), went through the private room, saying "I have him" or "I have got him" or words to that effect (R20), proceeded to the latrine in the rear of the house, and returned and informed Jackson, who was then in the barroom, that he was going back to camp (R16,25). Jackson did not see accused again on that date (R27).

A sketch of the floor plan of the Builders Arms was authenticated as a true reproduction and admitted in evidence "for reference" (R21;Pros.Ex.X). It was thereafter referred to and marked during the trial (R23,26,30). Without objection by the defense, a dagger was received "in evidence for identification purposes" (R15) and admitted in evidence, subject to withdrawal at the close of the trial (R31;Pros.Ex.1). It was thus described by the prosecution:

> "This dagger is approximately twelve inches in length. The blade is seven inches long, with a very fine point and two sharp sides which gradually lead up to a hilt made of steel. The blade itself is made of steel and on it are numerous markings which resemble rust. The handle is yellow, rounded, with a brass piece in the end of it. There is a group of several concentric rings cut into the yellow handle. The handle is about five inches in length" (R49).

The defense stated there was no objection to the foregoing description (R49). Pros. Ex 1 was identified by Private Land as similar to the knife accused had in his hand and put into his pocket at the time in question (R15,16), and by Leonard John Warwick, 36 Evingar Road, Whitchurch, "as the knife that he /accused/ had". Warwick witnessed the encounter between accused and deceased in the private room (R20-21). Jackson testified he had seen a knife similar to the exhibit in accused's possession at that time and on two or three prior occasions (R26). (See further evidence as to identity of Pros. Ex. 1, infra).

Land went out the front entrance of the public house directly after accused returned from the outside after his encounter with Jackson and pursuit of deceased. Land found deceased lying by a wall 75 feet from the entrance (R15,28,57), "hollering he was cut, wanted someone to take him to a doctor" (R15). Deceased had

a bayonet in a sheath on his belt (R17). Deceased was transported in a weapons carrier to the 38th Station Hospital (R28, 34). En route he said only "Someone help me" and "Someone take me to the hospital" (R29). After arriving at the hospital about 9:00 pm, deceased said "Someone help me, I am dying." On several occasions during the three hours he remained alive thereafter, he said he knew he was going to die (R29,34-35). When a medical officer asked deceased "who did it," he said he knew the soldier but did not know his name. He then said it was a man in his company who "had just got out of the guardhouse" (R29,36,37). When asked if it was "John Mitchell" he immediately replied "Yes," and when again asked if it was "John P. Mitchell" he replied "Yes." When asked "Who did you say again?" he answered clearly "John P. Mitchell." Asked once more, he repeated the name. He was referring to the person who stabbed him (R36-37,38).

Captain Edward T. Comer, Medical Corps, 38th Station Hospital, examined deceased shortly after his arrival at the hospital (R33). Deceased exhibited signs of internal bleeding without a great loss of blood. He was considerably weakened and was not entirely coherent (R35). Captain Comer signed a certificate dated 2 July 1944 (R33;Pros.Ex.2) regarding deceased's injury and reading in part as follows:

> "2. Injuries: Wound Penetrating, Abdomen, severe.
> 3. In my opinion soldier was not under the influence of intoxicants /or/narcotics.
> 4. Enlisted man expired 0015 hours 2 July 1944."

He also performed a post-mortem examination upon deceased and signed a protocol of the post-mortem findings (R34;Pros.Ex.3), concluding as follows:

> "Gross Anatomical Diagnosis:
> 1. Wound, incised, penetrating, left hypochondriac region of abdominal wall.
> 2. Wound, perforating stomach, at junction of middle and distal thirds, extending from greater curvature on anterior surface to lesser curvature, with severance of right gastric artery.
> 3. Wound penetrating anterior surface of duodenum, 6 cm. from pyloric sphincter, with severance of gastro-duodenal artery.

Cause of Death:
Hemorrhage into abdominal cavity and stomach, secondary to wounds as above."

Captain Comer testified directly that deceased had a "penetrating incised wound, left upper region of the abdomen." It was horizontal, external and penetrated upward. It could have been caused by an instrument of the type of Pros.Ex.1 (R34).

About 11:00 pm, 1 July, Warwick positively identified accused at a parade at his camp as one of the soldiers in the scuffle at the public house (R39,41), and again identified him at the trial (R20).

On 3 July 1944, after being warned as to his rights, accused made and signed a voluntary statement, without force, coercion, hope of reward or fear of punishment (R41-42,49; Pros.Ex.4), as follows:

" On 1 July 1944 at about 7 P.M. I met Mrs. Rogers at the railroad station at Whitchurch. With me at the time was Pvts. Rodgers and Patterson of my company. Pvt. Land was already at the station talking to Mrs. Rogers before I got there.

We all then walked to the Builders Arms Pub and went in and had a few beers. We also had a bottle of whiskey which we had bought from a colored British civilian out near our camp.

We had taken a few drinks out of the bottle on the way to the railroad station. We also had a few drinks out of it while we were in the pub.

After we were in the private room of the pub shooting darts and drinking beer, Pvt. Harris came in and he was pretty drunk and was making a lot of noise. Patterson told Harris to be quiet but Harris continued making a lot of noise. I saw Harris take Pvt. Eames glass and drink it. Eames told me to open the door that he wanted to push Harris out of the pub. I saw Harris pushed out of the pub by Eames, Patterson, Land and Rodgers.

At this time Mrs. Rogers and a Britisher were playing darts. Mrs. Rogers asked me what had happened and I told her I didn't know.

Pvt. Rodgers then came in the room and called me outside. I went outside and saw Harris sitting on the sidewalk. Pvts. Land and Patterson were also outside.

Rodgers said we'd better go back to camp as we had no pass and that Harris was cut. I was going to go back to tell Mrs. Rogers I was leaving but I saw an MP coming down the street.

Patterson, Rodgers, Land myself went back to camp. After I got back to camp I got in a crap game. Some of the boys in the crap game were Robert Evans, Robert Stokes, Chris Lovett, and David Lampert. The game broke up at 9:45 P.M. and I hung around at the motor pool."

On 2 July Mrs. Charlotte Lord, assistant to her brother-in-law, Owen Wade, licensee of the Builders Arms (R29-31), saw a knife lying in the leaves just inside the garden which was situate immediately to the rear of the latrine behind the public house. It was about a yard inside the four-foot-high fence or wall which was between the latrine and the garden (R30;Pros.Ex.X). Asked as to the location of the latrine, Mrs. Lord testified "You go through the back door and just turn to the right" (R31). The knife she saw was "very much the same" as Pros.Ex.1 (R30). Later in the day Constable Ronald G. Poore of the Hampshire Joint Police Force, Whitchurch, summoned to the scene by Wade, found the knife on creepers about three feet from the wall at the rear of the premises. There were light rust stains upon it when he picked it up. His identification of Pros. Ex.1 as the knife in question was positive. He recognized it by both a cross with which he had marked it and a stain (R31,32). He took the knife to the police station where it was left. He testified that he was acquainted with the location of the latrine and with the entire adjoining area, that it would have been possible for a person who entered the latrine to throw that knife over the wall to the position where he found it and that the person would be obliged to go through the public house to get to the garden (R32).

5. (a) Evidence for the defense was, in substance, as follows:

Frederick Wells, dustman, of 8 Evingar Road, Whitchurch, testified that at the time and place in question he saw a "big

soldier," with his hands on the back of a smaller soldier, push the latter through the barroom to the road, after which the "big soldier" returned to the room. Witness could see the tall soldier's hands but saw no weapon in them (R43-44).

Thomas Fenton, bricklayer, of 24 Church Street, Whitchurch, testified that at the time and place in question a small colored American soldier, wearing a field jacket and a steel helmet, walked up to some other colored American soldiers, with his left hand drew a knife about three or four inches in length from his right side and stood away from them. A scuffle followed, someone took the knife from him and "they went out the door" -- "three or four soldiers all went out in a bunch" (R45-47).

(b) After being advised as to his rights, accused elected to remain silent (R48-49).

6. In rebuttal, the prosecution offered evidence that deceased was wearing a raincoat (R49) as distinguished from a field jacket (R50).

7. The court adduced the following evidence, in substance:

Private Anderson Land testified in part that when he saw deceased lying outside the pub no one was around him, to his knowledge, and that he could recall no one passing him (witness) and entering the pub after the entry of accused (R51). Deceased was bleeding down his left side, complained that he "was hurting" and wanted to be moved. Accused was six or seven inches taller than deceased (R52-53). Witness saw no other soldiers in the private room holding knives (R53).

Technician Fifth Grade Ed Jackson testified in part that deceased and accused, who followed deceased almost immediately, both turned to the right as they came out of the public house (R58), but that he did not see accused attack deceased or hear any outcry from the latter (R59). When accused returned in "a couple of minutes" (R61), he proceeded alone to the latrine, stayed about sixty seconds, returned, said he was going to camp and went out the door. The reason witness knew accused went to the latrine was "because that's the only door that goes to the latrine, the door that he went in" (R62).

8. Certain further procedural matters require comment:

(a) The court sustained an objection by the prosecution to the admission of a certified true copy of a prior statement of

a prosecution witness (Warwick) offered by the defense upon cross-examination for the purpose of impeaching him. The ground of the objection was that the defense had not shown the original to have been lost or destroyed (R22-23). The ruling was proper (MCM, 1928, par.116,p.119; par.124b,p.134).

(b) Deceased, after stating several times that he knew he was going to die, stated that he knew the man who stabbed him because he "had just got out of the guardhouse." He twice replied in the affirmative to a question whether John P. Mitchell "did it," (the stabbing) and twice thereafter, when asked who it was, stated "John P. Mitchell." The defense objected to the testimony and moved that the same be stricken on the ground that it was hearsay (R29) and "not a dying declaration. It has not been clearly and conclusively shown that the man was in such a state of mind to make such a declaration." The court denied the motion (R37).

> "Dying declarations are the statements made by a person after the mortal wound has been inflicted, under a belief that death is certain, stating facts concerning the cause of, and the circumstances surrounding, the homicide. The authorities are practically uniform in definition, varying only in expression" (Wharton's Criminal Evidence, Sec.525,p.836).
>
> "There is considerable contrariety of conclusion as to the admissibility as dying declarations of statements involving an opinion or conclusion of the declarant as to the identity of his assailant. In general, it may be stated that where it is manifestly impossible that the deceased could have seen his assailant or known certainly who he was, a mere expression of opinion as to who he was is not admissible as a dying declaration; but where want of knowledge does not appear, either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within his knowledge. In these circumstances, it is a question for the jury whether the declaration represented the primary knowledge of the deceased or merely his opinion" (Ibid., sec.540,pp.872-875).
>
> "In trials for murder and manslaughter.--The law recognizes an exception to the rule rejecting hearsay by allowing the dying declarations

> of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them. It is necessary, however, to the competency of testimony of this character -- and it must be proved as preliminary to the proof of the declaration-- that the person whose words are repeated by the witness should have been in extremis and under a sense of impending death, i.e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown. And if this belief on his part sufficiently appears, it is not essential to the admissbility of his words that death should have immediately followed upon them.* * * But it is no objection to their admissibility that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons;
> * * *
>
> It is to be remarked that evidence of dying declarations is usually to be received with great caution, since such declarations are usually made under circumstances of mental and physical depreciation, and without being subjected to the ordinary legal tests" (MCM, 1928, par.148a,pp.164-165).

There was competent substantial evidence that at the time of his declarations a mortal wound had been inflicted upon deceased, that he was thus in extremis, that he was under a belief that his immediate death was certain and that his statement naming the person who caused his condition was one of fact and not a mere opinion or conclusion. He died at 12:15 am, 2 July. It was the duty of the court to determine as a preliminary issue if deceased made the declaration under such conditions as to entitle it to admission in evidence. In view of the evidence, the court's determination and ruling will not be disturbed upon appellate review (CM ETO 438, H. A. Smith and authority there cited).

(c) The ruling of the court admitting in evidence accused's sworn statement (Pros.Ex.4) was proper in view of its character as an admission rather than a confession and in the absence of any

showing that it was procured by means of such character as to cause accused to make a false statement (MCM, 1928, par. 114b, p.117; CM ETO 3644, Nelson).

9. (a) Accused's absence without leave from his station during the period alleged, in violation of the 61st Article of War, was clearly established by the testimony of his company commander that he was not authorized to be absent from his camp during any part of the day of 1 July 1944 (Charge III and Specification).

(b) It is alleged (Charge II and Specification) that accused did at Whitchurch "on or about 1 July, 1944, unlawfully, and in violation of standing orders carry a concealed and illegal weapon, viz, a knife whose blade length was greater than three inches," in violation of the 96th Article of War. Evidence of the standing orders in question was introduced in the form of the oral testimony of the company commander and another company officer. The hearsay character of the evidence was immaterial both because defense failed to object thereto (CM ETO 2098, Taylor and authorities therein cited) and because relevant standing orders are in fact contained in directives issued by Headquarters European Theater of Operations, of which the court and the Board of Review may take judicial notice, and with notice of which accused was charged (CM ETO 1538, Rhodes; CM ETO 1554, Pritchard; CM ETO 2788, Coats and Garcia). The relevant directives provide as follows:

> "The carrying of weapons of any kind, including straight razors and knives, other than small pocket knives (three inch blade or less), on leave, furlough or pass is prohibited" (Cir.34, Hq., ETOUSA, 28 Mar 1944, par.5j).
>
> "3. Special care will be taken to insure that arms are carried only when required in the performance of duty. The carrying of weapons of any kind, including straight razors and knives other than small pocket knives (three-inch blade or less), during off-duty hours among the civilian population is forbidden. All enlisted personnel leaving station on furlough or pass will be inspected by a commissioned officer to assure that compliance is had with the foregoing. Any infraction will be severely dealt with.

> 4. The above provisions are not appliable in the case of military and civilian personnel who own private firearms, provided they are carrying such arms only for the immediate purpose of sport or target practice, and further provided that they have fully complied with the British laws /respecting license to carry gun or hunt/" (Cir.35,Hq. ETOUSA, 29 Mar 1944, sec. II, pars.3,4).

At the time and place alleged accused was seen holding a knife similar to Pros.Ex.1 (the blade of which was about seven inches in length) by several witnesses, one of whom saw him put the knife into his pocket. His guilt of the Specification was fully established, irrespective of the fact that he was not on "leave, furlough or pass." Paragraph 3 of Circular 35, supra, makes it evident that the essence of the standing order is the prohibition of the carrying of the stated weapons during off-duty hours among the civilian population and not the possession of authority for absence at the time of such carrying. Otherwise a soldier would be able to circumvent the prohibitions of the circulars by the simple expedient of absenting himself without authority in the form of leave, furlough or pass. Such a situation was certainly not intended. There is no suggestion in the record that accused was within the exception provided by paragraph 4 of Circular 35, supra. However, it is clear that accused was guilty of an offense in violation of the 96th Article of War, included in the phraseology of the Specification, irrespective of the standing orders in question, i.e., carrying a concealed weapon (CM ETO 1100, Simmons, where evidence showed accused was absent without leave at the time in question; MCM, 1928, par.104c,p.100).

10. (a) In Charge I and its Specification accused is charged with the murder of Private James E. Harris by stabbing him with a knife.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.
>
> ******
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the

intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (MCM, 1928, par. 148a, pp.162,163-164) (Underscoring supplied).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its (sic) existence of malice must be determined as a fact from all the evidence.

* * * * * *

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life" (29 C.M., sec. 74,pp.1099-1101) (Underscoring supplied).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act. * * * Mere fear, apprehension or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent" (1 Wharton's Criminal Law, sec. 426, pp. 652-655).

(b) The fact that deceased was stabbed to death with a knife at the time and place alleged was established by evidence of the wound in his abdomen which penetrated through his stomach to his duodenum, severed two arteries, caused a hemorrhage and resulted in his death within several hours after its infliction. No witness saw accused stab deceased, but the evidence inculpating accused as the murderer was as follows: He was seen with deceased at the time and place alleged holding a knife with a seven-inch blade in his right hand. Medical testimony showed that this knife could have produced the fatal wound. Deceased was making a loud noise in the barroom and speaking in a foreign language to accused's "girl", who answered him in the same language. Accused told deceased to be quiet and to leave. Deceased left and returned and accused again told him to leave. Thereupon accused, holding him with his left hand and holding in his right hand the knife which he presently put into his pocket, pushed and chased deceased to the entrance door of the public house. A soldier coming in the door tried to stop accused, pursuant to deceased's request, but was shoved aside by accused, who followed deceased out the door. Both turned to the right when outside. Accused returned to the public house in about two minutes saying "I have got him," proceeded through the door to the latrine at the rear of the house, returned to the public house, announced that he was going back to camp and departed. Deceased was found lying 75 feet from the entrance. A knife (Pros.Ex.1), identified as similar to that in accused's hand at the time of the scuffle with deceased, was found in a small garden near the latrine, about a yard from the brick fence between the latrine and the garden, which was accessible only from the public house. There was evidence that the knife could have been thrown from the latrine to the position where it was found. Before he died, deceased, believing he was about to die, repeatedly named accused as his murderer. In his voluntary sworn statement accused admitted his presence at the time and place alleged. There was no evidence that anyone at the scene other than accused had a knife in his hand.

(c) The foregoing evidence, although circumstantial, shows beyond a reasonable doubt that accused, angered at deceased because of his noise and the fact that he spoke to and was answered by accused's "girl" in an unknown tongue, forced him outside the public house, stabbed him with the dagger, returned via the house to the latrine whence he threw the knife into the garden, presumably after removing any blood thereon, returned through the public house and left the scene.

> "Where evidence is of sufficient probative force, a crime may be established by circumstantial evidence, * * * '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, andthat that inference is the only one which can reasonably be drawn from those facts'" (People v. Razezicz, 206 N.Y.249; 99 N.E. 557,564).
>
> "A few circumstances may be consistent with several solutions, but the whole context of circumstances can consist of but one truth. Moral certainty is a strong presumption, grounded on probable reasons, and which very seldom fails or deceives us" (Burrell on Circumstantial Evidence, p.199).
>
> "Circumstantial evidence alone orwhen it is considered with all the evidence in arriving at a verdict, may justify a conviction. But when circumstantial evidence alone is relied upon, the facts and circumstances must form a complete chain, and point directly and unerringly to the accused's guilt. In other words, they must be of a conclusive character. Mere suspicions, probabilities, or suppositions do not warrant a conviction. The circumstances must be sufficient to show guilt beyond a reasonable doubt.
>
> Circumstantial evidence is limited by, or rather should be tested by, the following rules, which, while they may be differently phrased, are fundamental rules in all jurisdictions: (1) It should be

acted upon with caution; (2) all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; (3) the facts must exclude every other reasonable theory or hypothesis except that of guilt; and (4) the facts must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that the accused is the one who committed the offense.

Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt,i.e., the circumstances must not be consistent with innocence within a reasonable doubt. They must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence.

* * * * * *

Weight of circumstantial evidence is a question for the jury to determine" (Wharton's Criminal Evidence, Vol. 2, 11th Ed., sec.922,pp. 1603-1609,1611).

The evidence herein is not only "consistent with the hypothesis of guilt" but excludes "every other reasonable theory or hypothesis except that of guilt" (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; and authorities there cited).

(d) Whether or not accused's intent to kill was formed under the influence of an uncontrollable passion aroused by adequate provocation, and whether or not the killing was done in legitimate self defense or accidentally, were questions peculiarly within the province of the court. Fulfilling its duty to weigh the circumstantial evidence and to resolve all questions of fact, the court found accused guilty of the murder of Harris. As there was competent, substantial evidence to sustain the findings of guilty, they will not be disturbed upon appellate review (CM ETO 2686, Brinson and Smith, supra; CM ETO 3180, Porter; CM ETO 3200, Price; and authorities therein cited).

11. The charge sheet shows that accused is 24 years of age and was inducted 28 September 1942 to serve for the duration of the war plus six months. No prior service is shown.

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

sufficient to support the findings of guilty and the sentence.

13. Imprisonment for life is an alternative mandatory sentence for the crime of murder (AW 92). Confinement in a penitentiary is authorized for such crime by Article of War 42 and Section 275, Federal Criminal Code (18 USCA 454). In as much as the sentence included confinement at hard labor for more than ten years, i.e., life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4) and 3b).

Edward H. Keyser, Judge Advocate

Malcolm C. Sherman, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 OCT 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Private JOHN P. MITCHELL (38290072), Company E, 354th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In Special Orders No. 195, Headquarters Southern Base Section, Communications Zone, European Theater of Operations, 13 July 1944, appointing the court which tried this case, Lieutenant Colonel Norman W. Whited was designated President. Manual for Courts-Martial, 1928, specifically directs:

> "The senior in rank among the members present is the president and presiding officer of the court" (par.39,p.28) (Underscoring supplied).

It is accordingly improper practice to designate the President in the appointing order. The order properly designated the Law Member, as required by Article of War 8 and Manual for Courts-Martial, 1928 (par.4e, p.3; App.2,p.231,Notes).

3. The publication of the general court-martial order may be accomplished by you as the successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as officer commanding for the time being, as provided by Article of War 46.

4. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3649. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3649).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3664

7 OCT 1944

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ROBERT W. REASON (35202765), 3185th Quartermaster Service Company.	Trial by GCM, convened at Colleville-sur Mer, France, 18 and 19 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Robert W. Reason, 3185th Quartermaster Service Company, being on guard and posted as a sentinel at Post Number two (2), Engineer Depot E-505, near Valognes, France, on or about 26 July 1944, did leave his post before he was regularly relieved.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions: one by general court-martial for unlawful entry to commit larceny, in violation of Article of War 93, and one by special court-martial for failure to obey a lawful order, in violation of Article of War 96. He

was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence offered by the prosecution showed that accused was a private in the 3185th Quartermaster Service Company (R8), stationed on 26 July 1944, at or near Valognes, France. Accused was a sentinel, a member of, the guard on that date. Before leaving the company area, accused was advised as to the number of his post and instructed in the duties of his post, which was Post No. 2. This was a stationary post at the fork of two roads, one of which led to Engineer Depot E-505. The instructions given accused were, among others, to stand at his post, direct traffic, and prevent any unauthorized person from entering the depot (R6-9,11; Pros.Ex.A). He was on the first relief of the guard. Accused was actually "posted" at Post No. 2 on the day in question by the corporal of this first relief. The hour was about 1:45 a.m. (R9-11,14). His tour of duty was four hours "on" and eight hours "off" (R9). He relieved Private Irving McKinney at that post (R13,14). McKinney, at that time, gave accused his magazineclip (R12,14) and got on the truck and rode back to the guardhouse (R10,11,14). Post No. 1 was about a quarter of a mile from Post No. 2 (R6,15). The guardhouse was located at Post No. 1 (R8). The same morning, Private James Hollomon was supernumerary relief, on Post No. 1, and took his post at about 2 a.m. About a half an hour later, accused came up to him and talked until about 2:30, asked Hollomon for a match, and went inside the guardhouse. Hollomon's was also a stationary, standing post (R7,15-17).

Private Jonah Paschal was on guard duty that day. He was posted at Post No. 2 at 6 a.m., to relieve accused. There was no one on that post when Paschal was posted (R17). He was posted by Corporal Arthur Simmons. Simmons "looked around" for a couple of minutes and saw no one at that post (R19). Accused did not receive permission from the corporal or the sergeant of the guard to be absent from his post between the hours of 2:00 and 6:00 (R21,22). He was found "laying down" in the guardhouse at 6:30 a.m. He was wrapped up with blankets and was asleep. Accused at that time stated that the truck had gone off without him and that he had not been posted. He had in his possession his clip of ammunition which he said he had all the time, denying he had received it from McKinney (R23).

4. Accused, advised of his rights, was sworn and testified in his own behalf (R24). He said that he had gone to sleep in the guardhouse before going on his tour of duty, which was from 2 a.m. to 6 a.m.,

July 26th. That he was awakened before 2 a.m. and told it was about time for him "to go on guard". He figured he had about half an hour to prepare. He did not get up at once and must have dozed off. When he awoke, he went out and found "they must have just gone off and left" him "laying there". Accused said he was not "taken out and posted" at 2 o'clock that morning. He explained his possession of the ammunition clip by saying that although supposed to turn in all ammunition, he had kept a couple of clips (R25-27).

5. It was charged that accused while on guard, posted as a sentinel, left his post before he was regularly relieved, in violation of Article of War 86. It is not denied that accused was absent from his post between about 2:30 and 6 a.m. on the date and at the place alleged in the Specification of the Charge. It was contended by accused that he did not start off with the guard from the guardhouse and that he was never actually posted as a sentinel. An element of the offense charged is "That the accused was posted as a sentinel, as alleged" (MCM, 1928, par.146c, p. 161). The prosecution offered to the court the direct testimony of the corporal of the guard, of the driver of the truck which carried out the relief guard and picked up those relieved, and also of the sentry on the post who was on the earlier tour and who was to be relieved by accused, that accused was taken to his post, Post No. 2, that he dismounted from the truck, received from the sentry being relieved the latter's ammunition clip, and that the sentry thus relieved got on the truck and rode back. There was substantial evidence that accused was actually posted. The issue thus raised by the defense, as to whether or not accused was posted, was one of fact to be determined by the court. The court's determination of this fact adversely to accused may not, under the circumstances, be disturbed by the Board upon appellate review (CM ETO 3056, Walker; CM ETO 3470, Harris).

6. Accused is 21 years old. He was inducted at Huntington, West Virginia, 31 March 1941, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. 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 authorized punishment for violation of Article of War 86, in time of war, is death or such other punishment as a court-martial

(148)

may direct. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

_____ Judge Advocate

_____ Judge Advocate

(Absent on Leave) _____ Judge Advocate

1st Ind. (149)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 OCT 1944 TO: Commanding General, Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Private ROBERT W. REASON (35202765), 3185th 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 and this indorsement. The file number of the record in this office is CM ETO 3664. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3664).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

CONFIDENTIAL

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

BOARD OF REVIEW NO. 1

1 NOV 1944

CM ETO 3677

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at Bricquebec, Department of Manche, France, 10 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HARRY L. BUSSARD (13015257), 666th Ordnance Ammunition Company.	

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

---

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification 1: In that Private Harry L. Bussard, 666th Ordnance Ammunition Company, did, at Bricquebec, Manche, France, on or about 1 July 1944, unlawfully enter the dwelling of Mme. Veuve Josephine Surcouf, with intent to commit a criminal offense, to wit, robbery therein.

Specification 2: In that * * *, did, at Bricquebec, Manche, France, on or about 1 July 1944, by force and violence, and by putting him in fear, feloniously take, steal, and carry away from the person of M. Louis Leon Charles Viel, one watch, the property of the said person, value $10.00.

Specification 3:(Disapproved by Reviewing Authority).

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * *, did, at Bricquebec, Manche, France, on or about 1 July 1944, willfully and wrongfully discharge a carbine in vicinity of 609th Engineer Light Equipment Company bivouac area, Bricquebec, Manche, France.

Specification 2: (Finding of Not Guilty).

He pleaded not guilty and was found guilty of Charge I and its specifications, guilty of Charge II and Specification 1 thereunder, and not guilty of Specification 2, Charge II. Evidence was introduced of one previous conviction by special court-martial for absence without leave for two days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved only so much of the finding of guilty of Specification 2, Charge I, as found that accused did, at the time and place alleged, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of M. Louis Leon Charles Viel, one watch, the property of the said person, value not in excess of $10.00, disapproved the finding of Specification 3, Charge I, approved the sentence, but reduced the period of confinement to ten 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.

3. The prosecution's evidence showed that on the afternoon of 1 July 1944, Private Emiliano Montoya, 666th Ordnance Company, stationed about one mile from Bricquebec, France (R6) left the company bivouac area and walked in the opposite direction from

town. He met accused and two other soldiers from his organization, who were sitting by the side of the road drinking cognac (R9). Montoya sat down with them (R13) and had a few drinks (R11). Accused had a carbine (R12) and was drunk (R14). Two French civilians stopped and talked with them (R9,13,39). One of the civilians, Louis Leon Charles Viel, accepted a cigarette offered by accused (R18). Accused and Montoya twice left the group to get more cognac (R10,39). On one of these occasions they entered the home of Mme. Josephine Surcouf (R11,15) in Malert, a town about three kilometers from Bricquebec (R10,15). She was sitting in her house by a table sewing, when the two soldiers, both armed, walked in uninvited. Accused opened a buffet and without permission took a full bottle of calvados. She got up to

> "take the bottle away from him and that is when he took the gun and pointed it at my throat" (R16,17).

Accused gave the bottle to Montoya who put it in his shirt and they left (R10,17). Mme. Surcouf identified the accused by a crucifix tatooed on his chest, after he, at the request of the President of the Court, unbuttoned his shirt and displayed such a design. She had observed it when he entered her home (R16).

Returning to the place on the road accused jerked Viel's watch from the latter's hand (R33) and, when Viel requested its return, refused to give it back, saying it was a souvenir. Accused offered to pay for the watch but Viel wanted to keep it. Viel did not know its value but stated without objection by defense that he believed it to be worth "about 1000 or 2000 francs," He tried to take the watch from accused who then fired his carbine in the air. Viel "was scared of the machine gun" and left. He returned home and accused followed him part way (R18-20,33). A watch, received in evidence (R35;Pros.Ex.1), with Viel's initials marked on the back, was identified by him as the one taken by accused (R19). Montoya also identified it as the one taken from Viel by accused (R33). Second Lieutenant Robert B. Malone, 666th Ordnance Company identified the watch as the one he obtained from accused on the morning of 2 July 1944.

4. After being warned of his rights accused elected to testify in his own behalf (R38). The pertinent part of his testimony reads as follows:

> "It was about 1 o'clock when Pvt. Chase and Sgt. Bullock and myself left the company area. We walked over and on the way bought a quart of cognac and

we came back and were sitting in a road drinking and Pvt. Montoya and Pvt. Harper came by and they sat down and they started drinking. So we went back up there after we finished the quart to get another quart and two civilians came down - we were there - and they both stopped and I gave them cigarettes and we were sitting there and they kept talking. We didn't understand what they were talking about but when we took a drink we would give them a drink. Then I went back up after another quart and Pvt. Chase came up after me. He said we were staying too long and Pvt. Montoya and myself came back down and the two Frenchmen were still there and they had the watches. I asked him if he wanted to sell the watch and so this other Frenchman - the one with that case on it - he put his watch out and I told him I would give him 500 francs and he didn't know what I was talking about so I counted five one-hundred franc notes and he took it and he gave me the watch. I put the watch in my pocket and the other one, I asked him if he wanted to sell his. So he put the watch back in his pocket and I asked two or three times if he wanted to sell it and finally he took it out, so I had a good many of these 20-franc notes and so I started counting and I says, 'Here, just take them all, I guess you have got 500 there,' and so the other Frenchman, the last one I bought the watch from, he went on the road. The other one who I gave the twenties to, he went on the road and this other Frenchman, as I remember, he went up the road and we walked up the road with him." (R38).

In cross-examination the following questions and answers are relevant (R40):

"Q Have you ever seen this Mrs. -- this lady who testified here today?
A. Yes, sir.

Q Did you go in her house?
A I couldn't say.

Q. You wouldn't say you didn't go in?
A. No, sir, I couldn't say I did or did not.

Q. You cannot give us any reason now for going in that house, if you went in?
A. No, sir, I cannot. We would see the lady every time we passed there. She lived in a little house right by the gate. The first time we went there I stopped and gave her some candy. I would stop and talk to her a few minutes every time I would go by.

Q. You remember very well practically everything that happened that afternoon, don't you?
A. Yes, sir.

Q. And you don't remember a thing about going in this woman's house?
A. No, sir."

Accused admitted firing his carbine while talking to the civilians, explaining that "they wanted to know what it was and how it worked so I shot it" (R40).

5. As to Specification 1, Charge I, housebreaking is defined as

> "Unlawfully entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par.149e,p.169).

The court was warranted in finding that accused, when he entered the house of Mme. Surcouf, armed with a carbine and without invitation, intended to commit a criminal offense therein, to wit: robbery. Such intent was evidenced by his prompt seizure of a bottle of calvados from a buffet and his pointing his carbine at Mme. Surcouf when she objected. The evidence is legally sufficient to support the findings of guilty of Specification 1, Charge I. (CM 157982 (1924) (Dig. Op. JAG, 1912-1940, sec. 451 (32), pp. 321-322; CM ETO 2840, Benson; CM ETO 3754, Gillenwaters).

6. As to Specification 2, Charge I, robbery is defined as

> "The taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (MCM, 1928, 149f, p. 170).

3677

It was clearly shown that accused did, at the time and place averred in the specification, take the personal property (a watch) from the possession of Louis Leon Charles Viel, in his presence against his will by violence. All of the elements of the offense of robbery were therefore proven beyond any reasonable doubt (CM ETO 2779, Ely, et al; CM ETO 1621, Leatherberry; CM ETO 78, Watts). The action of the reviewing authority in approving only so much of the finding of guilty of the Specification as involved a finding that the watch was of value not in excess of $10.00 was proper, since proper evidence of its value was not shown.

> "Where the character of the property clearly appears in evidence, for instance, if it is exhibited in court, the court, from its own experience, may infer that the property has some value" (MCM,1928, par. 149g, p.173).

As to Specification 1, Charge II, it was clearly shown that accused discharged a carbine, in violation of Article of War 96, as alleged (CM ETO 866, O'Connell and Haza).

7. The charge sheet shows that accused is 22 years and five months of age and enlisted at Roanoke, Virginia, on 6 March 1941 to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Kite, Judge Advocate

Elwood H. Hayward, Judge Advocate

Edward L. Stevens Jr., Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 NOV 1944 TO: Commanding General, Headquarters, First United States Army, APO 230, U. S. Army.

1. In the case of Private HARRY L. BUSSARD (13015257), 666th Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the approved 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 3677. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3677).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

8 OCT 1944

CM ETO 3678

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at Headquarters, First United States Army, near Saint Lo, France, 11 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private First Class BERNARD CARTER (12159166), 3192nd Quartermaster Service Company	

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Bernard NMI Carter did at 3192nd Quartermaster Service Company, Camp Bridestowe U.K., on or about 4 June 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Henry NMI Jackson, a human being by shooting him with a rifle.

He pleaded not guilty to the Charge and its Specification. He was found guilty of the Specification of the Charge, except the words "with malice aforethought" and "and with premeditation", of the excepted words, not guilty; not guilty of the Charge, but guilty of manslaughter in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit allpay and allowances due or to become due, and to be confined at hard labor,

at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution showed that on 4 June 1944, accused was a private first class and Henry Jackson a private in the 3192nd Quartermaster Service Company, stationed on that date at Camp Bridestowe, United Kingdom, England (R6,7,9). First Sergeant Alvin Emanuel, Corporal Robert Simmons, Sergeant James H. Gilliam, Technician Fifth Grade M. I. Ward, Second Lieutenant James M. Worthington, Quartermaster Corps, all of the 3192nd Quartermaster Service Company, and Captain Joseph M. Gannon, Medical Corps, of the 141st General Hospital, were all called as witnesses by the prosecution and testified (R8,13,19,22, 30,32). On 4 June 1944, at about 10:45 in the evening, accused and Henry Jackson, the latter referred to hereafter as the deceased, "rushed into" their company orderly room at Bridestowe, England. Present were the witnesses Emanuel and Simmons (R8,9,13). Ward was in the supply room, which connected with the orderly room (R22,23). According to Emanuel, accused's breath smelled as though he had been drinking hard liquor (R9). Simmons said "they", accused and deceased, "entered the orderly room intoxicated" (R13); that "both men were drunk, but they both appeared to me that they knew what they were doing" (R18). Accused and deceased "started making a boisterous noise". Accused hugged the first sergeant around the shoulders and "sounded off", despite the former's efforts to quiet him down. Corporal Simmons "started hollering" at accused and told him "it was the orderly room and not a play house". Accused "got hot at that" and after further words slapped Simmons in the face. The two thereupon "started to tussle", whereupon deceased "jumped on Carter and tried to part them" (R9,14). Deceased drew a knife and said he would kill accused. He "got Carter" (accused) "right in the corner and held him by his throat * * *, and held his knife in his right hand and stabbed at him" (R9, 10). Emanuel grabbed the knife by catching Jackson's wrist and, with the help of Ward, separated the two soldiers and took the knife from deceased (R9-10,13-14,23). Accused and deceased left the orderly room. Each went to his own barracks. Deceased started to come out of his barracks with a carbine. "He swore he was going to kill Carter again with it". Simmons and some others took the carbine away from him. While being disarmed, deceased said: "Anyone that bothered the company clerk * * * his friend wasn't getting away with it". After this deceased, accompanied by Simmons, left his barracks and walked a 100 feet away, when they saw Carter standing a barrack's length - about 40 feet - away with a rifle in his hand (R10,13,14,17,19-21,23,26). Corporal Ward asked accused to put away his rifle and forget about it, but was told to get out of the way or get shot. Accused ejected a bullet that was in the chamber. "One of the boys picked it up"; accused reached out and got it; and put it back in his rifle (R24,26). The rifle held by accused was a Springfield, '03 model, single-shot bolt action (R27). "Sergeant James Bean" and Sergeant Gilliam were holding deceased. Accused told them to "turn Jackson loose, don't hold him". This they did (R20). Accused then said to deceased

that he would shoot deceased if the latter moved one step closer. Deceased took about three steps toward accused who aimed and fired (R10,15,16,19-21,24,25). The shot hit deceased; "he turned, made a half turn and fell to the ground" (R28). Corporal Simmons, who witnessed the shooting, immediately examined deceased's body and found a wound located on the right side, near the right lower rib area (R29). Deceased was removed to the 115th Station Hospital (R29), where he died on 7 June 1944. An autopsy was performed on deceased's body by Captain Joseph M. Gannon, Chief of Laboratory Service at that hospital, five hours later (R31). Captain Gannon testified that the cause of death, as determined by his autopsy,

> "was a through and through bullet wound of the chest which resulted in a perforation of the right lung and destruction of part of the right lobe of the liver; subsequantly this right lobe of the liver became infected with one of the organisms that causes gas gangrine. The patient (deceased) died from both the destruction of the liver and from the infection, but either condition would have been an adequate cause for death" (R32).

In addition to the foregoing, the evidence showed that about seven minutes elapsed from the time that deceased had said he was going to kill accused until the time accused shot deceased (R12); and that it was about 10 to 15 minutes after accused left the orderly room that the fatal shot was fired (R16,25). Sergeant Emanuel said: "It was dark at the time this happened"; but he later said it was light enough for him to see "them take this gun away from" deceased, at a distance of 50 or 60 yards (R12). Corporal Simmons said the shooting occurred about 10:45 (in the evening) and "it was getting just about dark" (R17).

The same night, 4 June 1944, after the shooting, accused was interviewed by Lieutenant Worthington as Investigating Officer. Lieutenant Worthington advised accused of his right to make a statement of what occurred or to remain silent. Accused made a signed statement in writing (R32-34; Pros.Ex.1). The pertinent part is as follows:

> "I came into the orderly room with Jackson to listen to the radio after hearing music from outside. After entering I went over to the 1st/Sgt and started to play. Cpl. Simmons thought the 1st/Sgt and I were fighting so started to break it up. At this time somebody hit me in the mouth. I thought it was Simmons so went after him. At this time Jackson started after me. He grabbed me around my neck and I pushed him aside. I heard somebody say 'Don't do it, Don't do it.' I then tried to make my way

3678

(162)

to the door but fell over the nets at the door. While trying to get up I saw Jackson with a knife being held by two soldiers. He broke away from the soldiers and started for me. He got me and managed to get the knife around my neck. He tried to pull it down on my neck but I managed in getting hold of his hand and throwing him. After this I ran to the 1st/Sgt room and jumped out the window.

"After getting out of the window I ran to my hut and got my rifle and came outside again where I heard Jackson saying, 'I'm going to kill him.' He was being held by some soldiers.

"I didn't know if Jackson was armed or not because of it being dark. I know he had had some carbine ammunition.

"Jackson at this time broke away from the fellows and started down the hill in my direction. I told him not to come near me. Cpl. Ward who was standing by told me to put my rifle away but I told him to get away from me.

"Jackson was still advancing towards me saying, 'I'll kill you.' While this was going on I was holding my gun waist high and it went off.

"I saw Jackson fall to the ground. I then went to my hut and put my rifle down." (Pros. Ex.1).

4. After being advised of his rights, accused elected to remain silent. He called no witnesses. On cross-examination of first sergeant Emanuel, the defense showed that this witness had known accused about 23 months in the service. Emanuel said accused had always been nervous and "very quick to get hot-headed, especially when drinking"; and that "as to work" accused was about the hardest worker in the company (R27,28).

5. Accused was charged with murder. The court, by exceptions, found him guilty of voluntary manslaughter. The latter crime is an intentional homicide committed in the heat of sudden passion caused by provocation, but without malice aforethought (MCM, 1928, par.149a, p.165). The evidence clearly showed that this homicide was intentional. Accused had been drinking but there was clear evidence that

he knew what he was doing. He was able to take careful aim with his rifle. It was within the province of the court to resolve the evidence in the light most favorable to accused and conclude that the homicide, although intentional, was not committed with malice aforethought but under the influence of anger and passion upon provocation. The conduct of deceased prior to the homicide was undoubtedly the primary cause of accused's violence. The finding of the court was supported by substantial evidence (CM ETO 72, Jacobs and Farley).

The court was justified in concluding that the killing was not excusable on the theory of self-defense. It was sufficiently light for accused to see that deceased was not armed with a rifle when the latter started to walk toward him. Accused fired at deceased when the latter was 40 feet away. He was in no imminent peril at that time. He still had opportunity to walk or run away, to retreat. Even had accused believed that deceased was armed with a knife, it was his duty to avoid conflict by retreating as far as possible. (Wharton's Criminal Law, 12th Edition, sec.616, p.832). Instead of retreating, accused used his rifle, employing greater force than that offered by deceased.

> "A man may oppose force to force in defense of himself, his family or property. Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defense of the person will be justified when the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending". (Winthrop's Military Laws and Precedents, 1920, Reprint, p.674).

The court was justified in rejecting any theory of self-defense (CM ETO 2103, Kern; CM ETO 3180, Porter).

6. Accused is 22 years old. He enlisted on 24 October 1942, in New York City, New York, to serve for the duration of the was plus six months. There was no prior service.

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

8. Confinement in a United States Penitentiary for a period not exceeding ten years is authorized for the offense of voluntary manslaughter committed in violation of Article of War 93 (MCM, 1928, par. 104c, p.99; AW 42, and sec.275, Federal Criminal Code (18 USC 454)). As accused is under 31 years of age and the sentence is for not more

(164)

than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 OCT 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private First Class BERNARD CARTER (12159166), 3192nd 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 and this indorsement. The file number of the record in this office is CM ETO 3678. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3678).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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

BOARD OF REVIEW NO. 1

1 NOV 1944

CM ETO 3679

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at First Army Stockade, near Formigny, Department of Manche, France, 2 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.
Technical Sergeant HAROLD F. ROEHRBORN (36359537), Company "A", 5th Ranger Infantry Battalion.	

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

---

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

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

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Technical Sergeant Harold F. Roehrborn, Company "A", Fifth Ranger Infantry Battalion, and Private First Class Joseph O. Smith, Company "A", Fifth Ranger Infantry Battalion, acting jointly, and in pursuance of a common intent, did, at LaQuiesce, Manche, France, on or about 5 July 1944, unlawfully enter the dwelling of Messieurs Alaers Arie, Charley L. Ruelle, Antonio B. Canes, Bordius Mareel, Valentino S. Bertran, Joquim Marcos, Ben H. Mdallah, with intent to commit a criminal offense, to wit, robbery therein.

(168)

Specification 2: In that * * *, acting jointly, and in pursuance of a common intent, did, at LaQuiesce, Manche, France, on or about 5 July 1944, by force and violence and putting them in fear, feloniously take, steal and carry away from the persons of Messieurs Alaers Arie, Charlie L. Ruelle, Antonio B. Canes, Bordius Mareel, Valentino S. Bertran, Joquim Marcos, and Ben H. Mdallah, 1225 francs, French currency, the property of Messieurs Alaers Arie, Charlie L. Ruelle, Antonio B. Canes, Bordius Mareel, Valentino S. Bertran, Joquim Marcos and Ben H. Mdallah, value about $24.50, and by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Monsieur Joquim Marcos, one watch, the property of Monsieur Joquim Marcos, value about $5.00; total value about $29.50.

Specification 3: In that Technical Sergeant Harold F. Roehrborn, Company "A", Fifth Ranger Infantry Battalion, did, at LaQuiesce, Manche, France, on or about 5 July 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os, with Messieurs Charley L. Ruelle, Alaers Arie and Ben H. Mdallah.

Specification 4: (Charges Private First Class Joseph O. Smith with sodomy per os).

Specification 5: In that Technical Sergeant Harold F. Roehrborn, Company "A", Fifth Ranger Infantry Battalion, did, at LaQuiesce, Manche, France, on or about 5 July 1944, with intent to commit a felony, to wit, sodomy, commit an assault upon Joquim Marcos, by willfully and feloniously striking at the said Joquim Marcos with a pistol.

Specification 6: (Charges Private First Class Joseph O. Smith with assault with intent to commit sodomy).

He pleaded not guilty to and was found guilty of the Charge and specifications 1, 2, 3 and 5. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, 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 35 years. The reviewing authority approved the findings of guilty of specifications 1, 3 and 5 of the Charge, and approved only so much of the findings of guilty of Specification 2 of the Charge as found that accused did at the time and place specified and in the manner set forth, feloniously take, steal and carry away from the persons of Charlies L. Ruelle, Antonio B. Canes, Bordius Mareel and Valentino S. Bertran 190 francs, French currency, the property of Charlie Ruelle, Antonio B. Canes, Bordius Mareel and Valentino S. Bertran, value about $3.84, and by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Monsieur Joquim Marcos one watch, the property of said Monsieur Joquim Marcos, of a value not in excess of $5.00. The reviewing authority also approved the sentence, reduced the period of confinement to 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Private First Class Joseph O. Smith (34389689), Company "A", 5th Ranger Infantry Battalion, named in Specifications 1 and 2, supra, was tried jointly with accused Roehrborn upon the Charge and said specifications and upon Specifications 4 and 6 under the Charge, in which latter specifications he was separately charged. He pleaded not guilty to the Charge and Specifications 1, 2, 4 and 6 thereunder and was found guilty of Specifications 1 and 2, not guilty of Specifications 4 and 6 and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the findings of guilty of Specification 1 of the Charge and approved only so much of the findings of guilty of Specification 2 of the Charge as found that accused did at the time and place specified and in the manner set forth, feloniously take, steal and carry away from the persons of Charlie L. Ruelle, Antonio B. Canes, Bordius Mareel and Valentino S. Bertran, 190 francs, French currency, the property of Charlie Ruelle, Antonio B. Canes, Bordius Mareel and Valentino S. Bertran, value about $3.84, and by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Monsieur Joquim Marcos one watch, the property of

said Monsieur Joquim Marcos, of a value not in excess of $5.00. The reviewing authority also approved the sentence, reduced the period of confinement to five 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 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

At the time of the examination of the record of trial by the Board of Review, the reviewing authority had not published the general court-martial order promulgating the sentence of accused Smith.

4. Undisputed evidence establishes that at the time and place alleged accused Roehrborn and Smith, without invitation or authority, via an open door, entered a dwelling house occupied by Messieurs Arie, Ruelle, Canes, Borderes Marcel (erroneously named Bordius Mareel in the Specification), Bertran, Marcos and Mdallah (R8,14, 19,21,28). By threatening them with the pistols which accused held in their hands, and thereby putting them in fear (R9,14,22,26,28-30), accused without justification took from the respective persons of four of the occupants, against their will, the following French currency and other personal property:

From Ruelle	10 francs (R26-28);
From Canes	100 francs (R9,10,11);
From Marcel	30 francs (R29);
From Bertran	50 francs (R9,30);
(Total	190 francs).
From Marcos	One pocket watch worth not in excess of 2100 francs (R21-22).

(The exchange value of a franc is $.0202) (Specifications 1 and 2).

The evidence is also undisputed that at the time and place alleged accused Roehrborn disrobed and by means of threats (R18-20) compelled Ruelle, Arie and Mdallah each to engage with him in acts of sodomy per os (R17-18, 19-20,27) (Specification 3). Although the evidence would have warranted including Marcos among the victims named in the sodomy specification (R22-23), it also shows that Roehrborn first attempted to strike Marcos with a pistol but was thwarted by the latter, and thereafter grasped Marcos by the shoulder and hair, threw him to the ground and compelled him also to engage in an act of sodomy per os (R22-24) (Specification 3).

Accused were both drunk at the time of the foregoing events (R19,24,31,34,35).

Specification 1

5 (a) "Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein. The offense is broader than burglary in that * * * it is not essential that there be a breaking; the entry may be either in the night or in the day time" (MCM,1928, par.149e, p.169).

As in the case of burglary (Ibid, par.149d, p.169, Proof), the actual commission of a criminal offense in the building entered, in this case robbery as hereinafter stated, is probative of an intent to commit the same at the time of the unlawful entry. All the elements of the offense of housebreaking as to both accused were established by the evidence (CM ETO 2840, Benson, and authority there cited).

Specification 2

(b) "Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.

* * *

It is equally robbery where the robber by threats or menaces puts his victim in such fear that he is warranted in making no resistance" (MCM,1928, par. 149b, p.170).

The findings of accuseds' guilt of Specification 2, as modified by the reviewing authority, are amply supported by the evidence.

Any failure by the prosecution to prove that the robbery was accomplished "by force and violence" (as well as by intimidation) was not fatal, as the words were merely descriptive and accused were adequately notified of the offense charged (Cf: CM ETO 764, Copeland and Ruggles).

Specification 3

(c) "Sodomy consists of * * * sexual connection * * * by mouth, by a man with a human being. Penetration alone is sufficient" (MCM, 1928, par. 149c, p.177).

The commission of the revolting offense by accused upon each of the persons named in the Specification is clearly shown by the evidence (CM ETO 1743, Penson, and authorities there cited; CM ETO 2701, Webb).

Specification 5

(d) Assault with intent to commit sodomy

> "must be against a human being, and must be with the specific intent to commit sodomy. Any less intent, or different intent, will not suffice" MCM, 1928, par.149l, p.180).

The evidence shows that after assaulting his victim (Marcos) in a thwarted attempt to strike him with a pistol, accused compelled him to engage with him in an act of sodomy. The inference of the requisite specific intent was justified and the findings of guilty are supported by the evidence (CM NATO 1702, Reynolds).

6. The variance between the name "Bordius Mareel" set forth in Specifications 1 and 2 and the action of the reviewing authority, and the name "Borderes Marcel" as it appears in the testimony (R28) was immaterial as accused was adequately notified of the offense charged and his substantial rights were not affected (CM ETO 800, Ungard).

7. The question whether accused's drunkenness was such as to affect his mental capacity to entertain the several specific intents involved in the offenses charged was one of fact for the court, whose determination against him in its findings of guilty is supported by competent substantial evidence and will not be disturbed upon appellate review (CM ETO 3475, Blackwell, et al).

8. The charge sheet shows that accused Roehrborn is 31 years of age and was inducted at Chicago, Illinois, 16 July 1942 to serve for the duration of the war and six months. He had prior service from 10 November 1933 to 9 November 1936 with Company "C", 132nd Infantry and from 1 December 1936 to 26 February 1938 with Service Company, 132nd Infantry.

9. The court was legally constituted and had jurisdiction of the person of accused Roehrborn and the offenses.

No errors injuriously affecting the substantial rights of this accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to accused Roshrborn to support the findings of guilty, as modified by the reviewing authority, and the sentence.

10. Confinement in a penitentiary is authorized for the crimes of housebreaking by AW 42 and secs. 22-1801 (6:55) and 24-401 (6:401), District of Columbia Code; robbery by AW 42 and sec. 284, Federal Criminal Code (18 USCA 463); sodomy by AW 42 and sec. 279, Federal Criminal Code (18 USCA 458); and assault with intent to commit sodomy by AW 42 and sec. 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

B. Franklin Riter, Judge Advocate

Ellwood K. Kleegsen, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 NOV 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Technical Sergeant HAROLD F. ROEHRBORN (36359537), Company "A", 5th Ranger Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as modified by the reviewing authority, 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 3679. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3679).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3686

8 OCT 1944

U N I T E D S T A T E S v. Private BERT G. MORGAN (33506253), Headquarters Company, Headquarters, Southern Base Section, Communications Zone, European Theater of Operations.	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Wilton, Wiltshire, England, 28 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years. Federal Reformatory, Chillicothe, Ohio.

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

---

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

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

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

Specification: In that Private Bert G. Morgan, Headquarters Company, Headquarters, Southern Base Section, did, without proper leave absent himself from his organization at Wilton, Wiltshire, England, from about 5 June 1944 to about 18 June 1944.

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

Specification: In that * * * did, at Bath, Somerset, England, on or about 5 June 1944, feloniously take, steal, and carry away thirty-eight pounds (£38.0.0.) English currency, the equivalent ex-

(176)

change value of one hundred and fifty-three dollars and thirty-three cents ($153.33), the property of Violet May Lye.

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

Specification 1: In that * * * did, at Bath, Somerset, England, on or about 5 June 1944, without the consent of the owner, wrongfully take and carry away one Hillman truck, value of over fifty dollars ($50.00), the property of the American Red Cross.

Specification 2: (Nolle Prosequi)

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that * * * having been duly placed in confinement in United States Military Police Headquarters on or about 18 June 1944, did, at Salisbury, Wiltshire, England, on or about 7 July 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Wilton, Wiltshire, England, from about 7 July 1944 to about 11 July 1944.

He pleaded not guilty to and was found guilty of the charges and specifications on which he was tried. Evidence was introduced of four previous convictions: Three by special court for absence without leave on three occasions, for 31 days, in violation of Article of War "75" (61), and for 11 and eight days, respectively, both in violation of Article of War 61; and one by summary court for absence without leave for 17 hours on 16 March 1944, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3686

3. The prosecution showed that accused was a private, Headquarters Company, Headquarters, Southern Base Section, Communications Zone, European Theater of Operations, stationed on 5 June 1944, at Wilton, Wiltshire, England. On that day and at that place, accused absented himself from his organization without proper leave. A search was made for him through the area and he was not in camp. He remained absent from his organization without permission or authority until 18 June 1944 (R5-7; Pros.Ex.1). On 18 June 1944, the commanding officer of accused was notified that accused had been picked up, sent after him and ordered him confined(R7-10). On the night of 6 July 1944, at about 12 o'clock, accused was a prisoner, confined in cell No. 3, the door of which was locked, at the United States Military Police Headquarters, Salisbury. On the morning of 7 July 1944, accused was missing from his cell. In the cell were found at the time "two metal strips * * * and a wooden wedge" (R10-11). On 11 July 1944, accused was taken "into custody" in Birmingham, England, and returned to Salisbury (R11, 12). His absence from 7 to 11 July was also unauthorized (R8).

Prior to the foregoing occurrences, on the evening of 4 June 1944, at about 10 o'clock, accused went to the Dolphin Cafe in Bath, Somerset, England. Accused secured a room for the night at that cafe. About 12;30 the following morning, 5 June, accused and a friend of his, one "Chuck Lawson", accompanied Mrs. Violet May Lye, the manageress of the cafe, upstairs to the sitting room over the cafe, where they sat a few minutes. The manageress then went to her bedroom and, presumably, accused "retired" to his room. Mrs. Lye took upstairs with her and into her room when she retired "receipts of the business", money of the business contained in two mugs, over which she had the control and custody as manageress of the business. These moneys amounted to "near abouts" £36 or £38, English currency. At about one o'clock, the same morning, accused went into Mrs. Lye's room and talked to her. During this time he closed her blackout curtains. He smoked and seemed restless. Finally, accused asked directions "for the gent's place". A short time after, Mrs. Lye discovered this money was gone, as well as the two mugs. Mrs. Lye looked for accused and found he had left the Dolphin Cafe. She found the empty mugs "down by the gent's room" (R14-20).

On the night of 4 June 1944, a Hillman truck worth at the time "in excess of $50", the property of the American Red Cross, was taken without permission or authority from the parking area at the Red Cross Club at Bath, Somerset, England, and was driven to Wilton, Wiltshire, England, where it was located the following day (R23; Pros. Ex.5).

To Ralph S. Chaplin, 3rd Criminal Investigation Section, on 18 June 1944, accused voluntarily made an oral and a written state-

ment, the latter of which he signed after it was read to him (R20-22; Pros.Ex.3). On 12 July 1944, accused voluntarily made a statement to First Lieutenant Thomas J. Walsh, Corps of Military Police, Headquarters Company, Southern Base Section. This statement was reduced to writing and afterwards read and signed by accused (R12-14; Pros.Ex.2).

In his statement of 18 June (Pros.Ex.3), accused said he had gone to Bath from Salisbury on 4 June "without a pass". He and "Charles Lawson" went to the Dolphin in Bath and had supper. After midnight he was in the room of "Vi", the woman who ran the Dolphin. There was about £38 ($153.33) American money (R23) in a cup in her room. When he left the room he took this money with him. He said he had spent most of this money which he "had stolen". Shortly after, the same morning, he took a Red Cross truck which was parked (in Bath) and drove it to Wilton, where he left the truck in the street. The statement made on 12 July 1944 to Lieutenant Walsh related, among other things, how accused blocked his cell door on the night of 6 July, when he was confined at Salisbury, so that the door would not close tightly and was not secure. He was thus enabled to get out of his cell and out of the building at about dawn the next morning.

4. The accused, advised of his rights, elected to remain silent. The defense called no witnesses.

5. From the evidence presented by the prosecution, it appears that every element of the offenses with which accused was charged and on which he was tried, was proved by competent evidence.

(a) The offense of absence without leave, in violation of Article of War 61, Charge I and its Specification, was proved by the company morning report. The intital absence was not only established by the testimony of the sergeant who searched the area for accused and could not find him, but was admitted by the accused. The termination of this absence and the fact that it was unauthorized were also proved.

(b) The larceny of $153.33, in violation of Article of War 93, Charge II and its Specification, was established by the testimony of Mrs. Iye and by the confession of accused.

(c) The wrongful taking ("joy-riding") of the Red Cross truck, of a value of more than $50, in violation of Article of War 96, Charge III, Specification 1, was proved by stipulation and by accused's confession (Pros.Ex.3). Accused admitted that he com-

mitted the offense, that it was he who took and used the truck. In other words, the corpus delicti of the offense charged was proved by stipulation. Thereafter, it was permissible to use the confession of accused to show that it was he who committed the offense (MCM, 1928, par.114, p.115).

(d) The facts of the escape of accused from confinement and of his corresponding unauthorized absence from his organization, on 7 July 1944, after he had been returned to military control and to his organization, and of the continuation of this absence until 11 July, were completely proved by the prosecution and admitted by accused. These offenses were in violation of Articles of War 69 and 61, as alleged and charged in Additional Charge I and its Specification and Additional Charge II and its Specification, respectively. Accused, at the time he escaped from confinement, absented himself from his organization, as alleged in the Specification of Additional Charge II. The Military Police Headquarters where accused was confined and from which he escaped was undoubtedly the place of detention used by and under the control of accused's command. It was located at Wilton, Wiltshire, England, where the Headquarters Company, Headquarters, Southern Base Section, to which accused belonged, was stationed. Technician Fifth Grade John M. Malone, clerk, at the Military Police Headquarters, and Sergeant John W. Williams, a guard at the Guardhouse of the Military Police Headquarters, were both members of the Headquarters Company, Headquarters, Southern Base Section (R9,10).

6. Accused is 23 years old. He was inducted at Harrisburg, Pennsylvania, 1 April 1943, for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offenses. 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. Larceny of property the value of which exceeds $50 is punishable by penitentiary confinement for five years (MCM, 1928, par.104c, p.99; AW 42; sec.287, Federal Criminal Code (18 USC 466)). Absence without leave, in violation of Article of War 61, is punishable as a court-martial may direct.

"When a sentence of confinement is adjudged by a court-martial upon conviction of two or more

(180)

acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary" (AW 42).

The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

1st Ind. (181)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 OCT 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Private BERT G. MORGAN (33506253), Headquarters Company, Headquarters, Southern Base Section, Communications Zone, European Theater of Operations, 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 3686. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3686).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3691

29 SEP 1944

U N I T E D S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private EUGENE HOUSTON (34757918), 3919th Quartermaster Gasoline Supply Company.	)	Trial by GCM, convened at Le Mans and Etampes, France, 29 August, 1 and 4 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

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

Specification: In that Private Eugene Houston, 3919th Quartermaster Gasoline Supply Company, did, at or near Yvre L'Eveque, France, on or about 13 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Georgette Plessis, a French woman.

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

Specification: (Finding of not guilty)

He pleaded not guilty to and, three-fourths of the members of the court present when the vote was taken concurring, he was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. All members of the court present when the vote was taken concurring, he was sentenced to be 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 testimony for the prosecution shows: That on 13 August 1944, Madame Georgette Plessis was living with her small daughter on a farm near Yvre L'Eveque, France. Her father lived in another house but stayed nights with her. She testified that about three o'clock in the afternoon of 13 August accused and two other colored soldiers came to her house, gave some biscuits to her daughter, drank a half glass of cider and left. Later, about a quarter past six, accused returned. He put his hand behind her back and said, "zig zig". She was afraid and left, but saw her father in the yard and returned, accused following her, and went with her father to feed the pigs. Accused fired his gun at her father's side and threatened him, and her father left to bring help. Accused caught her by the collar and pointed his gun at her, then put her on the ground holding the gun against her, and against her will had sexual intercourse with her. She fainted. She wore no pantaloons and he did not remove any of his clothing (R8-10) but unbuttoned them. Some American soldiers, her father, mother and some neighbors arrived, accused got up from her, and she fled. She had never seen accused before that day. This occurred on the dirty floor of the pig house and when accused closed the door it was dark (R13). She called for help. She was positive in her identification of accused (R15). Later she found in the straw of the pig house a carbine cartridge pouch of the United States Army, containing one empty carbine clip and one clip containing 13 cartridges, and bearing the number 7918 and also the initials of witness which she wrote in before delivering it to an officer (Pros.Ex.2). Her father, M. Jules Goutard, corroborated her story up to the time he was threatened by accused and ran away to "fetch neighbors" whom he asked to go and "fetch American soldier". With the neighbors and soldiers he returned and saw accused lying on top of his daughter in the pig pen (R18-20). Accused, when ordered, came out with his hands in the air. He was dressed but his pants were still unbuttoned. The white soldiers took accused away (R21). A statement of accused (Pros.Ex.1) given to the investigating officer herein, was received in evidence. In this statement accused told about the same story as Madame Plessis, except that he denied that her father was present when he returned about six o'clock, stated that in the afternoon she

asked him to return when no one would be around, and that she readily consented to the intercourse had with him.

When the defense rested their case, the president expressed the desire of the court that the arresting officer and his assistant be called and court was adjourned, meeting again at Etampes, France, on 4 September, when First Lieutenant Harry C. Armstrong, 92nd Signal Battalion, testified that about six o'clock on the afternoon of 13 August, in the vicinity of Savigne, a farmer and two very excited Frenchmen came to him and asked him to come to a barn about a half mile away. Several of his men followed them. As he entered the barnyard he saw accused on top of a woman. Accused got up and the woman got up also and ran. She appeared badly frightened and dazed and didn't know where she was going. Accused came out of the barn, when ordered to do so, with his trousers half down and his flap open (R39-40). Technician Third Grade Austin A. LeBlanc and Private Joseph F. Jacober, 92nd Signal Battalion, who accompanied Armstrong, told similar stories. They said the woman was nervous, frightened and screamed as she got up and ran to the house (R42-47).

4. The evidence for the defense was furnished by accused and the two soldiers who accompanied him in the afternoon. The two soldiers stated accused paid Madame Plessis 50 francs and one of them gave her ten francs and some rations for the cider. They left to go to another place and accused said he was returning to camp. He was in camp when they got back (R25-29).

Accused was sworn as a witness and told substantially the same story as given in his statement (Pros.Ex.1). He testified to the afternoon visit when he paid 50 francs and one of the others paid 10 francs to the lady for the cider. He returned later when no one was present except "Madame Georgette". She went to feed the pigs and "then we had intercourse" (R30). Her father was not there. He pulled his "trousers and shorts off. * * * My rifle was leaning against the door with my pants and shorts on it". He denied he had the rifle in his hand while having intercourse, that he used any force whatever, or that she offered any resistance. He gave her 100 francs for the intercourse (R31) after it had taken place (R34). She told him in the afternoon to come back (R31-33). He admitted ownership of Prosecution's Exhibit 2 which he took off and left in the pig pen, when intercourse was had (R35).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The only dispute here is whether or not consent to the act of intercourse was voluntarily given or whether it was had by force, presenting a question of fact within the exclusive province of the court to decide. The father states he was with his daughter at the time of the return of accused and both he and the daughter state accused fired his rifle and threatened the father if he

(186)

did not leave. Accused denied that the father was present. However, the father shortly returned with the soldiers and neighbors. Accused states he removed his trousers and shorts and hung them on his rifle leaning against the wall. Madame Plessis says that he held the rifle against her during the entire intercourse. When interrupted by the arrival of the father with help, accused was fully clothed with only his trousers unbuttoned and lowered. There is substantial evidence to support the findings of guilty by the court and on appellate review by the Board it will not be disturbed (CM ETO 1953, Lewis; CM ETO 3470, Harris).

6. The charge sheet shows accused was inducted at Fort Benning, Georgia, 6 August 1943. He was 21 years seven months of age and 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 mandatory penalty for rape is death or life imprisonment, as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of rape (AW 42; secs.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 (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

(187)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 SEP 1944 TO: Commanding General, Advance Section Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Private EUGENE HOUSTON (34757918), 3919th Quartermaster Gasoline Supply 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 3691. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3691).

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

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

BOARD OF REVIEW NO. 1

8 NOV 1944

CM ETO 3699

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RUDOLPH ALLISON, (37132331), 381st Quartermaster Truck Company.	Trial by GCM, convened at East Harling, Norfolk, England, 12 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

CHARGE I: Violation of the 64th Article of War.
Specification 1: In that Private Rudolph Allison, 381st Quartermaster Truck Company, East Harling, Norfolk, England, having received a lawful command from Second Lieutenant Benjamin V. Nolan, 987 Military Police Company (Aviation), his superior officer, to show his identification tags or pass, did at East Harling, Norfolk, England, on or about 2 July 1944, willfully disobey the same.
Specification 2: In that * * * did, at East Harling, Norfolk, England, on or about 2 July 1944, strike Second Lieutenant Benjamin F. Nolan, 987 Military Police Company (Aviation), his superior officer, who was then in the execution of his office, on the left shoulder with his right fist several times.

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 thereunder. Evidence of two previous convictions was introduced, one by special court-martial for taking a Government vehicle

3699

without proper authority, and one by summary court for being drunk and disorderly in a public place, both in violation of Article of War 96. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 2 July 1944 accused was one of about 40 to 50 colored soldiers in a group outside a public house in the town of East Harling, Norfolk County, England (R6). Second Lieutenant Benjamin F. Nolan, 987th Military Police Company (Aviation), observed that accused was not wearing a blouse or tie and that his shirt collar was open. The officer inquired of accused the reason he wore no blouse. The subsequent conduct of accused was succinctly described in Nolan's testimony as follows:

> "He immediately was very insulting and started to call me names right out of a clear sky. I asked him for his pass and he refused to give it to me. I asked him if he had any dog tags, and he refused to show them to me, and he was very insulting and very disrespectful. I then asked him if he was aware of the fact that he was addressing an officer; he said he was, and that he did not care, and he was very disrespectful again, and he called me a considerable amount of names. So I then placed my hand on his shoulder and I informed him that he was under arrest. He heard what I had to say, and then he broke away and ran off towards an alley way which led from the main street. I immediately followed after him to try and catch him because I knew that even if I could ask someone in the crowd who he was I could not identify him probably on another date; so I wanted to keep up with him and hold on to him and take him into custody. So I followed after him and reached him about 20 or 30 yards away. As I reached him and tried to grab him he swung at me several times; he struck me off the left shoulder; I blocked a few of the blows and held on to him." (R6)

This behavior of the accused was similarly described in the testimony of Privates Albert G. Wilson (R10-13) and Clyde G. Wambach (R14-15), both of the 987th Military Police Company. Wambach said that accused "took a swing" at Nolan but he did not know whether he struck him or not (R15).

4. After being warned of his rights (R18), accused elected to testify in his own behalf. He stated that on the afternoon of 2 July 1944 at about 12 o'clock when the pub opened he went in and "began to drink, and I was drinking until closing time." He "drank a considerable amount." After that he "was around the streets." When the pub opened in the evening he returned, started drinking again and did not remember what happened or what took place thereafter (R19).

Captain Erwin R. Jensen, 381st Quartermaster Truck Company, commanding officer of accused, testified that on the afternoon of 2 July 1944 he went to East Harling, where he saw accused "out of uniform, not having a blouse on." Accused appeared to have been drinking and "we brought him back to quarters," where he was told to remain. In the evening Jensen again observed accused after the incident described by witnesses for the prosecution. Regarding accused's condition at that time, he stated:

> "I do not know whether he had drunk any more; I would not say that he was any more under the influence of liquor, but he was excited definitely." (R20)

Sergeant Willie Love, 381st Quartermaster Truck Company, was present near the pub in East Harling on 2 July 1944 at the time of the meeting between accused and Nolan. He testified that accused "had been drinking some, but he was not drunk" (R22). According to Private Belvie B. Ferguson, 381st Quartermaster Truck Company, who was also present, accused was "still pretty tight" (R23), but he did not strike the officer (R24).

5. All the elements respectively of the offense of willfully disobeying the lawful command of his superior officer (MCM, 1928, par. 134h, pp. 148-149; CM ETO 2608, Hughes, and authorities therein cited), and of the offense of striking his superior officer (MCM, 1928, par. 134a, pp. 147-148; CM ETO 2484, Morgan, and authorities therein cited) are fully established by competent substantial evidence.

6. The charge sheet shows that accused is 26 years of age and was inducted 28 January 1942 to serve for the duration of the war plus six months. He had no prior service.

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

(192)

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

Judge Advocate

Judge Advocate

Judge Advocate

3699

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army

1. In the case of Private RUDOLPH ALLISON (37132331), 381st Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The publication of the general court-martial order may be accomplished by you as the successor in command to the Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, and as officer commanding for the time being, as provided by Article of War 46.

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 3699. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3699).

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

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

(195)

BOARD OF REVIEW No. 1

8 NOV 1944

CM ETO 3707

UNITED STATES	V CORPS
v.	Trial by GCM, convened at Headquarters V Corps, rear echelon Command Post, near Sees, France, 25 August, 3 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Private W. H. MANNING (14040029), Battery "A", 200th Field Artillery Battalion.	

HOLDING by BOARD OF REVIEW NO. 1

RITER, SARGENT, and STEVENS, Judge Advocates

---

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

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

CHARGE I: Violation of the 93d Article of War.
Specification 1: In that Private W. H. MANNING, Battery "A", 200th Field Artillery Battalion, did, at Almenesches, France, on or about 2400 hours, 20 August 1944, with intent to do him bodily harm, commit an assault upon Rene Albert Roussel, by wrongfully and feloniously threatening him and shooting at him with a dangerous weapon, to wit, a carbine.
Specification 2: In that * * * did, at Almenesches, France, on or about 2400 hours, 20 August 1944, unlawfully enter the dwelling of Ernest Marcelin Barreau, with intent to commit a criminal offense, to wit, assault and battery therein.

CHARGE II: Violation of 96th Article of War.
Specification: In that * * * did, at Almenesches, France, on or about 2400 hours, 20 August 1944, wrongfully and unlawfully commit assault and battery upon Angeline Philamene Barreau, by kissing, squeezing, fondling, and holding her forcibly and against her will.

3707

(196)

He pleaded not guilty and was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for one day, carrying away a bicycle, value about $44.00, and being drunk in quarters, in violation of Articles of War 61, 93 and 96, respectively. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, 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 shows that on 20 August 1944, Ernest Barreau, his wife and children, including his grown daughter, Angeline, together with his nephew Rene Albert Roussel, the latter's wife, Renee, and their three children, all lived together in a house in Alemeneches, France (R6,13,18). On the night of 20 August at about 2400 hours, accused knocked at the door of this dwelling. Roussel admitted him to a room adjoining the house referred to as "the cave" where he was given a drink of cider. Accused gave cigarettes to Barreau and the Roussels. He indicated that he wanted "mademoiselle" (R6,9,13,14,15). He was told there was no mademoiselle and on request he "went out very nicely". Barreau and the Roussels went to bed. Accused

> "continued to go back and forth knocking on the door, and said if we wouldn't open the door, he would go boom-boom" (R7,9), and "he was going to kill us if we didn't present mademoiselle" (R10).

He then fired four shots into the house (R14), the bullets passing "through the door into the hallway into another door" (R7). Roussel then opened the door and accused pointed a gun at his chest (R7,10,14) "as if he wanted to kill him" (R7). Accused "wanted mademoiselle" (R12). At Barreau's request, his daughter, Angeline, came downstairs and stood at the entrance of the door where accused pulled her "by the hand to make me come out" (R19) and "kissed her hand; then he kissed her face" (R8), while she "was just withdrawing all the time" (R12). She allowed him to kiss her "because I was afraid he might fire - fire on me" (R21). Meanwhile, Barreau and Roussel stood at the door with their hands raised above their heads as accused pointed his gun in their direction (R8,11,18). He was "between two cups. He was neither drunk or not drunk" (R12). Renee Roussel went for help and in about a half hour returned with two American soldiers. As they approached the house accused left (R15,19). Accused was positively identified as the soldier who entered their house on the night of 20 August 1944 by Barreau (R9), by Renee Roussel (R15) and by Angeline (R21). A yellow sweater introduced in evidence (R20,22; Pros. Ex."B") and later withdrawn, was described by Angeline as "exactly the same kind of sweater" she saw accused wearing on top of his brown shirt

on the afternoon of 20 August 1944 when (197)

> "we went with a little carriage to get covers. I was coming from the chateau, and he followed us" (R18).

Corporal Joe Flagler, Headquarters V Corps, identified accused as the soldier he took to the Master Stockade on 23 August 1944 and for whom he was acting as guard on the day of trial. That morning accused was wearing the yellow sweater introduced in evidence as Prosecution Exhibit "B" (R22). On 19 August 1944 accused went to the Barreau house (R8) with three other soldiers and drank a glass of cider for which accused paid ten francs (R12,15,17).

4. After being warned of his rights (R23-24) accused elected to testify in his own behalf. On 20 August 1944 he left his battery around five or six p.m. and went to Almeneches (R24). He had a few drinks. An "MP" picked him up and took him to the 80th Division Stockade. He was released at about 11 p m, obtained his bicycle and rode one or two miles to camp, arriving there between 12 and 12:30 (R25). He denied all the acts alleged by prosecution witnesses to have been committed by him on the night of 20 August (R26).

Cross-examined, he testified that he did not stop at the Barreau dwelling that night (R27-28). He was armed with a carbine on 20 August 1944 and had one clip of ammunition in his weapon and four clips in his belt. He saw Angeline and her mother on the afternoon of 20 August 1944, and rode along beside them. He was then wearing his yellow sweater (R30). He was at the Barreau dwelling "in the place where they keep cider and stuff" at four o'clock on the afternoon of 19 August 1944 with two other soldiers, saw Angeline, but did not speak to her (R31).

5. As to Specification 1 of Charge I, it was clearly shown by competent, substantial evidence that accused committed an assault upon Rene Albert Roussel with intent to do him bodily harm as alleged. (CM ETO 2899, Reeves; CM ETO 3255, Dove).

As to Specification 2 of Charge I, housebreaking is defined as

> "* * * unlawfully entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par.149e,p.169).

The unlawful entrance of the dwelling of Ernest Marcelin Barreau was clearly shown by accused's intimidation of the occupants of the house by threats and by firing four times with his carbine through the door of the building, so that, as a result, Roussel opened the door.

> "There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as personating

(198)

a gas or telephone inspector, or by intimidating the inmates through violence or threats into opening the door" (MCM, 1928, par.149d, p.169; Cf CM ETO 3754, Gillenwaters).

The court was warranted in finding that accused, upon thus gaining unlawful entrance, intended to commit a criminal offense therein, to wit, an assault and battery. Such intent was evidenced by his subsequent actual assault and battery upon Angeline in pulling her by the hand and kissing her while he menaced Barreau and Roussel with his carbine (CM ETO 3677, Bussard; CM ETO 3679, Roehrborn; CM ETO 2840, Benson).

As to the Specification of Charge II, it was clearly shown by competent, substantial evidence that accused committed an assault and battery on Angeline Philament Barreau, as alleged (MCM, 1928, par.149l, p.178).

6. The charge sheet shows that accused is 22 years and six months of age and enlisted 16 January 1941, at Montgomery, Alabama. (His period of service is governed by the Service Extension Act of 1941.) No prior service is shown.

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

8. Confinement in a penitentiary is authorized for the offense of housebreaking by Article of War 42 and sections 22-1801(6:55) and 24-401 (6:401), District of Columbia Code. As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper. (Cir.229,WD, 8 June 1944,sec.II,pars.1a(1),3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 NOV 1944 TO: Commanding General, V Corps, APO 305, U. S. Army.

1. In the case of Private W. H. MANNING (14040029), Battery "A", 200th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3707. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3707).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3714

23 SEP 1944

U N I T E D S T A T E S)	THIRD UNITED STATES ARMY
)	
v.)	Trial by GCM, convened at Beauchamps, France, 7 August 1944. Sentence: To be dismissed the service.
)	
Captain EIDON E. WHALEN (0-451061), MAC, 48th Field Hospital.)	

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

---

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that Captain Elden E Whalen, then 1st Lieutenant, 48th Field Hospital, was, at Fort Jackson, South Carolina, on or about 25 December 1943, drunk while on duty as the Commanding Officer of the 48th Field Hospital.

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

Specification 1: In that Captain Eldon E Whalen, 48th Field Hospital, having been detailed as Officer of the Day for his organization for the period from 0900 26 July 1944 to 0900 27 July 1944, did in the vicinity of les Moitiers d'Allonne, France, fail to inspect the guard during the period from 0100 to 0400 27 July 1944 as ordered by paragraph 2, Memorandum to the Officer of the Day, Headquarters 48th Field Hospital, dated 20 July 1944.

(202)

Specification 2: In that Captain Eldon E Whalen, then 1st Lieutenant, 48th Field Hospital, did at Fort Jackson, South Carolina, on about 2300, 24 December 1943, go to the barracks occupied by enlisted men of his organization and there remain until 26 December 1943, during this time repeatedly drinking with enlisted men of his organization.

Specification 3: In that * * * did, at Fort Jackson, South Carolina, on or about 25 December 1943, in the barracks occupied by enlisted men of his organization, wrongfully wear a fatigue uniform bearing staff sergeant's chevrons.

Specification 4: In that * * * did, on or about 24 December 1943, in Officers Barracks No 5, Station Hospital No 1, at Fort Jackson, South Carolina, wrongfully drink intoxicating liquor with Master Sergeant John P Fay, an enlisted man of his organization.

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

3. (a) With reference to the Specification, Charge I, and Specifications 2, 3 and 4, Charge II, the evidence for the prosecution shows that on 22 December 1943, accused, as senior officer present for duty, assumed and thereafter exercised command of the 48th Field Hospital, Fort Jackson, South Carolina, during the temporary absence of Lieutenant Colonel (then Major) Robert J. Hoagland, which terminated 30 December 1943 (R7,20; Ex.1). On the night of 25 December 1943, accused invited Master Sergeant John P. Fay, of 48th Field Hospital, to the officers' barracks where, in the presence of other officers, accused and Fay had "four or five drinks of whiskey and coke and sat there and talked" for "about two hours and fifteen minutes". When Fay left, at approximately 11 p.m., accused accompanied him to his barracks where he slept in the bed of Fay's absent roommate (R12-14). Accused spent the whole of the following day in the enlisted men's barracks, wearing a fatigue uniform with staff sergeant's chevrons, drinking whiskey with various enlisted men of his organization and in the presence of others (R17,21,26-28,30,31,33,35,37,39). On the morning of 27 December, another officer of accused's organization found

him in Sergeant Fay's room, still wearing staff sergeant's fatigues (R20). Various witnesses testified that accused was drunk, both on the night of 25 December and on the day following (R18,21,23,27,28, 31,35,37,39).

(b) Concerning Specification 1, Charge II, the evidence for the prosecution shows that in July 1944, the 48th Field Hospital was stationed about two miles north of Barneville, France (R8). On 20 July there was posted on the hospital bulletin board a memorandum promulgated by order of the commanding officer, signed by accused as adjutant, outlining the duties of the officer of the day, directing, among other things, that the

> "Guard will be inspected before 2300 and between 0100 and 0400 hours".

This notice remained on the bulletin board of the organization for about two weeks (R9-10; Ex.2). Accused was officer of the day, 48th Field Hospital, from 0900 hours, 26 July 1944 to 0900 hours, 27 July 1944 (R10). Accused inspected the guard about 11 p.m., then instructed the sergeant of the guard to wake him in the morning in time for reveille (R40). There were two posts in the hospital guard at that time, one at each gate. A relief was posted at 0145. Sentries were unarmed and their equipment consisted only of pistol belts, first aid packs, whistles, and steel helmets (R41). Accused did not inspect the first relief between 2300 hours 26 July 1944 and the termination of its tour at 0145 hours 27 July 1944, nor the second, whose tour of duty extended from 0145 to 0430 hours 27 July 1944 (R41-43).

4. The only evidence adduced by the defense was a stipulation with reference to accused's service record as shown by his 66-1 card, to the effect that he received the following ratings for the periods indicated:

Period	Duty	Rating
15 Jan 1942 to 6 Apr 1942	Platoon leader	Superior
6 Apr 1942 to 15 Jun 1942	Instructor	Superior
4 Aug 1942 to 31 Dec 1942	Asst. Personnel Officer	Excellent
31 Dec 1942 to 30 Jun 1943	Asst. Personnel Officer	Very Satisfactory
30 Jun 1943 to 9 Sep 1943	Asst. Personnel Officer	Excellent
10 Sep 1943 to 8 Nov 1943	Adjutant	Excellent
8 Nov 1943 to 30 Nov 1943	General Duty	Excellent
1 Dec 1943 to 31 Dec 1943	Adjutant	Excellent
1 Jan 1944 to 30 Jun 1944	Adjutant	Very Satisfactory
1 Jul 1944 to 5 Aug 1944	Adjutant	Satisfactory (R44-45)

(204)

5. Accused elected to remain silent after the law member explained to him his rights as a witness (R45).

6. Competent evidence establishes commission by accused of each of the offenses alleged. He was on duty as commanding officer of a field hospital on Christmas day 1943. His status, analogous to that of post commander, rendered his drunkenness, on the occasion in question, a clear violation of Article of War 85 (MCM, 1928, par.145, p. 159; Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint, pp.613-614). The other offenses were each prejudicial to good order and military discipline, in violation of Article of War 96, as charged.

7. The charge sheet shows that accused is 26 years ten months of age; that he served three terms of enlistment from 10 September 1935 to 20 January 1938, from 17 February 1938 to 16 February 1941, and from 17 February 1941 to 23 December 1941, respectively; and that he was commissioned in the Army of the UnitedStates on 24 December 1941.

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. A sentence of dismissal is mandatory upon conviction of an officer of violation of Article of War 85 in time of war and authorized upon conviction of a violation of Article of War 96.

Judge Advocate

(Sick in quarters) Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, European Theater of Operations, United States Army, APO 887, U. S. Army.

1. In the case of Captain ELDON E. WHALEN (O-451061), MAC, 48th Field Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3714. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3714).

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

(Sentence ordered executed. GCMO 89, ETO, 12 Oct 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1 23 SEP 1944

CM ETO 3716

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened in the vicinity of Periers, Department of Manche, France, 1 August 1944. Sentence: Dismissal.
First Lieutenant AARON M. SPIRER (O-494449), Medical Corps, Medical Detachment, 359th Infantry.	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 64th Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty)

CHARGE II: Violation of the 96th Article of War.
Specification: In that First Lieutenant Aaron M. Spirer, Medical Detachment, 359th Infantry, did, in the vicinity of Cretteville, France, on 3 July 1944, while before the enemy and in the presence of military personnel, use, maliciously and defiantly, the following threatening and disrespectful language toward Captain John F. Smith, 359th Infantry, his superior officer, who was then in the

execution of his office, "I'll remember you when you come to the aid station with your toe hurt, I'll cut off your legs," and "Let me get a good look at your face so I'll remember you when you get to the aid station," or words to that effect.

He pleaded not guilty, and was found not guilty of Charge I and its Specification and guilty of Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 90th Infantry Division, approved only so much of the sentence as provided for dismissal from the service, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Although accused was found not guilty of the willful disobedience of the order of his superior officer, in violation of Article of War 64 (Charge I and Specification), evidence with reference to this offense is included briefly herein in order that the merits of the offense of which he was found guilty may be properly considered (using threatening and disrespectful language toward his superior officer, in violation of Article of War 96 (Charge II and Specification)).

The evidence for the prosecution shows that on 3 July 1944, accused was Assistant Battalion Surgeon (R19) of the 3rd Battalion, 359th Infantry, and that his organization was situated in the vicinity of Cretteville, France (R6-7). The battalion "had just closed an engagement" (R7) and was in an "alert" position prior to attack. It was ready for orders to move (R9,16) and was undergoing shell fire (R10,16). Major John F. Smith (then Captain), Captain George A. Godding, and First Lieutenant Oscar Drake, all of accused's battalion, were in the battalion command post which consisted of "a dugout with a tent over it" (R6-7,14,17). They were making route overlays "for our movement forward" (R12). It was raining hard (R7,9,10,19) and the light inside the tent "wasn't any good" (R19). The rear of the tent was up in order that the outside light might be used (R15). Captain Smith, acting executive officer of the battalion, was the senior officer present (R9). The whereabouts of the battalion commander (Major Benbrook) who was telephoning the regimental command post, was unknown (R9,15). Smith was clad in an officer's

uniform and his insignia of rank was painted on his helmet which was covered with a net (R8,11). The battalion aid station vehicles were in the same orchard as the command post between 300 - 500 yards distant (R11-12). Accused had been in the battalion about a week and had been introduced to Smith who had talked to him three or four times in an official capacity. Smith testified that he was sure accused knew his (Smith's) capacity because of "prior conversations and contacts" and that he should have been able to recognize witness in the command post (R10-11). Accused approached the tent and stood in the entrance. Smith told him there was not enough room in the tent, that it was only for staff officers, and ordered him to return to his aid station (R7,11-12,14,17). Accused remained in the tent, hanging onto the tent pole and a few minutes passed. Smith told accused that he (Smith) was in command and again ordered him to return to the aid station. Accused mumbled about the rain and mud, referred to "the good hole we had picked" and said that he wanted to get out of the rain (R7,11-12,14,18). He said to Smith:

> "Let me get a good look at your face, if you come to my aid station with a sore toe I will cut off your leg" (R7,14,18).

Accused remarked that no one was standing "in the hole or entrance" and started "to the direction of the aid station to /via/ the back of/the/tent to get out of the rain." He was "blocking the light all the time." Smith, seeing that accused was not "complying with my orders * * * went out," seized him and repeated the order for the third time outside the tent. There were a number of enlisted men present at this place (R7-8,11-15,18). Accused said that he wanted "to get a good look" at Smith's face.

> "I want to be sure and know you when you get to my aid station" (R7,15).

Smith watched accused leave and observed him for a distance of about 20 feet outside the tent (R13).

Smith testified that accused's remark about cutting off his leg "was definitely a malicious and defiant reply to my order" (R9). He was about five feet away from accused during their conversation (inside the tent) and had hold of him outside the tent (R8). When accused said that he wished "to get a good look" at Smith's face so that he would know the latter when he came to the aid station, Captain Godding, because of accused's tone of voice, "would take it as a threat" (R15-16). It was customary for the battalion surgeon, his assistant, and members of the medical detachment to come to the battalion command post only when ordered to do so (R13,18).

Captain James M. George, battalion surgeon, testified that he had known accused since about 3 June and that he had been under George's command as his assistant for about four days. Accused complained of his eyesight (R19) and said that he "had a myopia" (nearsightedness). In Captain George's opinion, accused was able to perform any duties required of him. He showed witness a form which disclosed that his vision was corrected. (R20).

On 30 July accused saw Major Edwin F. Beshara, Surgeon, Special Troops, 90th Infantry Division, and requested a physical examination. Major Beshara examined his eyes and found that

> "he had a reading of 20-50 for both eyes. * * * That man would compare with a man with 20-20 normal eyesight. He could see at a distance of 20 feet what a man with normal eyesight could see at a distance of 50 feet. * * * with the correction of glasses, 20-50, he could see clearly at 15 feet."

A man of such vision would have difficulty in distinguishing small objects or markings in a room in which there was little light or in a shelter where it was dark. Rain on his glasses would affect his vision (R20-21).

4. For the defense, accused testified that he had been in the Army since 22 September 1942. For nearly one year he served at the Hammond General Hospital, Modesta, California, and on 12 September 1943 arrived at the 203rd General Hospital, Fort Lewis, Washington, where he remained until about 18 May 1944. He then served for two or three weeks each at the following places: Raglan Barracks, Plymouth, England (assistant to Dispensary Surgeon), at a prisoner of war camp, at 0680 Ordnance Depot, Thatchton, England, and finally, at "G-45." He was then transferred to his present organization and arrived about 28 June, five days prior to the incident concerned. He had never served in the Infantry before nor had he ever served as an assistant to an Infantry surgeon. He had never been in a position where it was necessary to take orders from an officer other than a medical officer (R22-23). With the exception of six months, his civilian practice was institutional in character. He did not specialize and was unable to do any surgical work because his coordination and eyesight were bad (R27). He performed limited service in the "3rd Zone of Communication" and was rather surprised when he was assigned to a combat zone (R26). When he came to his present organization, Captain George, his commanding officer, introduced him to the

other officers. He shook hands with everyone present. He did not pay any special attention to them and from where he "sat, 5 or 6 feet away," he could not see their faces clearly (R23). He was not certain whether he was introduced to Captain (later Major) Smith (R23,26).

On the morning of 3 July, when the organization was to move forward, it was raining "terribly hard" and everyone was looking for shelter. Accused "was still groggy from the Luminal I had taken the night before for my backaches" (R23). He went to the command post to get out of the rain, noticed inside "a number of figures from about the shoulders up and the helmets." A voice shouted "don't come in, it is crowded, stay out * * * get back to your place." Accused did not know who was speaking or whether officers or enlisted men were in the tent. He supposed those inside were seeking shelter from the rain and that they were enlisted men who were going to take down the tent. He was "astounded" and holding the pole of the tent, he peered inside to see from whence the voice came. Someone said "get out of here, get back to where you belong." Accused who was about six or eight feet away could see two white bars on a helmet but saw only the helmet as the face thereunder "was covered by darkness from the helmet." He did not know at first whether the two bars were on the helmet of the person then speaking to him but he later "identified the two people as the same person" (R23-24,26-27). Accused "just kept saying 'yes sir' and held on to the pole." He "was astonished that a captain could talk like that" and that he would "throw me out like dirt." He left the pole and as he reached the end of the tent, he saw a doorway. The officer, whom accused identified at the trial as Major Smith (then Captain), walked over to the doorway as accused proceeded in that direction, pushed accused, and said "get back" (R24). When he told accused to leave the tent, his manner was gruff and accused was angry (R27). Accused said:

> "'don't you come around me, if you do, if your toe hurts, I will cut off your toe'" (R25).

Accused testified that he did not know what to say and that "it had to come out" (R25). He did not recognize the face of the officer to whom he was speaking. Accused then said:

> "at least let me see who you are. I want to know what Officer could be so heartless or inhuman" (R25).

He saw Captain Smith's face but "still didn't know his name or capacity" (R25). "I saw it was somebody I hadn't seen before" (R26).

Asked on cross-examination if he had ever seen Smith before that time, accused replied:

> "I suppose I saw him but I did not recognize him at that time. I may have been introduced to him I don't know" (R26).

Smith, who was "very excited" said to accused:

> "Did you say that if I came to the Aid Station and my foot hurts, you will cut my leg off".

When accused answered in the affirmative, Smith said:

> "I charge you with malingering, threatening malpractice, and desertion of your post in time of attack" (25).

He further stated that as accused's superior officer he was ordering his arrest, and directed two captains who were present to arrest him. Accused did not know until he was arrested that the person who told him to go back to his post was his superior officer (R25). When ordered by Smith to go outside, accused walked to the orchard outside the tent and inquired of two enlisted men as to the whereabouts of Lieutenant (Captain) George. They replied that he might be in a farmhouse across the road and offered to escort him there (R25,27). Accused joined others in the farmhouse who were "drying up from the rain." At the time, the aid station

> "was on a jeep packed up. Figuratively I could say there was no Aid Station. Just an empty orchard" (R28).

Asked on direct examination if he had any intention of actually following out the words he uttered to Smith, accused testified:

> "Never in my life would I have such an intention. I have said things like that to patients and no one ever took offense to it. Not unless I was insane could I have done such a thing" (R25).

5. It was clearly established by the evidence that at the time and place alleged, accused was before the enemy as alleged. His battalion had just concluded an engagement with the enemy and was in an "alert" position, awaiting orders to move out for another attack. They were undergoing shell fire. Accused freely admitted using the language alleged and testified that he was angry at the

time. Military personnel, other than Captain Smith, were present and heard accused use such language. One witness testified that accused's tone of voice caused the witness to view his words as a threat, and Smith testified that accused's remark about cutting off his leg was "definitely a malicious and defiant reply" to Smith's order.

The evidence for the prosecution shows that accused was twice ordered to leave the tent and to return to his station, before he addressed the alleged language to Captain Smith. He was definitely informed by Smith that the tent was for staff officers only, and that the latter was in command. Smith was the senior officer present in the tent and was acting Executive officer of the battalion. He was accused's superior officer and was clearly acting in the execution of his office when he ordered accused, who was blocking the light in the crowded tent, to leave and to return to his proper place of duty. Smith's insignia of rank was plainly painted on his helmet, and during the few days accused had been with the organization, Smith had talked with him on several occasions in an official capacity. Accused admitted being ordered out of the tent and testified that, upon peering around he saw two white bars on a helmet. He was astonished that a captain would talk to him in such a manner and that he would "throw me out like dirt." Accused held on to the tent pole and said repeatedly "yes sir." He then crossed the tent and actually came face to face with the officer who had been speaking to him. It is clearly apparent from accused's testimony that he knew he was addressing a captain when he then used the language alleged. The main contention of the defense was that when accused used such language, he did not recognize Smith's face and did not know his name or "capacity."

> "By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused" (MCM, 1928, par. 134a, p. 147).

Whether accused knew at the time that Smith was his superior officer was a question of fact for the sole determination of the court. As competent, substantial evidence fully supported the findings of guilty, such findings will not be disturbed by the Board upon appellate review (CM ETO 1388, Madden; CM ETO 2484, Morgan).

6. The charge sheet shows that accused is 36 years of age, that he was commissioned 8 September 1942, and entered on active duty 22 September 1942. No prior service is shown.

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

8. Dismissal is authorized punishment for an officer convicted of a violation of Article of War 96.

_____ Judge Advocate

(Absent on Leave) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant AARON M. SPIRER (O-494449), Medical Detachment, 359th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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 3716. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3716).

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

(Sentence ordered executed. GCMO 96, ETO, 6 Nov 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 3717

31 OCT 1944

U N I T E D S T A T E S	)	3D BOMBARDMENT DIVISION
	)	
v.	)	Trial by GCM, convened at AAF
	)	Station 142, APO 559, 8 Septem-
Private THOMAS H. FARRINGTON	)	ber 1944. Sentence: Dishonor-
(18076121), 50th Fighter Squad-	)	able discharge, total forfeitures
ron (TE), Army Air Force Station	)	and confinement at hard labor for
376.	)	two years. Federal Reformatory,
	)	Chillicothe, Ohio.

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

---

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

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

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

Specification: In that Private Thomas H. Farrington, 50th Fighter Squadron (TE), AAF Station 376, APO 634, U.S. Army, on detached service with 8th Weather Reconnaissance Squadron (Heavy) (Provisional), 802nd Reconnaissance Group (Special) (Provisional), did, at Watton, Norfolk, England, on or about 22 July 1944, commit the crime of sodomy, by feloniously and against the order of nature permitting carnal connection to be had with him per annum by Bernard Frederick Hawke.

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

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

Specification 2: In that * * * did, at Watton, Norfolk, England, on or about 22 July 1944, wrongfully contribute to the delinquency of Bernard Frederick Hawke, a minor, under sixteen (16) years of age, by handling, fondling and playing with his penis.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence introduced by the prosecution showed: Accused is a private in the United States Army (R20,25; Pros.Ex.1). On the evening of 22 July 1944, in Watton, Norfolk, England (R5,7,20,21), accused met Bernard F. Hawke, in a dance hall (R5). Bernard was 15 years old at the time (R5,26). Accused asked the boy if the latter would do him a favor. The reply was "Yes". Accused then took Bernard to the latrine of a picture house "down the street". After putting out the light, he undid the boy's belt and started fondling the boy's "person" and spitting on it. The boy's "person" stood up. In the meantime, accused had lowered his own trousers, bent over with his back to the boy and with one of his hands inserted the boy's "person", his penis, into his own rectum "about an inch". The boy's penis remained there about two minutes during which period accused "was wriggling about" (R5-7,14,19). Bernard's testimony indicated that he did not know the purpose of going into the latrine and that he was not complacent at first or entirely cooperative (R6,11,12). After this incident, accused and the boy went "to the wood" about 50 or 100 yards "back of the picture house". Accused asked Bernard "to sit down with him in a ditch". At first he refused, but later he complied. Accused opened one button of the fly on the boy's trousers, inserted two fingers and started "playing about with his hand" with the boy's "person". "He just pulled it out" and "It was hard then" (R7,8,20,21). This lasted about five minutes and then Police Constable Leonard Eric Gay of Watton, Norfolk, England, who had been observing these proceedings in the ditch, appeared on the scene (R8,20,21). He testified that at that time the boy's person was erect and one fly button undone (R21). Gay identified both accused and the boy, Bernard, in court. On 25 July 1944, Gay took a statement from accused. First, he "gave him the necessary caution according to British law", as follows:

"Do you wish to say anything in answer to the challenge? You are not obliged to say anything unless you wish to do so, but what you do say will be taken down in writing and may be used in evidence".

This warning was given in the presence of "Captain Epsom", the Provost Marshal (R21,22). A portion of this statement dealing with the matters, covered by the charges and specifications, at issue on this trial was received in evidence. It was a "word for word" recording "as Pvt Farrington" (accused) "dictated it" (R24,25). In his statement accused, referring to the lavatory incident, said that he rubbed the person of a boy, whom he had met previously, in the lavatory where they spent about 25 minutes together. He also said that later, in a wood, he had put his hand on the front of the boy's trousers (R25,26; Pros.Ex.1).

4. The defense called as a witness Major Thomas A. March, Medical Corps, Chief of Neuropsychiatry Department, 231st Station Hospital. Major March was a qualified neuropsychiatrist. He testified that he examined accused and had concluded that accused was a constitutional psychopath; that the deviations of a psychopathic personality from the normal, that the misconduct of such a personality, is not the result of a psychosis or insanity (R29,30; Def.Ex.A). He also testified that he had concluded accused could determine right from wrong and that it would be possible for accused to adhere to the right but easier for him to adhere to the wrong (R33,34).

Accused, advised as to his rights, elected to read an unsworn statement into the record. In this statement, accused said that he had "never had this sex problem explained to" him until "the last month in the hospital". He said that he had worried about his sex problems ever since he had been in the Army and had wanted to see a doctor but feared that that would involve his discharge. He said that he now saw his mistake and intimated that he wanted medical treatment.

5. The offense of sodomy, as alleged in the Specification, Charge I, in violation of Article of War 93, was proved in every element (CM ETO 1743, Penson; CM ETO 2082, Hall; CM ETO 2188, Prince; CM ETO 2766, Jared).

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum * * * by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals" (MCM, 1928, par. 149k, p.177).

(220)

6. Specification 2, Charge II, alleges that accused did by handling and fondling the penis of a minor, under 16 years of age, contribute to the delinquency of the minor, in violation of Article of War 96. The acts performed by accused on the person of the 15 year old boy were grossly indecent. An indecency of a similar nature committed on a youth 12 years of age was held in CM ETO 3436, Paquette, to be service discrediting conduct, in violation of Article of War 96, "calculated to corrupt the morals and contribute to the delinquency of a child". The record shows some discussion as to the meaning of "minor", the descriptive term used here, under the District of Columbia Code. That Code, in establishing the Juvenile Court and its jurisdiction does not use the term "minor". It refers to "children" (D.C. Code, 1920 edition, Title 11, Chapter 9, sec.11-919) and defines children as persons under the age of 18 (Ibid., sec.11-906). The 15 year old boy, mentioned in the Specification now under discussion, would, accordingly, be a child within the meaning of this Code. His age "under 18" sufficiently describes him for the purpose of alleging an offense. In a prosecution for contributing to the delinquency of a child, it should appear that the child has been delinquent as a result of the conduct of accused. A serious question would arise, under the allegations found in this Specification, if the indecent advances of the adult were rejected by the child and if there was no consent by the child. In some jurisdictions, where the child has been made the unwilling subject of indecencies, the accused has been prosecuted for impairing ("corrupting" in CM ETO 3436, Paquette) the morals of a child. No such difficulty exists in the present case. It appears that with more or less encouragement by accused, the child became an acquiescent or complacent partner in the wrongdoing. The boy's person was erect. He made no effort to escape accused's advances. The boy wrongfully remained and accepted accused's indecencies. The boy himself was guilty of conduct commonly known as delinquency. The District of Columbia Code does not expressly use the word "delinquency". But employing the language of the more advanced school of social thought, it, in effect, condemns certain wrongful conduct by children and also makes punishable as for a misdemeanor any adult who wilfully contributes to or encourages such conduct by a child (Title 11, secs.906,907, D.C. Code). The conduct of the adult and of the child, as alleged in Specification 2 of Charge II, come squarely within the last-cited section of the District of Columbia Code.

In CM 237359, Richards (23 B.R. 391), accused was charged with furnishing intoxicating liquor to a minor, 17 years of age, causing him to become drunk, thereby contributing to the delinquency of a minor, in violation of Article of War 96. The Board of Review in that case held the offense so alleged to state a violation of Article of War 96.

7. There was no reasonable doubt as to accused's mental responsibility, as defined by the Manual for Courts-Martial, 1928, paragraph 78, page 63. The medical expert called by accused testified that accused was a constitutional psychopath but not psychotic or insane. He also testified that accused knew right from wrong and could adhere to the right but that it would be easier for him to adhere to the wrong. This is not evidence and there is none in the record that accused was so far affected by mental defect, disease or derangement as to be unable both to distinguish right from wrong and to adhere to the right.

8. Accused is 23 years old. He enlisted 25 May 1942 at Lubbock, Texas, to serve for the duration of the war plus six months. There was no prior service.

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

10. The offense of sodomy, in violation of Article of War 93, is punishable by imprisonment for five years. Penitentiary confinement is authorized (CM ETO 2380, Rappold; CM 187221, Sumrall; D. C. Code, secs. 24-401(6;401), 22-107(6;7)). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

(222)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 OCT 1944 TO: Commanding General, 3D Bombardment Division, APO 559, U. S. Army.

1. In the case of Private THOMAS H. FARRINGTON (18076121), 50th Fighter Squadron (TE), Army Air Force Station 376, 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 3717. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3717).

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

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

BOARD OF REVIEW NO. 1

3 NOV 1944

CM ETO 3718

U N I T E D S T A T E S v. Private LEONARD K. STEELE (7004728), Company A, 771st Tank Destroyer Battalion.	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Newport, Monmouthshire, Wales, 8 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 Leonard F. Steele, Company "A", 771st Tank Destroyer Battalion, did, at Michaelston-Y-Vedw, Mons, England on or about 3 April 1944 forcibly and feloniously, against her will, have carnal knowledge of Miss Elsie Otty.

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 of two previous convictions was introduced: one by summary court for absence without leave for two hours in violation of the 61st Article of War, and one by special court-martial for striking a female with his hand in violation of the 96th Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the

(224)

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, reduced the period of confinement to 30 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The instant trial of accused was a rehearing conducted after his former conviction for the same offense had been disapproved by the Commanding General, European Theater of Operations, for the reason that accused's rights under the Fifth Amendment to the Federal Constitution had been violated in that he was arraigned and tried on the day charges were served upon him and also by reason of the fact that certain errors were committed at the trial which were prejudicial to accused. The rehearing was conducted before a court composed of officers not members of the court which first heard the case (AW 50½; MCM, 1928, par.89, p.80). The sentence imposed at the first trial was dishonorable discharge, total forfeitures and death. Inasmuch as the approved sentence at the rehearing included confinement for 30 years, the limitation of Article of War 50½ (MCM, 1928, p.215; par.87b, p.73) with respect to sentences was observed.

4. The prosecution proved the following facts by competent substantial evidence:

On 3 April 1944 accused was a member of Company A, 771st Tank Destroyer Battalion, which was stationed at St. Mallon's Camp in Wales (R6). Elsie Otty, age 22 years, was a member of the Women's Land Army (British) and resided at a hostel situate at Michaelston-Y-Vedw near Cardiff, Wales (R19). Miss Otty had met accused at a dance held in St. Mary's Hall, Castleton, Wales, on 30 March 1944 (R7,16). On that occasion accused also became acquainted with Marjorie E. Fowler, a member of the Women's Land Army who lived at a hostel at Wilta Court, Rummey, near Cardiff, Wales (R16). Miss Fowler made an engagement with accused to meet him at a subsequent time but did not keep the engagement (R17).

On the evening of 3 April 1944 both Otty and Fowler were at the Cefn-Mably public house situate in or near Michaelston-Y-Vedw about one-half mile from the Land Army hostel in which Otty lived (R11,14,16). Accused was in the public house bar when Otty arrived at about 8:00 p.m. (R7,11). He and she soon engaged in conversation during the course of which he purchased beer for both of them. Otty consumed three or four half pints (R7,11,12). Neither Otty nor accused appeared intoxicated (R13). At about 9:40 p.m. the couple left the public house (R7,11). Immediately outside of the public house Otty voluntarily kissed him (R17) and they then walked along a public road in the direction of the Land Army hostel (R7,11). At a point on the road near a stile, he turned from the pathway and said to her, "We'll go this way", pointing

to the stile. She said, "No". He then picked her up and lifted her over the stile (R7,12). She weighed 115 pounds (R7,12). Across the stile the girl stood on her feet and he then seized her by the arms and dragged her backwards towards a distant gate which he opened. She struggled and offered resistance (R12), but accused pulled her through the gate (R7,8,12). During this movement from the stile to the gate he again kissed the girl who attempted to reason with him, "telling him to let me go and stop being a fool". Accused drew her head back on to the bar of the gate and kissed her. At that time her scarf came off her neck and he placed it in his pocket (R10,14). At a place beyond the gate he threw the girl to the ground and she then commenced to scream for help (R7,10,14). The locus was not far distant from the road and a passer-by could have heard her cries. No one appeared (R14). She struggled to free herself and accused struck her in the mouth with his fist. The blow loosened two of her front teeth and caused her mouth to bleed (R7,15). Again she screamed, pleaded with accused to free her, but he refused. She threatened to report him. Accused replied he "knew I'd report him, and that was why he was having the last go at me" (R7,11). During this struggle accused tore her corduroy trousers (R7, 14,15). She endeavored to push the soldier away from her and rolled on the ground to escape his clutches. He held her fast, although she screamed, struggled and attempted to strike him (R8). Accused finally succeeded in disrobing her to the extent that sexual intercourse was possible (R8). He then inserted his penis in her sexual organ (R8). Otty insisted that the act of intercourse was consummated without her consent (R8).

After the completion of the sexual act she feigned unconsciousness (R7,15). She heard accused say, "I can't go on" (R7,13). While she was still prone on the ground he arose and ran down the road (R7). The victim of the assault proceeded alone to the Land Army hostel where she arrived at 11:45 p.m. (R7,20).

When the victim arrived at the hostel she was met by Miss Edith Reynolds, the hostel warden (R7,20). She did not at that time report to Miss Reynolds her experience with accused. Neither did she intend to report the episode to Miss Reynolds (R13). As an explanation of her silence upon her return to the hostel and of her intended action, she stated:

> "You see, the boys used to come down to the hostel to see the other girls, and I didn't want to make it hard for the other boys to come to see their girl friends for something that happened to me" (R13).

Miss Reynolds described the girl's attitude and appearance upon her arrival at the hostel thus:

(226)

"she was quite quiet which was unusual. She was very late, and she knew I would be angry. I reasoned with her, and she knew I would do so possibly, a nd I thought possibly that was the cause of her being so quiet, because when I did speak to her, she said, 'No, it wouldn't happen again.' That was the answer" (R20).

Miss Reynolds saw no marks on the girl and no disarrangement of her clothing. She kept her clothing "drawn together" and that "camouflaged" any torn clothing. The night light gave but a faint glow and the dimness obscured Miss Reynolds' observation (R20).

Otty went to bed immediately. The next day, 4 April 1944, she went to work as usual. She informed some of her co-workers of her experience, and during the afternoon reported the affair to officers at accused's camp. An identification parade was held at which she identified accused (R10).

Miss Reynolds learned of the episode on 4 April through sources other than the girl. She interviewed her and required Otty to deliver to her the clothes she wore on the night of 3 April, viz (a) Land Army trousers, and (b) panties, which she retained until they were produced in court. When received by Miss Reynolds they were in the same condition as they appeared at the trial (R19,20). The trousers were admitted in evidence as Pros.Ex.1. They were described as being "ripped". They were withdrawn at conclusion of trial with consent of the court (R8,10). The panties, described as "torn and blood-stained", were admitted in evidence as Pros.Ex.2 (R8,10). They also were withdrawn by permission of the court (R8).

Dr. C. E. Davis, Russell House, Machen, Wales, examined Otty at 5:30 p.m. on 4 April (R21-22,24). He described her condition as follows:

"When I saw her, she had some bruised lips. She had two loose teeth. She had some bruises * * * on the two legs, and the external organs were bruised, and she had some hemorrhages from the hymen" (R22).

In his opinion the injuries to the hymen were caused by sexual intercourse which occurred within 48 hours prior to examination, and since she had hemorrhages from the hymen at the time of examination, he believed that she was a virgin prior to the intercourse (R22). He described the tear in the hymen as

"The ordinary one that you have with all virgins after they have intercourse, just that the hymen was torn as always happens when they have intercourse" (R23).

Dr. Richard G. Morgan, gynecologist, 24 Stow Park Avenue, Newport, Wales, a lso examined Otty on 6 April. He testified:

> "I found a couple of bruises on the legs, and there were signs of injuries to the genital organs, the external genital organs. There was an injury to the lower inferior edge of the hymen. I formed the conclusion that it was a recent injury. * * * In my opinion, it was either recent intercourse with the male sexual organ, or with some mechanical interference with her sexual organ. * * * The main thing that influenced me was that when the external genital organs were separated quite gently, there was bleeding that took place that showed the separation of the torn injuries" (R24-25).

Sergeant John W. Hargus, Company A, 771st Tank Destroyer Battalion, was on the night of 3 April 1944 tent leader and section sergeant. Accused was a member of his tent and section (R25-26). Hargus was present with an officer who made a bed check at twelve o'clock midnight 3-4 April. Accused was absent from bed check. He arrived in his tent about 12:10 a.m. on 4 April (R26).

5. Accused elected to make an unsworn statement through his counsel. The same is as follows:

> "My client wishes me to say for him that on the night in question, he went to this pub, Club Mabley, or whatever it is. He had a date with Miss Fowler, but was late in showing up and Miss Fowler was gone. So he proceeded to the pub alone. He was drinking in the pub when Miss Otty came in. He asked her to have a drink with him which she readily assented to. They drank there from approximately eight-thirty to near closing time. The reason they know it was closing time, was that all the people were leaving. He asked permission to take her home, and it was granted. He left the pub, proceeded a short way where they proceeded to make love to each other to the extent of kissing and fondling. They proceeded on farther. The accused suggested they go into this field. The girl proceeded into the field willingly, and they sat down on the ground. They proceeded to have sexual intercourse, in the middle of which the girl suddenly became either frightened or indignant and screamed. This was after penetration was made. The accused had been drinking.

(228)

> Without thinking, he hit her with an open hand. He hit her once and once only. She didn't scream after that or offer further resistance. Upon completion of the act, they sat down and talked the situation over. The girl was excited at first and mad, and then she calmed down and relaxed, and they made a date for the following night. She then hurried home. The accused hurried home, arriving ten minutes late for bedcheck. That is the accused's story" (R27).

Major Carson E. Hunt, Medical Corps, stationed at 81st General Hospital, was permitted to examine the trousers worn by Otty (Pros.Ex.1). He testified that the corduroy material was of fairly strong textural strength but could be torn with one hand (R27-28).

Miss Otty, the victim, was called as a witness for the defense and testified that during the assault she made no attempt to cross her legs because accused was on top of her. As soon as she was on the ground accused was on top of her and she had no time to cross her legs (R29).

6. The Manual for Courts-Martial defines the elements of the crime of rape as follows:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> The offense may be committed on a female of any age.
>
> Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design a s she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

Accused admitted that he engaged in sexual intercourse with the British Land Army girl, Otty, at the time and place alleged. The girl's testimony, accused's admission and medical testimony irrefragably established the fact that penetration occurred. The question of accused's guilt, therefore, turns upon a narrow one of fact. Was the act of intercourse performed with the consent of Otty? If so, accused was not guilty of the crime charged. Conversely, if the sexual act was achieved by accused through use of force which overpowered the girl's resistance and if copulation was effected without her consent, the guilt of accused was established. The court concluded that accused obtained intercourse with Otty as a result of force and violence visited upon her by him and without his victim's consent. Upon appellate review it is the duty of the Board of Review to determine whether there is competent substantial evidence to support the findings of guilty (CM ETO 3200, Price).

The testimony of the victim asserts resistance by her to accused's advances. It is corroborated by evidence of bruises on her legs, mouth injuries and loosened teeth. Her Land Army trousers were "ripped" and torn and her panties were also damaged and torn. Such objective injuries to her body and clothing bespeak the application of force and violence upon her and deny that she was a voluntary party to the sexual act or that she consented to the same. There are no inconsistencies in her recital of events. Her narrative is not only plausible but also inherently truthful. It exhibits none of the infirmities displayed by the testimony of the alleged victim in CM ETO 2625, Pridgen. The Board of Review therefore concludes that substantial evidence exists of accused's force and violence and of Otty's nonconsent to the act of sexual intercourse. It was peculiarly within the province of the court to determine this issue of fact and having satisfied itself that substantial evidence supports the court's findings the Board of Review has performed its proper function. The record is legally sufficient to support the findings of guilty (CM ETO 3197, Colson and Brown; CM ETO 3141, Whitfield; CM ETO 2472, Blevins; CM ETO 1899, Hicks).

The Board of Review, in reaching this conclusion has not ignored two highly relevant factors with respect to Otty's conduct. Prior to the actual assault upon her she was confessedly a willing party to accused's advances. She admitted she voluntarily kissed him at least once and probably twice. Other amatory actions on her part may be legitimately inferred. Considering the fact that she and accused were acquaintances of but few days' standing, her conduct undoubtedly influenced accused in the belief that she would be a willing party to sexual acts. Such situation forms a pattern well known to the Board of Review, as the cases cited above will indicate. In this instance, the evidence is clear that no matter how willing the girl was to engage in acts of kissing and caressing, she did reject and resist accused's actions when they advanced to the stage where they threatened her virtue. This is the determinative element in the case. Subsequent to the rape Otty made no complaint to Miss Reynolds, the hostel warden. However, the next day she did report accused's conduct to officers at

accused's camp. The failure of the victim of a rapist to make immediate complaint of the crime to the person upon whom it may be expected she would bestow her confidence, affects the credibility of her testimony. However, it was the right and duty of the court to weigh and consider this facet of the evidence. In this instant case, it was justified in accepting Otty's explanation of her silence in view of her lodgment of a complaint with the American military authorities at a reasonably early time after the commission of the offense.

7. The charge sheet shows that accused is 22 years five months of age and enlisted 10 February 1940 in the Regular Army of the United States to serve for three years. (His period of service is governed by the Service Extension Act of 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.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). However, the approving authority was authorized upon approval of the sentence which included confinement at hard labor for life to reduce the period of confinement to a term of years (SPJGK, CM 241226, Bull. JAG, Oct 1943, Vol.II, sec.407(2), p.379). The approved sentence is therefore legal. Confinement in a penitentiary is authorized for rape by AW 42 and Secs. 278,330, Federal Criminal Code (18 USCA 457,567). Inasmuch as the sentence included confinement at hard labor for more than 10 years, i.e., 30 years, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 3 NOV 1944 TO: Commanding General, United Kingdom Base, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private LEONARD F. STEELE (7004728), Company A, 771st Tank Destroyer 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. The publication of the general court-martial order may be accomplished by you as the successor in command to the Commanding General, Western Base Section, Communications Zone, European Theater of Operations, and as officer commanding for the time being as provided by Article of War 46.

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 3718. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3718).

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

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

BOARD OF REVIEW NO. 2

31 OCT 1944

CM ETO 3719

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private RAYMOND C. CONNER (34771622), Medical Detachment, 10th Station Hospital	Trial by GCM, convened at Kirby Hostel #1, Lancashire, England, 7 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five and one-half years. The Federal Reformatory, Chillicothe, Ohio.

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Raymond C. Conner, Medical Detachment, 10th Station Hospital, did, at Davyhulme, Lancashire, England, on or about 6 April 1944, feloniously take, steal, and carry away one wool shirt (Government issue, olive drab), value about three dollars and sixty eight cents ($3.68) property of Technician Fifth grade Karl Reinholtz.

Specification 2: In that * * * did, at Davyhulme, Lancashire, England, on or about 5 July 1944, feloniously take, steal, and carry away seventeen pounds (£17.-.-d) sterling lawful money of the United Kingdom, of an exchange value of about sixty-eight dollars and fifty-nine cents ($68.59) the property of Second Lieutenant Jewell J. Baker.

3719

(234)

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

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for ten days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. The reviewing authority disapproved the finding of guilty of Specification 3 of the Charge, approved the sentence, but reduced the period of confinement to five and one-half years, and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement.

3. The prosecution showed by competent evidence that accused is a private, Medical Detachment, 10th Station Hospital, located at Davyhulme, Lancashire, England (R15). Corporal Karl Reinholtz, Medical Detachment, 10th Station Hospital, identified Prosecution Exhibit 1, an "OD" wool shirt, government issue, of a value of less than $20.00, and testified that it "belonged" to him and was missing from his belongings on 6 April 1944, after he returned from a leave of absence. It was hanging with his other clothes, before he left on furlough, in Ward 11 (presumably of 10th Station Hospital) at Davyhulme, Lancashire, England. He gave the shirt to no one (R6-8,12,20; Pros.Ex.1). On or about 10 July 1944, this shirt, (Pros.Ex.1), was found in accused's quarters, in a tent, at the 10th Station Hospital (R12,13).

Second Lieutenant Jewell J. Baker, Army Nurse Corps, was admitted as a patient at the 10th Station Hospital, 29 June 1944, and discharged 21 July. She was in Ward 9 (R8), the ward in which accused was an attendant (R11,12). She was paid on 1 July. On 9 July, she examined her billfold, where she kept her money, and found that 17 one-pound notes were missing. The "seventeen (17) pounds are equal to a value of more than fifty dollars ($50.00) in the currency of the United States" (R20). The search made of accused's quarters on 10 July revealed in the billfold of accused 17 one-pound notes, British currency, whose serial numbers corresponded with the notes still in the possession of Lieutenant Baker (R10,12,13).

First Lieutenant Donald F. Hueber, Hospital Detachment, stationed at the 10th Station Hospital, as investigating officer, interviewed accused on 12 July 1944. Accused made a statement to the lieutenant which the latter took down in longhand and "typed up". Accused signed this statement, a portion of which was admitted in evidence as Prosecution Exhibit 6. Before accused made this statement he was warned by Lieutenant Hueber "that he didn't have to make a statement - he could if he

wished. If he did so, the statement could be used as evidence in a Court-Martial" (R15-18; Pros.Ex.6). In this statement accused said that on 5 July 1944, he took £17-0-0 from Lieutenant Baker, a nurse patient in the hospital (Pros.Ex.6).

4. Accused, after being warned of his rights, took the stand and testified under oath. He related briefly and quite generally a history, dating to his youth, of the larceny by him of miscellaneous items of property, including money on one occasion. Other than this and the fact that he knew it was wrong to steal, his testimony did not deal with the allegations contained in the specifications of the Charge on which he was tried (R21-23). He called as a witness a medical officer, a psychiatrist, who testified that accused was suffering from a personality defect but was without psychosis (R23,24).

5. The allegations of larceny contained in Specifications 1 and 2 of the Charge were proved. The injured persons named therein established the respective larcenies of the shirt and of the money by their testimony. The property so stolen was found in accused's quarters; money equal in amount and kind to that stolen was found in accused's billfold. Accused admitted the theft of the money. Possession by accused of the shirt was unexplained. Such possession in itself was sufficient to raise a presumption of guilt under the circumstances, which circumstances included the finding of the admittedly stolen money in accused's possession (MCM, 1928, par.112a, p. 110). The testimony of the psychiatrist showed nothing which indicated accused's mental irresponsibility for his act (MCM, 1928, par.78a, p.63).

6. Accused is 20 years old. He was inducted 9 April 1943, for the duration of the war plus six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of larceny of property of a value in excess of $50.00 (AW 42; sec.287, Federal Criminal Code (18 USC 466)). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(236)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 OCT 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private RAYMOND C. CONNER (34771622), Medical Detachment, 10th Station Hospital, 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 3719. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3719).

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

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

BOARD OF REVIEW NO. 1 — 4 NOV 1944

CM ETO 3722

U N I T E D S T A T E S	V CORPS.
v.	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, Sceaux, France, 30 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private (formerly Corporal) RUSSELL B. SKAMFER (36215537), Medical Detachment, 38th Cavalry Reconnaissance Squadron (Mecz).	

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

---

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private (then Corporal) Russell B. Skamfer, Medical Detachment, 38th Cavalry Reconnaissance Squadron (Mecz) being present with Troop B, 38th Cavalry Reconnaissance Squadron (Mecz) while it was engaged with the enemy, did at Vidouville, France, on or about 27 July 1944, shamefully abandon the said troop and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

Specification 2: In that * * * being present with Troop B, 38th Cavalry Reconnaissance Squadron (Mecz) while it was engaged with the enemy, did at Etouvy, France, on or about 3 August 1944, shamefully abandon the said troop and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 1 of the Charge, except the words "Troop B" and "troop" substituting therefor, respectively, the words "2d Platoon, Troop B" and "platoon", of the excepted words not guilty, of the substituted words guilty, and guilty of Specification 2 of the Charge and of the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent substantial evidence, including his own admissions against interest, shows that accused, a medical aid man, was present with his unit while it was engaged with the enemy at the times and places alleged in Specifications 1 and 2, and that on the two occasions alleged he abandoned the unit and sought safety in the rear, first in a motor pool and second at his squadron aid station. Both elements of the violation of Article of War 75 were thus established as to each Specification (CM ETO 3196, Puleio, and authorities thereincited). The allegations of abandonment and seeking safety in the rear were equivalent to allegations of running away (Ibid.). The court properly overruled the defense motion for findings of not guilty (R46) (MCM, 1928, par.71d, p.56).

4. The charge sheet shows that accused is 25 years of age and was inducted at Milwaukee, Wisconsin, 8 July 1941 to serve for the duration of the war plus six months thereafter. He had no prior service.

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

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

B. Franklin Riley Judge Advocate

Edward W. Ferguson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 NOV 1944 TO: Commanding General, V Corps, APO 305, U. S. Army.

1. In the case of Private (formerly Corporal) RUSSELL B. SKAMFER (36215537), Medical Detachment, 38th Cavalry Reconnaissance Squadron (Mecz), 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 3722. For convenience of reference please place that number in brackets at the end of the order; (CM ETO 3722).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

CM ETO 3725

28 SEP 1944

U N I T E D S T A T E S)	1ST INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Bagnoles
)	De L'Orne, Orne, France, 19 August
2nd Lieutenant THOMAS A. COX)	1944. Sentence: Dismissal, total
(O-1825660), 635th Tank De-)	forfeitures, and confinement at hard
stroyer Battalion.)	labor for ten years. Eastern Branch,
)	United States Disciplinary Barracks,
)	Greenhaven, New York.

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

---

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Thomas A. Cox, 635th Tank Destroyer Battalion, was, in the vicinity of Juvigny le Tertre, Manche, France, on or about 4 August 1944, found drunk while on duty as Platoon Leader of Second Platoon, Company "A", 635th Tank Destroyer Battalion.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing

(242)

authority may direct, for ten years. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 3 and 4 August 1944, accused commanded the second platoon, Company A, 635th Tank Destroyer Battalion, having a strength of approximately 50 men and equipped with four 3-inch guns, four half-tracks for towing them, and four quarter-ton trucks, commonly denominated "blitz buggies" (R5,13,22). Accused's platoon was attached to the second battalion of the 16th Infantry, then in contact with the enemy in the vicinity of Juvigny, between Avranches and Mortain (R26,31,35). At about 2:30 on the afternoon of the 3rd, accused left his platoon, in its established position about ten miles west of Juvigny, in a blitz buggy for a reconnaissance with Private First Class Hubert J. Wanitschke, his regularly assigned driver. They stopped along the road and met some civilians, who offered them "a few drinks", of which accused imbibed about three; he also accepted a full quart bottle of cognac which he took back unopened to his command post area (R5-6,13). In the late afternoon, he received instructions through Major William R. Washington, battalion executive, that Lieutenant Colonel Herbert C. Hicks, Jr., commanding the second battalion, 16th Infantry, wanted accused's guns to be placed in depth along the road running north out of Juvigny (R26-27,31,35). Accused instructed his platoon sergeant that the platoon should "stand-by; that he /accused/ was going on reconnaissance and that he would return to pick up the platoon" (R14). Wanitschke drove accused on this second reconnaissance upon which an otherwise unidentified "Anti-Tank officer" accompanied them (R7). Accused took along one of his 3-inch guns, of which Sergeant Bernard M. Carroll was gun-commander (R14,22). Wanitschke testified, "When we went on that reconnaissance with the Anti-Tank officer and we came back I saw him take a few swallows from the bottle /of cognac/". As for saying that he was drunk, "He knew what he was doing but he was feeling good. * * * When we got back to the CP you could see that he was not walking straight" (R7). According to Staff Sergeant Woodrow C. Larson, accused's platoon sergeant, accused was "all right" when he returned from Juvigny to pick up the platoon, at which time he gave instructions, "That we were moving up to Juvigny and that one gun was going into firing position and that the other three would go into an assembly area" (R14). On the road march which ensued, Wanitschke testified that "while we were going along the road he was taking a few swallows" (R7). Accused told Wanitschke to drive as fast as possible.

"We went on and passed up the whole convoy. * * * On and off all the time we were on the march he was drinking. * * * He took the bottle with him when he went to look for a gun position".

Accused left Wanitschke and another soldier at Juvigny to guide the other three guns to the assembly area, while he went to Carroll's gun position (R8). Carroll observed that accused had been drinking (R22). He staggered noticeably and his tongue was a little bit thick when he informed Carroll that they "were up with the infantry or ahead of them". All of the crew were "pretty scared". They got the gun in place faster than Carroll had ever seen them do it before. Accused then instructed Carroll to "put a bazooka at the corner of the road on the right to help cover the road". Carroll took it upon himself, without informing accused, to refrain from complying with these instructions, explaining - on the stand - that he "didn't want to put two men in the road. A 57 came down the road and went into position and I felt that the 57 could cover the road much better than a bazooka could" (R23). Asked if accused was properly performing his duties as platoon leader at the time and place in question, Carroll testified:

"The only thing was that the gun was in a bad position. It was out in the middle of the field. Outside of that I don't know of anything which would indicate that he was not performing his duties as platoon leader" (R24).

According to Carroll, accused was at that time "under the influence of liquor but he was not drunk, I do not believe" (R25).

Having guided the other three guns to the assembly area, Wanitschke proceeded in his blitz buggy to Sergeant Carroll's gun position. Accused was not there and the members of the gun crew all seemed scared (R8). At their request, Wanitschke drove back to the assembly area to fetch Sergeant Larson. When the two returned, they found accused at Carroll's gun position. According to Wanitschke,

"He was talking to the men out of his head. * * * telling them he was going to make a reconnaissance ahead of the lines that night with some of the men going along with him" (R9).

As for his actions, "he was staggering pretty bad and I would say he would not know what he was doing at that time" (R8). Sergeant Larson testified that when he arrived at the forward gun position with Private Wanitschke, he saw accused drinking from a bottle there in the half track and could smell liquor on his breath. Accused appeared to lack full control of his senses. The gun crew was demoralized and the gun was not in a practical position for night firing (R15-16).

3725

(244)

Between 12 and 1 a.m., 4 August 1944, accused reported to Lieutenant Colonel Hicks at his command post. According to Lieutenant Colonel Hicks, accused was drunk.

> "I asked him where he had set up his guns. He told me where the guns were but was not very coherent. I asked him to show me their location on the map. He leaned over the desk where I was sitting and as he did that he nearly fell over. I caught hold of him and he sort of caught himself at the same time. He pointed to a spot on the map which was about 2000 yards in enemy held territory. We had not any friendly troops in the area he indicated. I told him to orient himself and proceeded to show him where we were and told him to show me where the guns were. He again indicated a point which was in enemy territory and he said that his guns were there. Then I told him that I knew where his guns were and that I knew where they were better than he did. I told him to go back to his CP and to go to bed and to put the guns in a better position in the morning" (R27).

Major Washington, who was present during the interview, corroborated Colonel Hick's testimony, and shared his opinion that accused was drunk and was not performing his duties as an officer for that reason (R30-31).

When Major Washington went to bed at three o'clock that same morning, he instructed his duty officer to call him if accused's guns were not in position by six o'clock (R31). In compliance with these instructions, he was called and thereupon sent a runner for accused, who reported at the command post about 7 or 7:30 a.m. (R31-32). He was still under the influence of alcohol. Major Washington did not think there was much change in his condition as compared to the night previous. However, having just received a report that tank destroyers were in position on the left, Major Washington requested accused to go out and ascertain their coordinates, advising him, at the same time, that "the enemy was in strength to the north of us" (R32). When accused returned with a satisfactory report, Major Washington instructed him to move his own guns into position to cover the road from the north, "to move ahead of the 15 grid line but not ahead of the 17 grid line" (R32,34). Accused took his driver and another enlisted man and drove ahead of the 17th grid line where he ran into enemy machine gun fire, as a result of which one enlisted man was wounded (R34,36-37). Major Washington received a report of this occurrence from Company E, 16th Infantry (R32). When he saw accused on the morning of the 4th, there was some question in his mind as to whether he was performing his duties as an officer.

3725

"* * * Unless you know just how much a man can consume and carry, one can't tell very well whether or not a person is drunk or under the influence of liquor. When I told him to go out to investigate the Tank Destroyers on the left, he came back with an intelligent explanation of its identification and position. I thought that he was all right then. However, when I got the report from Company E, I realized that he still could not perform his duties as an officer" (R32-33).

4. For the defense, Sergeant Larson testified that after daybreak 4 August, accused was all right as far as the witness could see. He appeared to be normal and was able to perform his duties as platoon leader, but at that time was not acting as platoon leader (R42).

After his rights as a witness had been explained to him by the law member, accused testified that on the night of August 3rd, he received orders that his platoon was to cover the approach from the north into the town of Juvigny. He selected the position for Sergeant Carroll's gun (R38).

"* * * It was pretty dark when we got into the position and it was not possible to make a thorough reconnaissance. The position in which the gun was placed was such that it would cover the road. I looked on both sides of the road and found out thatthat the best place for the gun was where I had put it."

After placing it there, he

"* * * looked around for a better positionfor the gun. I found out that all the fields of fire were limited and that the best place for the gun was just where I had it set up. The gun could not be placed on the road side."

He then

"* * * went to the Battalion CP and reported the position of the gun to them and explained to them that it was difficult to find a good position at night. I told him that I had three guns in an assembly area and the Colonel told me that I was to go out at day break in the morning and to find new positions for the gun and to move them at that time."

(246)

At daybreak he

> "* * * went out in front of the gun which Carroll had placed the night before to look for new positions and at that time I was brought under fire by machine guns. We backed the vehicle out of the fire for 300 yards or more" (R39).

With reference to the instructions he received for placing his guns on the morning of the 3rd, he

> "* * * was never told not to go beyond any point. The Colonel pointed out some coordinates on the map and told me to put my guns on that coordinates. I copied the coordinates down on the map I had just as they appeared on his map. * * *"

When he was fired upon he was perhaps about 200 yards beyond "that coordinate" at the 16 grid line. He was proceeding to "put security out there" and did not go beyond the 16 grid line (R40). He absolutely knew what he was doing all the time (R39).

5. The Specification alleges that accused was found drunk while on duty, in violation of Article of War 85. The uncontradicted evidence shows that, on 3 and 4 August 1944, accused was continuously engaged upon military duties of prime importance and that while so engaged, on the afternoon and night of August 3rd, he imbibed freely of cognac. Five witnesses testified to physical manifestations, varying in degree, but all unquestionably demonstrating accused's detrimental reaction to the intoxicating liquor which he had consumed. Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of Article of War 85 (MCM, 1928, par.145, p.160). There is ample competent evidence to show that accused's mental and physical faculties were very sensibly impaired while he was on duty at the time and place specified. Accused's testimony goes no further than to assert that, during the period in question, he absolutely knew what he was doing. If this be regarded as raising an issue of fact, the court's determination that accused was drunk is fully supported by substantial evidence of such a character as precludes disturbance upon appellate review (CM ETO 1953, Lewis).

6. The charge sheet shows that accused is 27 years, five months of age, and that he was commissioned 25 June 1943. He had served three years and 11 months as an enlisted man.

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. Dismissal and confinement are authorized under Article of War 85.

8. For consideration by the reviewing authority on the question of clemency, affidavits of eight company grade officers were appended to the record, reciting fine, previous service on the part of accused, demonstrating high qualifications as a company officer and leader of men.

9. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

(248)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant THOMAS A. COX (O-1825660), 635th Tank Destroyer Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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 3725. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3725).

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

(Sentence ordered executed. GCMO 84, ETO, 4 Oct 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

22 SEP 1944

CM ETO 3726

UNITED STATES)	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private MADISON THOMAS (38265363), 964th Quartermaster Service Company.)	Trial by GCM, convened at Plymouth, Devonshire, England, 21 August 1944. Sentence: To be hanged by the neck until dead.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Madison Thomas, 964th Quartermaster Service Company did at Gunnislake, Cornwall, England, on or about 26 July 1944, forcibly and feloniously, against her will, have carnal knowledge of Beatrice Maud Reynolds.

He pleaded not guilty and, by unanimous vote of all the court present at the time the vote was taken, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court for using threatening and insulting language toward a woman and making malicious remarks about bombing government property, in violation of Article of War 96. By the unanimous vote of all members of the court present when the vote was taken, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action

under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed testimony for the prosecution, in substance, shows: That on 26 July 1944, Mrs. Beatrice Maud Reynolds, a widow of the last war, lived at Gunnislake, Cornwall, England, and kept house for an invalid brother. She was active in the British Legion, being chairman of the British Legion Hall. She testified that she left the hall at about 2240 hours on the evening of 26 July alone, to return home. As she did, accused appeared walking by her side and asked if she had far to go. She replied, "No" and suggested he had better hurry on to catch his ride back to his camp, as she did not care for his company. Thinking accused would go on, she stopped to talk to Miss Jean Elizabeth Blight who was sitting just outside her home. He did go on down the road and she thought he was gone. However, he returned to speak to the young lady and Mrs. Reynolds went on. As she came to the loneliest part of the hill, to her surprise accused again appeared and asked if she had far to go. She gave him a definite "no", when, to her horror, he seized her and, despite her struggle, picked her up and put her over a hedge. She pleaded with him, saying she was old enough to be his mother but his answer was, "that didn't make any difference". He wrenched her gold wrist watch from her arm and said he would return it when she gave him all he desired and when she replied, "That will never be boy", he struck her a heavy blow on the side of the head that "sort of stupified me for a bit". She then remembers "going to the ground" and his ripping her underclothes off. She pleaded and prayed and reminded him of his own parents, but he said he had none. He dragged her, still struggling, further in the field. She tried to scream for help but "he clutched" her throat and she throught she was dying and became "sort of semi-conscious". "It happened", his private parts entered hers. Accused had a knife with a very sharp point which he held up to her throat. She identified an ivory handled table knife with a five inch blade sharpened on both edges (Pros.Ex.1), as being the same knife. After accused had completed the act of intercourse, he showed her a .30 caliber carbine bullet (Pros.Ex.2) and said "You see this bullet, if you make any attempt to run, you'll get it". He pulled her to her feet and quickly disappeared (R7,8). She was positive in her identification of accused. The light was quite good when these happenings occurred (R9-10).

Miss Blight testified that she lives at home. She had seen accused three or four times during the two weeks just before 26 July 1944. On this evening, at about eleven o'clock, she noticed him coming down the road with Mrs. Reynolds. Mrs. Reynolds came and spoke to her "just after 11 o'clock, in front of my house. * * * She said she was nervous and to see if he (the accused) got on the truck". At the time accused was standing "by the wall on the other side". Accused "came back and spoke to me and asked me to go for a walk with him. He asked me if I would kiss him good-night and then he left me

3726

and started to run down the road". He came back and spoke to her after Mrs. Reynolds had left, then went "down the Road" running in the same direction in which Mrs. Reynolds had gone. She positively identified accused as the man she saw that evening (R11-12).

Dr. Frederick A. J. Woodland, of Gunnislake, testified that on the early morning of 27 July 1944, he examined Mrs. Reynolds. He found her in a very shocked condition, her clothes disheveled, her hair down, a contused wound over the right eye and a small cut on the nose. Pieces of grass were on the back of her neck, mud on her knees, and both stockings were badly torn. The left side of her neck showed fairly extensive bruising with marks normally caused by fingernails. There was considerably hemorrhage from the vagina, red and very recent. There had been a definite recent penetration of the vagina. He later took a sample of Mrs. Reynold's blood (R12-13).

Police Constable James H. Elliott, Cornwall Constabulary, Gunnislake, testified that he saw accused "At four-thirty (4:30) on the 27th of July 1944 at Whitchurch Down Camp", when the whole company was paraded in an identification parade and accused was identified by Miss Jean Blight. Witness then went to the tent accused was occupying and searched his kit bag, finding a pair of khaki trousers (Pros.Ex.3) upon which were smears similar to blood opposite the lower portion of the right fly. At the time accused said the marks on the trousers were paint. The trousers were delivered to Dr. Hocking, County Pathologist, Truro. He identified Prosecution Exhibit 1 as found by him, together with a similar knife, under accused's mattress on 27 July. Witness identified Prosecution Exhibit 2 (a .30 caliber carbine bullet) as the one taken at the same time and place from accused's hip pocket. Witness was also present when a sample of accused's blood was taken and he delivered it, with the sample of Mrs. Reynolds' blood, to Dr. Hocking. He had received a complaint at 12:50 a.m. on 27 July, that Mrs. Reynolds had been assaulted and immediately went to her home. She was in a most disheveled condition and appeared to be suffering from a very severe shock. She had a contusion over the right eye, a scratch on the nose, and a severe reddening of the skin on each side of her neck (R13-15).

Dr. Frederick D. M. Hocking, Royal Cornwall Infirmary, Truro, testified that he had examined the stains on the trousers (Pros.Ex.3) and "found that it was human blood, fairly recent, belonging to group 'A'". He received also samples of the blood of Mrs. Reynolds, which he found belonged to "group 'A'", and of the blood of accused, which he found to belong to "group 'O'". He was definitely of the opinion that the blood on the trousers could not have come from accused but it could have come from Mrs. Reynolds.

Captain Robert W. Larson, 964th Quartermaster Service Company, identified accused as a member of his company, stationed at Tavistock, Devonshire, England, on 26 July 1944.

(252)

4. After accused's rights were explained to him by the court and he had announced his understanding of such rights, defense counsel stated that accused elected to remain silent. No witnesses were introduced for accused.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. To convict it must be shown that, (a) accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, par.148b, p.165). All the essential elements of the offense are conclusively shown to have occurred herein. Identification was positive and the blood test removes any vestige of doubt as to the guilt of accused.

6. The charge sheet shows accused to be 23 years and four months of age. He was inducted into service on 8 December 1942, at Lafayette, Louisiana, without prior service.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death or life imprisonment is mandatory upon conviction of an offense in violation of Article of War 92.

[signature] Judge Advocate

Sick In Quarters Judge Advocate

[signature] Judge Advocate

3726

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 SEP 1944 TO: Commanding General, European Theater of Operations, United States Army, APO 887, U. S. Army.

1. In the case of Private MADISON THOMAS (38265363), 964th 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 and this indorsement. The file number of the record in this office is CM ETO 3726. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3726).

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

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

(Sentence ordered executed. GCMO 85, ETO, 5 Oct 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

29 SEP 1944

CM ETO 3740

U N I T E D S T A T E S v. Technician Fifth Grade JAMES B. SANDERS (34124233), Private FLORINE WILSON (34124246), and Private ROY W. ANDERSON (35407199), all of Company B, 29th Signal Construction Battalion.	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at St. Mere-Eglise, Department of Manche, France, 17,20 July 1944. SENTENCES: Wilson, dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania. Sanders and Anderson, each to be hanged by the neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 upon the following charges and specifications:

ALL ACCUSED

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

Specification: In that Technician Fifth Grade James B. Sanders, Private Roy W. Anderson and Private Florine Wilson, all of Company B, 29th Signal Construction Battalion, acting jointly and in pursuance of a common intent to aid each other in the perpetration of a felony, viz: rape, did, at Neuville-au-Plain, Village Le Port, Manche, France, on or about 20 June 1944, wrongfully and unlawfully, each in turn, threaten and hold at the point of a gun Auguste Martin and Alphonse Lehot.

(256)

SANDERS

CHARGE II: Violation of the 92nd Article of War.
Specification 1: In that Technician Fifth Grade James B. Sanders, Company B, 29th Signal Construction Battalion, did, at Neuville-au-Plain, Village Le Port, Manche, France, on or about 20 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Jeanne Martin.
Specification 2: In that * * * did, at Neuville-au-Plain, Village Le Port, Manche, France, on or about 20 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Louise Bocage.

WILSON

CHARGE II: Violation of the 92nd Article of War. (Finding of Not Guilty).
Specification 1: (Finding of Not Guilty).
Specification 2: (Finding of Not Guilty).

ANDERSON

CHARGE II: Violation of the 92nd Article of War.
Specification 1: In that Private Roy W. Anderson, Company B, 29th Signal Construction Battalion, did, at Neuville-au-Plain, Village Le Port, Manche, France, on or about 20 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Jeanne Martin.
Specification 2: In that * * * did, at Neuville-au-Plain, Village Le Port, Manche, France, on or about 20 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Louise Bocage.

Each accused pleaded not guilty. Two-thirds of the members of the court present at the timesthe votes were taken on Charge I and its Specification concurring, each accused was found guilty of said Charge and its Specification, except the words, "Auguste Martin and." Accused Wilson was found not guilty of Charge II and its specifications as directed against him. All members of the court present at the times the votes were taken on Charges II and their respective specifications concurring, accused Sanders and Anderson were each found guilty of the specific Charge II and its specifications as directed against him. No evidence of previous convictions was introduced against accused Sanders. Evidence was introduced against accused Wilson of one previous conviction by summary court for absence without leave from his station for three days in violation of the 61st Article of

War; and against accused Anderson of two previous convictions: one by special court-martial and one by summary court, both for absence without leave from his station for an unstated time, 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, accused Wilson was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. All members of the court present at the times the votes were taken concurring, accused Sanders and Anderson were each sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Advance Section, Communications Zone, European Theater of Operations, approved the sentence as to accused Wilson, 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; and approved the sentences as to accused Sanders and Anderson 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 as to Sanders and Anderson and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

On and prior to 20 June 1944, Mons. Alphonse Lehot and wife, Madame Marguerite Lehot, Madame Louise Bocage, Mons. Auguste Martin and wife, Madame Jeanne Martin, and the small daughter of the Martins, resided at the home of Madame Bocage, situate in Neuville-au-Plain, Village Le Porte, Department of Manche, France (R8,9,17). Madame Bocage was 26 years of age (R23), Madame Martin was 28 years of age (R26).

On said date Company B, 29th Signal Construction Battalion, was bivouacked approximately one-half mile from said village (R31,35). The accused were members of said organization (R30,33).

Madame Bocage, Madame Martin and the Lehots were in the Bocage dwelling house on the morning of 20 June 1944. About 11 o'clock a.m. three colored American soldiers called at the house and asked for cider. Madame Bocage filled their canteens and the soldiers departed (R13,15,18,27). Seven or eight minutes later they returned to the house accompanied by four or five other colored soldiers (R13,15,18). Mesdames Lehot and Martin were engaged in domestic duties indoors. The soldiers remained in the court yard of the dwelling. Madame Bocage again served them with cider which they drank as they stood and sat about the yard (R13). She also cut roses which she gave to the three soldiers who first appeared at her home. They, in turn, displayed photographs to her (R13,21,24). She passed pleasantries with them. "At that moment the soldiers were already asking for women" (R13). The men by signs and gestures indicated to her their desire for sexual intercourse. They also displayed a French-English phrase

book and pointed to the French expression for "I want to pass the night." They also offered her money in exchange for favors. Previously they had paid her fifteen francs for the cider (R22). She became frightened by this demeanor of the men and departed to secure the presence of a neighbor, Mons. Dubois (R13,18,22).

Mons. Dubois appeared at the Bocage menage within a few minutes but Madame Bocage remained at the Dubois house. Mesdames Lehot and Martin and the Martin's daughter returned with Mons. Dubois to his home (R14,18, 24). The colored soldiers then left the Bocage premises and after a short interval Mons. Lehot appeared at the Dubois home and escorted Mesdames Bocage, Martin and Lehot and the Martin daughter to the Bocage home (R5,13, 18,24).

About twenty minutes later or between 12 m. and 12:30 p.m. three colored soldiers, accused Sanders, Anderson and Wilson, returned. The three women were in the kitchen (R9,14,18,21). Mons. Lehot was in the store-room. The men entered the kitchen and pointed their rifles at the women. Two of the soldiers then compelled Mesdames Lehot and Martin and the little Martin girl to leave the house and enter the court yard. Madame Bocage was detained in the house (R14,16,18,24). Immediately thereafter, Mons. Lehot, under force of arms, was also taken into the court yard and was placed with the two women and little girl (R5,18). The soldier who remained in the house appeared in the doorway of the house and from his carbine fired a shot which passed between Mons. Lehot's legs and struck the ground behind him (R6,9,17,18). Madame Bocage succeeded in escaping from the house and joined Mons. Lehot and the two women in the yard (R18).

Thereafter one of the soldiers, accused Anderson (erroneously identified as accused Sanders by witness Lehot), approached Madame Bocage, grasped and pulled her by her arm and then pointed his gun at her. Pressing the gun against her back, he forced her to walk into the house (R5-7, 10,17,18), and then directed that she enter the bedroom (R18). She made an effort to free herself from Anderson (R6), but she did not scream (R11). Accused Wilson remained in the yard. Mons. Lehot and Mesdames Lehot and Martin stood in a line (R25), and Wilson kept them covered with his carbine and a German machine pistol (R34). When Madame Bocage and accused Anderson entered the bedroom accused Sanders, "a little short soldier" -- was awaiting them. He forced Madame Bocage to remove her pantaloons and lie on the bed. He opened his trousers and shirt and raised Madame Bocage's skirt (R18,19). He then engaged in sexual intercourse with her. She stated that such act was performed without her consent and a gainst her will, and that she did not remonstrate or struggle because she was in fear of her life (R18,19,22). Upon completion of the act by Sanders, Madame Bocage was held on the bed and Anderson engaged in sexual intercourse with her (R19). She asserted that this act also was performed without her consent and against her will, and that she was on that occasion under the influence of fear (R19,20,22).

After the second violation of Madame Bocage's person, Sanders went to the court yard, grasped Madame Martin by the arm, menaced her with his rifle and marched her into the bedroom (R7,19,20,25,26). Madame Bocage was on the bed. Sanders compelled Madame Martin to prostrate herself upon a mattress which was on the floor of the room. He then unbuttoned his trousers, lay by the side of Madame Martin, raised her dress and removed her pantaloons (R20,25). At this point Madame Bocage asked Madame Martin, "What the devil are they going to do to us?" Madame Martin replied, "I don't know", upon which Madame Bocage exclaimed, "Be quiet, they might kill us" (R23). Sanders removed Madame Martin from the mattress to the bare floor and engaged in sexual intercourse with her (R20,23,25,26). When Sanders had completed the sexual act Anderson took his place on Madame Martin's body and copulated with her. With respect to both Sanders and Anderson, Madame Martin declared that she never consented to the sexual intercourse and that she remained silent and did not struggle because of fear of bodily harm (R26).

Madame Bocage definitely identified Sanders as one of the soldiers who engaged in sexual intercourse with her (R19,20) and Madame Martin was positive in her identification of both Sanders and Anderson as the assailants of herself (R26).

During the violence visited upon Madame Martin a third colored soldier who was not identified entered the bedroom, and while Sanders and Anderson were violating Madame Martin, he forced his attentions upon Madame Bocage as she lay on the bed and without her consent had intercourse with her (R19,20,22,23). Neither of the women was able to identify the third negro who assaulted Madame Bocage (R20,26). (However, see testimony of accused Anderson, infra, given as a witness on his own behalf. He asserted that a soldier and a defense witness, Riggle McCutcheon, was this third participant in the orgy). Upon completion of the third act of intercourse Madame Bocage went into the yard (R20).

Private William L. Pope, 29th Signal Construction Battalion, who knew the three accused, arrived at the Bocage home at about 2:30 p.m. 20 June 1944 (R31). He testified that Sanders stood in the doorway of the house with his carbine across his shoulder (R31,32). There was a line of people in the court yard composed of two women, a man and a little girl. Anderson stood before them and held his carbine with the finger of his right hand on the trigger and with the muzzle pointed in the air (R31-32). Wilson was in the yard and held a carbine and a German machine gun across his shoulder (R31). Pope approached Anderson and asked, "What's doing; what you up to?" Anderson replied, "Nothing," and signified to Pope that he had better leave. Pope departed and soon thereafter encountered Private Patrick R. Keely, of the same battalion, who also was acquainted with accused (R32). As a result of his conversation with Pope, Keely went to the Bocage home (R10,28,34) and upon his arrival stood at the yard gate (R35). His summary of ensuing events is as follows:

(260)

Wilson was in the court yard. He knelt in front of a line of civilians composed of two men, two women and a little girl (R35). A machine pistol was across his knee and he aimed his carbine directly at the group (R34). (This group was undoubtedly composed of Messieurs Lehot and Auguste Martin, Mesdames Lehot and Hochet (mother of Madame Bocage) and the Martin daughter. See summary of Mons. Martin's testimony, infra). Wilson called to Anderson announcing that "someone had come." The latter appeared in the doorway of the house and said to Keely, "You can come in." Upon entering the yard Keely saw a woman standing in the doorway by Anderson's side. He called Anderson into the yard and informed him that the "officers had got wind of what was going on and leave as quick as possible" (R35). (Keely admitted this statement to Anderson was a falsehood uttered by him in order "to make them go home" (R41)). Anderson replied,

> "I didn't get any of this meat and I am going to get me some more pussy before I leave; Old Sanders is in here now" (R35).

In the meantime the woman in the doorway had entered the court yard (R40). Keely went into the house and opened the door to a room on the left of the doorway. He saw Sanders engaged in sexual intercourse with a woman. He pulled Sanders from his position on top of the woman, causing him to fall off the bed into a corner of the room. He remonstrated with Keely. Anderson appeared and took possession of the woman who was on the bed and began to engage in sexual intercourse with her. She did not struggle or cry and apparently did not object. Sanders seemed "pretty high" and was under the influence of intoxicants (R35-37) but seemed sober enough to know what he was doing (R39). Anderson gave Keely his carbine and Keely took Sanders' gun from a table in the room where he found it (R35). There were clips in both of the guns (R37). Keely left the house taking the guns with him. By that time five or six colored soldiers had arrived at the gate and one of them, known to Keely as Riggle McCutcheon, came into the yard. As Keely turned to speak to the civilians, McCutcheon passed him and said the men "wanted woman" (R38). Keely did not see McCutcheon enter the house but opportunity was afforded him to do so at that time. Thereafter Keely entered the house. Sanders was on his feet and Anderson was helping him to put his clothing in order. Keely brought the two men into the yard and returned their carbines to them, whereupon they left the Bocage premises (R35).

Keely described the appearance of the two women he saw in the house as follows:

> "one of the ladies, a little taller than the other one had a fair complexion and one seemed to have a little lighter hair than the other" (R36).

He had seen the same women at a subsequent identification parade and also in the court room (R36). With respect to the condition of the women at the conclusion of the affair, Keely stated

> "The little lady, when she came out of the house, walked as though she was toting something that was too heavy for her" (R39).

She (the little lady) looked the "worse" and "awful tired," but Keely did not know if her clothes were torn (R38).

Mons. Lehot testified that Madame Bocage was crying when she came out of the house (R11). Madame Lehot described the condition and attitude of the two victims of the attack as follows:

> "Madame Bocage was not crying but she appeared somewhat annoyed, Madame Martin was very nervous and disgusted" (R16).

While the two women were in the house with the soldiers Madame Lehot heard no noise or screams, and when they came out of the house at the conclusion of the affair the clothes of neither of them were torn (R16).

As corroborative of Private Keely's recital of events within his cognizance, Mons. Martin testified that he and Madame Hochet (mother of Madame Bocage) arrived at the yard gate about 12:20 p.m. after having attended mass at Fresville. They were met at the gate by Anderson who pointed his gun at Mons. Martin and ordered him and Madame Hochet to enter the yard and stand next to Madame Lehot (R28). Thereafter a tall soldier arrived at the gate, talked with Anderson and then went into the house. Thereafter three soldiers came out of the house followed by the tall soldier (R28,29). Mons. Martin identified Wilson and Sanders as two of these soldiers but was uncertain in his identification of Wilson (R29). According to Mons. Martin, accused Anderson was the soldier who held the group in the yard under guard with his carbine (R29).

4. The defense presented the witnesses hereafter named, whose testimoney is set forth in substance as follows:

Private Riggle McCutcheon, Company B, 29th Signal Construction Battalion, arrived at the Bocage premises while Keely was in the court yard and inquired of him as to the cause of the excitement (R42,46). Keely directed McCutcheon not to go into the house (R46). He saw accused Wilson holding a gun but he did not have it pointed at any person and did not appear to be guarding any persons (R42,43). McCutcheon stepped into the doorway of the house, where a lady was standing. He saw Sanders lying on the floor. He did not know whether Sanders was drunk or not but "he seemed so" (R43). Anderson said to Sanders, "Come on, let's go" (R43,44,45). The lady was not crying nor did she make any attempt to pass McCutcheon in the doorway (R44). McCutcheon denied he had sexual intercourse with a

woman while in the house (R46).

Accused Anderson elected to testify on his own behalf (R46). He admitted that he was at the Bocage home on 20 June 1944, where they met a lady "with glasses" (Madame Bocage (R47)), to whom he gave five francs for a canteen of cider. She was friendly and smiling (R47,50). Anderson commenced to make signs to her "of sexual intercourse." Sanders made similar signs. Anderson gave the woman ten francs in payment for sexual intercourse (R47,53), whereupon the woman (Madame Bocage) went into the house (R47,51), accompanied by Sanders and Anderson. Sanders had his gun slung on his shoulder. Madame Bocage went into the bedroom and lay on the bed. Her dress was raised (R48). It was then that the "short lady" left the house and came into the yard (R47). Anderson went into the yard, touched her on the shoulder and made signs to her to go into the house. She went into the house with Anderson (R48,51,54), and arrived in the bedroom before "Sanders was through". The "short lady" lay down on a mattress in the corner. Madame Bocage went into another room (R54). Sanders was engaged in intercourse with the "short lady" when Keely entered and pulled Sanders off her (R48,54). Anderson made signs to her, she arose from the floor, lay on the bed and raised her dress. She had a smile on her face and did not appear frightened (R49). Anderson then informed Keely that he was going to do the same thing Sanders had done (R47,48,51). Anderson then had intercourse with the "short lady that don't wear glasses" (Madame Martin) (R48,49,55).

McCutcheon entered the room at this moment and "laid one of the women himself." He said, "It was just like a repeat" (R47). Anderson left the house before McCutcheon or the women and met Keely in the yard (R47,49). Anderson saw Wilson in the yard.

> "He was sitting down on the wood pile and had his carbine between his legs. As far as the German sub-machine gun, I don't know about that" (R49).

Anderson did not see either Sanders or Wilson point a gun at any person (R49,50).

Accused Sanders elected to testify in his own defense (R55). Wilson, Anderson and Sanders met the "lady with glasses" at the Bocage home on 20 June 1944 (R55). He saw only this lady and a man sitting by a cider barrel. He saw no other civilians (R56). She gave them one canteen of cider and Anderson paid her five francs for another canteen of it. At that time Sanders, Anderson and the lady walked towards the door. The two soldiers made signs that they wanted intercourse with her. The lady stood in the doorway. Anderson gave her ten francs more (R57,60). She accepted the money and went into the room. Sanders had his rifle slung on his shoulder, and did not remove it until he went into the room when he placed it on the table (R57,58,59). The lady lay on the bed and pulled up her clothes (R56).

She did not struggle, "she just went in there and went to bed" (R57). He then had intercourse with her and at the completion of same the lady left the room. He "found /himself/getting drunk." He remembered walking as far as the "middle of the door" and leaning against the building. The last thing he remembered "was that some one came in the door." He did not know who it was (R57,58). He did not remember that Keely came into the house although he had seen him previously in another place, or on the road. He did not remember having intercourse with a lady who did not wear glasses.

When Sanders and Anderson arrived at the Bocage premises Wilson was with them. He entered the gate with Sanders and Anderson and he went "back" into the yard (R57,59). Sanders did not see Wilson point a gun at any person nor did he hear a shot fired (R57). Sanders did not see either Wilson or Anderson in the house. Anderson had his gun slung on his shoulder (R59).

Accused Wilson elected to testify as a defense witness (R61). He denied categorically that on 20 June 1944 he pointed a gun at any person; that he indulged in sexual intercourse with any person; that he shot his rifle or heard a shot fired (R61). He admitted he was with Sanders and Anderson for a period of two hours on 20 June 1944, during which time they were at an old man's house drinking cider (R62). Wilson, Sanders and another soldier unknown to Wilson then went to the home of the woman "in eye glasses" (Madame Bocage). They obtained a canteen of cider which they drank and then left. Around two hours later Wilson, Anderson and Sanders returned to the woman's house (R63), and went into the yard. Anderson obtained a canteen of cider from the woman (R62,63), who then walked towards the house, followed by Anderson and Sanders. Wilson saw an old man at the house, but did not see either a little girl or another woman who did not wear glasses (R64). Wilson had with him his carbine and a German machine gun which he carried on his shoulder "all the time" (R63). He remembered nothing from the time he saw Anderson and Sanders walk towards the house until the time he "turned in" the German machine gun. He did not remember leaving the yard and did not go into the house (R65).

5. Consideration will be first given to questions of procedure and practice and evidence which arose during the course of the trial:

(a) Accused were charged jointly with aiding and abetting each other in the perpetration of a felony, viz, rape (Charge I and Specification), and each was charged severally and separately with raping Mesdames Bocage and Martin (Charges II and respective specifications). As to Charge I and Specification, the trial was joint; as to Charges II and respective specifications the trial was several. The record does not disclose that the several accused affirmatively consented to such trial, but the right of each accused to a separate peremptory challenge was particularly recognized (R2). There was no motion for a severance of the trial. The situation thus presented was considered by the Board of Review in CM ETO 3147, Gayles, et al., wherein the right of each accused, under conditions exactly similar to those in the instant case, to a separate trial was sharply raised by a

timely and appropriate motion by the defense. Reference is made to the holding in that case for a discussion of the problem. Upon the authority of said holding and the authorities therein cited, the Board of Review is of the opinion that even had the defense in the instant case interposed a motion for severance of trial the court would have been fully authorized to deny the motion. Ergo, the consent of each accused herein to be tried together was unnecessary.

(b) At the conclusion of the prosecution's evidence in chief, the defense on behalf of each accused moved for findings of not guilty. The motion was properly denied. As will hereinafter be demonstrated sufficient evidence had then been presented to warrant the court finding each accused guilty of Charge I and its Specification. Under such circumstances the denial of the motion was not only proper, but was also required (MCM, 1928, par. 71d, p.56; CM ETO 393, Caton and Fikes; CM ETO 1673, Denny; CM ETO 1991, Pierson).

(c) Similarly the defense moved on behalf of accused Wilson for a finding of not guilty of Charge II and its specifications (as preferred against Wilson). The motion was denied. Inasmuch as the court thereafter acquitted Wilson of this Charge and specifications, the question as to correctness of the ruling is moot.

(d) The record of trial is remarkably free from errors in admission of evidence. The objections of defense counsel with respect to interrogations of witnesses (R6,7,20,28,40) were without merit. The rulings of the law member thereon were correct.

6. The Manual for Courts-Martial, 1928, defines the elements of the crime of rape as follows:

> "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" (MCM, 1928, par. 148b, p.165).

For the purpose of simplifying the determination of the question whether there was substantial evidence supporting the findings of Sanders' and Anderson's guilt of the crimes of rape charged against them respectively, the fundamental elements of the offense will be discussed separately as to each accused.

IDENTIFICATION

(a) Martin rape:

(1) Sanders (Specification 1, Charge II) was positively identified by Madame Bocage as the soldier who had sexual intercourse

with Madame Martin (R20,23). Madame Martin identified Sanders as her first assailant (R26). Accused Anderson testified Sanders engaged in sexual intercourse with Madame Martin -- "this short lady" (R48,52).

(2) Anderson (Specification 1, Charge II) Madame Martin identified Anderson as the second of her assailants (R26). Anderson in his testimony admitted he had sexual intercourse with Madame Martin -- "the low lady that don't wear glasses" (R54,55).

(b) Bocage rape:

(1) Sanders (Specification 2, Charge II). Madame Bocage identified Sanders as the man who first engaged in sexual intercourse with her (R19). Anderson testified that Sanders had intercourse with Madame Bocage -- "The lady with glasses" (R47,48,54). Sanders himself admitted he had sexual connections with Madame Bocage (R56,57).

(2) Anderson: (Specification 2, Charge II). According to Anderson's own testimony, he paid Madame Bocage ten francs when he and Sanders, by signs, solicited her for sexual intercourse after they entered the house (R47,48,53). Madame Bocage was ravished by a second soldier immediately following Sander's intercourse with her (R19,23). Anderson was in or near the bedroom at the time of the Sander's ravishment of Madame Bocage (R18,19,48). There were only three soldiers at the Bocage place (the three accused) at the time Anderson, Sanders and Madame Bocage went to the house (R8,53). Wilson remained in the yard and did not enter the house (R16,25,27,55).

With respect to accused Sanders, there is, therefore, definite and substantial evidence that he engaged in sexual intercourse with both of the women at the time and place alleged. No further comment or argument are necessary to demonstrate the substantiality of the proof in support of the court's findings on this issue. Likewise the evidence is indisputable that Anerson had carnal knowledge of Madame Martin, as alleged in the specification. However, neither Madame Bocage nor Madame Martin nor any other witness identified Anderson as one of the negroes who engaged in sexual intercourse with Madame Bocage, although she was positive that following the act by Sanders two acts of intercourse were performed by two different colored assailants (R19,20). Anderson asserted that he copulated only with Madame Martin (R55). Therefore, factually the proof of Anderson's copulation with Madame Bocage must depend upon evidence of surrounding facts and circumstances.

The Board of Review has heretofore considered the problem involved in the proof of identity of an accused in trial of a capital case by circumstantial evidence only, in CM ETO 1621, Leatherberry; CM ETO 2002, Bellot; CM ETO 2686, Brinson and Smith; and CM ETO 3200, Price. Reference is made to said holdings for a detailed discussion of the problem. It is the opinion of the Board of Review that substantial evidence was presented at the trial from which the court was fully justified in inferring that Anderson was the second man who ravished Madame

Bocage. It was the function and duty of the court to analyze and evaluate the evidence of these incriminating circumstances. Inasmuch as the Board of Review is completely satisfied that the evidence of Anderson's connection with Madame Bocage is competent and substantial, it is not authorized to disturb said finding upon appellate review (See authorities cited immediately above).

There is another facet of the evidence, however, that irrefragably affixes upon Anderson, the guilt of raping, Madame Bocage assuming, as will be hereinafter demonstrated, that the other elements of the crime were proved. Beyond all reasonable doubt Sanders' male organ penetrated the person of Madame Bocage (R18,19).

The distinction between principals, and aiders and abettors have been abolished by Federal statute.

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (Sec.332 Federal Criminal Code, 18 USCA 550; 35 Stat. 1152).

The distinction is also not recognized in the administration of military justice (Winthrop's Military Law & Precedents - Reprint, p.108; CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler).

> "and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal. Whitt v. Commonwealth, 221 Ky 490, 298 S.W. 1101" (Morei v. United States, 127 Fed (2d) 827, 831) (Underscoring supplied).

Mere presence during the commission of an offense by another, without more, does not constitute one an aider and abettor (CM ETO 804, Ogletree, et al).

> "Something must be shown in the conduct of the by-stander which indicates a desire to encourage, incite, or in some manner afford aid or consent to the particular act; though when the by-stander * * * knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement. * * *. It is not necessary, therefore, to prove that the party actually

> aided in the commission of the offense; if he watched for his companions in order to prevent surprise, * * * or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting" (1 Wharton's Criminal Law, 12th Ed., sec.246, pp.333-334).

> "On the other hand, where one's presence is by preconcert, he may be guilty as an aider and abettor, although neither by word nor by act does he encourage or discourage the commission of the felony" (22 CJS, sec. 88b (4), p.161).

If the proof shows that a person was present at the commission of a crime without disapproving or opposing it, the jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same (People v. Cione, 293 Ill. 321, 127 N.E. 646, 12 ALR 267, 273; State v. Maloy, 44 Iowa 104, cited therein at pp.280-281).

> "Mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of consent and concurrence in the perpetration of a crime by a defendant sought to be held responsible for the homicide, as aiding and abetting the actual perpetrator, unless such defendant participated in the felonious design of the person killing. Whether or not there was such participation is to be determined by the jury, under the facts and circumstances of the case" (Fudge v. State, 148 Ga. 149, 95 S.E. 980 - Annotation 12 ALR p.277).

In order to convict of an offense

> "the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty" (MCM, 1928, par.78g, p.63).

Under Sec.332 of the Federal Criminal Code, above quoted, the acts of the principal become the acts of the aider and abettor

3740

and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (DePreta v. United States, 270 Fed. 73; Conelli v. United States 289 Fed. 791; Kelly v. United States, 258 Fed. 392, certiorari denied 249 U.S. 616, 63 L.Ed. 803). Premised on the above stated doctrine is the established and well recognized rule that an accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse (52 CJ, Sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl. 7; People v. Zinn, 6 Cal. App. (2nd) 395, 44 Pac. (2nd) 408; People v. Nieto, 14 Cal. App. (2nd) 707, 58 Pac. (2nd) 945; People v. Durand -- Cal. App. (2nd) ---, 134 Pac. (2nd) 305; CM NATO 385, Speed).

> "The contention that the girl made no attempt to induce the three disengaged men to beat off her present assailant and that she made no outcry as they successively raped her is an idle mockery. From the first exhibition of a criminal intent toward her they had demonstrated perfect harmony and fraternal cooperation among themselves. For any man to stand by serenely and sympathetically in the presence of an act of rape by his associate is itself proof of his approval of and cooperation with the criminal act. That she should in her anguish make an outcry to such associates and thereby attempt to gain their protection is not necessary to render them guilty of aiding and abetting the criminal. They aided and abetted by their actual presence, and by their acts they rendered actual assistance to the perpetrator. Lassen v. Board of Dental Examiners, 24 Cal. App.767, 772, 142 P.505. At the time of the rape by each of the men the other three stood near by and abetted the perpetrator by presenting a show of force and by keeping watch against intrusion. As each without resentment toward his acting confederate and without concern for the girl permitted the outrage, they exemplified a united and single purpose which would brook no interference. Each thus encouraged and aided his several companions and was therefore a principal in each of the crimes. People v. Best, 43 Cal. App. 2d 100, 105, 110 P. 2nd 504." (People v. Mummert -- Cal. App. (2d)---; 135 Pac. (2nd) 665, 668).

Anderson admitted that at the commencement of the orgy he solicited Madame Bocage to engage in sexual intercourse with him and Sanders. Thereafter, with force of arms, he compelled her to enter the bedroom where Sanders was waiting to ravish her. He notonly delivered her to Sanders for such purpose but also he had first put her in fear of her life by display of firearms and other threats of violence. When she fell into Sanders' clutches her will to resist had been destroyed and it was Anderson who had primarily produced such result. He witnessed Sanders' act of intercourse with her and at that time, according to his own statement, he not only did nothing to prevent it, but he was also seeking another victim (Madame Martin) upon whom he could satisfy his bestial lust. Even though the court might have believed that Anderson had not personally ravished Madame Bocage, the foregoing evidence beyond all peradventure proved that he aided and abetted Sanders in the commission of his unlawful act of intercourse. Anderson was therefore properly charged with and found guilty of raping Madame Bocage. Sanders' act of intercourse was legally also that of Anderson.

PENETRATION

The evidence beyond doubt established the fact that Sanders effected penetration of the bodies of both Mesdames Bocage and Martin. Similarly the proof is undenied that Anderson penetrated the person of Madame Martin. As to Madame Bocage her testimony is specific and positive that her second assailant inserted his penis in her vagina (R20). Upon the hypothesis that Anderson was this second assailant the proof of penetration is substantial. Upon the alternative hypothesis that he aided and abetted Sanders in his ravishment of Madame Bocage (supra) the proof is positive that Sanders effected penetration of her body. On such premise proof of Anderson's penetration of the woman was immaterial (See authorities, supra).

CONSENT

The vital issue in the determination of Sanders and Anderson's guilt of the crimes of rape revolves about the subsidiary question as to whether the acts of intercourse were performed by the accused with the consent of the two women. The controlling legal principles are as follows:

> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
> Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a

(270)

woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

"At common law the three elements, carnal knowledge, force, and commission of the act without the consent or against the will of the woman, must be present to constitute the crime of rape upon a female above the age of consent, and these are the essential elements of the offense under statutes which define the crime substantially as at common law. The elements of want of consent and force may, however, not be required where the carnal knowledge is accomplished upon a female * * * by threats and fear, or by fraud or surprise, these conditions being generally considered sufficient to constitute a substitute for want of consent and force" (52 CJ, sec.20, pp.1013,1014) (Underscoring supplied).

"Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent, or is capable in the eyes of the law of giving consent, or her consent is not extorted by threats and fear of immediate bodily harm. * * *. 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, pp.1016,1017) (Underscoring supplied).

"To constitute carnal knowledge of a female, rape, the law requires something more than mere absence of consent; there must be actual resistance, or excuse, incompatible with consent, for its absence. Thus, generally, resistance by the female is a necessary element of the crime. In fact, the essential element of nonconsent, or that the act be against the woman's will, signifies, and is indicated by, resistance by the female.

The female need not resist as long as either strength endures or consciousness continues. Rather the resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends on the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested. * * *. Stated in another way, the resistance of the female to support a charge of rape need only be such as to make nonconsent and actual resistance reasonably manifest" (52 CJ, sec.29, pp.1019, 1020).

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

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

(272)

It is apparent from the foregoing that an accused may be guilty of accomplishing rape by mere threats of bodily harm as distinguished from rape by means of actual force and violence. In each instance the offense must be consummated without the voluntary consent of the victim. Rape accomplished through force and violence ordinarily requires proof that the victim exercised all of her powers of resistance, consistent with the surrounding circumstances. Such offense assumes that the victim does resist and her opposition is overcome by physical force of her assailant. Rape accomplished by threats of bodily harm assumes that she does not resist but upon the contrary that she is prevented from doing so through fear caused by the assailant's threats to inflict upon her great bodily harm (People v. Battilana, --- Cal. App. (2nd) ---, 128 Pac. (2nd) 923).

The evidence in the instant case shows that after each of the women was taken to the bedroom there was practically no resistance offered by them or either of them to the obvious intentions of Sanders and Anderson. Their answers to formal questions of the trial judge advocate that they did not consent to the acts of intercourse are not particularly impressive if judged solely by their conduct during the sexual orgy in the bedroom. If the prosecution's case depended solely upon proof of resistance by the victims immediately prior to the copulative acts, it must be confessed that the court would have been justified in acquitting accused on the theory that the women entered into and were cooperative parties to a sexual saturnalia. However, such an interpretation of the evidence wholly ignores the factual background of the several acts of intercourse.

A group of colored American soldiers, including at least two of the accused, arrived at the home of provincial French people in a village recently liberated from the control of a foreign invader. They were received kindly and cordially and the soldiers were given and sold quantities of cider. Roses were offered to them. Manifestly misunderstanding Madame Bocage's friendly actions they immediately commenced solicitation for sexual intercourse. Madame Bocage became alarmed over their advances and departed for a neighbor's (Mons.Dubois) home to secure protection. In the arrangement which followed all of the women at the Bocage home were escorted to the Dubois habitation and there remained until the negroes departed. The women then returned to the Bocage home. A few minutes later the three accused appeared, each armed with a carbine and in addition Wilson carried a German machine pistol. The three soldiers entered the house and drove Mesdames Lehot and Martin and the Martin daughter into the yard. Mons. Lehot was made captive and placed with the women. Madame Bocage had been detained in the house, but she escaped and joined the group in the court yard. During the time she remained in the house either Anderson or Sanders, standing in the doorway of the house, discharged his carbine at Mons. Lehot. The bullet passed between Lehot's legs. Wilson had placed the group in the court yard in a line and stood guard over them covering them with his fire arms. Anderson came from the house to the yard, pointed his carbine at Madame Bocage, grasped her by the arm, held his gun at her back and forced her into the house. Sanders

awaited in the bedroom. Immediately upon her arrival she was pushed on to the bed and Sanders engaged in the first act of intercourse. When he concluded, Anderson took his place on the boady of the woman and copulated with her. While Anderson engaged in this act of intercourse, Sanders went into the yard, aimed his gun at Madame Martin, pulled her by the arm and under cover of the gun marched her into the bedroom where she was pushed on to a mattress on the floor. He then engaged in a sexual act with her. Upon the arrival of Madame Martin in the room Madame Bocage in the presence of Sanders and Anderson said to her,

"What the devil are they going to do to us?"

Madame Martin replied, "I don't know." Whereupon Madame Bocage responded, "Be quiet, they might kill us." During this entire period Wilson held Mons. Lehot, Madame Lehot and the Martin daughter prisoners under guard with his firearms threateningly displayed. Upon the later arrival of Mons. Martin and Madame Hochet they were also placed under Wilson's guard.

When the conduct of Mesdames Bocage and Martin in the bedroom is measured against the background above narrated, their assertions that the acts of intercourse were against their respective wills (R19, 20,26) and under fear of bodily harm (R22,26) possesses genuine substance and worth. The evidence shows that the Bocage home was invested by three armed negroes determined to satisfy their lustful desires upon the bodies of the young women they had previously seen; the inhabitants were made prisoners and held under cover of firearms; the two victimes (young women of the age of 26 and 28 years, respectively), were deliberately selected and each at the point of a gun was forced into the bedroom where the sexual acts were consummated. The discharge of the firearms by Anderson or Sanders at Mons. Lehot at the crucial moment effectively impressed upon the two women the danger of their positions and the fact that their assailants were potential killers as well as rapists.

It was the duty of the court to determine from this evidence whether the two victims had been put in fear of their lives by this show of forces and violence and whether such fear prevented them from offering resistance to the attacks. The findings of the court on this issue are supported by substantial evidence as above demonstrated and under such circumstances will not be disturbed upon appellate review.

The prosecution sustained the burden of proving beyond reasonable doubt all of the elements of the crime of rape. The Board of Review is of the opinion that the record is legally sufficient to support the findings of the guilt of Sanders and Anderson of raping Mesdames Bocage and Martin at the time and place alleged (CM ETO 3709, Martin, and authorities therein cited).

3740

(274)

7. It is also charged that accused

> "acting jointly and in pursuance of a common intent to aid each other in the perpetration of a felony, viz: rape, did, * * * wrongfully and unlawfully, each in turn, threaten and hold at the point of a gun Auguste Martin and Alphonse Lehot" (Charge I and Specification).

Each accused was found guilty of said Charge and Specification except the words "Auguste Martin and".

The evidence is clear beyond all doubt that two overt acts directly threatening Mons. Lehot were committed during the course of the violence and disorder: (1) Anderson or Sanders discharged a carbine at him. The bullet passed between his legs and struck the ground behind him; (2) Wilson, armed with a carbine and a German machine pistol, held Mons. Lehot (with others) in the court yard as a prisoner and during such time covered him with his firearms.

The evidence is highly convincing that the three accused acted in unison with a common intent and with a common purpose of accomplishing the rape of Mesdames Bocage and Martin. No other reasonable construction can be given the evidence. The three negroes were active, violent participants in the siege of the Bocage home. It was not necessary for the prosecution to prove that each accused threatened and held Mons. Lehot at the point of a gun. All that was necessary was proof that Sanders, Anderson and Wilson were joint participants in the disorder, and this was established by an abundance of uncontradicted evidence. Each accused was responsible not only for his own acts but also for all acts committed by his co-actors in pursuance of the common purpose (CM ETO 804, Ogletree,et al; CM ETO 895, Davis et al; CM ETO 2297, Johnson and Loper; CM ETO 3499, Bender, Owsley and Henderson). The prosecution therefore sustained the burden of proving beyond all reasonable doubt the commission of the overt acts of threatening and holding Mons. Lehot at the point of a gun.

The fundamental question involved in the determination of accuseds' guilt of this charge is whether a substantive offense under the Articles of War was alleged and proved. A problem of interpretation and construction of the specification is primarily presented. There are certain fundamental rules of construction and interpretation of indictments and informations:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged,

3740

and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" (Cochran v. United States, 157 U.S. 286, 290, 39 L.Ed., 704, 705, 15 S. Ct. 628; Rosen v. United States, 161 U.S. 29, 34, 40 L.Ed., 606, 607, 16 S.Ct. 434, 480, 10 Am. Crim. Rep. 251).

"Section 1025 Revised Statutes (U.S.C. title 18, sec.556) provides:

> 'No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.'

This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading.

It, of course, is not the intent of sec.1025 to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the court to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment" (Hagner v. United States, 285 U.S. 427, 431, 433, 76 L. Ed., 861, 865, 866).

Section 1025 Revised Statutes (18 USCA Sec. 556) is the counterpart of the 37th Article of War, which in pertinent part reads as follows:

> "The proceedings of a court martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or

3740

(276)

> confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused".

The Board of Review in its appellate function has heretofore exercised the power to construe and interpret specifications (CM ETO 1190, Armstrong; CM ETO 1249, Marchetti; CM ETO 2608, Hughes).

An examination of the specification under consideration shows plainly that the pleader intended to charge each of the accused as aider and abettor in the commission of the substantive crimes of rape charged in subsequent charges and specifications (Charges II and Specifications). By the awkward placement of the principal verb "did", the use of the present tense of the verbs "threaten" and "hold" instead of the participal forms thereof, and the omission of the preposition "by", he obscured the meaning of the specification without destroying its real sense and purpose. Its intrinsic meaning is rendered clear by a rearrangement in the following form:

> "acting jointly and in pursuance of a common intent did aid each other in the perpetration of a felony, viz: rape * * * by wrongfully and unlawfully, each in turn, threatening and holding at the point of a gun Alphonse Lehot."

Thus construed, the specification clearly stated facts constituting the offense of aiding and abetting the commission of the crime of rape. Inasmuch as all distinctions between principals and aiders and abettors have been abolished by Federal statute and are not recognized in military jurisprudence (see par.6, supra), the charge should have been laid under the 92nd Article of War (CM ETO 1453, Fowler; Bull, JAG, July 1944, Vol.III, No.7, sec.450, pp.284,285; CM NATO 643, Bull, JAG, Feb. 1944, Vol.III, No.2, sec.541, pp.61,62). However, the laying of the specification under the wrong Article of War was a non-prejudicial irregularity under the 37th Article of War (MCM, 1928, par.28, p.18; CM ETO 1057, Redmond; CM ETO 3118, Prophet).

At the common law aiders and abettors of others in the commission of a crime were punishable as such. To aid and abet the commission of a felony was a substantive offense (1 Wharton's Criminal Law, 12th Ed. sec. 245, pp.327,328; Coffin v. United States, 162 U.S. 664, 40 L.Ed., 1199; Haggarty v. United States, 5 Fed (2nd) 224. The enactment of sec.332 of the Federal Criminal Code (18 USCA 550)

> "does not assume to change the facts. Before the statute aiders and abettors of others in the commission of crime were punishable as such, whether or not they were themselves capable of committing the principal crime * * *. The

3740

> statute, in designating aiders and abettors as principals granted them no immunity, but merely prescribed and simplified the means and manner of procedure for their prevention on account of their part in the crime" (Haggarty v. United States. supra).

(See also: Bacon v. United States, 127 Fed. (2nd) 985, 987; Marino v. United States, 91 Fed (2nd) 691; 113 ALR 975; Westfall v. United States, 21 Fed (2nd) 604, 606; United States v. Lehigh Valley R. Co. 43 Fed. (2nd) 135, 144).

(a) There is therefore no difficulty in holding Sanders and Anderson under the charge of aiding and abetting each other in the commission of the rapes committed by them respectively upon Mesdames Bocage and Martin. Their actions on this occasion have been fully set forth above and there is no necessity to make further comment on same. The record of trial is legally sufficient to support the findings of Sanders' and Anderson's guilt of the specification of Charge I, an offense under the 92nd Article of War instead of the 96th Article of War (see supra).

(b) Accused Wilson was acquitted of the rapes of Mesdames Bocage and Anderson. However, such action by the court did not affect its finding of his guilt as an aider and abettor of Sanders and Anderson in the commission of their crimes.

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment" (Dunn v. United States, 284 U.S. 390; 76 L.Ed., 356, 80 ALR 161, 163).

The rule of the Dunn case has been followed in United States v. Dotterweich, 320 U.S. 277; 64 S.Ct. 134, 88 L.Ed., 207 and Andett v. Johnston, Warden, 142 Fed. (2nd), 739,740. Under the facts proved and the applicable legal principles hereinabove set forth the court would have been fully authorized to find Wilson guilty of raping both of the women (Charge II and specifications). With reference to its failure to do so the following comment is pertinent:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions

> but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but which they were disposed through leniency" (Steckler v. United States, 7 Fed. (2nd) 59, 60).

The Board of Review recognized the foregoing principle as to inconsistent findings in CM ETO 1453, Fowler (Cf: CM 197115, Froelich, 3 BR 81, Dig. Op. JAG, 1912-1940, sec.395 (44) p.230; CM NATO 2121, Bull. JAG, June 1944, Vol. III, No.6, sec.450, pp.235,236).

The evidence as to Wilson's complicity in the crimes committed by Sanders and Anderson shows that he held Mons. Lehot, Madame Lehot and the Martin child under armed guard during the entire orgy. When Mons. Martin and Madame Hochet arrived at the premises they were also taken prisoners by Wilson. The proof is clear that he had his carbine and the German machine pistol continuously aimed at the group and thereby effected their terrorization and complete control. They were thereby prevented from succoring the two victims of the attacks. His guilt as an aider and abettor is complete and the finding of his guilt is supported by substantial evidence (CM NATO 385, Speed; CM NATO 643; CM NATO 1242; CM NATO 1121, Bray et al., Bull. JAG, February 1944, Vol. III, No.2, sec. 450, pp.61,62).

Three-quarters of the members of the court present at the time the vote was taken concurring, Wilson was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The sentence is legal for the following reasons: The Table of Maximum Punishments does not prescribe any limit of punishment for the crime of aiding and abetting the commission of the crime of rape. The nearest related offense is the crime of rape itself, for which a life sentence is one of the alternative mandatory punishments (AW 92). However, Wilson's guilt of the crime of aiding and abetting the commission of the crime of rape is not in this instance guilt of the crime of rape itself. He was acquitted of that crime. As has been demonstrated "aiding and abetting" is a distinct offense. The measure of punishment for it is determined by analogy only. While death is a legal punishment for rape it is not legal punishment for the separate offense of "aiding and abetting" the commission thereof

because Congress has not specifically authorized it(AW 43; MCM, 1928, par.103a, p.92). The sentence however may include confinement for life or any period less than life. This conclusion is not at variance with CM NATO 544, Helton wherein it was held that since life imprisonment is one of the mandatory punishments for murder the action of the reviewing authority in returning the record of trial for proceedings in revision whereby an original sentence of which included confinement at hard labor for 50 years only was increased to a life sentence was proper under Article of War 40(d). In that case the only authorized period of confinement was for life because accused was found guilty of murder under Article of War 92. In the instant case Wilson was found guilty of aiding and abetting the commission of the crime of rape for which imprisonment for life is not mandatory but only by analogy a measurement of the period of confinement which may be included in the sentence. In this instance, if Wilson's sentence had included confinement for life it would have been legal. Therefore, confinement for 20 years is legal.

Article of War 42 authorizes penitentiary confinement where an accused is convicted of an offense which

> "is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States"

Sec. 278, Federal Criminal Code (18 USCA 457) prescribes death as punishment for rape. However, upon qualifications of the verdict of guilty by the jury, the sentence shall be imprisonment for life (Sec.330, Federal Criminal Code; 18 USCA 567). Inasmuch as an aider or abettor is a principal under sec. 332 of the Federal Criminal Code he may be punished as such. Therefore, the confinement of Wilson in a penitentiary is authorized by law. The designation of United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement was proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

(280)

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

Sanders is 27 years of age. He was inducted 26 May 1942, at Fort Jackson, South Carolina;

Wilson is 24 years six months of age. He was inducted 27 May 1942, at Fort Jackson, South Carolina;

Anderson is 26 years nine months of age. He was inducted 22 June 1942, at Columbus, Ohio;

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

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

10. Death is an alternative mandatory sentence for the crime of rape (AW 92). The sentences of accused Sanders and Anderson are legal.

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(281)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Technician Fifth Grade JAMES B. SANDERS (34124233) and Private ROY W. ANDERSON (35407199), both of Company B, 29th Signal Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders 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 3740. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3740).

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

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

1 Incl:
Record of Trial

(Sentences ordered executed. GCMO 91, 92, ETO, 21 Oct 1944)

(282)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 SEP 1944 TO: Commanding General, Advance Section, Communications Zone, European Theater of Operations, APO 113, U.S. Army.

1. In the case of Private FLORINE WILSON (34124246), Company B. 29th Signal Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The sentences of death imposed upon Sanders and Anderson, co-accused with Wilson, were confirmed by the Commanding General, European Theater of Operations. The Board of Review held the record of trial legally sufficient to support the findings of guilty and sentences of death as to each of said two accused. I approved said holding. The confirming authority will promulgate the order directing execution of said sentences of death. In the event the sentences are carried into execution it is requested that you secure a complete copy of the proceedings and forward the same to this office in order that its files may be complete.

3. Accused Anderson testified that a soldier by the name of Riggle McCutcheon of Company B, 29th Signal Construction Battalion, engaged in an act of sexual intercourse with either Madame Martin or Madame Bocage. As a witness for the prosecution Madame Bocage testified that she was the victim of three assaults committed by three different soldiers. The evidence identified the accused Sanders and Anderson as the perpetrators of two of these offenses. The evidence also shows that accused Wilson remained in the court yard. Madame Bocage was unable to identify any of her assailants except Sanders. McCutcheon as a defense witness denied that he had engaged in sexual intercourse at the time and place alleged in the specifications. McCutcheon was not charged with any offense. I cannot ignore the implications of the foregoing evidence and invite your attention to same for such additional action as you may find advisable and proper under the circumstances.

4. When copies of the published order with respect to accused Wilson 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 3740. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3740).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3749

31 OCT 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Fougerolles du Plessis, France, 23 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private O. B. WARD (38469275), 3192nd Quartermaster Service Company.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private O. B. Ward, 3192nd Quartermaster Service Company, did, in the vicinity of Le Chene-Guerin, Normandy, France, on or about 11 August 1944, with intent to commit a felony, viz., rape, commit an assault upon Miss Melle Fernande Marie by willfully and feloniously throwing the said Miss Melle Fernande Marie to the ground, striking her on the body with his fists, and tearing away her clothing.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence was introduced of one previous conviction by special court for being drunk and disorderly in quarters and disobeying orders, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to be-

(284)

come due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 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 under Article of War 50½.

3. The uncontradicted evidence shows that at 8:15 on the morning of 11 August 1944, prosecutrix was milking cows about 400 meters from her home in the little village of Le Chene-Guerin in Normandy, France, where accused's organization was stationed (R6-7). Accused approached and attempted by signs and words to make conversation with her, suggesting that she come with him, and indicating, at the same time, the direction of the field. "I noticed that he wasn't so right", she testified, "so I quit milking the cows and started driving the cows away" (R7). Accused, however, prevented her returning home - "he grabbed me by the arm and threw me around". In the process, she lost a wooden shoe and a sock. Seizing her from the rear, accused then flung her to the ground where she lay on her back struggling while he "jumped down like a beast and got across my body". He also spread her legs apart and held them down with his knees.

> "I tried to get up and it was impossible. When I would say a word he would stop my mouth up and he hit me with his fist on my face. My nose started bleeding. Then I started hollering, hollering for help but nobody was coming. Then he crossed his arm and put it over my mouth and pressed my head down on the ground where I could hardly breathe. I started fighting with my arms. He was still fighting me every time I said a word. * * * The apron I was wearing was torn and the blouse I was wearing is torn. My blouse was full of blood. My face was full of blood too" (R8).

Endeavoring to remove her drawers,

> "He succeeded in taking one leg out but he couldn't take the other one out. * * * I don't know how I did it but I fought away from him. Every time I would holler he would stop my mouth up. He just succeeded in touching me but that is all. * * * I heard a truck on the road right close so I started hollering then right after he stopped my mouth up again then I used my fists and hit him two or three times and got up. Then I got up and started to take the little path to the road but he grabbed me again but didn't throw me down" (R8-9).

At the end of the struggle accused "had something on his face. He had the right eye kind of swollen". She could smell "a little, not much, not very much" liquor on accused's breath. During the assault, prosecutrix observed that "he was watching right on either side to see if anybody was coming". The next time she saw him was on the afternoon of the same day when military police escorted her to the bivouac area, where she recognized him (R9-10).

Accused's corporal checked his squad at about 8:30 that morning and found accused absent. About 45 minutes later, at approximately 9:15, he discovered accused asleep in his tent in the bivouac area about a quarter of a mile distant from the place of the assault. Upon wakening accused, it appeared to the corporal that accused had been drinking (R10-12).

4. The only evidence adduced by the defense was the testimony of the same corporal that, on the night preceding the assault, witness and three others, including accused, were out together, that accused was drunk, and that he fell down in the road and scarred his right eye. The corporal left accused about 10:30 p.m. and did not see him again until 9:15 the next morning, at which time "his eye was swollen and he was scarred on his side" (R12-13).

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

6. The evidence clearly indicates that the assault upon the prosecutrix was motivated and accompanied by the intent to rape her. Her identification of accused as her assailant was positive and definite. Surrounding circumstances, clearly shown, were such as to readily permit accused's being at the scene of the offense at the time it was committed; and the testimony of the sole witness for the defense that accused's eye was swollen and his face scarred as the result of a fall on the previous night, tends to corroborate rather than to refute prosecutrix' identification.

7. The charge sheet shows that accused is 26 years seven months of age, and that, with no prior service, he was inducted at Tulsa, Oklahoma, 29 April 1943, to serve for the duration of the war plus six months.

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

(286)

9. The offense of assault with intent to commit rape, in violation of Article of War 93, is punishable by imprisonment for 20 years (MCM, 1928, par.104c, p.99). Confinement in a United States Penitentiary is authorized (AW 42; 18 USC 455).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (287)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 OCT 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private O. B. WARD (38469275), 3192nd 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 and this indorsement. The file number of the record in this office is CM ETO 3749. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3749).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3750

31 OCT 1944

UNITED STATES	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Bricquebec, France, 10 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Private LEONARD G. BELL (35688818), 440th Quartermaster Troop Transport Company.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Leonard G. Bell, 440th Quartermaster Troop Transport company, did, at Pont D'Annaille, Brix, on or about 1 July 1944, with intent to commit a felony, viz., rape, commit an assault upon Madame Charles Henrix of Pont D'Annaille, Brix, by grabbing her and forcing her to her knees.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority 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.

(290)

3. The prosecution showed by competent evidence that accused is a private, United States Army, and was during July 1944 a member of the 440th Quartermaster Troop Transport Company, which was stationed in the vicinity of Rueville, France. About 1 July 1944, some of the troops of this organization, including accused, were temporarily bivouacked in the vicinity of Pont D'Annaille, France. Madame Charles Henrix, lived at Pont D'Annaille, France, with her husband (R7,11). On the afternoon of 1 July 1944, accused and Technician Fifth Grade Homer Wiley, of accused's organization, were near the home of Madame Henrix. She and her husband "came out" and gave them a glass of cider. Wiley went "back to the area for some cigarettes". He returned with a carton of cigarettes and accused presented five packs to the husband (R11). The two soldiers remained for about five minutes and then left the home. Accused told Wiley "to wait until he got back", after which he went "down toward St. Mere Eglise" (R12). Later on, Madame Henrix was at the river, where it flowed through a field, "about 250 meters from" her "plantation", getting ready to wash her clothes. Accused came into the field. She saw him. He remained "a few seconds and then went back". Later, according to Madame Henrix:

> "He [accused] went and looked under the bridge and he looked further out in the ditch. * * * About at the end of a few minutes he came back towards me. At that time he came back to me he made to catch me but he didn't. The rock he had underneath his feet made him roll and he fell with his two feet into the river" (R8).

When accused fell, Madame Henrix picked up her clothes and took "the little path in the field to escape to the road". She walked fast. Accused followed her. Three steps from the road, accused caught up and, grabbing her around the body, put his hand on her throat and carried her a little distance toward the field. He put her down. She was on her knees with her back to him. Then he pushed her to the ground, bruising her shoulder, and got on her. He "took" her "so rough" and she was so afraid that she couldn't exactly tell how. Madame Henrix said she could "not tell very well", but accused had hold of her "about two or five minutes - maybe more". She remembered that she screamed before and after he had his hands on her. At this time, two women came along and accused "turned me loose" and left (R8-10). Accused then met Wiley, about 30 minutes after the time they had separated on leaving the Henrix home. When Wiley saw him, accused was going away from the Henrix home. There were two ways to get back to their bivouac area. One, down the regular road past the Henrix place; and one, by a short cut back of that house. Wiley tried to get accused to return by the regular road, but accused said "it was a near cut through here and we would go through there" (R12).

4. Accused, after being advised of his rights, testified, under oath, in his own behalf. He said he knew the prosecutrix, having been at her home drinking cider "with another boy and her husband". He said he saw her later that day, about 30 steps across the road, "leaning down and washing clothes". He "walked down there and * * * offered a cigarette to her". He said she appeared frightened, picked up her washing and "started up the steps". Accused said that she had "two big shoes on" and, with the wash, "it seemed like she couldn't hardly make it". Accused explained that, accordingly, he

> "walked on the side and put my hand on her elbow and was helping her like you help a woman cross the street. She dropped the clothes and started screaming. I walked out and up on the road and seen T/5 Homer Wiley walking on the road and I walked up the road with him".

On cross-examination, accused said that he had a carbine "around" his arm that afternoon. He also said that immediately after this occurrence he ran into some other soldiers, whom he knew, on the way back to the bivouac area. They returned by the road that went past the Henrix home. He and Wiley went back by a short cut.

5. The story told by the prosecutrix shows that as she was about to emerge from a field onto a road, accused grabbed her around the body, put his hand on her throat and carried her back to the field where he forced her down on the ground and got on top of her. The evidence also shows that accused had seen this woman before the attack and that he followed her down to this field, where she was doing some washing and that before going into the field accused told a companion to wait until he got back. After the attack, accused avoided the road back to his bivouac area, which passed the home of the prosecutrix, and returned by a "near cut". The proved circumstances, judged in the light of human experience, indicate beyond doubt that accused's purpose in attacking Madame Henrix was to have sexual intercourse with her, accomplished by force, against her will, if necessary. Her screams proved that she did not consent. Accused desisted from his purpose, not voluntarily, but only because the two women approached the place of the attack. The evidence thus offered shows an assault with intent to commit rape, in violation of Article of War 93, as alleged in the Specification and as charged (MCM, 1928, par. 149 l, p.179).

On the other hand, accused told a story of a friendly approach by him to the prosecutrix, of his gentlemanly offer to assist her up an incline by putting his hand on her elbow, and of her subsequent fright and screaming.

It was the province of the court to accept the testimony introduced by the prosecution or the explanation offered by accused. The

prosecution's case was based on competent testimony and, substantial in character, spelled out the offense charged. The court accepted the prosecution's case and rejected the story of accused, as indicated by the findings of guilty. Under these circumstances, the findings of the court will not be disturbed by the Board of Review upon appellate review (CM ETO 1953, Lewis).

5. Accused is now 24 years old. He was inducted at Louisville, Kentucky, 27 November 1942, for the duration of the war plus six months. He had no previous service.

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

7. The offense of assault with intent to commit rape, in violation of Article of War 93, is punishable by imprisonment for 20 years (MCM, 1928, par.104c, p.99). Confinement in a United States Penitentiary is authorized by Article of War 42; section 276, Federal Criminal Code (18 USC 455).

E. U. Van Buren Judge Advocate

John Trumbull Judge Advocate

Benjamin R. Sleeper Judge Advocate

1st Ind. (293)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 OCT 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private LEONARD G. BELL (35688818), 440th 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 3750. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3750).

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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1 2 OCT 1944

CM ETO 3754

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at First Army Stockade, near Formigny, France, 3 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.
Private PAUL GILLENWATERS (15011040), 3686th Quartermaster Truck Company.	

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

---

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Paul Gillenwaters, 3686th Quartermaster Truck Company did, without proper leave, absent himself from his camp in the vicinity of St Marie Du Mont, France from about 2345, 16 July 1944 to about 0130 17 July 1944.

CHARGE II: Violation of the 93 Article of War.
Specification: In that * * * did, at or in the vicinity of Puppeville, Normandy, France, on or about 17 July 1944, feloniously and burglariously break and enter the dwelling house of Mrs. Marie Lecoeur with intent to commit a felony, viz Robbery therein.

He pleaded not guilty to and was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by summary court for being drunk and disorderly in uniform in a public place in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and of Charge I as involved a finding of guilty of absence without leave at the place alleged on 17 July 1944, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused Gillenwaters was charged separately and tried with Private Sandy Hubbard (34662274), 3687th Quartermaster Truck Company. Accused were tried together with their consent.

Accused Hubbard was tried upon the following charges and specifications:

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Sandy Hubbard 3687th Quartermaster Truck Company, did without proper leave absent himself from his camp in the vicinity of Ste Marie Du-Mont, France from about 2345 16 July 1944 to about 0130 17 July 1944.

CHARGE II: Violation of the 93 Article of War.
Specification: In that * * *, did, at or in the vicinity of Puppeville, Normandy, France, on or about 17 July 1944, feloniously and burglariously break and enter the dwelling house of Mrs. Marie Lecoeur with intent to commit a felony, viz Robbery therein.

He pleaded not guilty to and was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and of Charge I as involved a finding of guilty of absence without leave at the place alleged on 17 July 1944, approved the sentence and ordered it executed, but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The sentence as to accused Hubbard was promulgated in General Court-Martial Orders No. 73, Headquarters, First United States Army, APO 230, 1 September 1944.

4. The evidence is legally sufficient to support the approved findings of guilty of absence without leave in violation of Article of War 61 in the case of accused Gillenwaters (R8-15,17-18), and of accused Hubbard (R6-8,18-20;Ex.1) (Charge I and Specification as to each accused.

5. With reference to Charge II and Specification as to each accused (burglary in violation of Article of War 93), the evidence shows that on 17 July 1944 Madame Marie Lecoeur lived at St. Marie du Mont, France, with her four children (R8,10,13). On that date accused Gillenwaters was drinking cider in the area occupied by accused Hubbard's company, and said that he knew where some more cider could be obtained. Thereupon Gillenwaters and Hubbard left the area, went to the village of St. Marie du Mont, and knocked on the door of the Lecoeur dwelling about 1:20 a.m., 17 July. When Madame Lecoeur did not answer, accused opened the "blind window" of her bedroom (R8;Exs.2,3). She was in bed and although it was dark she could see both accused as her bed was very close to the window (R10-11). She then called her son Joseph, who opened the door, and both accused, uninvited, entered the house "on their own hook." Madame Lecoeur testified that she did not invite accused to enter the house, that she let them in solely because she was afraid, and because she thought they were going to "come through the window" (R8-10,13). When Joseph opened the door Gillenwaters was armed and held the gun in his right hand, with the barrel pointed downward and his right index finger on the trigger (R9-11, 13). Madame Lecoeur testified that she was "afraid" (R10), and Joseph testified that he "didn't feel so safe" (R13). Both accused entered Madame Lecoeur's bedroom and Gillenwaters asked for some cider. She replied that she had none (R8,12-13,15). Both

accused lit matches and requested that the light be lit, which was done by either the woman or her son (R8,11,14). Joseph asked them to leave but Gillenwaters again asked for some cider. Joseph continually asked them to leave, but Gillenwaters "kept on bothering" him for cider. Neither accused "wanted to leave" (R13). Finally, the woman and her son went to the nearby home of Madame Lecoeur's mother. They were followed by Gillenwaters but Hubbard remained in Madame Lecoeur's house. Gillenwaters was given two glasses of cider at the second house. He gave Joseph a cigarette but did not pay for the cider. Joseph testified that he wanted no payment (R8-10,13-14). While Gillenwaters was in the second house Madame Lecoeur left and informed the military police, who went to her home and took Hubbard into custody (R9-10,14-16). When Gillenwaters finished drinking the cider he returned to his company area (Ex.3). Accused did not harm anyone, asked only for cider and took nothing from the house (R11,15,17). An inspection of the house the following day disclosed no evidence that accused broke into the dwelling (R17). The cider consumed by Gillenwaters belonged to Madame Lecoeur's mother (R23).

6. The specification in which the offense of burglary is alleged (Specification of Charge II as to each accused) is not in the usual form in that the words "in the night time" were omitted (MCM, 1928, app. 4, form No. 91, p. 249). However, it is alleged that each accused did, at the time and place alleged,

> "feloniously and burglariously break and enter the dwelling house of Mrs. Marie Lecoeur with intent to commit a felony, viz. Robbery therein." (underscoring supplied).

Thus, all of the elements of burglary were alleged with the exception of the above mentioned omitted words.

> "BURGLARIOUSLY. A technical word which must be introduced into an indictment for burglary at common law" (Bouvier's Law Dictionary, 3d Ed., Vol. 1, p. 404).

> "BURGLARIOUSLY. In pleading, A technical word which must be introduced into an indictment for burglary at common law" (Black's Law Dictionary, 3d Ed., p. 259).

It is provided in part in Article of War 37 that the proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case:

> "***for any error as to any matter of pleading *** unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused" (Underscoring supplied).
>
> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby.***." MCM, 1928, par. 87b, p.74). (Underscoring supplied).

The counterpart of Article of War 37 contained in the United States Criminal Code is as follows:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. R.S.sec. 1025." (18 USCA, sec. 556, p.34).
>
> "An indictment or information is sufficient under this section, if the offense be described with sufficient clearness to show a violation of law, to enable accused to know the nature and cause of the accusation, and to plead a judgment, if one be rendered, in bar of further prosecution for the same offense." (18 USCA, Note 27, p. 43).

"An indictment which will enable a person of common understanding to know what is intended is sufficient." (Ibid).

"Mistakes in expressing the substance of a crime, if the meaning can be understood, will be looked upon as formal defects." (18 USCA, Note 28, p. 44) (Underscoring supplied).

The specifications as to each accused definitely set forth the time and place where the offense was committed, the fact that accused feloniously and burglariously broke and entered the dwelling house of the person alleged with the intent to commit a felony, namely, robbery therein. The Board of Review is of the opinion that the inclusion of the word "burglariously", with its special connotation, together with the other allegations contained in the specifications, were sufficiently detailed in nature as to enable each accused adequately to prepare his defense and to obviate any risk of double jeopardy. It cannot reasonably be claimed that accused were misled by any defects contained in the specifications. The defense made no objection with relation to the sufficiency of the allegations as to burglary, and the evidence clearly showed that the offense was committed during the night time. In view of the foregoing, the provisions of Article of War 37 are clearly applicable. The Board of Review is of the opinion that the allegations with respect to this offense were legally sufficient (CM ETO 850, Elkins; 9 CJ, footnote 38, p.1036).

7. "Discussion.--Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. (Bishop).

"The term 'felony' includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value). It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible."

* * *

"Proof.--(a) That the accused broke and entered a certain dwelling house of a

certain other person, as specified; (b) that such breaking and entering were done in the nighttime; and (c) the facts and circumstances of the case (for instance, the actual commission of the felony) which indicate that such breaking and entering were done with the intent to commit the alleged felony therein." (MCM, 1928, par.149d,pp.168-169).

"Where the owner, either from apprehension or force, or with the view more effectually to repel it, opens the door through which the robber enters, this is burglary. (Vol. 2, Wharton's Criminal Law, 12th Ed., sec. 986, pp.1285-1286). (Underscoring supplied).

The accepted rule concerning proof of intent is as follows:

"The intent must be proved as laid in the indictment. An allegation of breaking and entering with intent to commit a particular felony is not sustained by proof of a breaking with intent to commit some other felony. It is not necessary, however, to prove the whole intent if enough is proved to make out the offense." (9 C.J., sec. 118,p.1063).

"As the felonious intent alleged in the indictment is an essential element of the offense, it must be established affirmatively by the evidence beyond a reasonable doubt, unless there is a statute allowing presumption of intent from the breaking and entry.

"The intent, however, may, and generally must, be proved by circumstantial evidence, for as a rule it is not susceptible of direct proof. And it has been held that the evidence of intent sufficient to support a conviction of burglary may be slight, in the absence of any evidence that the entry was made with any other intent. The existence, at the time of the breaking and entering, of an intent to commit larceny, rape, murder, or other felony may be inferred as a fact from proof of the actual commission of a felony

is the best evidence of the felonious intent. And even where the felony was not actually committed, an intent to commit the same may be inferred from the time and manner at and in which the entry was made, or the conduct of the accused after the entry, or both." (9 CJ, sec. 138, pp. 1078-1079). (Underscoring supplied).

"Robbery is the taking, with the intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark) * * * It is not necessary that the person from whom the property is taken be the actual owner - it is enough if he has a possession or custody that is good against the taker. * * * It is equally robbery where the robber by threats or menaces puts his victim in such fear that he is warranted in making no resistance. The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while such apprehension exists. The danger apprehended may be, for instance, his own death or some bodily injury to him * * *" (MCM, 1928, par. 149f, pp. 170-171) (Underscoring supplied).

The evidence shows that both accused went to the village for the sole purpose of obtaining cider. It was about 1:20 a.m. and was dark. Gillenwaters armed himself with a gun. When their knock on the door was unanswered, they opened the "blind window" of Madame Lecoeur's bedroom, and when her son opened the door at her request, both accused, uninvited, made their way into the house. It was clearly established by the evidence that Madame Lecoeur allowed them to enter solely because she was frightened and feared that otherwise they would effect an entry through her bedroom window. Her son Joseph, who opened the door, was also frightened. Gillenwaters' finger was on the trigger of his gun. They invaded the privacy of the woman's bedroom and demanded some cider. When she replied that she had no cider, both accused told the occupants to light the light. Thereafter, despite repeated requests that they leave the house, they steadfastly refused to do so and insisted that they be given cider. Finally, the woman and her son went to the house of the former's mother where they gave some cider to accused Gillenwaters who had followed them.

The evidence clearly established a "constructive" breaking by accused in that they were allowed to enter the house solely because they put the occupants thereof in fright. The breaking was effected during the night time, namely, about 1:20 a.m. The intent to commit the alleged felony, robbery, was clearly evidenced by a breaking and entry during the night at a time when the occupants would be in bed, by the fact that Gillenwaters was armed, by the repeated and menacing demands for cider, and the outright refusal to leave the premises until accused fulfilled their purpose. It is apparent that the woman and her son finally obtained the cider because they feared, and reasonably so, that death or bodily injury would be inflicted upon them by accused unless they acceded to their demands.

The evidence showed that accused Gillenwaters was armed and that accused Hubbard was not armed. Gillenwaters was apparently the chief spokesman concerning the cider and successfully obtained two glasses of the beverage. There was no evidence that accused Hubbard obtained any cider. However, the evidence, viewed as a whole, showed that both accused engaged in a wrongful joint venture to obtain cider and each was responsible not only for his own illegal acts, but also for all illegal acts committed by his partner in pursuance of the common purpose of forcing the victims to accommodate them (CM ETO 3475, Blackwell, et al). Moreover, as indicated by the foregoing authorities, it is immaterial whether the intended felony was actually committed or even attempted.

Whether the breaking and entry were accompanied by the intent to commit the felony alleged, robbery, was a question of fact for the sole determination of the court. As competent substantial evidence fully supported the findings of guilty, such determination will not be disturbed by the Board upon appellate review (CM ETO 78, M. Watts).

8. The charge sheet shows that accused Gillenwaters is 35 years of age and enlisted in the regular army 3 August 1940 at Fort Hayes, Ohio. (His period of service is governed by the Service Extension Act of 1941). He had no prior service.

9. The court was legally constituted and had jurisdiction of the person of accused Gillenwaters and of the offenses committed by him. No errors injuriously affecting the substantial rights of this 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 approved findings of guilty and the sentence as to accused Gillenwaters.

10. Confinement in a penitentiary is authorized for the offense of burglary by Article of War 42 and section 22-1801 (6:55), District of Columbia Code. In as much as accused Gillenwaters is 35 years of age, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), and 3a,b).

Edward K. Dupuy, Judge Advocate

Malcolm C. Sherman, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 OCT 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private PAUL GILLENWATERS (15011040), 3686th Quartermaster Truck Compan, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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 3754. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3754).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General

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

BOARD OF REVIEW NO. 1

11 NOV 1944

CM ETO 3775

U N I T E D S T A T E S v. Privates CHARLES MOORE (38289428), JAMES I. BURGESS (33451702), and JAMES PARKS (36300300), all of Company B, 40th Signal Construction Battalion	HEADQUARTERS SPECIAL TROOPS, TWELFTH ARMY GROUP. Trial by GCM, convened at Headquarters, Central Group of Armies, APO 655, U. S. Army, 1 September 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for eight years. The Federal Reformatory, Chillicothe, Ohio.

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

---

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

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

CHARGE I: Violation of the 92nd Article of War.
(Finding of not guilty)
Specification 1: (Parks - rape of Germaine Ozenne, 4 August 1944) (Finding of not guilty)
Specification 2: (Parks and Burgess - joint rape of Germaine Ozenne, 6 August 1944) (Finding of not guilty)
Specification 3: (Moore - rape of Catherine Mucha, 6 August 1944) (Finding of not guilty)

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private James Parks,

3775

(308)

Private James I. Burgess, and Private Charles Moore, all of Company B, 40th Signal Construction Battalion, acting jointly and in pursuance of a common intent, did, in the vicinity of Cerisy la Salle, Manche, France, on or about 6 August 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of one Rene Fossard with intent to commit the felonies of larceny and rape therein.

ADDITIONAL CHARGE: Violation of the 92nd Article of War.
(Finding of not guilty)
Specification: (Parks - rape of Catherine Mucha, 6 August 1944) (Finding of not guilty)

ADDITIONAL CHARGE: Violation of the 92nd Article of War.
(Finding of not guilty)
Specification: (Moore - rape of Germaine Ozenne, 6 August 1944) (Finding of not guilty)

Each accused pleaded not guilty to the charges and specifications preferred against him, and each was found guilty of Charge II and of its Specification, except for the words "and rape", and not guilty of the remaining charges and specifications preferred against him. No evidence of previous convictions was introduced against accused Moore. Evidence was introduced against accused Burgess of two previous convictions: One by summary court for absence without leave for 20 days, in violation of Article of War 61, and one by special court-martial for absence without leave for 20½ hours and disobedience of the lawful order of a superior officer to perform company punishment, in violation of Articles of War 61 and 96, respectively. Evidence was introduced against accused Parks of one previous conviction by special court-martial for absence without leave for ten days (erroneously shown as one year and ten days), in violation of Article of War 61. 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 eight years. The reviewing authority approved each of the sentences, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The court was warranted in finding that each accused, at the time and place alleged, acting jointly and in pursuance of a common intent, entered in the night the home of Rene Fossard, intending to commit a criminal offense therein, to wit: larceny. Such intent

was evidenced by their taking and carrying away Fossard's personal property, namely, money, a radio, a watch and spirits or wine. All the elements of burglary were clearly shown by competent substantial evidence fully supporting the findings of guilty as to each accused (MCM, 1928, par.149d, pp.168-169; CM ETO 3754, Gillenwaters).

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

Moore is 22 years of age. He was inducted 23 September 1942, at Little Rock, Arkansas.

Burgess is 24 years of age. He was inducted 8 January 1943 at Fort Myer, Virginia.

Parks is 21 years of age. He was inducted 3 November 1941 at Chicago, Illinois.

Moore and Burgess were inducted to serve for the duration of the war plus six months. (Parks' service period is governed by the Service Extension Act of 1941). None had any prior service.

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

6. Confinement in a penitentiary is authorized for the offense of burglary by Article of War 42 and section 22-1801(6:55), District of Columbia Code. As each accused is under 31 years of age and the sentence as to each is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as to each accused is proper (Cir.229, WD, 8 Jun 1944, Sec.II, pars.1a(1), 3a).

_____ Judge Advocate

Ellwood K. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

3775

(310)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 NOV 1944 TO: Commanding General, Special Troops Twelfth Army Group, APO 655, U. S. Army.

1. In the case of Privates CHARLES MOORE (38289428), JAMES I. BURGESS (33451702) and JAMES PARKS (36300300), all of Company B, 40th Signal Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the 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 orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3775. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 3775).

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

3775

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

BOARD OF REVIEW NO. 2

CM ETO 3778

31 OCT 1944

U N I T E D S T A T E S	)	3D BOMBARDMENT DIVISION
	)	
v.	)	Trial by GCM, convened at AAF Station 152, England, 13 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
	)	
Private GEORGE B. DARCY (12156344), 862nd Bombardment Squadron, 493rd Bombardment Group.	)	

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

---

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

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

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

Specification: In that Private George B. Darcy, 862d Bombardment Squadron, 493d Bombardment Group, did at Ipswich, Suffolk, England, on on about 10 August 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Anthony Ernest Rose, 20 Dover Road, Ipswich, Suffolk, England.

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

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

(312)

Specification 2: In that * * * did, at Ipswich, Suffolk, England, on or about 10 August 1944, wrongfully contribute to the delinquency of Anthony Ernest Rose, 20 Dover Road, Ipswich, Suffolk, England, a minor under the age of sixteen years, by handling, fondling and playing with his penis.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court, for failure to perform assigned duties, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority disapproved the findings of Specification 1, Charge II, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent uncontradicted evidence, including the testimony of accused, establishes his commission of the offenses charged. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence (CM ETO 3436, Paquette; CM ETO 3717, Farrington).

4. The charge sheet shows that accused is 20 years eight months of age, and that he enlisted at New York City, New York, 20 October 1942, for the duration of the war plus six months. He had no prior service.

5. Confinement in a penitentiary is authorized for the offense of sodomy (AW 42; District of Columbia Code, title 22, section 107; MCM, 1928, par. 90a, p.81). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

Benjamin R. Cooper Judge Advocate

3778

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 OCT 1944 TO: Commanding General, 3D Bombardment Division, APO 559, U. S. Army.

1. In the case of Private GEORGE B. DARCY (12156344), 862nd Bombardment Squadron, 493rd Bombardment Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3778. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3778).

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

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

(315)

BOARD OF REVIEW NO. 1

10 NOV 1944

CM ETO 3801

U N I T E D S T A T E S	)	V CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, Magny, France, 9 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private EDWARD H. SMITH (32521127), 3892d Quartermaster Truck Company	)	

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

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

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

CHARGE I: Violation of the 63rd Article of War.
Specification: In that Private Edward H. Smith, 3892 Quartermaster Truck Company, did, in the vicinity of Torigni-Sur-Vire, France, on or about 6 August 1944, behave himself with disrespect toward Second Lieutenant Albert B. Skinner, 3892 Quartermaster Truck Company, his superior officer, by saying to him, "You dirty son-of-a-bitch, you bastard" or words to that effect.

CHARGE II: Violation of the 65th Article of War.
Specification: In that * * * did, in the vicinity of Torigni-Sur-Vire, France, on or about 6 August 1944, use the following threatening and insulting language and behave himself in an

(316)

insubordinate manner toward Sergeant Eugene E. Catlett, 3892 Quartermaster Truck Company, a noncommissioned officer who was then in the execution of his office, by saying to him, "I'll get even with you yet, You dirty Son-of-a bitch", or words to that effect.

CHARGE III: Violation of the 83rd Article of War.
(Finding of Not Guilty)
Specification: (Finding of Not Guilty)

CHARGE IV: Violation of the 96th Article of War.
Specification I: In that * * * did, in the vicinity of Torigni-Sur-Vire, France, on or about 6 August 1944, wrongfully and deliberately discharge a rifle in camp.

Specification 2: In that * * * was, in the vicinity of Torigni-Sur-Vire, France, on or about 6 August 1944, drunk and disorderly in camp.

Specification 3: In that * * * did, in the vicinity of Torigni-Sur-Vire, France, at about 0730 hours on or about 7 August 1944, use the following threatening and insulting language and behave himself in an insubordinate manner toward Second Lieutenant Albert B. Skinner, 3892 Quartermaster Truck Company, his superior officer, who was then in the execution of his office, by saying to him, "I'll get you yet, I know where your home is located, you son-of-a-bitch", or words to that effect.

Specification 4: In that * * * did, in the vicinity of Torigni-Sur-Vire, France, at about 1300 hours on or about 7 August 1944, use the following threatening and insulting language and behave himself in an insubordinate manner toward Second Lieutenant Albert B. Skinner, 3892 Quartermaster Truck Company, his superior officer, who was then in the execution of his office, by saying to him, "Your time is coming, I'll get even with you yet, you No Good Son-of-a-bitchin Officer", or words to that effect.

He pleaded not guilty and was found guilty of Charges I, II, IV, and all specifications thereunder and not guilty of Charge III and its Specification. No evidence of previous convictions was introduced. He was sentenced to be

dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence, in pertinent summary, showed that on 6 August 1944 at the place alleged, while in camp, accused was drunk and violently disorderly (R10-12, 18-22) (Charge IV, Specification 2), and wrongfully and deliberately fired three shots from an O-3 rifle (R8-9, 12, 23-24) (Charge IV, Specification 1). At about 2300 hours, upon the order of Second Lieutenant Albert B. Skinner, of accused's company, Sergeant Eugene E. Catlett, of the same company, assisted in placing accused and another soldier in a guard trailer, from which they attempted to escape, and thereafter in tying their hands and feet (R9-10, 12-14). Accused thereupon said to Catlett "I'll get you, you dirty son-of-a-bitch" (R10) (Charge II, Specification), and said to Lieutenant Skinner when the latter attempted to "cool Smith down", "Get your Goddamned hands off of me, you son-of-a-bitchin bastard" and called him a "No good son-of-a-bitch, mother _____ officer. Goddamned horse's ass of an officer" (R13) (Charge I, Specification).

About 0730 hours, 7 August, Lieutenant Skinner sent accused and the other soldier under guard to the mess hall for breakfast (R15). On their way back to the trailer, Lieutenant Skinner ordered accused to remove a cigarette from his mouth and, upon the latter's remonstrance, ordered it forcibly taken from him (R17). Accused said to Lieutenant Skinner

> "I will get you yet. I know where you live. You live in Cumberland, Wisconsin. I'll get you yet. You, no good son-of-a-bitch. You mother _____ bastard. Treat us like we were in the Nazi army" (R15) (Charge IV, Specification 3).

About 1300 hours accused and the other soldier boarded a truck for the stockade. Accused, who was ill, started to lie down on the seat of the truck. Lieutenant Skinner ordered him to sit up. Lieutenant Skinner testified

> "He didn't like that. He told me, 'You Goddamned son-of-a-bitch. You are a no good officer. Your time is coming. You no good son-of-a-bitchin bastard, mother _____ officer'" (R16; Charge IV, Specification 4).

4. (a) For the defense, Private William Knight, of accused's company, testified that he was with accused throughout the entire day of 7 August 1944 and that after breakfast when Lieutenant Skinner told accused and witness to extinguish their cigarettes, each said "that even Nazis were allowed

cigarettes after eating" (R26). This was the only remark made by accused to Lieutenant Skinner "outside of asking to get his shelter-half" (R26-27).

(b) After his rights were explained to him, accused elected to remain silent (R28).

5. (a) Immediately following the arraignment the defense moved

> "that specifications 3 and 4 of Charge IV be struck out as not alleging any offense under the 96th Article of War, but being properly chargeable under the 63rd Article of War. There being, therefore, a multiplication of charges in contradiction to paragraph 27, page 17, Manual for Courts-Martial" (R5).

The court overruled the motion (R6-7). The cited provision of the Manual for Courts-Martial (1928), is as follows:

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. * * * when a soldier willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is again given by the same or other superior, a multiplication of charges of disobedience should be avoided. However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses."

With respect to the charging of a series of similar offenses, Winthrop comments as follows:

> "*******. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offence or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permits of an indefinite number of offences being charged and adjudicated together in one and the same proceeding. And, with a view to the summary and final action so important in military cases, wherever an officer or soldier has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all, should, if practicable, be preferred together and together brought

to trial; separate sets of charges, where they exist, being consolidated" (Winthrop's Military Law and Precedents - Reprint, p. 152).

The evidence establishes that accused committed three separate and distinct offenses with respect to Lieutenant Skinner, his superior officer, as severally alleged in the Specification of Charge I (using disrespectful language) and Specifications 3 and 4 of Charge IV (using threatening and insulting language and insubordination) (MCM, 1928, par. 133, pp. 146-147; CM ETO 2921, Span, and authorities there cited; CM ETO 106, Orbon). There were clear lapses of several hours between the first and second and between the second and third offenses. The separateness and distinctness of each of the three offenses is not affected by the fact that their commission indicated a continuing contumacious state of mind on accused's part.

Moreover, as stated by the prosecution (R5-6) and the Staff Judge Advocate (Review, par. 11, p. 4), the offenses alleged in Specifications 3 and 4 of Charge IV as violations of Article of War 96, involved not only disrespectful behavior toward a superior officer but also threatening language of an extremely insubordinate nature toward such officer, and were therefore far more serious in nature than the mere disrespectful behavior contemplated by Article of War 63, the maximum punishment for which is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (MCM, 1928, par. 104c, p. 98).

"The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

* * * * * * * * *

Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. Disrespect by acts may be exhibited in a variety of modes--as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer" (MCM, 1928, par. 133, pp. 146-147).

Although threats may and sometimes do accompany or aggravate disrespectful behavior (Cf: CM ETO 106, Orbon), they may extend beyond the scope of Article of War 63 in seriousness, as may be inferred from the above quoted portions of the Manual for Courts-Martial.

Although Article of War 63 denounces only disrespectful behavior toward a superior officer and Article of War 64 denounces only the assaulting and willful disobedience of such officer, Article of War 65 denounces

these offenses when committed against a warrant officer or a noncommissioned officer and also the use of threatening language and insubordinate behavior toward such officer. Neither Articles of War 63 or 64 denounce as such the use of threatening language or insubordinate behavior toward a superior commissioned officer. Consequently such conduct may also with propriety be charged as a violation of Article of War 96, under which there is no maximum punishment except that a sentence of death is unauthorized (Cf: CM ETO 2212, Coldiron, p. 12 and authorities there cited). With respect to the scope of Article of War 63 in this connection, the following comment on the scope of Article of War 65 should be considered:

> "This article has the same general objects with respect to warrant officers and noncommissioned officers as A.W. 63-64 have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect.
>
> * * * * * * * * *
>
> The part of the article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application" (MCM, 1928, par.135a, p. 149).

Reading the two portions of the comment together, it is apparent that the same offenses are denounced in Articles of War 63 and 64 on the one hand and Article of War 65 on the other only generally, in regard to the objects sought to be attained, and that one respect in which Article of War 65 is more inclusive in its scope is in the matter of threatened violence.

The determination of the defense motion to strike out Specifications 3 and 4 of Charge IV was a matter wholly within the judicial discretion of the court, and, as in the opinion of the Board of Review in view of the foregoing it was not arbitrary, the denial of the motion will not be disturbed by the Board upon appellate review (Winthrop's Military Law and Precedents - Reprint, p. 291; CM ETO 895, Davis et al., p. 24).

(b) The issue of fact raised by the defense testimony in denial of the allegations of Specifications 3 and 4, Charge IV, was resolved against accused by the court in its findings of guilty. As such findings are supported by competent substantial evidence, they will not be disturbed upon appellate review (CM ETO 3628, Mason; CM ETO 1621, Leatherberry).

6. The evidence is clear that accused used threatening and insulting language and behaved in an insubordinate manner toward Catlett as alleged in the Specification of Charge II, in violation of Article of War 65 (CM ETO 1661, Hass); also that he wrongfully and deliberately discharged a rifle in camp as alleged in Specification 1, Charge IV (CM ETO 866, O'Connell and Haza),

and was drunk and disorderly in camp, as alleged in Specification 2, Charge IV, both in violation of Article of War 96.

7. Inasmuch as it was not necessary to prove a specific intent on the part of accused, his drunkenness could not minimize his offense (CM ETO 106, Orbon; Cf. CM ETO 3937, Bigrow).

8. The charge sheet shows that accused is 34 years of age and was inducted at Fort Jay, New York, 6 October 1942, 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec. VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

3801

(322)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 NOV 1944 TO: Commanding General, V Corps, APO 305, U. S. Army

1. In the case of Private EDWARD H. SMITH (32521127), 3892d Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. There was no evidence of previous convictions of accused by court-martial and his civil record fails to reveal bad character. Although his conduct was certainly disorderly and highly insubordinate, it appeared to be more properly attributable to his drunken condition at the time than to any inherent viciousness in his character. I do not believe that he should be separated from military service and freed from the hazards and dangers of combat by incarceration until all possibilities of salvaging his value as a soldier have been exhausted. The Government should preserve the right to use his services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend that consideration be given to the designation of an appropriate disciplinary training center as the place of confinement, with suspension of the execution of the dishonorable discharge until the soldier's release from confinement. Supplemental action should be forwarded to this office for attachment to the 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 3801. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3801).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3803

16 NOV 1944

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class BOOKER T. GADDIS (42018556), Privates DAVID KING (14045559), VELMUS HOLLAND (38031960), JESSE NEWSOM (37526569), RAYMOND SMITH (38326926), JOE W. BURNETT (18002916), MARSHALL W. CARTER (35735785), ALONZER FULLER (34065098), JAMES L. TARVER (34748635), and ROBERT A. HOGG (35733757), all of 3184th Quartermaster Service Company.	Trial by GCM, convened at Rennes, Brittany, France, 4 September 1944. Sentences: Each accused, dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

2. The accused were jointly tried upon the following Charge and Specification:

CHARGE: Violation of the 66th Article of War.
Specification: In that Private Velmus Holland, Private David King, Private Jesse Newsom, Private Raymond Smith, Private Joe W. Burnett, Private Marshall W. Carter, Private Alonzer Fuller, Private Robert A. Hogg, Private James L. Tarver, and Private First Class Booker T. Gaddis, all of the 3184th Quartermaster Service Company, acting jointly, and in pursuance

3803

(324)

of a common intent, did in the vicinity of Rennes, Brittany, France on or about 18 August 1944 cause a mutiny in that they did, concertedly and willfully refuse to obey the lawful orders of First Lieutenant Eddie Diamond, 3184th Quartermaster Service Company, their superior Officer, to turn in their weapons, namely Carbines and Rifles Caliber thirty 1903-A3, with the intent to usurp, subvert and override for the time being lawful, military authority.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions of any of accused was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence substantially proved the following facts:

All of accused were members of 3184th Quartermaster Service Company, which on 18 August 1944 was stationed in the proximity of Rennes, France at or near L'Hermitage. First Lieutenant Eddie Diamond was in command of the company, which was composed of approximately 190 enlisted men. The company was bivouacked in an area about 100 feet square and its shelters were pup tents (R8-9). The company camp consisted of three fields. In one field the first platoon was bivouacked and the bivouac of the second platoon was in the second and third fields. The company had been bivouacked in that area for about four or five days prior to 18 August 1944 (R31).

At about 1800 hours on 18 August 1944, First Sergeant Willie L. Simms, 3184th Quartermaster Service Company, walked from the orderly room to the mess hall. En route he saw a group composed of 12 to 14 soldiers gathered in the second field. Sergeant Willie Parker and Private Robert Thomas were on the ground engaged in a fight. Simms separated the combatants (R31) and ordered the two men to report to the company commander who was near the orderly room in the first field. Parker immediately complied with the order and departed, but Thomas refused to go (R32). Lieutenant Diamond at that time proceeded through the bivouac area. He passed Parker and then saw Simms grab Thomas and try to hold him. Thomas endeavored to attract the attention of other soldiers who were then at mess. The company commander and Simms attempted to quiet Thomas. A number of the soldiers left the kitchen area and assembled near Thomas, but were prevailed upon to

return to their supper (R9, 23). Lieutenant Diamond escorted Thomas to the edge of the area and questioned him in an effort to discover the cause of the disturbance. Thomas continued disorderly and demanded and attempted to secure a weapon. The situation with respect to the soldiers had "gotten bad" by this time (R10).

Lieutenant Diamond then left the area, visited Colonel Collis, commander of the 534th Quartermaster Group, and explained to him the situation which had arisen (R10). He returned to the area and ordered a company formation. Between 1900 and 2000 hours approximately 190 men "fell out" with their weapons.(R10, 24, 32). The ten accused were then present bearing their arms. Lieutenant Diamond told the men that when the supply sergeant called each of their names from Form 32 each soldier was to step to the rear of a truck and deposit his weapon in the truck, and that bayonets were also to be delivered (R11, 18, 24, 27, 32, 34). Murmuring and conversation immediately commenced in the second platoon which contained the accused. One Private Joseph L. Mattox talked loudly. Simms gave him the order "at ease", which was not obeyed by Mattox, who stepped out of the formation. Simms started to walk towards him but was halted by Lieutenant Diamond (R11, 18, 24, 32, 34). At this time a number of the men commenced to load their weapons. When Mattox left the formation the ten accused followed him and stood about in a disorganized group separate from the company. The murmuring of the men increased. It came from the direction of the accused. One soldier said in effect,

> "I am not going to turn in my piece and if you expect me to turn my piece in, send me back to the States" (R11, 18).

The company commander then informed the men that he was not going to try to take the pieces from them, but that he ordered them "to turn their pieces in". He further stated that it was a direct order that every man should step up and deliver his piece to the supply sergeant when his name was called. (R11-12, 19, 24, 32, 35). He also directed Mattox and the ten accused, who continued to be out of formation, "to fall in where they were". Mattox stood a greater distance from the company formation than the accused. The commander directed him in particular "to come back and fall in on the side" (R12, 19, 24, 32). The ten accused and Private Mattox thereupon deliberately and of their own volition turned and walked down to the end of the bivouac area and "assembled on the grass" at a point estimated by witnesses to be from 40 to 150 yards distant from the company. They carried their weapons with them. The remainder of the company, approximately 179 men, delivered their weapons as ordered (R12, 16-17, 25). Lieutenant Diamond did not direct Mattox and the accused to proceed to the other end of the field (R17, 28).

When two-thirds of the men had delivered their weapons, Lieutenant Diamond walked to the place where Mattox and the ten accused were sitting on the ground. He asked them as a group, "Do you men know what you are doing?" There was no reply. Instead, all of the men laid back on the ground with

their weapons in their arms or between their legs. The company commander repeated his question to each of the men individually and further said, "Do you realize you will get yourself into a lot of trouble for what you are doing now? Do you know what you are doing?" As he asked each man he wrote his name and reply in a note book. The substance and effect of their replies were that "if they did not know what they were doing they would not have come down to the area" (R12, 13, 17, 19, 22). After he had ordered each man to "turn in his piece" and made proper note of the fact in his book he said,

> "You have all been properly instructed and have received orders what to do and you have refused to do it."

He then returned to the supply sergeant and directed him to check and account for each weapon (R13, 17). The arms held by Mattox and the ten accused were not delivered nor did any account of them appear (R13).

Thereupon, Lieutenant Diamond reported the facts to Colonel Collis. When he returned to the bivouac area he directed his officers and non-commissioned officers to go to the supply sergeant and secure the re-issuance of their arms to them. Upon being rearmed the noncommissioned officers were instructed to "sling their arms" and spread out behind Lieutenant Diamond. Each had a clip of cartridges (R13, 17, 20, 25, 33). In this formation at about 2100 hours they approached the area or field occupied by the second platoon where the ten accused were located (R13, 17). Lieutenant Diamond mounted a bank which separated the areas occupied by the first and second platoons and called in a loud voice,

> "Put your pieces down on the ground and come out with your hands up" (R13, 20, 33).

There was no reply and the order was repeated two or three times (R13, 36). Major Kaufman and First Lieutenant Jack S. Harvey, who accompanied Lieutenant Diamond, each repeated the order several times but there was no immediate response. It was dark and the area was wooded, but the forms of men could be plainly seen in the center of the area. Finally a man appeared and was ordered to keep to the center of the field. Major Kaufman directed him to lie on the ground and crawl across the bank or ditch, and also ordered, "Drop that piece." At that moment five or six men appeared and simultaneously two or three shots came from the direction of these men (R14, 26). At the first burst a man then in the field about 12 feet in front of Lieutenant Diamond weaved about and fell. It was Mattox (R14-15, 17, 33). He had been shot and thereafter died (R15). A volley of 20 or 25 shots then came from all directions in the field in front of Lieutenant Diamond (R14, 33), and these were followed by shots coming from the kitchen which were fired by accused Holland (R41-42). Private Jimmie Stanfield, who had been left to guard the kitchen, called, "Here's Buttercup over here" ("Buttercup" was the nick-name of accused Holland). Lieutenant Diamond

directed Holland, "Don't make a move or I'll shoot." Holland was taken into custody (R14, 22, 41).

After Mattox fell, Major Kaufman ordered all of the men to crawl across the ditch bank and lie face-downward. All accused complied except Hogg, Carter and Tarver. As the men came over the ditch, Lieutenant Diamond wrote their names in his note book. They had, pursuant to directions, left their arms in the field (R15, 26, 33). The arms of all accused (as well as the gun of deceased Mattox) except that of accused Holland were recovered from the field. Holland's gun was found in the kitchen (R15, 16, 22). Two of the guns picked up in the field by Lieutenant Diamond had been fired (R17, 22). Holland's gun had been fired and had jammed (R18, 34). Considerable ammunition was also recovered from the accused (R18). About 25 or 30 minutes after seven of the accused surrendered Hogg, Carter and Tarver appeared (R14-15, 33). A shot was fired by Corporal Hutton at Hogg to require him to come into the light. Tarver was the last man to appear. Mattox was taken to the hospital. The ten accused were ordered into formation, searched and placed in arrest (R16).

4. In addition to the testimony which proved the foregoing facts, the prosecution introduced in evidence over objection of the defense written statements of each accused which were obtained by Major William J. Fedeli, 534th Quartermaster Group, who investigated the incident upon the orders of Colonel Collis (R44-47; Pros. Ex. 1, Holland; Pros. Ex. 2, King; Pros. Ex. 3, Newsom; Pros. Ex. 4, Smith; Pros. Ex. 5, Burnett; Pros. Ex. 6, Carter; Pros. Ex. 7, Fuller; Pros. Ex. 8, Tarver; Pros. Ex. 9, Hogg; Pros. Ex. 10, Gaddis). The statements bear a striking similarity. For this reason it is not necessary to reproduce each of them in extenso. The statement of accused Gaddis (Pros. Ex. 10) is typical of the statements of all other accused, except Holland. Gaddis' statement follows:

> "Disobeyed C.O. order because a colonel told us that there were snipers still around. Went to other end of field gathered in small group, later went to bed: Took off my shoes and jacket. Suddenly heard an order to come out of tent with hands up. This I did, and walked up to where the men were at the ditch and laid my rifle on the ground. After this the firing started and I jumped into the nearby ditch without my rifle. I ran on down the ditch during the actual firing and met Pfc. Daymond Henderson one of the guards. He was laying down on the bank too. When firing ceased I came on out over the ditch and got into the group as they told me. Pfc. Turner Hargrave saw me in the ditch too."

(328)

Holland's statement (Pros. Ex. 1) reads thus:

> "When the company commander ordered all those who did not want to turn in their rifles to go to the other end of the field, I went to the other end of the field, sat down by my tent talking to Pvt. James L. Tarver. Later the C. O. came down to the tent and asked us if we knew what we were doing. I answered I did know what I was doing, and the C.O. walked back to the orderly room. Then I laid down in my tent. When the C.O. ordered Fall out with your arms" I got up and started to walk towards the orderly room with my piece at slung arms. Then a shot was fired. The order came from the C.O. to put down your arms and come out with your hands up. More shots were fired and I took cover. Then I got up after the order came to cease fire, and walked across the ditch."

5. Each of the accused elected to testify as a defense witness. Their testimony may be fairly summarized as follows:

The company was ordered into formation. Simms indicated that the soldiers' guns would be collected. Lieutenant Diamond said,

> "When your name is called off, come down here to the sergeant and turn your piece in" (R57, 65, 69, 74, 78, 80, 83, 88, 94, 99).

Simms and Mattox engaged in a dispute (R57, 65, 69, 94, 99). The company commander halted Simms and said to Mattox,

> "I want you to turn in those rifles. That's a direct order" (R57, 99).

Mattox replied,

> "If I turn in my rifle, will you put me under guard for protection?" (R57-59, 65, 70, 78, 83, 88).

At that point Lieutenant Diamond turned to the company and said,

> "All that don't want to turn in their rifles go to the other end of the field" (R57, 59, 62, 65, 69, 71-72, 74, 76, 77, 79, 80, 83, 86, 88, 94, 96, 99, 102).

Mattox and the ten accused stepped from the company formation and walked to the other end of the field (R57, 62, 65, 74, 79, 83, 88, 94). They crossed a ditch into another field and remained there "shooting craps" and singing until they went to bed (R57, 59, 62, 65, 99). They had their weapons with them (R60, 63, 67, 71, 75, 79, 84, 89, 95, 96, 100).

Lieutenant Diamond came to the group and asked each of the accused whether he knew what he was doing. Hogg replied that he wanted to keep his rifle because he was scared (R58), Holland answered, "Yes sir" (R62) and "that there was snipers and the officer told us to watch out for snipers and the Germans" (R63). Gaddis said, "I didn't want to turn my piece in because of snipers and Frenchmen walking around the area with their guns" (R65). Burnett informed Lieutenant Diamond "that the reason I didn't want to turn my piece in was on account of out there in that bivouac area the French civilians were walking out through the area all the time through the day and some of them had rifles, and I told them I didn't know whether they were Germans or not because I wouldn't know a Frenchman from a German because I can't speak either one of the languages" (R70, 71). Smith replied that he kept his rifle "because of snipers" (R74). Tarver said "we knew what we are doing" (R79). Fuller announced: "I was afraid" (R85). Carter: "I told him I was keeping my rifle to try to protect myself; that I was afraid out there at night" (R88). King answered, "I didn't want to stay there without my piece" (R94). Newsom also answered: "Yes, Sir" (R99).

Newsom, about dark went to his tent. As he was removing his shoes the company commander ordered: "All men with pieces come out with your hands up." He complied. Upon the further command "Lay down in front of me with your hands stretched over your head", he laid down. Shots were fired (R99). He left his rifle in his tent (R101). Thereafter he was taken to the guard house (R99).

Hogg remained in the field for some time, but finally went to his pup tent and removed his shoes. Soon thereafter he heard the order,

> "Lay your rifle down and come out with your hands up" (R57).

He put his shoes on and then laid down in the field. He did not fire a shot (R57-58). He admitted that the declaration in his statement (Pros. Ex. 9):

> "Disobeyed the order of the C.O. to turn in rifles"

was true (R60).

Holland was in the field about 25 minutes and then went to his tent. He heard the command,

(330)

"Throw up your hands and drop your rifle" (R62).

He put up his hands and his rifle fell to the ground. When he stooped to pick it up he heard a shot and took cover near some trees. Corporal Hagood ordered, "Come out with your hands up". Holland complied with the order and delivered his gun (R62). He denied that he was behind the stove in the kitchen, and that he had shot his gun or that it jammed (R63).

Gaddis remained in the field singing and talking to the kitchen personnel until he and King went to bed. When nearly asleep he heard the order "to come out". He dressed, took his rifle and went to the ditch. The order was given,

"Halt, we have you covered. Drop that piece" (R66).

He dropped his gun and ran along the bank until he met the guard, Private First Class Daymond Henderson. There were shots fired. Henderson and Gaddis lay down in the ditch together until the firing ceased and they and another soldier then came out together (R66). He admitted he disobeyed the order to turn in his rifle (R67).

Burnett remained in the field until black-out time and then went to his tent. When he was about ready for bed he heard the company commander order,

"Come out with your hands up. We have you covered" (R70).

He and Newsom dressed and advanced with their hands in the air. Burnett left his rifle in his tent. At a second command he lay on the ground. Firing commenced and after the second burst all of the men except three came to Lieutenant Diamond, who called the roll from a note book. He denied that he had fired his gun (R70, 71). He admitted that he knew Lieutenant Diamond wanted the arms turned in and that he had not done so, but offered no excuse for not complying with the order (R72).

Smith, when it was dark, went to his pup tent and lay down. After 35 or 45 minutes he heard the order,

"All of you men with your pieces come out with your hands up" (R74-75).

He went with six others to the ditch where somebody shone a flashlight on them and said, "Drop them rifles. I have got you covered." He laid down his rifle and firing commenced. He went into the ditch until firing ceased and then left the ditch and surrendered. He did not fire his gun (R74).

Tarver went to his tent when it was dark. He heard the company commander's voice and when he heard it again, went out and advanced until a voice cried, "Drop your rifles, we got you covered". He dropped his rifle. A light was flashed and a shot was fired. Tarver took cover and then went to his tent until the firing ceased. Then the company commander appeared, and was "checking". Three were missing, Tarver, Holland and Carter. Tarver was in his tent. Upon Lieutenant Diamond's order, he came out. He did not fire his rifle, which he left in the middle of the field when he was ordered to drop it (R79).

Fuller, after Lieutenant Diamond visited the accused in the field, went to his tent. After about an hour a voice which sounded like that of the commanding officer said, "Come out with your pieces and hands up." Fuller went to within 25 paces of the spot from whence the voice came and received the order, "Drop your pieces. I got you covered." He dropped his gun. A shot was fired and he took cover behind a tree. The shooting continued about 10 minutes, when the order was given, "cease firing and come out with your hands up". Fuller obeyed and lay down on the ground upon subsequent order. He did not fire his gun (R83), as it was in the field while the shooting was occurring (R84).

Carter remained until it was dark and then went to his tent and to bed. He was informed by Gaddis that Lieutenant Diamond had ordered them to "fall out". He took his gun and with Gaddis and King went into the field. Some one ordered, "Halt, Drop your pieces we have got you covered." Firing commenced from an adjoining field and he took cover in a ditch. He was called and when he advanced another shot was fired. He took cover again, but finally he went out. He did not fire his gun (R88).

King went to his tent and to bed after the company commander left the group. He was awakened, took his gun and started for the front area when he heard some shots and took cover. When the shooting ceased some one said, "You men raise your hands and come on out". He obeyed the command, and lay on the ground. He did not fire his gun (R94-95).

6. With respect to the ten several statements of accused (Pros. Exs. 1-10) the court was specifically instructed that

> "any statement in any or the written statements just read which refers to any of the accused other than the man making that particular statement is inadmissible and irrelevant and will not be considered by the Court. * * * the statement made by each accused is admissible only against the particular person who made the statement" (R47).

Such cautionary instruction has been approved by the Board of Review as being adequate and sufficient to protect the rights of each of several

co-accused (CM ETO 1052, Geddies, et al; CM ETO 3499, Bender, et al). The statements in legal effect were not confessions but only admissions against interest. Consequently they were admissible without proof of their voluntary nature and without the establishment of the corpus delecti by independent evidence (CM ETO 2535, Utermoehlen, and authorities therein cited).

7. The Specification alleges that the accused

> "acting jointly, and in pursuance of a common intent, did * * * cause a mutiny in that they did, concertedly and willfully refuse to obey the lawful orders of First Lieutenant Eddie Diamond, * * * their superior Officer, to turn in their weapons, namely Carbines and Rifles * * * with intent to usurp, subvert and override for the time being lawful, military authority" (Underscoring supplied).

The 66th Article of War provides:

> "Any person subject to military law * * * who begins, excites, causes or joins in any mutiny * * * in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court martial may direct". (Underscoring supplied).

The Manual for Courts-Martial explains:

> "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. * * * The concert of insubordination contemplated in mutiny * * * need not be preconceived nor is it necessary that the act of insubordination be active or violent. * * * The intent which distinguishes mutiny * * * is the intent to resist lawful authority in combination with others. The intent to create a mutiny * * * may be declared in words, or, as in all other cases, it may be inferred from acts done or from surrounding circumstances. * * *
>
> "There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons.

> Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.
>
> " * * * no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities" (MCM, 1928, pars. 136a,b,c, pp. 150, 151).

Winthrop makes the following pertinent comments:

> "Mutiny has been variously described, but in general not in such terms as fully to distinguish it from some other military crimes, the characterizing intent not being sufficiently recognized. It may, it is believed, properly be defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office.
>
> "It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. Thus, disrespect toward a commanding officer, the offence which is the subject of Art. 20, has sometimes been charged as mutiny. More frequently the * * * disobedience of orders, -- offences specifically made punishable by Art. 21 -- have been so charged or considered."

* * *

(334)

"The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offence as understood at martime law. Thus, in regard to mutiny or revolt on American merchant vessels, it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime, * * *, that mere disobedience of orders, unaccompanied by such intent, does not amount to mutiny, * * *.

* * *

"The intent may be openly declared in words, or it may be implied from the act or acts done, --as, for example, from the actual subversion or suppression of the superior authority, * * * and refusal to march or do duty, * * *; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination — that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose — is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question.

* * * *

"While the intent indicated is essential to the offence, the same is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice.

"Who begins, excites, causes, or joins in, any mutiny, &c. Samuel distinguishes in general terms the two classes of persons contemplated by the Article as those who lead and those who follow. And the simplest view to take of the words quoted is, to treat begin, excite and cause as different names

for the same thing, to wit the offence of the officer or soldier who originates or is instrumental in originating a mutiny, and join in as referring especially to the offence of one who participates in a mutiny when once inaugurated.

"Strictly, however -- though the terms are not necessarily so closely construed -- the beginning of a mutiny would embrace only cases in which the offender himself personally takes the initiative in the overt act or proceeding of opposition or resistance; while the exciting or causing of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance, &c., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as -- especially -- by an officer or non-commissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, &c." (Winthrop's Military Law and Precedences - Reprint, pp. 578-583).

The evidence is substantial that Lieutenant Diamond, the company commander, for reasons deemed expedient and proper by him, obtained the approval by his superior of the plan to collect and impound the weapons of the members of his company on the night of 18 August 1944. As to the necessity or wisdom of such action the Board of Review is not concerned. Acting upon such determination, he caused his company to be assembled and gave to the personnel thereof, including the ten accused who were present, the clear and positive order to deposit their firearms and bayonets on a truck as their names were called. The accused and the deceased, Mattox, protested this order by dissident mutterings and murmurings which finally ripened into active and overt disobedience. They left the company formation and upon receiving a definite command from Lieutenant Diamond to reform themselves in military order they ignored the command and moved to an area considerably distant from the company. Thereafter, when approached by Lieutenant Diamond and warned by him as to the consequences of their disobedience, they persisted in their refusal to obey his command, and

offered in lieu of performance excuses with respect to the presence of snipers and the enemy although it is clear that none of them had encountered either the one or the other. Thereafter, the commander deemed it necessary to secure possession of the weapons by force, with the result that promiscuous and uncontrolled discharge of firearms occurred in camp. During this melee Mattox met his death at the hands of one or more of his fellow soldiers.

The case obviously could have been properly laid and expeditiously handled under the 64th Article of War -- disobedience of a lawful command of a superior officer (Cf: CM ETO 3078, Bonds, et al). However, the evidence discloses the presence of elements of collective insubordination and of the specific intent by each of the accused to override and displace, in combination with his fellow accused, the powers of command and the authority of Lieutenant Diamond. Although the recalcitrancy and specific intent may have arisen spontaneously upon the giving of the order by the company commander to the personnel to deliver their weapons, there is substantial evidence that a consolidation of purposes followed immediately. Consequently when Mattox and the ten accused left the company formation the existence of a conspiratorial agreement may legitimately and reasonably be inferred. That such agreement had for its purpose the retention of their weapons by the accused, in derogation of the authority of the company commander, is made manifest by the conduct of accused when they were approached a few minutes later by Lieutenant Diamond and warned of the probable consequences of their conduct. They thereby succeeded, temporarily, in setting aside the power and authority of higher command. The necessary overt act of beginning a mutiny was shown by their deliberate, willful and disobedient departure from the company formation carrying with them their firearms. All of the elements of the offense of beginning a mutiny therefore existed -- (a) a conspiratorial agreement, (b) the specific intent to displace and override superior authority, and (c) the overt act of beginning a mutiny.

The primary question involved is whether this evidence sustains the allegation that the accused did "cause a mutiny". It is unfortunate that the pleader did not heed Winthrop's dissertation as to the strict meaning which it is possible to apply to the word "cause" in connection with the charge of "causing" a mutiny in contradistinction to the meaning of the word "begin" in connection with the charge of "beginning" a mutiny. There need be no hesitation in declaring that the accused, and each of them, committed an overt act of "beginning" a mutiny, but does this conclusion deny the averment that they thereby "caused" a mutiny?

Webster's New International Dictionary (2nd Edition) defines the verb "cause" as follows:

> "To be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make. Synonymous: create, produce, occasion, originate, induce."

Notwithstanding Winthrop's refinement above quoted, which distinguishes between "beginning a mutiny" and "causing a mutiny" (but is qualified by the statement that "the terms are not necessarily so closely construed"), it would seem that the verb "cause" includes within its meaning the verb "begin". While the former is probably broader in its connotation than the latter, no uncertainty or ambiguity arises in attributing to the verb "cause" a meaning equivalent to that possessed by the verb "begin". It appears to the Board of Review that any other interpretation of the verb "cause" would be playing with words based on a mere metaphysical distinction which ignores the practical daily use of words. When one says that "Jones caused a mutiny" he certainly includes the assertion that "Jones began a mutiny".

The Board of Review in its appellate function has heretofore exercised the power to construe and interpret specifications (CM ETO 1190, Armstrong; CM ETO 1249, Marchetti; CM ETO 2608, Hughes; CM ETO 3740, Sanders, et al).

Therefore, the specification may properly be construed as charging that the accused did

"begin a mutiny".

As has been demonstrated above, the evidence substantially sustains such charge (CM ETO 895, Davis, et al; CM ETO 3147, Gayles, et al.).

The defense was predicated upon the proposition that Lieutenant Diamond offered members of his company the alternative of either surrendering their arms and bayonets or moving to the "other end of the field", and therefore when accused left the formation and refused to deliver their arms they did not disobey the company commander's order but conversely acted under it. This version of the episode is directly opposed to the theory of the prosecution's case and evidence, and insofar as the defense's evidence conflicted with that of the prosecution an issue of fact arose. The court's determination of this issue adverse to accused is binding upon the Board of Review and it will not be disturbed upon appellate review (CM ETO 3147, Gayles, et al, supra).

8. The charge sheet shows the service of the several accused as follows:

Accused	Age	Inducted (I) or Enlisted (E)	Date
King	22 yrs. 5 mos.	(E) Fort Benning, Georgia	10 Jun 1941
Holland	24 " 3 "	(I) Fort Sam Houston, Texas	20 May 1941
Newsom	24 " 3 "	(I) Fort Leavenworth, Kansas	20 May 1943

(338)

Accused	Age	Inducted (I) or Enlisted (E)	Date
Smith	21 yrs. 1 mo.	(I) Tulsa, Oklahoma	31 Dec 1942
Burnett	22 " 9 "	(E) ---	22 Aug 1940
Carter	20 " 2 "	(E) Fort Benjamin Harrison, Indiana	8 Nov 1943
Fuller	22 " 1 "	(I) Fort Benning, Georgia	10 Nov 1941
Tarver	19 " 9 "	(I) Fort Benning, Georgia	23 Apr 1943
Hogg	25 " 9 "	(I) Fort Benjamin Harrison, Indiana	6 Oct 1943
Gaddis	21 " 2 "	(E) Fort Dix, New Jersey	27 Oct 1943

None of the accused had any prior service.

9. The punishment for violation of the 66th Article of War is "death or such other punishment as a court-martial may direct". The Table of Maximum Punishments prescribes no maximum limit of confinement. The sentences are therefore legal. Confinement in a penitentiary is authorized upon conviction of the crime of mutiny in any of its aspects by AW 42 and Act 28 Jun 1940, c. 439, Title I, sec. 5; 54 Stat. 671; 18 USCA sec. 13.

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

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens Jr. Judge Advocate

(339)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private First Class BOOKER T. GADDIS (42018556); and Privates DAVID KING (14045559), VELMUS HOLLAND (38031960), JESSE NEWSOM (37526569), RAYMOND SMITH (38326926), JOE W. BURNETT (18002916), MARSHALL W. CARTER (35735785), ALONZER FULLER (34065098), JAMES L. TARVER (34748635), and ROBERT A. HOGG (35733757), attention is invited to the foregoing holding of the Board of Review that the record is legally sufficient as to each accused 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. I inclose copy of GCMO No. 24, 16 February 1944, VIII Air Force Service Command, in CM ETO 895, Davis, et al, and also copy of GCMO No. 83, 29 September 1944, First United States Army, in CM ETO 3147, Gayles, et al. (Please return said copies). In the first-mentioned case certain accused were found guilty of joining in a mutiny under the 66th Article of War and of offenses growing out of the same incident under Articles of War 89 and 96. In the second case certain accused were found guilty of beginning a mutiny, other accused of joining in a mutiny under the 66th Article of War, and all accused of disobedience of the lawful command of a superior officer under the 64th Article of War, an offense directly involved in the mutiny charges. You will note that the approved penitentiary sentences in these cases are of considerably less duration than the sentences in the instant case. In the interest of maintenance of equality and uniformity of sentences in this theater, I submit for your consideration the question whether the periods of confinement of the soldiers named in paragraph 1 hereof should be reduced.

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 3803. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3803).

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

2 Incls:
1 - Cy GCMO #24, 16 Feb 1944,
VIII Air Force Service Command
2 - Cy GCMO #83, 29 Sep 1944,
First United States Army.

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

BOARD OF REVIEW NO. 1

CM ETO 3811

25 NOV 1944

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Saint Hubert, Belgium, 14 September 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROBERT E. MORGAN (37554121) and Private First Class RICHARD E. KIMBALL (39195190), both of Company "I", 8th Infantry	)	

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

---

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that (Private Robert E. Morgan) (Private First Class Richard E. Kimball), Company "I", 8th infantry did, near St Pois, France, on or about 4 August 1944, misbehave himself before the enemy, by failing to advance with his command, which then had been ordered forward by the Battalion Commander to engage with the Germans, which forces the said command was then opposing.

Each pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, each was found guilty of

the Charge and Specification pertaining to him. No evidence of previous convictions of either accused was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, 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 as to each accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each and forwarded the record of trial for action pursuant to Article of War 50½.

3. Uncontroverted evidence for the prosecution established the following:

Second Lieutenant Mahlon C. Knorpp testified that on 4 August 1944 he was platoon leader of the second platoon of Company I, 8th Infantry (R6). Both accused were members of his platoon. For a number of days prior to 4 August, Company I was continuously in contact with the enemy (R8). On that date the company was in the vicinity of Hill 211, St. Pois, France (R6). Just prior to 1100 hours Knorpp received from the company commander an attack order, which emanated from the battalion commander and which indicated the location of Company K as on the left of Company I, with Company L in reserve, and ordered an advance toward Hill 211, approximately 200-250 yards to the front (R6,8,12). He immediately informed the squad leaders and assistant squad leaders of his platoon of the order and instructed them to pass it on to the men (R8,12). The second platoon was on Company I's left flank and was supposed to keep in contact with Company K (R6). Accuseds' proper position was even with the leading squad (R11). Shortly after the commencement of the advance pursuant to the order, the company encountered heavy enemy flat trajectory fire. After elements of the second platoon had advanced approximately 200-300 yards, witness discovered that one of his squads did not keep abreast with the remainder of the platoon. While going back to check the situation he found both accused huddled together along a sunken road about 300 yards back of the forward elements of the platoon (R6) and at least 200 yards behind its rearmost elements (R6,9). The sector where accused were found was then receiving "fairly heavy" fire from at least two enemy machine guns and several automatic pistols (R9). When discovered, both explained to him that the reason they were in that location was that they were scared (R8,10). They were evidently aware of the situation and that they should have been up with their own squad. No other men of the second platoon were back there at the time (R8). Knorpp ordered both accused to accompany him forward to the platoon area, directed them in front of him and opened a gate in a fence for them to pass through toward the front. They protested that flat trajectory fire was coming through the gap formed by the open gate. Knorpp waited for some time, but no fire came through the gap. On his order both accused preceded him through the gap. The three thereupon encountered enemy mortar fire and several shells fell near them (R7,9,10). Witness ordered them to take cover in nearby foxholes which

had been dug by Germans along a hedgerow running parallel to the line of attack. He entered the leading foxhole and accused, who understood his order, occupied foxholes directly behind him. The fire continued for several minutes (R7,9,11) and when it lifted, neither accused was in his foxhole (R7). They did not pass in front of Knorpp (R9). He searched carefully for them for a few minutes but did not find them and rejoined his platoon (R7,12). The second platoon was in continuous contact with the enemy (R11), and the relative positions of the Companies I, K and L remained the same until nightfall (R11,12). Thereafter the platoon assembled approximately half-way up the hill, where it remained during the night of 4 August (R7).

Knorpp did not see either accused that night and neither attempted to rejoin the company then, but the next morning, 5 August, between 0800 and 0900 hours, prior to the resumption of the attack, he discovered accused Kimball sitting on a stone near the company command post eating a C ration (R7,11). Questioned as to his whereabouts, Kimball stated he had gone to the rear and had remained with Company L during the remainder of the attack of the previous day (R7-8, 10-11). Thereafter the company continued the attack and immediately gained contact with the enemy (R11).

On 7 August 1944 Lieutenant Knorpp saw accused Morgan, who also stated that he had been with Company L during the attack of 4 August.

> "He stated at that time that he did not have * * * the moral strength to carry him through another attack" (R8).

Knorpp did not order accused or any other men to join Company L on 4 August, nor did he order accused to perform any duty which would require them to leave their position in the leading wave of the attack (R11).

At the time of the commencement of the attack the physical health of both accused was excellent and they were evidently physically capable of advancing with the remainder of their platoon (R8).

4. (a) For the defense, a soldier of accused's company testified that he was in combat with accused from sometime in July through 10 August 1944 and that based on his personal knowledge of them he did not think they would have gone to the rear or intentionally separated themselves from their organization in combat (R13).

(b) After accused were advised of their rights, each elected to remain silent (R13).

5. During cross-examination of Lieutenant Knorpp the following colloquy occurred:

(344)

"Q. Is it possible, Lieutenant Knorpp, that these two men (the accused) could have been separated from their squad in the advance in this fire fight?

A. There is always that possibility. However, I can say without reserve, 'No' in this case. Although I have never been able to prove it before, these men have been in similar incidents about two or three times.

Q. Do you mean to say this is not the first time?

A. Yes, however, I cannot prove that. That is the reason I have not brought charges against them before.

Q. It is just your opinion that they might have stayed behind in a fire fight before?

A. Yes, sir" (R10).

No objection to the above quoted testimony was made and the members of the court were not instructed to disregard it. Whether competent proof that accused had committed offenses similar to those for which they were being tried might have been admissible in evidence under the rule permitting the introduction of "evidence of other acts of accused, not too remote in point of time, manifesting (criminal) intent, motive, or knowledge," (MCM, 1928, par. 112b, p. 112), the Board of Review is not here called upon to decide; the witness' statements above quoted fell far short of competent proof. They well illustrate the reason for the fundamental general principle that "a witness must state facts and not his opinions or conclusions", which applies in full force in trials by courts-martial (MCM, 1928, par. 112b, p. 111).

> "Giving in evidence his (the witness') opinion or conclusion upon matters within the scope of common knowledge and experience, or where all the relevant facts can be introduced, is not permitted. It is the peculiar province of the jury to draw deductions and form conclusions from the facts shown by the evidence, and questions which call for the ultimate conclusion of the witness on facts invade that province. Furthermore, the danger that the members of the jury may substitute the opinion for their own is involved" (Underscoring supplied) (2 Wharton's Criminal Evidence, sec. 944, pp.1658-1659).

That the commission by accused of similar acts was susceptible of competent, objective factual proof without the need of opinions or conclusions of a witness, is well illustrated by the evidence adduced by the prosecution herein which is set forth and will be adverted to below. The failure of the defense counsel to object to the testimony or to request that the members of the court be instructed to disregard it did not waive or cure its incompetency (CM ETO 1042, Collette, and authorities therein cited). The frankness and forthrightness of the witness' testimony as to prior similar misconduct by accused, evidenced by his acknowledgment that he had "never been able to prove it before" and therefore had not previously brought charges against them, did not nullify the potential damaging effect of his testimony. Rather, it may well have impressed the members of the court with the essential fair-mindedness of the witness, thereby involving the danger that they might substitute his opinion and conclusion for their own. Because of the peculiarly damming nature of the testimony

> "it is impossible for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court" (CM ETO 1201, Pheil, quoted in CM ETO 1693, Allen).

The vital question for determination here, as in the last cited cases, is whether the manifestly improper injection of this testimony "injuriously affected the substantial rights" of accused within the purview of Article of War 37. The answer to this question must be in the affirmative unless the record contains compelling evidence of accuseds' guilt, within the doctrine of the Pheil and Allen cases, supra.

The uncontroverted evidence, inculpating both accused, which includes their own admissions against interest, aliunde the inadmissible opinion testimony, is full, clear and convincing. Accuseds' platoon leader testified that while their company was pressing the attack upon the enemy at the time and place alleged in the specifications and when it was under fire, accused not only surrepetitiously hid together in a sunken road 200 yards behind their platoon, but after the platoon leader ordered them forward and shells fell near them, they left the foxholes where they had taken cover pursuant to his order, departed and thereafter failed to advance with their company.

Lieutenant Knorpp's testimony was a particularly convincing eyewitness account of accuseds' shameful actions. His powers of observation and memory, reflected in his detailed testimony as to the times, places, distances, tactical situations and other attendant circumstances and as to accuseds' conduct could leave no doubt in the minds of reasonable men of each accused's guilt of the offense charged against him. The following

language by the Board of Review in CM ETO 1693, Allen, is peculiarly relevant:

> "In the opinion of the Board of Review, the legal evidence against accused in this case, unlike that against the accused in CM ETO 1201, Pheil, was not only incriminating but also excluded 'any fair and rational hypothesis except that of guilty' (MCM, 1928, par. 78a, p. 63). The evidence, aliunde the (inadmissible evidence), was 'of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty'. It did not contain that 'inherent uncertainty which prevents it from attaining the weight and dignity of "compelling" evidence; rather it did "possess the quality of realism demanded to sustain the finding of guilty"' (CM ETO 1201, Pheil).
>
> "Consequently it may be said that the repercussion of the illegal evidence (inadmissible evidence) upon the other evidence would not 'influence the court in its weighing and consideration of the other evidence' and hence that its admission did not substantially prejudice accused's rights" (Ibid.).

Both elements of the offense alleged in violation of Article of War 75 were fully, clearly and compellingly established by competent evidence as to each accused. The Board of Review is therefore of the opinion that the introduction of the improper testimony of witness' opinion and conclusion as to former similar acts of accused did not injuriously affect the substantial rights of either accused within the purview of Article of War 37.

6. The charge sheet shows that accused Morgan is 21 years of age and was inducted at Fort Snelling, Minnesota, 8 March 1943, and that accused Kimball is 28 years of age and was inducted at Tacoma, Washington, 19 November 1942. Neither had any prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(348)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding Officer, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private ROBERT E. MORGAN (37554121) and Private First Class RICHARD E. KIMBALL (39195190), both of Company "I", 8th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3811. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3811).

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

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

BOARD OF REVIEW NO. 2

16 DEC 1944

CM ETO 3812

U N I T E D S T A T E S	XII CORPS
v.	Trial by GCM, convened at Sens, France, 28-29 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.
Private CHARLES A. HARSHNER (17045842), Company A, 93rd Signal Battalion	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private Charles A. Harshner (then Technician Fourth Grade) Company A, 93rd Signal Battalion, did, in the vicinity of VW 0951, Nord De Guerre Section, France on or about 19 August 1944, with intent to do him bodily harm, commit an assault upon Monsieur Manuel Martinez, by shooting at him with a dangerous weapon to wit, a carbine.

He pleaded not guilty, and was found not guilty of Specification 1, guilty of Specification 2 and guilty of the Charge. 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

3812

reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence offered by the prosecution showed that on 19 August 1944, at about 1330 hours, accused and Private Clinton E. Salyer, both of Company A, 93rd Signal Battalion, left camp and walked about three and one-half miles to a house where they were offered refreshments. This house was at Foutaine Raoul, Par Droue, France (R10,11,26,29). Here the two soldiers remained until about 1630 hours drinking wine, cognac and coffee (R11,13). They then departed, going across a field to another farmhouse. There accused tried to talk to a lady "holding a little kid". Salyer left them, and was proceeding along the road where he had reached a point some 100 or 150 yards from the farmhouse when he heard a woman's cries. He ran back to the farmhouse where he saw the lady and the little child. "The lady was standing out in the yard crying and hollering". Accused, also, was standing there. Salyer said to accused, "Come on with me". Accused "didn't want to go to camp", but accompanied Salyer "out to the road and down the road". Then accused sat down (R11,12,13).

"The lady with a little child" was Madame Suzanne Martinez of Foutaine Raoul, Par Droue. She testified that on the day in question, at about 1900 hours, she was at home when two soldiers "passed on the road". One of them was the accused, who fell in front of the house, "got up and came to me at the door". He was armed with a rifle. "After the rifle shots", her husband, who had been working nearby, arrived in the farmyard. He "tried to make the soldier understand that" he and his wife were French. Accused "did not understand". He loaded his rifle and pointed it at Monsieur Martinez (R26,27,29,30). "The rifle was touching me", Martinez testified. "I backed up slowly and when I was about 4 meters away from him I ran". As the Frenchman retreated, accused walked toward him. When Martinez turned to run, accused fired. Martinez was about five meters from accused when he heard the bullet. "It passed very near me", he testified (R29-32).

4. The defense showed on cross-examination of prosecution witnesses that accused during his visit to the first farmhouse drank a quart of wine and had two drinks of cognac in coffee (R13). Madame Martinez said that at the time when accused was at her house, he appeared very drunk, "a very, very drunk man" (R28). Monsieur Martinez described accused as "very drunk" (R32). At about ten o'clock that night, Captain Eugene M. Henry, Medical Corps, a prosecution witness, examined accused, whom he found lying in the yard of a Madame Biette (who lived between 100 and 150 meters from the home of Madame Martinez) (R16,17,18,28).

The captain testified he found accused in a complete alcoholic stupor (R17,19); he was "out * * * he had no mental function in him at that time * * *. He could not be aroused, he had no reflexes" (R18). The captain further testified that this amounted to a mental "derangement" such as to incapacitate him to appreciate the wrongfulness of any acts committed by him, specifically, at the time of the shooting of Madame Biette (R19), which occurred at about 7:30 p.m., approximately one-half hour after accused shot at Monsieur Martinez (R28,33,40). An alcoholic stupor of this kind could continue "for hours" (R20). First Lieutenant George R. Leonard, III, 3255th Signal Service Company, saw accused "after seven o'clock" (p.m.), very shortly subsequent to the shooting of Madame Biette. He found him "stretched out, he wasn't conscious". The lieutenant succeeded in bringing him to.

> "I asked him his organization and he said he was from the 93rd Signal Battalion. There was the odor of intoxicating beverages about him. He had been sick all over himself.* * * soon I had gotten him on his feet but he staggered all around so I had him sit down. He went out a second time. * * * He got up on his feet. I didn't help him" (R21,23).

Captain Logan, accused's commanding officer, was recalled as a witness for the defense. He said accused had been in his platoon and later in his company for over two years, during which time accused had been "a law-abiding citizen", had borne a very good reputation and had, so far as he knew, never received company punishment. He had never heard of accused drinking to excess and in fact understood from "some of the men" that accused had not taken a drink "for quite some time" (R41-43).

Accused, advised as to his rights, elected to take the stand and testify under oath. He said that he entered the military service in 1942 as a volunteer and had worked his way up to technician fourth grade. He never had been reduced during that time until "recently". He remembered leaving his area about 1:30 p.m. on 19 August and walking with Private Salyer about one and a half miles to a farmhouse where they were offered drink. He and Salyer drank two bottles of wine and some cognac. He said he was not an "experienced drinker" and that "the next thing I remember I got up and was putting on my cartridge belt and everything got dizzy to me and that is all". He remembered none of these occurrences nor seeing Monsieur Martinez. His memory failed him while he and Salyer were drinking, "everything just went into a spin". Accused believed that he was "exceedingly drunk" (R44-47).

5. The evidence shows that at the time alleged in Specification 2 of the Charge, and at a place near the bivouac of the 93rd Signal

Battalion, in France, accused did wrongfully commit an assault on Monsieur Manuel Martinez by shooting at him with a carbine. The proof showed that accused was close enough to Martinez to injure him. An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another (MCM, 1928, par.149l, p.177; Wharton's Criminal Law, Vol.I, sec.799, p.1094). Unlawfully firing a pistol at another while near enough to injure him is an assault though the bullet does not hit him (State v. Lichter, 102 A. 529, Words and Phrases, Vol.4, p.370). This assault was wrongful since it was unjustified.

However, an abundance of competent uncontradicted evidence indicates that accused was in an advanced state of drunkenness at the time he committed the assault. In certain offenses "specific intent is not an element, and proof of the act alone is sufficient to establish guilt" (MCM, 1928, par.126, p.135). Winthrop Military Law and Precedents, Second Edition, pages 292,293, says:

> "/The/ general principle of law is that voluntary drunkenness furnished per se no excuse or palliation for criminal acts committed during its continuance".

Winthrop excepts from this general principle such offenses as require for their commission a certain specific intent, in which case he says:

> "Evidence of drunkenness is admissible as indicating * * * whether his act was anything more than a mere battery, trespass, or mistake".

Winthrop then specifically cites "assault" as an offense in which proof of "no peculiar intent" is required (see also BULL. JAG, Vol.I, No. 3, Aug 1942, p.159, sec.422(5), CM 223336 (1942)). Thus, the drunkenness of accused was no defense to his assault.

However, Specification 2 alleges that accused committed this assault on Monsieur Martinez "with intent to do him bodily harm", in violation of Article of War 93. An element of this offense is a specific intent, in this case, to do bodily harm (MCM, 1928, par.149l, p.177). Voluntary drunkenness is a defense and "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.126, p.135; Winthrop's Military Law and Precedents, Second Edition, p.293). While the testimony tends to show that accused was so drunk as to render it extremely unlikely that he could have been capable of intending to do Martinez bodily harm at the time he fired, the bulk of the evidence on this point actually pertains to a period of time from half an hour to

three hours subsequent. He was indeed undoubtedly heavily intoxicated at the time of the assault but he pointed his gun at Martinez, advanced as the latter retreated and fired when Martinez ran manifesting, for the time being, a malign continuity of purpose on which the court obviously based its inference of intent. Whether he was too drunk to entertain a specific intent was, under the circumstances, a question for the court's determination (BULL. JAG, Vol.II, No. 11, Nov. 43, Dec. 451(10), p.427; CM NATO 774 (1943)).

6. The record shows that as punishment for this conduct accused was reduced from technician fourth grade to private on recommendation of his company commander. This action was pleaded in bar of trial by the defense. This plea was properly overruled. An offense for which a maximum of five years' confinement at hard labor is authorized obviously involves a greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial and is, therefore, not a minor one (MCM, 1928, par.105, p.103).

7. Accused is 24 years old. He enlisted at Jefferson Barracks, Missouri, 24 March 1942, for the duration of the war plus six months. He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

3812

(354)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 DEC 1944 TO: Commanding General, XII Corps, APO 312, U. S. Army.

1. In the case of Private CHARLES A. HARSHNER (17045842), Company A, 93rd Signal Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3812. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3812).

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

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

BOARD OF REVIEW NO. 1

11 NOV 1944

CM ETO 3813

U N I T E D S T A T E S	)	104th INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Valognes
	)	Staging Area, France, 16 September
Private WILLIS P. GALLOWAY (34570694), Company "I", 414th Infantry.	)	1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years.
	)	United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 93rd Article of War.
Specification: In that Private Willis P. Galloway, Company "I", Four Hundred and Fourteenth Infantry, did, at Valognes Staging Area, France, on or about 9 September 1944, with intent to commit rape, commit an assault upon Simonne Lepoittevin, by willfully and feloniously striking, pushing to the ground, and drawing a knife, upon the said Simonne Lepoittevin.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as

(356)

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

3. Credible, uncontradicted testimony of the victim of the alleged assault, Simonne Lepoittevin, 15 years of age, residing at Hameau Des Gendres, A Teurtheville, Bocage Manche, France (R6cc), established in summary that at the time and place alleged, accused followed her into a field, grabbed her by the hand and put his bayonet against her neck. When she screamed, accused struck her in the face (R6ee) many times, covered her mouth with his hand, unbuttoned his trousers, tore her slip and blouse, felt her breasts and between her legs under her dress. He attempted to have intercourse with her, while she constantly struggled to drive him away (R6ff). The accomplishment of his purpose was thwarted by the appearance of four soldiers who observed that he was buttoning the fly of his trousers (R6b), that the girl was crying (R6c, 6m,6n), that she had been beaten about the face (R6d,6e,6f,6i,6j,6k,6n) and that her dress was wet and muddy (R6d,6i). They obtained from the accused his name and accompanied the girl to her grandmother's home nearby (R6c,6d,6j).

Captain Thomas A. Morman ("Moorman", according to signed statement in record), Medical Corps, 414th Infantry, examined Simonne on 9 September 1944 at her home. She had a contusion or bruise on her forehead, a contusion of the right forearm (R6z,6aa), her right eye was almost shut and her upper lip was cut in several places. He examined her female organs and, in his opinion, she had not been penetrated (R6bb).

4. After his rights were explained to him, accused elected to remain silent. The defense introduced no evidence (R6hh).

5. The evidence supports the findings that accused at the time of the assault upon his victim entertained the specific intent to commit rape. The findings of guilty were fully warranted (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd; CM ETO 3255, Dove; CM ETO 3644, Nelson).

6. The charge sheet shows that accused is 22 years and four months of age and was inducted at Fort McPherson, Georgia, 3 November 1942, to serve for the duration of the war plus six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USC 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

_____ Judge Advocate

Elwood W. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(358)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 NOV 1944 TO: Commanding General, 104th Infantry Division, APO 104, U. S. Army.

1. In the case of Private WILLIS P. GALLOWAY (34570694), Company "I", 414th 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 3813. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3813).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant JudgeAdvocate General.

3813

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

BOARD OF REVIEW NO. 2

CM ETO 3827

2 NOV 1944

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened in the vicinity of Reims, France, 3 September 1944.
Private JOHN L. McADAMS (38125531), Company "B", 315th Engineer Combat Battalion.	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

---

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private John L. McAdams, Company B, 315th Engineer Combat Battalion, did, at or near Montginoux, France, on or about 6 August 1944, draw a weapon, to wit a bayonet against Captain Wilson M. Midyett, Company B, 315th Engineer Combat Battalion, his superior officer, who was then in the execution of his office.

Specification 2: In that * * * having received a lawful command from Captain Wilson M. Midyett, Company B, 315th Engineer Combat Battalion, his superior officer, to rejoin his squad, did, at or near Montginoux, France, on or about 6 August 1944, willfully disobey the same.

(360)

He pleaded not guilty to the Charge and specifications. Two-thirds of the members of the court present when the vote was taken, concurring, he was found of Specification 1 and the Charge: "Guilty"; of Specification 2 and the Charge: "Guilty, except the words 'wilfully disobey' substituting therefor the words 'fail to obey', of the excepted words 'Not Guilty' of thesubstituted words 'Guilty'. Of the Charge: 'Not Guilty' of a violation of the 64th Article of War, but 'Guilty' of a violation of the 96th Article of War". Evidence was introduced of two previous convictions, one by special courts-martial for absence without leave for three days and one by summary court for absence without leave for ten hours, each in violation of Article of War 61. Two-thirds of the members of the court present when the vote was taken, concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of ten years. The reviewing authority approved the sentence, designated the "Eastern Branch, United States Disciplinary Barracks" (Greenhaven, New York), as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence conclusively shows accused to have committed the offenses of which he was found guilty. His defense was drunkenness and no recollection of the occurrences described by witnesses. Drunkenness does not excuse or give immunity from the penal consequences of acts committed while under the influence of intoxicating liquor (Winthrop's Military Law and Precedents, 1920 Reprint, p.292).

4. The charge sheet shows that accused is 30 years ten months of age and was inducted 24 March 1942 into theArmy of the United States. He previously served from 15 August 1938 to 22 July 1941 in Company D, 19th Engineers.

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

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin R Sleeper Judge Advocate

CONFIDENTIAL

1st Ind.

(361)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 NOV 1944 TO: Commanding General, 90th Infantry Division, APO 90, U. S. Army.

1. In the case of Private JOHN L. McADAMS (38125531), Company "B", 315th Engineer Combat 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. The published general court-martial order should state the location of the Disciplinary Barracks, viz, Greenhaven, New York.

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 3827. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3827).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant JudgeAdvocate General.

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

BOARD OF REVIEW NO. 1

CM ETO 3828

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened in the vicinity
Private LEONARD S. CARPENTER	of Brimont, France, 2 September 1944.
(31284144), 790th Ordnance	Sentence: Dishonorable discharge, total
Light Maintenance Company	forfeitures and confinement at hard
	labor for ten years. Eastern Branch,
	United States Disciplinary Barracks,
	Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1

RITER, SARGENT 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 75th Article of War.

Specification: In that Private Leonard S. Carpenter, 790th Ordnance Light Maintenance Company, 90th Infantry Division, did, in the vicinity of Pont la Abbe, France, on or about 23 July 1944, misbehave himself before the enemy, by absenting himself without proper leave, from his organization, which was then engaged with the enemy, and did not return thereto until on or about 30 July 1944.

He pleaded guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for absence without leave of unstated duration in violation

of Article of War 61 and one by special court-martial for absence without leave for six hours and wrongfully taking and using a Government vehicle in violation of Articles of War 61 and 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to ten 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.

3. (a) Accused's pleas of guilty, the meaning and effect of which were explained to him by the court (R5-6), were supported by evidence of his absence without leave from his organization, the 790th Ordnance Light Maintenance Company as alleged (R7-9,10; Pros. Exs. A,B), and evidence that such organization was in direct support of the 90th Infantry Division (R7-8,13), which was engaged in combat with the enemy (R8-9,12-13,15; Pros.Ex.C). The ordnance company was providing direct evacuation, maintenance support and ordnance equipment supply to the division (R8). The allegation of absenting himself was equivalent to an allegation of running away (Cf: CM ETO 3196, Puleio, and authorities therein cited; CM ETO 3722, Skamfer). Accused and his company were before the enemy (Winthrop's Military Law and Precedents, Reprint, pp. 623-624; MCM, 1928, par 141a, p. 156; CM ETO 3091, Murphy, et al).

(b) The court properly overruled the motion by the defense, to direct that the charge be laid under Article of War 61 instead of Article of War 75 (R11-12). The essence of accused's offense was "his absence from his company where it was his duty to be" (CM ETO 1663, Ison, p.4). The fact that such absence occurred "before the enemy" distinguishes it from a mere violation of Article of War 61 and makes it punishable as a violation of Article of War 75, both elements of which were established (par. 3a, supra).

(c) The admission in evidence of the "G-3 Journal" of the 90th Infantry Division, showing combat activity, for the purpose of proving the division's contact with the enemy at the time in question was proper (CM ETO 2185, Nelson and authorities therein cited).

4. Lieutenant Colonel Charles W. O'Bryant, Infantry, Commanding Officer of Special Troops, 90th Infantry Division, of which accused's company was a part, referred the charges for investigation, following which he forwarded them to the division commander, recommending trial by general court-martial. Lieutenant Colonel O'Bryant was detailed as senior member and sat as president of the court (R2), and although his name was read as that of the officer who forwarded the charges, he was not challenged either for cause or peremptorily. When the members were requested to state any facts believed to be a ground for challenge by either side against any member, he remained silent (R3). There is no indication that he was not competent or ineligible to serve on the court-martial. He was not the accuser, did not investigate the case and was not called as a witness at the trial. His only connection with the case

was as hereinabove set forth. The reference of the charges for investigation and the forwarding of them for trial may be considered as routine expressions of opinion that the charges were of a character proper for such action, and did not amount to an opinion as to accused's guilt.

Although it is not considered good policy to place a commanding officer of an accused on a court which tries him (CM ETO 804, Oglstree et al, pp.8-9, Bull.JAG,Vol.II,No.12, Dec 1943,sec.375(2), pp.466-467), particularly where as here such commanding officer has dealt with the charge and recommended trial thereon, the failure to excuse Lieutenant Colonel O'Bryant as a member of the court under the circumstances here shown cannot be held to have prejudiced accused's substantial rights, regardless of its obvious impropriety. Moreover, the failure of the defense, which was on notice as to his connection with the case, to exercise its right of challenge operated as a waiver of such right (Ibid; CM 219582, Braden (1942), Bull.JAG Jan-Jun 1942, Vol.I, No.1, sec.395(47), p.15, 12 B.R. 305,307; CM ETO 960, Fazio et al; Cf: CM ETO 2471, McDermott).

5. The charge sheet shows that accused is 28 years of age and was inducted 8 January 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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

H. Vaughan Rees Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 DEC 1944 TO: Commanding General, 90th Infantry Division, APO 90, U.S. Army.

1. In the case of Private LEONARD S. CARPENTER (31284144), 790th Ordnance Light 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, 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 president of the court, Lieutenant Colonel Charles W. O'Bryant, as accused's commanding officer, referred the charges for investigation and recommended trial thereon by general court-martial. Although, as indicated in the Board's holding, it may not be said under the circumstances that accused's substantial rights were injuriously affected, the status of the president at least raises a question as to the impartiality of the trial. The impropriety of Lieutenant Colonel O'Bryant's remaining on the court, under the circumstances noted by the Board in its holding, is obvious.

3. It is suggested that consideration be given to suspending the dishonorable discharge so that the government may preserve its right to use his services again, if his conduct at the Disciplinary Training Center, which should be designated as the place of confinement, so warrants.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3828. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3828).

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

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

BOARD OF REVIEW NO. 1

9 DEC 1944

CM ETO 3837

U N I T E D S T A T E S	VIII FIGHTER COMMAND
v.	Trial by GCM, convened at Headquarters VIII Fighter Command, AAF Station F-157, England, 25-26 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group	

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

---

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and

(368)

feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. 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. Charge I and Specification: Prosecution's evidence shows that on the night of 11 July 1944, Sheila Winifred Dale, 20 years of age, of Victoria Cottages, Manning Tree, Essex, England, rode her bicycle on a public highway between Brantham and Manning Tree (R8,10). She was returning to her home. At a point on the road near Bucks Horns in Brantham she was accosted by a white American soldier who also rode a bicycle (R9-10). He cycled by her side and asked to escort her home. His advances were rejected by the girl. When the couple reached a pathway which is a "short cut" to Manning Tree, the soldier suggested they travel the same. The pathway follows a river bank and is "very lonely". Sheila refused the suggestion and continued her travel along and over the regular road. When about 100 yards beyond the entrance to the "short cut" the soldier grasped the handle bars of the young woman's bicycle and shook it. He said, "You have got to stop here whether you like it or not". Sheila fell from her bicycle (R11). The soldier dismounted from his bicycle, dropped it and then threw Sheila's bicycle onto a wide grassy path. The girl ran, but was overtaken by the soldier who grasped her from the rear and pinned her arms about her body. He dragged her back to the spot where the bicycles were on the ground, and picked up his own bicycle and threw it aside. In this operation Sheila again freed herself and ran away. Again the soldier captured her and dragged her onto a grassy patch. She "started making excuses"; that it would spoil her clothes; that her father would come any minute and that she had to arise early the next morning (R12-13). The soldier paid no heed and removed his coat. He then threw her to the ground. When she screamed the soldier put his hands to her throat and said,

"if I didn't stop screaming, he would murder me" (R14).

He then pulled up her skirt. She struggled, kicked her legs and endeavored with her hands to push the man away. The soldier removed her

knickers from her body and then extended himself on the ground at right angles to the girl with his chest on her right leg (R14-15). He pushed her legs apart, put a hand over her mouth and applied his mouth to her private parts. His tongue entered the lips of her genitals. During this process she endeavored to sit upright but was pushed to the ground upon each effort. After two or three minutes of this perverted practice he placed himself on the girl, inserted his penis in her vagina and engaged in sexual intercourse (R15), at the conclusion of which he arose, threw the knickers to the girl and said, "You had better put these on again". At her request he secured her bicycle for her (R16). He asked to see her again.

> "I was all for it because I wanted to get away. I thought if I said I would he would let me go. He said he wanted to meet me on Thursday night at 7 o'clock. First he said at the white bridge, then he said: 'No, make it the other bridge, the one near the Bucks Horns.' I said: 'I will.' He said: 'I don't believe you will.' * * * I wanted to get away and get home. I was frightened that he would start everything all over again. * * * He wanted to kiss me good night and I think he did manage to. I let him. I saw he was getting mad again, so I let him do it to get away" (R17).

When Sheila arrived home in a hysterical, distraught condition (R39,54,58) she called her mother and informed her

> "I had been attacked by a sexual maniac and that if I didn't give in to him, he would kill me" (R18).

The skirt (Pros.Ex.1) and knickers (Pros.Ex.2) worn by Sheila during the occurrence of the events above described were identified by her and introduced in evidence. When she arrived at her home there was a wet stain on both articles of clothing (R19). Dr. James Davidson Hendon, founder and director of the Metropolitan Police Laboratory, made on 20 July 1944 a microscopic examination of the skirt and knickers and, as prosecution's witness, testified that by the discovery in the stains of spermatozoa he concluded the stains were male seminal fluid (R42-44,45). Due to the absence of tails on some of the spermatozoa there was a possibility that the fluid had been in the girl's vagina and then was excreted therefrom (R46).

Dr. Frederick H. E. Beckett, of Manning Tree, Essex, England, examined Sheila about 10:00 am on 12 July 1944. She had bruises on her right thigh, on her left arm and left knee and a "graze" on her left knee.

(370)

They were fresh bruises. An examination of the vagina showed she was not a virgin (R47-48). On 2 August he tested her for pregnancy by applying to her the prostigmine test. The result of the test indicated the strong probability that she was pregnant (R49-50).

At the time Sheila went to Dr. Beckett on the morning of 12 July he informed the British civil police of her complaint and made his examination in the presence of Police Constable Wilfred John Felton of Mistley, Essex, who thereupon commenced an investigation of the case (R48,93).

The foregoing evidence is proof beyond reasonable doubt that Sheila was assaulted on the night of 11 July by a white American soldier who secured sexual intercourse with her without her consent and in spite of her resistance by the exertion of force and violence upon her. All of the elements of the crime of rape were established (MCM, 1928, par.148b, p.165; CM ETO 3910, Hertsell, and authorities therein cited; CM ETO 3718, Steele; CM ETO 4017, Pennyfeather).

4. Charge II and Specification: Evidence for the prosecution established the following facts: Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, age 19 years, left Brantham on the night of 11 July 1944, accompanied by a friend, Mrs. Kerry (R60). They walked, although Miriam had her bicycle with her which she wheeled by her side. They passed a white American soldier on a bicycle (R61,65) who soon thereafter turned, followed after them and accosted the women. He asked if he could see them home. Mrs. Kerry refused. The soldier walked with them, again asked to escort them home and again Mrs. Kerry refused. At this point she bid Miriam "good night". Miriam mounted her bicycle and rode in the direction of Manning Tree, but on the road between two bridges he overtook her (R61-62). He solicited her to escort her home but she refused and rode onward toward her home. The man accompanied her on his bicycle. When they reached the "white" bridge (being the bridge nearest Manning Tree) he repeated his request and then suddenly turned his bicycle into Miriam's bicycle and knocked her to the ground. She struck her head against a telegraph pole and her bicycle fell onto the grass ledge. The soldier grabbed the girl by the hands and arms (R62,71) and dragged her across the road to the right-hand side thereof (R63,72). In this movement Miriam struck her bicycle and bruised the inside of her left leg (R72). The young woman pulled the soldier's hair, scratched him and kicked him. She escaped his hold and reached a little bank on the edge of a "corn" field on the right side of the road. He followed her and as she screamed he grabbed her by the throat. Miriam tried to kick him but lost her balance and fell to the ground. The soldier kicked her on her left shoulder and dragged her into the field (R64). During this altercation the soldier repeated several times his intention to secure sexual intercourse with her (R64, 73). She succeeded in escaping from the cornfield onto the road pavement near the bicycles. He followed her, grabbed her throat and in the melee Miriam bit his hand (R64,74-75). At that moment Frank

Albert Welham, "Bibury", Harwich Road, Lawford, and Corporal Cecil Carter, Bombardier (British), then stationed at Manning Tree, approached on bicycles (R66,82-83,85-86). The soldier, when he saw the two men, pushed Miriam and she fell over her bicycle. He mounted his bicycle and rode in the direction of Brantham - the opposite direction from Manning Tree (R66,75).

Both Welham and Carter testified that when they met the girl she was sitting on the ground, was crying and was in a shaken, nervous condition. Her clothing was ruffled. She informed them that a "Yank hit me on the head several times" and "I have been attacked by a Yank". Carter escorted the young lady home (R83,85,86). Miriam's father (Herbert Arthur Cullum) testified that when she arrived home she was crying. The next day he saw bruises on her neck which remained several days. Subsequently Miriam showed him her bruised legs (R87-88). Police Constable Felton, on Monday 17 July, saw Miriam and observed that the right side of her neck was swollen (R95). The foregoing facts were established by substantial, competent evidence and constitute complete proof of the offense of assault with intent to commit rape. The soldier repeatedly announced his intention to secure sexual intercourse with the young woman. These oral expressions of his felonious intention, coupled with the otherwise unexplainable assault and battery he committed on Miriam's person, fully sustain the findings of the specific intent to commit rape (CM ETO 3897, Dixon, and authorities cited therein; CM ETO 4294, Davis and Potts).

5. The theory of the defense was that of alibi and to sustain that plea it produced the following witnesses whose testimony is hereinafter summarized:

Accused elected to appear as a witness in his own behalf. He testified that at 7:00 pm on 11 July 1944 he was on duty at the mess hall of the 351st Fighter Group. At 7:30 pm he left the station via post number 2 for East Bergholt. He arrived at his destination "close to 8 o'clock". He rode about the town on his bicycle for about 45 minutes or an hour looking for heavy liquor. Then he went to Brantham - about 1½ miles distant. He went to the "Bucks Horns Inn" and arrived at 9:00 pm. He drank one glass of beer and then went to "The Ark" (R110). He consumed two glasses of beer at the latter public house and left at 9:20 or 9:30 pm. He then went to the "Club" where he consumed another glass of beer, remained 15 or 20 minutes and returned to the "Ark" at 9:45 pm. He remained at the "Ark" until closing time and left at 10:40 pm. (It was stipulated that it was 5 miles from the locus of the Dale crime to Gate #2 of AAF Station 157 (R111-112)). It was three-quarters of a mile from situs of the rape of Sheila Dale to the "Ark" and between 4½ and 5 miles from the "Ark" to Gate #2 of the station. Upon leaving the "Ark" he rode his bicycle toward East Bergholt. Midway between Brantham and East Bergholt - about one-half a mile from Brantham - he encountered an American military policeman named Partyka

about 10:45 pm or 10:50 pm (R112). Partyka and accused walked to the top of the hill, stopped five minutes to smoke and then rode slowly to the station. They reached Gate #2 between 11:15 pm and 11:30 pm, and proceeded to the mess hall of the 351st Group, which they reached not later than 11:30 pm. Staff Sergeant LaPage and another soldier were present (R113). In the back room there were Sergeants Pelletier, Callendar and Hayes. Accused spoke to all of them. He was in the mess hall until after 12:00 midnight (between 12:00 midnight and 12:30 am) when he went to his barracks (R114,117).

He denied he had ever seen Miriam except at the identification parade on 18 July when he was in a line of 15 soldiers. When she was "brought out of the guardhouse", a Criminal Investigation Department operative was standing a "little off" to accused's left, talking with him. He had his hand on accused's shoulder (R114). Likewise he saw Sheila at the identification parade. He had also seen her in the "pubs" in East Bergholt, but he did not see her on the night of 11 July 1944 (R116). At the parade neither Miriam nor Sheila looked at his hands which were behind his back (R121).

With respect to the wound on his left hand he testified that on the Thursday (13 July) following the Tuesday (11 July) of the alleged crimes he opened cans of milk with a cleaver and in the operation he stuck his hand (R115) and "took a good nick out of it". It bled badly and he asked Sergeant Pelletier for a "band aid" (R116).

The bicycle he rode on the night of 11 July was khaki-colored with a new black fender. He has one tooth missing from the left front of his mouth and one in the left rear. (Accused displayed his mouth to the court. "His teeth were somewhat widely spaced") (R116,117). When he left the mess hall he went first to his barracks and then to the orderly room (R118).

Upon cross-examination accused admitted that he could have arrived at the orderly room "any time between 12 and 1" (R118) and that "after 12 o'clock I am not sure of the time" (R119).

"Q - Your judgement of time after 12 o'clock was not as good as it was before 12 o'clock on this evening?
A - There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything.
Q - Was there an occasion before 12 o'clock for you to remember the time?
A - Yes, sir.
Q - What was that occasion?
A - At that time the radio was on" (R119).

He admitted that when he "signed in" he did not state the time he in truth arrived at the orderly room. He guessed at the time and "put down 2400, or 2300, I don't remember which it was" (R120).

Private Andy Partyka, Detachment A, 1260th Military Police Company (Aviation), testified he was at the "Bucks Horn" public house in Manning Tree on the night of 11 July; that he remained until it closed at 10:00 pm; that he actually left the place a "little after" 10:00 pm; that he talked to a girl until about 10:25 pm and then rode his bicycle in the direction of camp (R124). He met accused about "quarter to 11" on the night of 11 July as he cycled up the hill to East Bergholt. At East Bergholt they stopped five minutes to smoke, and reached Gate #2 of the camp at 11:30 pm (R125). Upon cross-examination he admitted he was "feeling high" and that

> " All the time I didn't know what time it was.
> Q - You were just taking what you thought the time was. It may have been close to midnight when you came on the post?
> A - Yes, sir" (R127).

He also admitted that he did not know whether the "Bucks Horn" closed at 10:00 pm or 10:30 pm (R130-131).

Sergeant Joseph C. Pelletier, 351st Fighter Squadron, declared he saw accused on 11 July between 11:00 pm and 12:00 midnight (R132) when accused came into witness' sleeping apartment (R134). It was about ten minutes after the conclusion of the news broadcast of American Forces Network at 11:00 pm when accused came in the first time (R132). He then went out and returned the second time at approximately 11:45 pm - about 15 minutes prior to the BBC 12 o'clock news broadcast (R135). Witness had no watch or clock and judged the time by the news broadcasts (R134-135). On Thursday (13 July) accused, with one of his hands cut, entered the room where the medical-aid kit was kept and witness was present. Blood was running from his hand and accused said he cut it opening cans (R133). However, Pelletier did not know which hand was cut nor whether it was the index finger or the thumb (R135-136). The cut was around the back of the left thumb (R136).

First Sergeant Robert A. Hayes, 351st Fighter Squadron, saw accused approximately 11:30 pm or 11:45 pm on 11 July in the kitchen of the mess hall in the 351st Fighter area. He based this time computation upon the fact he left a public house in Dedham between 10:30 pm and 10:45 pm. It was a ride of 30 minutes from the public house to the camp. Witness was in the area 10 minutes and in the mess hall 10 minutes before he saw accused (R137-138). He was positive it was not later than 11:45 pm that he saw accused (R139).

(374)

Staff Sergeant Edward R. LaPage, 351st Fighter Squadron, had been in Colchester on 11 July. He left that town about 10:40 pm in a taxicab. It required 25 minutes to travel to camp. He arrived at camp about 11:05 pm or 11:10 pm and went to the mess hall where he arrived about 11:15 pm. After about 30 minutes, accused entered the hall - about 11:45 pm (R139-140,142). Witness admitted he had stated to the investigating officer that accused arrived from 30 minutes to an hour after witness reached the mess hall, but he claimed he was confused as to dates (R142). However, he further admitted that he reckoned the time from the hour the taxi was ordered to pick him up in Colchester - 10:30 pm - and not from observation of any watch or clock (R143).

Technical Sergeant Stanley E. Pleban, 351st Fighter Squadron, stated that on the night of 11 July he was at the "P.X." drinking beer until 10:15 pm when the Officer of the Day excluded him from the Exchange (R143). He went to his barracks and then to the mess hall with LaPage. At about 11:30 pm accused entered (R144). Witness admitted that he did not look at any watch during the evening and that he did not know the exact time he saw accused although he said it was 11:30 pm (R145).

Mrs. Grace Somerhill, 63 South Street, Manning Tree, testified that in the community of Manning Tree the reputation of Sheila Winifred Dale for chastity was bad (R146).

6. The court of its own motion called witnesses who testified as follows:

Private Andy Partyka, recalled, testified he was "feeling good" on the night of 11 July. He drank seven or eight pints of beer but could ride his bicycle (R147-148).

Corporal William E. Sterman, Headquarters Detachment, 353rd Fighter Group, was charge of quarters on the night of 11 July. He produced the "in and out" book of the Squadron for that date which showed accused "signed in" at 2300 hours (Court's Ex.1) (R148-150).

Captain Ernest P. MacGregor, Headquarters 353rd Fighter Group, testified that a soldier coming in from leave should "check in" as of the time he reaches the orderly room (R150-151).

Sergeant Joseph C. Pelletier, recalled, testified that small milk cans were opened by use of a cleaver. A long slit is made in the top of a can (R151).

7. Upon rebuttal the prosecution presented the following witnesses:

Cyril Baker, owner of the "Bucks Horn" Inn in Brantham, testified that on the night of 11 July he closed at 10:30 pm and customers were out of the house by 10:40 pm (R152-153).

Rebecca Emily Boast was the licensee of "The Ark" in Brantham on 11 July 1944. On that date it closed at 10:30 pm and patrons were out of the place five minutes later (R154-155).

First Sergeant Bernard F. Kelly, Headquarters 353rd Fighter Group, testified that at AAF Station 157 on 11 July 1944 the time limit on the passes was 0100 hours "but our practice has been to stay out until 2400". It is immaterial whether men sign in as of the time they arrive at the field or the time they check in the orderly room if it is prior to 0100 hours. Men must be off the street between 0100 and 0600 hours (R155,157).

8. The vital question in this case arises in connection with proof of identity of the white American soldier who attacked Miriam Florence Cullum with the avowed purpose of securing sexual relations with her, and who raped Sheila Winifred Dale on the night of 11 June 1944. The time element (except dates) with respect to the two crimes was purposely omitted from the foregoing discussion of the proof of elements of the offenses (pars.3 and 4 supra) because the same is extremely relevant in consideration of the question of identity.

(a) The evidence is substantial and convincing that the same white American soldier committed the two crimes:

(1) The loci of the offenses were in the near proximity of each other. Miriam was attacked on the road from Brantham to Manning Tree opposite a house beyond the "white" bridge (the bridge nearest Manning Tree) (R62,82-83,85). The "short cut" road from Brantham to Manning Tree, described by Sheila, commences near the "white bridge" (the bridge nearest Manning Tree) on the main Brantham-Manning Tree road (R11). It was about 100 yards beyond this point in the direction of Manning Tree that Sheila was knocked from her bicycle by the white soldier (R11). Special Constable Felton discovered the area on the ground where "tall weeds had been broken down as if some person had been lying there" and this spot was on the left-hand side of the road approaching Manning Tree about 100 yards from "Marsh Cottage", the house by the "white bridge" (R89,94). It was therefore established that the siti of the two crimes were approximately 100 yards apart.

(2) The time elements of the two crimes complement each other and are in harmony.

Miriam left Brantham at 10:30 pm. She reached the "Royal Crown" public house at about 10:38 pm, and it was just prior to that time she first met the soldier (R69). It was 10:40 pm when Miriam left Mrs. Kerry and approached the first bridge (R69-70). The soldier "caught up" with her between the first and the second bridge, and "just beyond" the second bridge ("white bridge") he knocked her from her bicycle. The assault was completed and the soldier departed about

10:54 pm (R74). Welham and Carter left Brantham on their bicycles at 10:50 pm. Welham estimated the time he reached Miriam as about 11:05 pm. He passed a lone American soldier headed towards Brantham between the two bridges about 200 yards from the girl - about a five-minute ride (R84). Carter saw Miriam about a minute after he passed the lone soldier. Two American soldiers on bicycles preceded the lone soldier by three or four minutes (R86). Carter arrived at Miriam's home at about 11:15 pm (R86). Miriam's father fixed the time of their arrival at 11:10 pm (R87). Betty Goodall, a 16-year-old girl who was a guest at Marsh Cottage - the cottage by the bridge - on 11 July at 10:30 pm went to bed and read. At about 11:00 pm (estimated) she heard screams which came from the road (R89-90).

Sheila left her home at 10:30 with her sister, Pamela, and two American soldiers, "Kentucky" and "California", to cycle to Bergholt (R20,40). They reached a point designated as the "top of the hill" at about 10:50 pm and Sheila went with "Kentucky" about 50 yards beyond "California" and Pamela. They stopped for about 10 minutes and at 11:00 pm started back towards Pamela who had departed (R21-23). At about 11:05 pm Sheila mounted her bicycle and started for home in the direction of Manning Tree (R24). It was at 11:10 pm she first encountered the white soldier who eventually raped her (R10,25). They passed two American soldiers on bicycles at 11:20 pm (R10,27). She was finally knocked off her bicycle by the soldier at 11:25 pm (R12). The rape was complete by 11:45 pm (R16,38). Sheila reached her home between 11:50 and 11:55 pm (R17,38,54).

(3) The description given by Miriam of her assailant closely corresponds with the description given by Sheila of the man who raped her.

Miriam asserts that her assailant had "fair" hair and several of his teeth were missing. He wore an American soldier's uniform with no stripes. The bicycle he rode she believed was khaki-colored (R65). "He just kept narrowing his eyes" (R65,79). He had a "roundish" face (R79).

Sheila described her assailant as follows:

> "He has a roundish face, fair hair; there is a tooth missing on the left side and I think his other teeth are widely spaced" (R17).

(b) The identification of accused as the assailant of the two victims is satisfactory, positive and substantial.

(1) Miriam identified accused at the identification parade on 18 July (R68,77-78) and in the courtroom (R66).

(2) Miriam bit her assailant on one of his hands (R64, 74-75). Police Constable Felton on 18 July observed on the ball of accused's left thumb a scab wound (R95) which was not of the type made by the clean cut of a knife. The instrumentality which caused it had penetrated the flesh. It was a penetrating wound (R102) as opposed to a mere abrasion (R103).

(3) The description of their assailant given by both Miriam and Sheila (par.8(a)(3) supra) corresponds generally with accused's appearance. His hair is "fair, inclined to be dark" (R98). He has one tooth missing from the left front of his mouth and his teeth are somewhat widely spaced (R116-117).

(4) Miriam believed the bicycle which the soldier had with him when she was assaulted was khaki-colored (R65). The bicycle which accused rode on the night of 11 July was khaki-colored (R116).

(5) Sheila identified accused as her assailant at the identification parade on 18 July (R97,99) and in the courtroom (R17).

The evidence produced by the defense contains accused's specific denial that he saw or was with either Miriam or Sheila on the night of 11 July 1944. In short, he denies positively his commission of the crimes with which he is charged and asserts that he was at his station or at least returning to his station at the time the offenses were committed. Several of his fellow soldiers testified to facts which in some degree support accused's contention. There was therefore produced an issue of fact which it was the duty of the court to resolve and determine. It was its duty and function to analyze and evaluate both the inculpatory and exculpatory evidence, synchronize and reconcile factors of time and place, judge of the credibility of witnesses and reconcile differences and irregularities in their evidence. The evidence identifying accused as Miriam's and Sheila's assailant as set forth above is not only substantial but highly convincing. Appropriate is this comment:

> "With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility of witnesses and reach a determination whether the accused was the man who committed the atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such circumstances the finding of the court will be accepted as conclusive and final on appellate review" (CM ETO 3375, Tarpley).

(378)

To the same effect are CM ETO 3200, Price, and authorities therein cited; CM ETO 3897, Dixon; CM ETO 3910, Hartsell; CM ETO 4292, Hendricks. Upon appellate review the Board of Review must accept as final and binding upon it the findings of the court that accused was Miriam's assailant and Sheila's rapist, and with that conclusion the Board of Review is well satisfied.

9. Only one question with respect to trial procedure and to admission of evidence requires attention. The defense vigorously objected to the admission in evidence of testimony of identification of accused by Miriam and Sheila at the identification parade on 18 July (R97,99-100). Police Constable Felton testified after objection by defense that Sheila identified accused as her assailant at an identification parade held in camp on 18 July. Miriam was also permitted to testify over objection of defense that she identified accused at the same identification parade on 18 July (R68). The problem thus presented for consideration for the first time before the Board of Review (sitting in European Theater of Operations) deserves careful consideration.

The question as to the admissibility of extra-judicial identification of a defendant in a criminal case is the subject of an exhaustive annotation in 70 ALR 910. Reference is made to said annotation for the citation of authorities. The comment of the editor is informatory:

> "There is a wide split of authority on the question of the competency of evidence of extra-judicial identification in a trial where the identity of the accused as the person guilty of the crime is in dispute. Formerly the rule excluding such testimony was applied by far the greater number of courts. In recent years, however, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence, so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission" (70 ALR 911).

In view of the annotation of authorities above cited it would be a supererogation on the part of the Board of Review to indulge in an extended discussion of the problem at this time. However, the following quotation is adopted as expressive of the opinion of the Board of Review:

> "'The trustworthiness of the identification is of first importance. An identification of an accused, made publicly for the first time by a witness in court, when there presumably have been many opportunities for the witness to have seen

the accused and to have heard him spoken of by a given name, may be open to question; but, if it be shown that the witness identified the accused previously and the first time after his arrest or incarceration and under circumstances which removed the suspicion of unfairness or unreliability, the prior identification, together with the circumstances surrounding its making, will be of utmost aid in determining the trustworthiness of the identification made in the court room. Mr. Wigmore puts the reasons for the admission of the prior identification with unanswerable force: "Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness's act of pointing out then and there the accused (or other person) is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. . . . To corroborate the witness, therefore, it is entirely proper . . . to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness's mind, he recognized and declared the present accused to be the person." . . . We are not unmindful of the number and character of the courts of the states which take a contrary view, nor of the reasons they give for the exclusion of this evidence. Giving due heed to these, we can but think that their adherence to a technical rule deprived the courts of their jurisdictions of the benefit of a class of evidence which has strong testimonial value when weighed in the scales of the common sense of mankind.'" (State v. Frost, 105 Conn. 326; 135 Atl. 446, quoted in 70 ALR, pp.911-912).

It appears to the Board of Review not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of the identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian witnesses who are nationals of the country

in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier - both white and colored - after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority.

The Board of Review in electing to adopt the principle that evidence of subsequent identification is admissible has not overlooked the case of Hopt v. People of Utah (110 U.S. 574, 28 L.Ed. 262) decided by the Supreme Court of the United States on writ of error from the Supreme Court of the Territory of Utah in the year 1884. This case is often cited as an authority in support of the doctrine that evidence of subsequent identification is not admissible. If such were the holding of said case the Board of Review would, of course, feel itself duty bound to follow the same. The citator fails to show that the particular point in the Hopt case now under consideration has received subsequently any specific consideration by a Federal court. In Thompson v. United States (144 Fed. (First Cir.) 14,20) the Hopt case was distinguished with the comment:

> "The fact that the person who passed the spurious note was in court and identified by the witness clearly distinguishes the incident from that involved in Hopt v. Utah".

Hopt was charged with the murder of a man named Turner. In the course of the examination of the doctor who performed an autopsy on a body received at a railroad station in Salt Lake City, the question arose as to whether the body the doctor examined was that of the deceased Turner. The doctor did not know deceased. It was on this point that the court ruled:

> "No proper foundation was laid for the question propounded to the surgeon as to who pointed out and identified to him the body he examined, as that of John F. Turner. He had previously stated that he did not personally know the deceased and did not recognize the body to be his; he did not know that it was the body which the father of deceased desired him

> examine; consequently, his answer could only place before the jury the statement of some one, not under oath, and who, being absent, could not be subjected to the ordeal of a cross-examination. * * * The specific fact to be established by proof of what some one else said to the surgeon as to the identity of the body submitted to his examination was, that it was the body of John F. Turner. What Fowler, who was not even shown to have been placed in charge of the body nor commissioned to deliver it to the surgeon nor to be acquainted with the deceased, said in the absence of the prisoner, as to the identity of the body, was, plainly, hearsay evidence, within the rule recognized in all the adjudged cases. As such it should, upon the showing made, have been excluded" (110U.S. 581-582; 28 L.Ed.265-266).

It will be seen therefore that the point involved in the instant case was not in fact raised in the Hopt case. There can be no quarrel with the rule therein announced as applied to the facts before the court. The Board of Review therefore concludes that the Hopt case is not determinative on the question of admissibility of evidence of subsequent identification of an accused at a "police line-up" or at an identification parade and that it is free to adopt the rule which appears to it more nearly to meet the requirements of justice. In this connection it is interesting to note that in United States v. Fox (97 Fed.(2nd) 913) the discussion of evidence of a "police line-up" identification proceeds on the hypothesis that such evidence was admissible without question (see p.914).

In the opinion of the Board of Review no error was committed in the admission in evidence of Felton's testimony that Sheila identified accused as her assailant at the identification parade or of Miriam's statement while on the witness stand that she also identified accused as her assailant at the same identification parade.

10. The charge sheet shows that accused is 33 years four months of age. He enlisted at Syracuse, New York, 2 May 1942 to serve for the duration of the war plus six months. He had prior service in the United States Navy from 11 May 1928 to 11 May 1932. (Character of discharge: undesirable).

11. 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.

(382)

12. The penalty for rape is death or life imprisonment (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and sections 278 and 330 Federal Criminal Code (18 USCA 457,567), and for assault with intent to commit rape by AW 42 and section 276 Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 DEC 1944 TO: Commanding General, VIII Fighter Command, APO 637, U. S. Army.

1. In the case of Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3837. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3837).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3858

2 NOV 1944

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Poilley, France, 16 August 1944. Sentence: As to Each Accused: To be hanged by the neck until dead.
Privates CHARLES H. JORDAN (14066430), 3327th Quartermaster Truck Company; and ARTHUR E. DAVIS (36788637), 3326th Quartermaster Truck Company.	

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

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

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

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

Specification: In that Private Arthur E. Davis, 3326th Quartermaster Truck Company, and Private Charles H. Jordan, 3327th Quartermaster Truck Company, did, at or near La Rouennerie En Montour, Ille et Vilaine, France, on or about 10 August 1944, acting jointly and in pursuance of a common intent, forcibly and feloniously, against her will, have carnal knowledge of Aimee Hellondais Honore, a French woman.

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

Specification: In that * * * acting jointly and in pursuance of a common intent, did, at or near

(386)

La Rouennerie En Montour, Ile et Vilaine, France, on or about 10 August 1944, with intent to commit a felony, viz, murder, commit an assault upon Amand Honore and Joseph Taburel by willfully and feloniously firing at the said Amand Honore and Joseph Taburel with a dangerous weapon, to wit, a rifle.

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

Specification: In that * * * acting jointly and in pursuance of a common intent, did, at or near La Rouennerie En Montour, Ile et Vilaine, France, on or about 10 August 1944, commit an assault upon Amand Honore by wrongfully placing the muzzle of a rifle to the forehead of the said Amand Honore and firing shots over his head.

Each accused pleaded not guilty to all charges and specifications. All members of the court present when the vote was taken concurring, each accused was found guilty of Charges I and III and their respective specifications and "of the Specification of Charge II: Guilty except the words 'with intent to commit a felony, viz., murder', of the excepted words, Not Guilty; of Charge II Not Guilty but guilty of a violation of the 96th Article of War". No evidence was introduced of previous convictions of accused Davis. Evidence was introduced of four previous convictions of accused Jordan, two by summary court for two days' absence without leave, in violation of Article of War 61, and for breach of restriction, in violation of Article of War 96, and two by special court-martial, one for wrongful use of an automobile, in violation of Article of War 96, and one for breach of restriction, deceit in using an alias name and carrying a concealed weapon, in violation of Article of War 96. All the members of the court present when the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General of the Third United States Army, approved each of 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, confirmed the sentence as to each accused and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. Aimee Hellondais Honore, 37 years of age, is the wife of Amand Honore. On 10 August 1944, she lived with her husband and two children, a daughter, Aimee, age 19 years, and a son, Henri, age 17 years, on a farm near the village of Montour Commune, France.

Through an interpreter, she testified, in substance, as follows: About 6:30 on the evening of 10 August, two American negro

soldiers came to their farm (R22) when she and her daughter were there and asked for cognac. She sent her daughter into the house and informed the soldiers she had no cognac. They left after one of them had showed her a rabbit that he had in his shirt. They returned about 8:30 that evening. Her husband was present and her daughter in bed. At this time the soldiers repeatedly asked "for cognac and for young unmarried women". When told there were none, they discharged a rifle over her husband's head (R23). When they repeated the shot, she gave them some cognac. One of the soldiers then seized her arm while the other held her husband. She was forced to lie down in a haystack. Her husband escaped and returned with Joseph Taburel, a neighbor, from an adjoining farm. One soldier placed his carbine at her back. The other fired his carbine directly at her husband (R24) and Joseph Taburel, both of whom ran to call police. The two soldiers then took her to a nearby field and forced her to lie down. Despite her resistance, each had full sexual intercourse with her four times. When she resisted they placed their carbines to her forehead. Each took turns holding the gun over her. One of them fired his carbine during this time. The magazine fell out of one of their guns and they failed to find it (R25-26). They then threw her shoes (sabots) away and left her. She returned home (R27-28), arriving there about 11:30 p.m. She was in the field at least two hours (R26). She identified the two accused as her assailants. She also identified two bracelets (Pros.Exs.2 and 3) as bracelets she had seen accused Davis wearing. They were an identification bracelet bearing the name of Arthur Davis and a bracelet made of English copper farthings, respectively (R28-29). Davis also had a rabbit in his shirt which he had shown her (R30).

Examination by an American medical officer about 1100 hours the morning of 11 August disclosed that she had had recent sexual intercourse. Her parts were swollen and tender and vaginal smears contained sperm cells (R33).

The portions of the victim's testimony covering the periods when her husband and the neighbor, Taburel, were present, were corroborated by them. Both accused were identified by Monsieur Honore (R34-40) and also by Marcel Berthelot (R44-46). The carbine magazine was found in the field by the victim's son. He testified his mother had returned home about eleven o'clock that night, alone, barefoot and crying (R42-43).

The two accused were arrested in the vicinity of the Honore farm about one in the morning of 11 August. One of them had a rabbit and the guns of both had been recently fired. The magazine from one rifle was missing. Both had been drinking and one of them had his pants open at the fly (R48-57).

(388)

First Lieutenant Edward C. Heyne, Headquarters Detachment, 503rd Military Police Battalion, testified that both accused were in the military service of the United States. On the night of 12 August 1944, while investigating an alleged rape of Aimee Hellondais Honore, he interviewed accused Davis and informed him of the reason for questioning him and of his rights in answering questions propounded to him (R7-8). Thereupon, accused Davis made a signed statement (Pros.Ex.1), in which he admitted going with accused Jordan to seven or eight farmhouses for cider and cognac and then to a small town. On their way back to camp they bought a rabbit from a boy. They were arrested by some "MPs", who took their weapons and put them in the stockade where a Frenchman was brought in to look at them. Accused Jordan was questioned on both the 12th and 13th of August. His first story in the main was similar to that of accused Davis, but in the second story he became confused and denied they had been to any town. At first he said they had taken the rabbit at a farmhouse where no one was at home, but later asserted they bought it at a different place (R13-14). Lieutenant Heyne searched and took from accused Davis a light silver identification bracelet with the name Arthur Davis on it and also one made of English farthings (Pros.Exs. 2 and 3). From accused Jordan he took a bracelet made of English three-penny pieces (Pros.Ex.4) (R16-20).

4. Both of accused elected to remain silent after their rights as witnesses were explained to them by the court. No evidence was introduced in their behalf.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. The proof must show (a) that the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, pars. 148a,b, p.165). The evidence is conclusive that the offense was committed by force and without the victim's consent and that penetration occurred and fully supports the findings by the court of guilty of Charge I and its Specification as to each accused.

The firing of the rifle directly at Amand Honore and Joseph Taburel when they attempted to come to the assistance of Amand Honore's wife while she was held by accused, fully supports the court's findings of guilty, except for the words imputing felonious intent (which indeed might well have been quite validly inferred from the testimony), of the Specification, Charge II, in violation of Article of War 96; and the placing of the muzzle of the carbine to the forehead of Amand Honore and firing shots over his head during the occurrence of the same events, was plainly a threat of violence supporting the findings of guilty by the court of Charge III and its Specification.

6. The charge sheet shows that accused, Charles H. Jordan, is 24

years of age and enlisted 6 January 1942, at Fort McPherson, Georgia, and that accused, Arthur E. Davis, is 25 years of age and was inducted 8 November 1943, at Chicago, Illinois. No prior service by either accused is shown.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 mandatory penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

_____ Judge Advocate

(390)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates CHARLES H. JORDAN (14066430), 3327th Quartermaster Truck Company; and ARTHUR E. DAVIS (36788637), 3326th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the 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 3858. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3858).

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

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

(Sentences ordered executed. GCMO 105, ETO, 15 Nov 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3859

11 OCT 1944

U N I T E D S T A T E S	THIRD UNITED STATES ARMY.
v.	Trial by GCM, convened at Poilley and St. Sabine, France, 17, 19 August 1944. Sentence as to each accused: To be hanged by the neck until dead.
Private JOSEPH WATSON (39610125), and Technician Fifth Grade WILLIE WIMBERLY, JR. (36392154), both of 257th Signal Construction Company.	

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

---

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private Joseph Watson and Technician Fifth Grade Willie Wimberly, Jr., both of the 257th Signal Construction Company, acting jointly and in pursuance of a common intent, did, at or near Le Pas En Ferre, France, on or about 8 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Marie Josef Gourdin, a female.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * * acting jointly and in pursuance of a common intent, did, at or near Le Pas En Ferre, France, on or about 8 August 1944, with intent to do him bodily harm, commit an assault upon Pierre Gourdin, a human being, by shooting him in the leg with a dangerous weapon, to wit, a sub-machine gun.

3859

Specification 2: In that * * *, acting jointly and in pursuance of a common intent, did, at or near Le Pas En Ferre, France, on or about 8 August 1944, with intent to do her bodily harm, commit an assault upon Marie Josef Gourdin, a human being, by shooting her in the leg with a dangerous weapon, to wit, a sub-machine gun.

Specification 3: In that * * *, acting jointly and in pursuance of a common intent, did, at or near Le Pas En Ferre, France, on or about 8 August 1944 in the night time, feloniously and burglariously break and enter the dwelling house of Pierre Gourdin and Marie Josef Gourdin with intent to commit a felony, viz., rape therein.

Each accused pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions of either accused was introduced. All 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, Third United States Army, approved the sentence as to each accused, withheld the order directing execution thereof, forwarded the record of trial for action under Article of War 48, and directed that pending further orders each accused be confined in the Normandy Base Section Stockade, France. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

Marie J. Gourdin, 33 years of age and unmarried, lived with her father, Pierre Gourdin, 66 years of age, at Le Pas En Ferre, France (R6,22). They resided in a combination house and barn. The buildings were of stone and consisted of two floors. At one end on the first floor was a kitchen. A stairway connected the two floors and led "through the stable portion from the kitchen door up to the sleeping quarters." On the second floor were a hallway, attic and two rooms, one of which was used as sleeping quarters, and the other as "a bee supply room" which was "full of equipment". The rest of the establishment was used as a barn (R32,38).

About 8:00 or 9:00 p.m. 8 August, two colored American soldiers (later identified as the two accused) came to the Gourdin farmhouse and asked Marie and her father for some cider. They were told to return the following day, but as they insisted on having some cider they were given about a liter of the beverage (R6-7,22-23). One of the soldiers was large in stature (Watson) and the other was small (Wimberly) (R13,25). When both accused left, the Gourdins "barricaded" the door and Pierre went upstairs to his bedroom. Marie remained downstairs where she usually slept.

About five minutes later both accused returned, shook the door, broke a window pane, and then forced open the door which was "nailed by a bar of wood". The bar "gave in." Marie, who was afraid, called for her father who came down stairs and reproached the small soldier, Wimberly, because of the broken window. Wimberly then hit Gourdin on the back of the head with a gun, causing blood to flow down his neck, and Watson seized Marie by the shoulders and pushed her into a chair. Accused then departed (R7, 23,28). Because of the "danger" both Marie and her father went to bed in the upstairs bedroom and barred the bedroom door with a double lock. About midnight both accused returned, mounted the staircase, and fired at least three bullets from a machine gun through the bedroom door. Marie and Pierre were by the door at the time. She was hit by one bullet in the left leg and her father was struck by another in the right foot. During a lull in the firing Pierre "tried to hold the door to". Suddenly two more shots were fired from the machine gun and Marie cried out to her father "Leave the door." Accused then "demolished" the door, forced it open and entered the bedroom. Pierre shouted "'They have broken in'," and called, "Help, help." Marie, who because of her injury could not walk, dragged herself to the foot of her bed. Pierre said to accused, "'A pity, a pity, what do you want with us?'" and offered them some wine or whiskey but the offer was refused (R8-11,13-14,22-25,27). Wimberly approached Marie and Watson seized Pierre by the shoulders. Marie told her father to go for help and he escaped through the door (R11,25). Accused then placed Marie, who had not undressed, on the bed. When she cried out for help they put their hands over her mouth (R12,15,17). One of accused held the gun to her face and breast (R13,17). Each accused in turn then "violated" her while the other held her by the leg (R11,15-17). Marie testified in pertinent part as follows:

"Q What did they do to you, if anything, after your father left?

A They put me on the bed. I resisted as far as I could with all my force.

* * *

A I resisted with all my force. They did not arrive at what they wanted to do. They did not arrive at what they wanted to do by my resistance.

* * *

A They did something which they should not have done and up to then I didn't know what a man was, but now I do know. They did not arrive at what they wanted to do.

Q Did the male organ of either of these black soldiers penetrate into your female organs?

A A little.

Q Which soldier did it or did both of them do it or just one of them?

A Both of them, but principally the small one" (Wimberly) (R11)

"Q Which one went to sleep on your bed?
A Each took their turn. Each one held my leg and took his turn.

* * *

Q Did they tear your clothing?

* * *

A No, they arrived at what they wanted to without tearing the clothing. * * * And held my leg. I couldn't escape. Without that I would have tried to escape.
Q Will you describe just how they arrived at what they were trying to do?
A Because my leg was hurt, the one held me by the leg while the other did it and I could not resist like I wanted to because my leg was hurt. I do not know which of the two held me by the arms.
Q Do you know if both soldiers violated you?
A Oh, yes, each one in his turn.
Q Are you sure that both soldiers penetrated you?
A I don't think so, but it isn't their fault. He's also as as blamable if he had done it.
Q Did either soldier penetrate you?
A The two I think. I don't know.

* * *

Q Are you sure that either soldier penetrated you?
A Oh, yes.
Q Did each try only once?
A Several times and finally they got tired because they did not arrive finally at what they would have liked to have done" (R15-16).

After the incident was over one soldier left and the other went to sleep on the bed. Marie "Very gently" slipped out of the room and went to the garden where she remained about ten minutes. As she feared that accused would find her there at daybreak she went to the house of a neighbor, Alexandre Henry, who lived between 300-1000 meters away. Because of the injury to her leg she dragged herself to Henry's home on her elbows and it took her about one hour to make the journey (R12,29). When Marie arrived about 2:30 a.m. she cried out at the door. Henry observed that her leg was bleeding. She told him that two negroes were at her house and that they had "mistreated" her, "made her miserable, caused her misery" (R12,29-31).

Marie testified that accused were not drunk (R14). She was unable to identify either accused at the trial and testified that she knew "only there was a large and small one" (R13,15). She knew that the two soldiers

who broke into the bedroom were the same soldiers who visited the house earlier in the evening because they were "still the large one and the little one" and had the same voices. She saw their faces during their first visit at 8:00 p.m. Although it was dark in the bedroom she knew they were soldiers because of their speech and clothes, their inability to talk French and by the fact that they had machine guns. She also knew they were colored soldiers by their speech, large lips and shiny skins (R13-15). Marie's sight without glasses was "very weak". She believed she wore her glasses when accused broke into the room and violated her person but the glasses were apparently broken during the attack. She estimated that accused were in the room about an hour or an hour and a half (R17). Her father, Pierre, also testified that the two soldiers who broke into the bedroom were the same soldiers who came to the house earlier in the evening. At the trial he positively identified Wimberly, the small soldier, but was "doubtful about the large one" (Watson). There was evidence that he selected Wimberly from a group of six colored soldiers on the day of the trial (R25-26). A .45 calibre machine gun bullet, found by Pierre after the incident in the bedroom in a whiskey barrel which it had penetrated, was introduced in evidence (R26-27; Pros.Ex.1).

About 10:00 a.m. 9 August, Marie was examined by Major Frank E. Sohler, Jr., Medical Corps, 104th Evacuation Hospital (R18). An X-ray disclosed that she had a compound fracture of the tibia of the left leg which, in Sohler's opinion, was a gun shot wound. There were points of entrance and exit of the bullet (R19). The results of a vaginal examination disclosed that

> "* * * The external vaginals were essentially normal. The separation of the large labia and the small labia were normal above but below were swollen and reddened and on separation of the small labia there was bleeding. On the insertion of the examination fingers it did not reveal any essential information but on examination of the speculum it was noted that there was no menstruation so the bleeding definitely came from the injury on the small labium. Vaginal smears were taken and these vaginal smears were examined microscopically and sperm cells were found." (R19).

The hymen had been penetrated and was ruptured but Sohler was unable to testify whether the hymen "had ever been penetrated previous to that time or not." He was of the opinion that the woman "had recently had sexual intercourse" (R19,21).

> "The bleeding was due to traumatic injuries. In other words there had been some thing internally to cause the separation wide enough to tear this vaginal hymen" (R19).

The woman was not stripped for examination and Major Sohler did not notice any other bruises or wounds (R21).

During the early morning hours of 9 August Pierre was brought before Colonel Thomas A. Nixon, Ordnance Department, Third United States Army. Pierre was excited, his head and foot were bleeding and he stated that he had been shot and that his daughter "was being attacked" (R58,65). Colonel Nixon and others arrived at the Gourdin farmhouse about 3:00 a.m. (R58-59, 65,75,78). On about the third stair of the stairway leading from the first to the second floor Colonel Nixon found a helmet liner (R58-59,64,79). There were two beds in the upstairs bedroom both of which were "deranged" and a large pool of fresh viscous blood about four feet long and a foot and a half wide was on the floor just to the left of the door as one entered. A pillow with blood smears thereon was on the floor (R59,61-62,67,75; Pros.Ex.2). A Thompson sub-machine gun was in the room (R60,66-67,71-72). Lying on his side on the bed in the corner farthest from the door was accused Watson. When he was awakened and turned over on the bed, the fly of his trousers was open and his penis was hanging out. He was dressed in fatigues, the trousers of which were bloodstained, and the bedclothing was "tossed about considerably." He seemed "a little dazed" (R59-61,66,69-71,73-77,79-81; Pros. Ex.2). When interrogated he gave various replies. He first said that he had been sent to the house by a sergeant to investigate a shooting. He then said that he went there with another man or two men. Later, when taken outside, he denied "even being in the house" (R59). One witness testified that Watson was sober (R70), another testified that he "wouldn't call him drunk", that he talked and walked without any difficulty (R73). A third witness testified that when awakened Watson appeared to be drunk

> "but after I got him awake he seemed a little dazed and there was not light and only a flashlight and probably wasn't enough light for him to see good enough and he stumbled around and he may have been drunk. I couldn't say for sure. He could hardly walk by himself and I had to almost carry him downstairs." (R79).

Accuseds' company was situate about 200-400 yards away from the Gourdin farmhouse (R38,62-63,68). The helmet liner found by Colonel Nixon was put on Watson's head and he was taken into custody by the military police who also took possession of the Thompson sub-machine gun (R60,63-64,66,71,79). The military policeman who took custody of accused and the weapon delivered the gun to a Lieutenant Heyne and a Sergeant Browning (R71-72).

On 9 and 10 August Technical Sergeant Russell E. McCall, Headquarters Detachment, 503rd Military Police Battalion, personally examined the upstairs bedroom and on 10 August he made a sketch of the room which was admitted in evidence for illustration only. On the morning of 9 August a helmet, cartridge cases, "slugs", and cigarettes were found in the room and

were removed as evidence after McCall noted their exact location (R32-37; Pros.Ex.2). An examination of the door to the bedroom disclosed about ten fresh bullet holes in the door and door jamb (R27,33,40).

First Lieutenant Edward C. Heyne , Headquarters Detachment, 503rd Military Police Battalion, examined the premises on the morning of 9 August (R38). The door, which was very thin, had apparently been forced open (R40). Outside the bedroom door were found 22 expended cartridge cases, ".45 caliber ammunition fired from a sub-machine gun" (R38-39; Pros.Ex.3). Nine fired "slugs", .45 calibre, were found inside the bedroom, mostly just inside the door (R40-41; Pros.Ex.4). Lieutenant Heyne also observed packages of cigarettes and a bar of chocolate in the vicinity of a chair next to the bed which was farthest from the door (R42-43; Pros.Ex.5). Heyne further testified that the bedroom was "very much disheveled", and that the bedclothing was rumpled and "covered with blood in spots." On the floor was a pool of blood immediately to the left of the door as one entered which "had been smeared and tracked across the floor" (R43). Witness found an American helmet and helmet liner under one corner of the bed which was farthest from the door (see Pros.Ex.2). Marked in the helmet liner were the numbers "0125", the last four digits of accused Watson's serial number. The helmet and helmet liner were admitted in evidence as against this accused (R43-45; Pros.Ex.6). When Heyne saw accused Watson on the afternoon of 9 August at the stockade of Company B, 503rd Military Police Battalion, the latter was wearing a helmet liner. Watson said the liner did not belong to him. On the evening of 9 August witness showed this liner to accused Wimberly in the latter's company area. Wimberly identified it as his by a certain tear. Marked in the liner were the letter and digits "W2154," the first letter of Wimberly's surname and the last four digits of his serial number. The helmet liner was admitted in evidence against this accused (R45-47; Pros.Ex.7). (This helmet liner was the one found by Colonel Nixon on the staircase and placed on Watson's head when he was taken into custody). When Heyne saw Watson and Wimberly on 9 August he had them remove their fatigue clothing. Watson's clothing was admitted in evidence as Pros.Ex.8, and Wimberly's as Pros.Ex.9 (R47-49,55-56). Watson explained the condition of his clothing to Heyne by saying that he was drunk and "could have wallowed around in it" (R56). Wimberly offered no explanation concerning the condition of his clothing (R56-57). Whey Heyne saw Wimberly (9 August) in his company area the latter was in a jeep and had "his weapon with him." After Heyne took Wimberly into custody, the former returned to get the weapon but the jeep had been driven away. Later Sergeant Browning gave Heyne a Thompson sub-machine gun, No. 742540, which was produced by Heyne at the trial and admitted in evidence (R50,54-55; Pros.Ex.12). (In Wimberly's written statement secured by Lieutenant Heyne on 9 August (to which reference is hereinafter made), this accused admitted having a sub-machine gun in his possession on the evening in question, and stated that he believed the number thereof was 742540 (R54)).

On the evening of 9 August Heyne interviewed accused Wimberly, warned him of his rights under Article of War 24, advised him that "anything he said might be used against him in the event there should be any criminal

proceedings," and advised him that he need not make a statement. Wimberly voluntarily, and without threats or promises of reward, made a statement which was reduced to writing and then signed by accused after it was read to him. The statement was introduced in evidence as against accused Wimberly only (R50-52; Pros.Ex.10). On 10 August Heyne interviewed accused Watson, warned him of his rights under Article of War 24, advised him that anything he said could be used against him and that he need not make any statement. Voluntarily and without threats or force, Watson also made a statement which was reduced to writing and then signed by accused after it was read to him. This statement was introduced in evidence as against accused Watson only (R52-54; Pros.Ex.11).

Accused Wimberly's statement was in pertinent part as follows:

"Sometime earlier than midnight and a little later than darkness on the night of 8 August 1944 I left my company area where I had been drinking cognac with some of the men in the company. When I left the area I went to a farm house in the rear of the field where I was sleeping for the purpose of buying some cider. I bought two canteen cups full of cider and tendered ten francs to an old man with a limp who gave me the drinks. I then left to go back to my pup tent. When I had gone about fifty to seventy-five yards from the house I heard a burst of shots which were fired so rapidly I was certain they were fired from a sub-machine gun. I then decided to return to see if the shots came from the farm house and if they did to see what caused them. When I got to the farm house I saw Pvt. Joe Watson standing half in and half out of a door that appeared broken open just enough to permit the passage of a man. I asked him if he had fired some shots and he said in a sarcastic way, in substance, that he didn't but the way he said it led me to believe he had fired them. He then started to enter the house and I asked him where he was going to which he replied in effect that he was going inside and that if I was afraid I could go home. I heard him go up some stairs and I followed him to try to get him to go back to the company. I found him at the top of the stairs on the next floor up, put my submachine gun against the wall and tried to grab him to drag him away. I tussled with him and he gave me a shove. I started to fall and caught myself after falling down two or three steps.

While I was trying to get my balance Watson grabbed a sub machine gun and fired a burst into the wall and door leading into the sleeping room at what appeared to be waist high level. By the time I reached the top of the stairs he had stopped firing and the old man who was inside the room had opened the door and was hollering at us. I could tell by his actions that he was trying to get us to go away. The old man grabbed me and I shook him off so that I could again try to get Watson, who had already entered the room, to come away with me. When I found Watson he had a girl on a bed and had his arms around her shoulders. I made a grab for him and he shoved me away. I returned, made another grab for him and was shoved away again. When I saw I couldn't get him away from the girl I decided to leave and started for the door. All this while the girl was talking in a louder than normal voice as though she wanted him to leave and let her alone. I decided to make one more effort to get him away and went back to the bed and found both of them, Watson on the girl, lying on the bed. I grabbed him again and told him to come away but he swore at me and told me to go away if I was afraid. By this time the old man had gone. I picked up a submachine gun near the window, lit some matches to try to find my helmet liner which I had lost in the tussle but was unable to find it. I then went out on the stairs and lighted some more matches to try to find my helmet liner there but again could not. I then left, went back to the company area and went to bed.
I am not certain but I think the serial number of my submachine gun is 742540." (Pros.Ex.10).

Accused Watson's statement in pertinent part was as follows:

"On the night of 8-9 August 1944, I was in my company area after supper drinking cognac with some of the men from my company. There were Sgt. Dorsey, Sgt. Richmond, Pvt Willie Emery and several others. I was in the field where I sleep part of the time while I was drinking. This field is on the opposite side of the road from company headquarters. About

(400)

the time darkness fell I went to bed and went to sleep. I had just been to sleep a short while when Pvt. Willie Emery awakened me to tell me he had a bottle of cognac. We drank a little more than half of the bottle (quart) and then Emery took what was left and went to his bunk. I had a quart bottle myself that was almost full. I joined Sgt. Dillard, PFC Callahan and Pvt Odom and we drank all but about a third of my bottle between the four of us. While we were drinking T/5 Willie Wimberly came up to us but I can't remember if he had a drink or not. About midnight we all decided to go to bed and we broke up our party. I then went to bed again. In a short time I heard a weapon being fired in the rear of our area. Sgt. Dillard asked me to get up and see if Pvt. Charlie Gates had fired the shot because he was worried about Gates having had too much to drink earlier in the night. I got out of bed and went to the rear of the area and walked along a little road on the other side of the hedge from our field. I was going back to my bunk after being unsuccessful in finding out who fired the shot. I passed a man near one corner of our area which is also near a farm house. As I passed the man I inquired if he had anything to drink by saying "Cognac?" He replied, "Oui," and pointed to the farm house. Willie Wimberly who had joined me to walk back toward our bunks, was there at the time. I started for the farm house and Wimberly followed a few feet behind me and the frenchman with whom I was walking. The night was clear and bright -- not bright moonlight but just naturally light. We all went to a door in the house and while Wimberly and I waited there the Frenchman entered the house and went upstairs. I heard him say something and as I thought he was talking to me I started up the stairs. About three steps from the top I met him coming down with a bottle in his hand. I took the bottle and gave the man a five hundred franc note. The man stayed there and was talking to Wimberly who had followed me up the stairs. I went to the landing at the top of the stairs and started to drink from my bottle. I did not see or hear anyone around

except the man who sold me the bottle of cognac and Wimberly. Also it was the first time I had been in or near that particular farm house. I must have gotten drunk because the next thing I knew I was in the yard with a Colonel, two Lieutenants and two MPs. Someone, I think it was the Colonel, was asking me what I was doing in the house. I told him I had just gone into the house to get some cognac and must have gotten drunk. I was then turned over to the MPs and I have been under guard ever since.
At the time I was going to the house with the Frenchman I had a sub machine gun with me. I cannot recall whether or not Wimberly was armed." (Pros.Ex.12).

4. No evidence was introduced by the defense, and upon being advised of their rights each accused elected to remain silent (R81-82).

5. Certain procedural questions require comment.

(a) On several occasions during the trial both accused were directed by the trial judge advocate, the law member, or the president to arise after witnesses were asked if they could identify them (R25,60,69,74,76,80). Although, as later demonstrated herein, it was clearly established by the evidence that accused were the two soldiers involved in the entire events of the evening, the a ction in pointedly directing the attention of witnesses to accused by asking them to stand up was improper and is a practice not to be condoned. However, such action did not violate the prohibition of the Fifth Amendment to the Federal Constitution against compelling one to give evidence against himself (CM ETO 1107, Shuttleworth and authorities cited therein; CM ETO 3362, Shackleford).

(b) When introducing the helmet and helmet liner of accused Watson in evidence, the trial judge advocate showed the charge sheet with reference to this accused to the court and called its attention to the fact that the four numbers on the helmet liner were the last four digits of Watson's serial number as it appeared on the charge sheet. He then requested Watson to step forward "and show us his dog tags". The objection of the defense that such procedure constituted "compulsory incrimination" by accused was overruled by the law member, whereupon the trial judge advocate read aloud to the court from Watson's identification tags the data thereon, including his serial number. The defense counsel stipulated that the data was correctly read to the court (R44-45). The same procedure was followed when Wimberly's helmet liner (found in Watson's possession on 9 August) was introduced in evidence, except that Wimberly's serial number was not read from the charge sheet and the defense did not object to the request that Wimberly display his identification tags (R46-47). The reading of Watson's serial number from the charge sheet was authorized. The charge sheet is the "basic

instrument in the trial before a general court-martial" (CM ETO 1704, Renfrow). Had the identification tags of each accused been removed from his possession prior to trial by proper authority, kept in the possession of such authority, produced at the trial and properly identified as belonging to each accused, they could have been admitted in evidence. As the tags themselves could have been introduced in evidence under the indicated circumstances, the Board of Review is of the opinion that the error, if any, in reading the number from the identification tags personally worn by each accused at the trial, was not such as injuriously to affect his substantial rights.

(c) After the proceedings mentioned in the foregoing sub-paragraph, the helmet and helmet liner of Watson and the helmet liner of Wimberly were introduced in evidence over the objection of the defense (R45,47; Pros.Exs. 6,7). The respective articles were marked with the last four digits of the serial numbers of each accused and Wimberly's liner bore the first initial of his surname. The helmet and helmet liner of Watson were found under the bed where he was discovered asleep. Watson was later found wearing the helmet liner of Wimberly, who identified the liner as his and admitted losing it at the farmhouse. The liner had been placed on Watson's head as he was taken from the scene. The Board is of the opinion that these exhibits were properly identified and admitted in evidence.

(d) The Board is also of the opinion that the 22 cartridge cases, .45 calibre, found outside the door of the bedroom and the nine, .45 calibre "slugs" found inside the room were properly admitted in evidence. The defense objected to the admission of the nine "slugs" (R39-41). In his statement, each accused admitted having a sub-machine gun in his possession when he went to the farmhouse and Marie and her father testified that their assailants fired bullets from a sub-machine gun through the bedroom door. Lieutenant Heyne testified that the 22 expended .45 calibre cartridge cases were fired from a sub-machine gun, and the "slugs" were found in the bedroom.

(e) The law member admitted Wimberly's sub-machine gun in evidence over objection by the defense, "subject to it being further connected with the accused by subsequent testimony" (R54-55). There was no direct evidence that the particular sub-machine gun found at the scene of the crime and turned over to the military police was Wimberly's. The military policeman who took custody of Watson and the sub-machine gun found at the scene, testified that he gave the weapon to a Sergeant Browning and Lieutenant Heyne. Heyne testified that the gun admitted in evidence was given him by Sergeant Browning. The Board of Review is of the opinion that the gun was properly admitted in evidence because in his voluntary statement Wimberly admitted having a sub-machine gun in his possession at the farmhouse, and stated that he believed its number was 742540, the actual number of the gun. As later shown herein, the questions as to which accused fired the machine-gun bullets through the door, and which of the two sub-machine guns was then used, are immaterial with reference to the guilt of either accused of the offenses alleged.

(f) The defense objected to the introduction in evidence of the American cigarettes and chocolate bar found in the bedroom (R43) and the fatigue clothing which both accused were wearing on 9 August and which were taken from them by Heyne (R48-49). There was evidence that Watson was wearing fatigues when discovered asleep in the bedroom, and that his trousers were bloodstained. There was no evidence as to the nature of Wimberly's attire on the night of 8 August. The only other indication that the fatigue clothing taken from both accused by Heyne on 9 August was the identical clothing worn by accused the previous night, and the only evidence as to the condition of the articles, was the testimony of Lieutenant Heyne. He testified that Watson accounted for the condition of his clothing by stating that he "could have wallowed around in it" and that Wimberly offered no explanation concerning the state of his clothing. There was no direct evidence that the American cigarettes and chocolate bar were actually left in the room by accused. The Board is of the opinion that considering all the circumstances of the case, the exhibits were properly admitted in evidence (Cf: CM ETO 3042, Guy and authorities therein cited). In any event, as will be later demonstrated herein, the guilt of both accused of the offenses alleged was so convincingly proved by other competent and substantial evidence, that error, if any, in admitting these exhibits in evidence was not such as injuriously to affect their substantial rights.

6. Identification of both accused as the soldiers involved in the entire events of the evening was conclusively established by the evidence. At the trial, Pierre Gourdin definitely identified Wimberly, whose Thompson sub-machine gun and helmet liner were found in the farmhouse. His presence at the scene was also revealed by his own statement. Watson was actually found asleep on the bed of the victim of the rape during the early morning hours of 9 August and his helmet and helmet liner were found under the bed.

7. Accused Watson, in his statement contended that he was drunk. The victim, Marie, testified that neither accused was drunk and two additional witnesses testified that Watson was not drunk, one witness stating that he walked and talked without difficulty. A fourth witness testified that Watson might have been drunk but witness was not certain of this fact. The question of intoxication and the effect thereof on the specific intents requisite to constitute the offenses alleged in the specifications of Charge II, and on the general criminal intent involved in the offense of rape (Charge I and Specification), were issues of fact for the sole determination of the court. Such determination against accused, reflected in the findings of guilty, will not be disturbed upon appellate review as it was fully supported by evidence of a competent and substantial nature (CM ETO 3475; Blackwell et al and authorities cited therein).

8. The evidence conclusively established the guilt of each accused of assaulting Pierre and Marie with intent to do them bodily harm with a dangerous weapon (Specifications 1 and 2, Charge II). Without the slightest justification or excuse, accused fired bullets from a Thompson submachine gun through a locked door into a room which they had every reason

to believe was occupied. Both Marie and her father were wounded. Marie suffered such serious injuries to her leg that she was forced thereafter to use her elbows to drag herself to the home of a neighbor. There was no direct evidence as to which accused actually fired the sub-machine gun, but such proof was unnecessary in view of the fact that the evidence conclusively showed that both accused were engaged in a wrongful joint venture to obtain sexual intercourse, by any means whatsoever. (They refused the Gourdins' offer of wine or whiskey while in the bedroom). Under such circumstances each accused was responsible not only for his own illegal acts but also for all illegal acts committed by his partner in pursuance of their common purpose and the specific intent of one was also the specific intent of the other (CM ETO 3475, Blackwell et al, and authorities cited therein; CM ETO 3754, Gillenwaters; CM ETO 1737, Mosser, and cases cited therein; CM ETO 2297, Johnson and Loper).

9. The evidence is also legally sufficient to support the findings of guilty of burglary as to each accused (Specification 3, Charge II). All elements of the offense were convincingly established. The forcible breaking by accused of the upstairs bedroom door alone, followed by the entry into the bedroom, was a sufficient breaking and entry (MCM, 1928, par.149d, pp.168-169; CM ETO 3754, Gillenwaters). Whether the breaking and entry were accompanied by the intent to commit the felony alleged, rape, was again a question of fact for the sole determination of the court, whose findings of guilty are sustained by competent, substantial evidence (CM ETO 78, M. Watts).

10. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

* * *

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

* * *

Proof.--(a) That the accused had carnal knowledge of a certain female, as alleged; and (b) that the act was done by force and without her consent" (MCM, 1928, par.148b, p.165) (Underscoring supplied).

It was clearly established by the evidence that the victim was assaulted by force. After she was wounded in the leg by a bullet fired from a sub-machine gun accused forcibly entered the room. They placed her on the bed and held a gun at her face and breast. She screamed for help but they put their hands over her mouth. They held her down on the bed and then each accused in turn assaulted her. The fact that the victim did not consent was also convincingly proved. Despite the fact that

she was badly wounded in the leg she "resisted as far as I could with all my force." She could not escape because they held her by the leg. She testified that she resisted to such an extent that "they did not arrive at what they wanted to do."

This fact leads to a consideration of the subject of penetration. It is apparent that the woman, who was 33 years of age, was somewhat ignorant about sexual matters. She testified "up to then I didn't know what a man was, but now I do know." At one time she testified that her female organ was penetrated "a little," that both soldiers did it, but "principally the small one" (Wimberly). At another point she testified that she did not think both soldiers succeeded in penetrating her person, and then stated that she believed both of them did, but that she did not know. Then, asked if she was sure that either penetrated her person she answered "Oh, yes." It is indicated by the evidence that both accused tried several times to penetrate the person of the victim. That one or both of accused did penetrate her female organ was clearly and convincingly proved by the medical testimony. Major Sohler found that

> "The separation of the large and small labia * * * below were swollen and reddened and on separation of the small labia there was bleeding."

It was established that the bleeding was the result of a traumatic injury to the small labium. Vaginal smears were taken and sperm cells were found therein. The hymen was penetrated and ruptured. Major Sohler was of the opinion that the woman "had recently had sexual intercourse," and that

> "there had been some thing internally to cause the separation wide enough to tear this vaginal hymen."

In view of the medical testimony, considered together with that of the victim, the Board of Review is of the opinion that the fact of penetration was established by evidence of a competent and substantial character (CM ETO 3375, Tarpley; CM ETO 3044, Mullaney).

The testimony of the victim was additionally corroborated by the fact of her complaint to her neighbor, Henry, that two negroes were at her house and that they had "mistreated her", by her bleeding leg, by the testimony and condition of her father, Pierre, and by the condition of the victim's bed and the bedroom.

The possibility that only one of accused actually accomplished penetration is immaterial. As has been stated, both accused were engaged in a wrongful joint venture to secure sexual intercourse by any means whatsoever. It is abundantly evident that they aided and abetted each other in the accomplishment of penetration, and that one accused, if not both, were successful in this respect. One who aids and abets the commission of

rape by another person is chargeable as a principal whether or not the aider or abettor engages in sexual intercourse with the victim (CM ETO 3740, Sanders et al, and authorities cited therein). The Board of Review is of the opinion that as to each accused the evidence fully supported the findings of guilty of rape (CM ETO 2686, Brinson and Smith; CM ETO 3740, Sanders, et al; CM ETO 3197, Colson and Brown; CM ETO 2472, Blevins).

11. The charge sheets show that accused Watson is 25 years 11 months of age and was inducted 15 August 1942. Accused Wimberly is 32 years 11 months of age and was inducted 8 July 1942. Neither accused had any prior service.

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

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

Edward W. Sargent Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 OCT 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private JOSEPH WATSON (39610125), and Technician Fifth Grade WILLIE WIMBERLY, JR (36392154), both of 257th Signal Construction Company, attention is invited to the foregoing holding by the Board of Review that as to each accused the record of trial is legally sufficient to support 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 sentences.

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 3859. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3859).

3. Should the sentences 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.

B. Franklin Riter

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

1 Incl:
Record of Trial.

(Sentences ordered executed. GCMO 95, ETO, 6 Nov 1944)

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952