E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 16512
CM ETO 17698

VOLS. 31-32

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 32 B.R. (ETO)

CM ETO 17169 - CM ETO 17698

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D. C.

Judge Advocate General's Department

Holdings and Opinions

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

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 32 B.R. (ETO)

including

CM ETO 17169 - CM ETO 17698

(1945-1946)

Office of The Judge Advocate General

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BOARD OF REVIEW NO. 4

23 OCT 1945

CM ETO 17169

U N I T E D S T A T E S	6TH ARMY GROUP
v.	Trial by GCM convened at Heidelberg, Germany, 18, 19 June 1945.
First Lieutenant JAY S. MACDOWELL (O-1574085), 3460th Ordnance Medium Automotive Maintenance Company	Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER And ANDERSON, Judge Advocates

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

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

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

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Jay S. MacDowell 3460th Ordnance MAM Company, did, at Dijon, France, on or about 29 November 1944, in connection with the performance of his official duties and with theperformance of work by personnel of the military service of the United States in removing certain property from an arsenal utilized by the United States Army, wrongfully solicit and receive from Henri Imbert the sum of ten thousand

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(10,000) French francs, of the exchange value of about two hundred ($200.00) dollars.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

He pleaded not guilty, and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Specification I, Charge II, except the words "solicit and", and of Charge II, and not guilty of all other specifications and Charge I. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 6th Army Group, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution with reference to the Specification and Charge of which accused was found guilty (Specification 1, Charge II, and Charge II) may be summarized briefly as follows:

Accused's organization, the 3460th Ordnance Medium Automotive Maintenance Company, came to Dijon, France in October 1944 (R6), and was assigned to clearing a French artillery arsenal of approximately one hundred wrecked vehicles (R7). The wrecked vehicles were first removed to an area about a mile from the arsenal, but this location did not prove satisfactory and so they were taken to a nearby coal yard (R8). Monsieur Henri Imbert, a French civilian, had been authorized by the French Government to remove the French material located at the arsenal (R41; Pros.Ex.A), and in November 1944 he entered into negotiations with accused to remove it from the arsenal and store it in the coal yard (R14,15,43). Shortly thereafter, and at a time when accused and Imbert were

discussing the removal of the material, Imbert gave accused ten thousand francs (R14,15). Two French civilians were present at the time accused received the money (R19). At the time the payment was made Imbert declared that if the material were carefully handled "he would make it worthwhile" (R19,45).

4. Evidence for the Defense:

Accused testified as a witness in his own behalf and acknowledged the receipt of the ten thousand francs from Imbert (R65,67,77), but declared he did not think it wrong because Bourassa, another French civilian, "said it was in appreciation for what we were doing" (R65). At the time he did not consider the payment to be for any services rendered, although he admitted that "as you look at it now you might consider it that way" (R66). He understood the money was given in "appreciation for the moving of the trucks", and he admitted that Imbert said "he would like the wreckers to handle it with care" (R65). The payment did not affect him in the execution of his duties (R65) because he merely followed the orders of his superior officer (R71). He gave his company commander, Captain Salerno, one-half of the money received, or five thousand francs (R70).

5. The evidence clearly showed the payment to and acceptance by accused of ten thousand francs, as alleged in the Specification, and the sole question for solution is whether this conduct constituted a violation of Article of War 96.

The Specification alleged and the proof established that the payment was made to accused in connection with the performance of his official duties and with the performance of work by other personnel of the army. Imbert, by reason of authorization given him by the French government, had an interest in the expeditious and careful removal of the wrecked vehicles, and the evidence abundantly supported the inference that the payment to accused was made for the purpose of obtaining his cooperation.

Although accused contended that the acceptance of the money did not influence him in the execution of his official duties, the payment was made under suspicious circumstances, in the presence of two French civilians, and under conditions which would be

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conducive to corruption and disloyalty to the army and service. A discrediting conduct is clearly shown (CM 235011, Goodman, 21 BR 243 (1943); CM 234644, Cayouette, 21 BR 97 (1943)).

In CM 235011, Goodman, supra, the Board of Review, in discussing a similar case where a salvage officer accepted $20.00 from a junk dealer, said (p.253):

> "The real question is whether the acceptance of the money by accused, even if judged in its most favorable light as an unsolicited gift predicated upon no past or future consideration or favor, is an offense in violation of Article of War 96. It is the essence of naivete to believe that such a gift can be accepted without kindling forbidden hopes in the heart of the giver, or stultifying the recipient's sense of singleminded obligation to the Government. The public regards the acceptance of gratuities by public servants with grave suspicion. The acceptance of this money by accused was a suspicious circumstance. It tended to belittle accused, and to bring discredit and disrepute not only to him but to the service which he represented".

The record of trial is, therefore, legally sufficient to support the findings of guilty of Specification I, Charge II, and Charge II.

6. The charge sheet shows that accused is 26 years of age, enlisted 7 July 1941, was appointed a second lieutenant on 31 July 1942 and was promoted to first lieutenant on 22 November 1943. He had no prior service.

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

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

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(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

(5)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 23 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army

1. In the case of First Lieutenant JAY S. MacDOWELL (O-1574085), 3460th Ordnance Medium Automotive Maintenance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 17169. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17169).

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

IN
25 OCT 1945
AG M & R
USFET

(Sentence ordered executed. GCMO 547, USFET, 8 Nov 1945).

17169

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

BOARD OF REVIEW No. 3 15 OCT 1945

CM ETO 17185

U N I T E D S T A T E S	)	XXII CORPS
v.	)	
Private JOHN W. HARVEY (35727836), 558th Ambulance Company, Motor, Separate	)	Trial by GCM convenened at Krefeld, Germany, 1 June 1945, Sentence: Dishonorable discharge, total forfietures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW No. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John W. Harvey, 588th Ambulance Company, did, at Grefrath, Germany, on or about 3 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Margot Stiels.

He pleaded not guilty to and, three fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction for drinking in a public place, leaving vehicle unguarded and absence without pass, in violation of Article of War 96. Three fourths members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death

by musketry. The reviewing authority, the Commanding General XXII Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence shows that after nightfall - at about 1900 hours on the date and at the place alleged - a colored soldier, by pointing his pistol at the seventeen year old prosecutrix, forced her to leave her mother and several other terrprized civilians in a German house, where he had found them all together, and to accompany him to a lonely spot nearby (R7-8,23). There he had sexual intercourse with her without her consent (R8). Immediately afterward she escaped returning to the house where she had left her mother, who, in the meantime, had summoned military police (R9,12,14). Shortly thereafter, accused was apprehended near the scene of the crime and identified by the prosecutrix as her assailant (R9,12-13,15). He protested his innocence then and thereafter (R16-19). The following afternoon, at an identification parade, prosecutrix identified another soldier twice before re-identifying the accused; but she identified accused at the trial. Her mother and several civilian witnesses also testified that accused was the soldier who, on the occasion in question, forced the prosecutrix to go away with him (R10, 17,20-24).

Accused testified that he had never seen prosecutrix prior to the time he was brought before herby the military police for the purpose of identification. He explained that he had been out souvenir hunting and became separated from his companions when arrested near the scene of the crime (R16-19).

For further evidentiary details, see paragraphs five and six of the review by the staff judge advocate of the reviewing authority.

4. Competent, uncontradicted evidence established the rape of the prosecutrix by a colored soldier at the time and place alleged (CM ETO 4608, Murray; CM ETO 7078, Jones; CM ETO 7977, Inmon; CM ETO 11376, Longie; CM ETO 11779, Bohn and Bourbon). Accused was apprehended under inculpatory circumstances. Prosecutrix and other witnesses identified him as the soldier involved. His uncorroborated denial raised an issue of fact for the court, whose determination thereof, based on a complete substantial evidence, will not be disturbed on appellate review (CM ETO 5886, Brinson and Smith; CM ETO 3200,

Price; CM ETO 3837, Bernard W. Smith; CM ETO 12869, De War; CM ETO 14338, Reed; CM ETO 16971, Brinley).

5. The charge sheet shows that accused is 21 years of age, and was inducted 19 March 1943 at Evansville, Indiana. He had no prior service.

6. 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 as commuted.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[redacted] (Temporary Duty). Judge Advocate

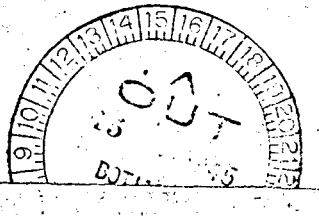
(10)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 15 OCT 1945 TO: Commanding General, XXII Corps, APO 250, U.S. Army.

1. In the case of Private JOHN W. HARVEY (3572836), 588th Ambulance Company, Motor, Separate, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17185. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17185).



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

(Sentence as commuted ordered executed. GCMO 556, USFET, 8 Nov 1945).

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

BOARD OF REVIEW NO. 4 19 OCT 1945

CM ETO 17186

U N I T E D S T A T E S	102ND INFANTRY DIVISION
v.	Trial by GCM, convened at Arnstadt, Arnstadt, Thuringen, Germany, 20 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private THOMAS L. McFALLS (36544071), Company E, 406th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private THOMAS L. McFALLS, Company "E", 406th Infantry, did, at Beggendorf, Province of Rhein, Germany, on or about 21 February 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until return to his organization on or about 24 April 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for four days in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonora-

bly discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority, the Commanding General, 102nd Infantry Division, approved only so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of desertion at the time and place and with the intent specified, terminated by return to military control in a manner unknown on 19 April 1945, in violation of Article of War 58, and only so much of the sentence as provides that accused be shot to death with musketry, recommending that owing to the previous satisfactory performance of this soldier in combat, the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the confirming authority may direct for the term of accused's natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence as modified by the reviewing authority, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

The evidence clearly establishes that accused absented himself without leave from his organization from 21 February 1945 to 19 April 1945 (R7,14; Pros.Ex.A), and the only issue of fact raised by the record of trial is whether accused entertained the specific intent to avoid hazardous duty at the time he absented himself without leave.

The evidence discloses that on 18 February 1945 accused returned to his organization, Company E, 406th Infantry, from special duty with a military police unit, and was assigned for duty as a rifleman with a platoon of that organization (R10). At that time Company E had been removed from the line and was making preparations to cross the Roer River (R7-9). Extra ammunition and a three-day supply of "K" rations were issued on 20 February 1945 (R8,11); signal equipment was being received, orientation lectures were being conducted and sand table discussions were held. There was general knowledge among the men that the crossing would be made in the near future, and they all talked about crossing the river and what they expected to do (R8,17). Preparations were completed on 22 February 1945 (R11), having required four days during which each man spent his entire time preparing for the crossing. On 21 February 1945, Company E was located in Beggendorf, Province Rhein, Germany, and was receiving enemy artillery fire (R9). The crossing of the Roer River was made pursuant to these preparations on 23 February 1945 (R10).

4. Evidence for the Defense:

Accused, after being informed of his rights with reference to testifying, elected to remain silent (R20,21).

His company commander stated that accused is a normal person insofar as courage is concerned, and that he did not believe he was the type of man to absent himself with the intention of avoiding hazardous duty (R18,19). While serving as a military policeman in January and February 1945, accused had been at the front and was "about like anybody else" under fire (R20).

5. It was incumbent on the prosecution to prove that, (a) accused absented himself without leave, as alleged, and (b) that he intended, at the time he absented himself, to avoid hazardous duty (MCM, 1928, par.130a, p.143).

The evidence abundantly proves the absence without leave, and the only question for solution is whether such absence was attended, at the time it commenced, by an intent to avoid hazardous duty.

The record of trial discloses that accused returned to his organization for duty as a rifleman at a time when it was making extensive preparations for a crossing of the Roer River, and that these preparations occupied aperiod of four days prior to 22 February 1945, involved the issuance of extra rations and ammunition, orientation lectures and sand table discussions, and were a subject of general knowledge and discussion among the men of the company. On the exact day accused absented himself without leave his company received enemy artillery fire, and two days thereafter the crossing of the Roer River actually was made. Throughout the period of time from 18 February 1945 to 21 February 1945, he was present for duty with his organization and, although there is no evidence to show he, as an individual, was specifically informed of the impending operation, the record of trial forcefully exhibits a situation of fact from which the court legitimately could conclude that he was apprised of the imminence of hazardous duty. His absence without leave occurring at this crucial period, the court was justified in concluding that he intended to avoid hazardous duty when he left his place of duty (CM ETO 6637, Pittala; CM ETO 1432, Good; CM ETO 8519, Brugaglio).

6. The charge sheet shows that accused is 22 years eight months of age and was inducted 12 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, as commuted.

8. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct. Confinement in a penitentiary is authorized by Article of War 42. The designation of the United

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Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42, Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 19 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private THOMAS L. McFALLS (36544071), Company E, 406th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the finding of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence, as commuted.

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 17186. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17186).

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

(Sentence as commuted ordered executed. GCMO 549, USFET, 8 Nov 1945).

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

BOARD OF REVIEW NO.3

13 OCT 1945

CM ETO 17205

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Heidelberg, Germany, 27 and 28 August, 1945.
Private PRIMITIVO CABAN-MONTALVO (3042668[illegible]), Company "G", 65th Infantry.	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 Primitivo Caban-Montalvo, Company "G" 65th Infantry, did, at Pfungstadt, Germany, on or about 10 June 1945, with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Orlando, Jose A., Company "G" 65th Infantry, a human being by shooting him in the back with a rifle.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitiary, 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 showed that on the afternoon of 10 June 1945, in Pfungstadt, Germany, accused was hit and knocked to the ground by Sergeant Julio Ortiz of his company after he threw a bottle at Ortiz when Ortiz reprimanded him for drunkenness and unsoldierly conduct on the street. Thereafter, accused returned to camp, some two kilometers from Pfungstadt, and there received treatment at the dispensary for minor injuries received during the fight. At the dispensary, he told the aid men that he had had a fight with Sergeant Ortiz in town and was going to kill him (R22). He was thought to be drunk by the personnel of the dispensary when he appeared there for treatment (R24). After leaving the dispensary, he went to his barracks, loaded his rifle, and started in the direction of the mess hall with the remark that he was going to kill a dog (R 8,12,13,16,19,22). He was staggering and appeared to be "somewhat excited" at the time (R18). As he neared the door of his barracks, he encountered Ortiz returning from town and immediately fired his rifle from the hip (R10,14,17,21). The shot grazed Ortiz and hit Private Jose A. Orlando, who was then standing in front of an adjoining building, causing his death almost instantaneously (R6,7,9,13,14,21, 23). Immediately after the shooting, accused was heard to express regret that he had killed an innocent man rather than the man he had wanted to kill (R17). A short time later, when taken before his Company Commander, he again stated that he had killed an innocent man and also said that he would "get the Sergeantif it was the last thing he did on this earth" (R34). About three-quarters of an hour elapsed between the time of the fight and the time of the shooting (R13).

4. For the defense, Corporal Francisco Collazo of accused's Company testified that he came upon accused some two kilometres from camp on the afternoon of the shooting and, noting that he was "somewhat half drunk" and had minor injuries about the head, accompanied him back to the company, where, at the direction of a lieutenant, he took him to the dispensary (R26,27). An aid man at the dispensary testified that he treated accused for "two simple wounds" on his head in the afternoon in question and noted at the time that accused was "very nervous and very jumpy like apparently being drunk" (R28). A medical officer who saw accused immediately after the shooting testified that accused was under the influence of alcohol at the time but did not appear to be"dead drunk" (R29).

Accused, after being advised of his rights as a witness, elected to testify on his own behalf. He stated that the incident in town did not result from his being reprimanded by Sergeant Ortiz for drunkenness but as the result of Ortiz' misapprehension of the import of a conversation he was having with Ortiz' girl. He further stated that Ortiz used brass knuckles during the fight (R 32). He asserted that he remembered nothing from the time he was taken to the aid station at his camp until the following morning when he was ordered to the stockade. Prior to the incident which precipitated the shooting, he had never had any trouble with Sergeant Ortiz (R33).

5. The evidence clearly shows that accused killed Private Jose A. Orlando at the time and place and in the manner alleged. Further, since malice aforethought may exist where an accused has knowledge that his act "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", and since it was shown that in firing the fatal shot accused intended to kill Ortiz, the court could find that accused acted with malice aforethought in committing the homicide even though the firing of the rifle resulted not in the death of Ortiz but in the death of Orlando, who happened to be standing in the line of fire at the time (MCM,1928, par. 148a, p.164).

> "It is clear that when accused for the fourth time discharged his rifle by aiming and shooting at Grady as the latter sought shelter, he intended with malice aforethought willfully, feloniously, unlawfully and with premeditation either to kill Grady or inflict serious bodily injury upon him. The bullet went wild and killed Coleman, malice followed the bullet. This was murder condemned by Article of War 92" (CM 221640, Loper; 13 BR 195,208, Cf: CM ETO 422, Green; 1 BR (ETO) 345).

While accused was drunk when the homicide occurred, there is little evidence to show that he was too drunk to realize the nature of his actions. Rather, the evidence strongly points to the conclusion that he was well aware of his surroundings and in substantial possession of his reasoning faculties. Ortiz struck accused earlier in the afternoon. A rather extended period of time elapsed between this altercation and the shooting. There is clear proof of the accused's actions in the intervening period which bespeaks planning and premeditation by accused. There is also substantial evidence to support the finding that sufficient time elapsed between the cessation of accused's initial conflict with Ortiz not only to enable accused to cool his anger and passion, but also to prove affirmatively that accused acted with malice aforethought and deliberately planned the shooting of Ortiz. Under such conditions of the record the finding of the court must be accepted by the Board of Review (CM ETO 292, Mickler; 1 BR (ETO) 231,250; CM 246101, Nickles; 29 B.R. 381387, III Bull; JAG 343).

6. The charge sheet shows that accused is 34 years of age and was inducted 13 February 1944 at Fort Buchanan, Puerto Rico. No prior service is shown.

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

(20)

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

B R Wagner Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

RESTRICTED

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

BOARD OF REVIEW NO. 3

6 OCT 1945

CM ETO 17231

U N I T E D S T A T E S	THIRD INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 28 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Disciplinary Barracks, Greenhaven, New York.
Private JAMES B. CRENNAN (12182019), Company G, 30th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private JAMES B. CRENNAN, Company "G", 30th Infantry, did, at or near Brignoles, France, on or about 20 August 1944, desert the Service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at his Company C.P., at or near Lievans, France, on or about 14 September 1944.

Specification 2: In that * * * did, at or near Belmont, France, on or about 16 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at his Company C.P., at or near Strasbourg, France, on or about 1 December 1944.

Specification 3: In that * * * did, at or near Worms, Germany, on or about 26 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Marseilles, France, on or about 20 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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 rest of his natural life. The reviewing authority approved the sentence, designated the "U.S." Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

a. Specification 1: Duly authenticated extract copies of the morning report of accused's company for 21 August and 15 September 1944 respectively show accused from "duty to MIA" on 20 August, and from "MIA to rejoined Co. 14 Sept." (R7; Pros.Ex.A). Accused's company commander testified that on 20 August 1944, the company was on an approach march from Brignoles to Aix, France. In the outskirts of Aix, the company encountered a "considerable amount" of enemy resistance and "received a lot of mortar fire and a lot of casualties". Accused was present with the company on 20 August, but was discovered to be missing that night. He had no permission to be absent at any time, and was not present for duty between 20 August and 14 September 1944 (R8-9). In a voluntary written statement made on 15 May 1945, accused stated that on or about 20 August 1944, at Brignoles, France, during the "fire-fight", he felt something hit him on the back and went back to find the "medics", but was unable to find them because it was dark. He stayed in the rear areas and thought about going back, but could not "get enough nerve". On 14 September 1944 he "made" himself return to his company and determined to stay with it (R16-17; Pros.Ex.D).

b. Specification 2: Duly authenticated extract copies of the morning report of accused's company for 19 September and 2 December 1944 respectively show him from "duty to MIA 16 Sept." and from "MIA to duty 1 Dec." (R7; Pros.Ex.B). Accused's company commander testified that accused was present for duty on 16 September 1944, when the company was attacking the objective of Belmont, France, and meeting "a lot of small arms fire, fanatic resistance, Panzer Fausts, and things like that". Accused started to make the attack, but later it was reported

by the platoon sergeant that he did not go through with it. Witness gave accused no permission to be absent, and although witness did not make a personal search for him, he would have seen accused had the latter been present. Accused was not present for duty from 16 September until early in November when witness was transferred (R9-11). In his voluntary statement made on 15 May 1945, accused stated that after returning to his company on 14 September 1944, he "stayed for two days and couldn't take it, and again went back to the rear", where he remained until 1 December, at which time he returned to the company (R16-17; Pros.Ex.D).

c. Specification 3: A duly authenticated extract copy of the morning report of accused's organization for 26 March 1945 shows accused from "Duty to AWOL 0200". The record of events for the same date shows that the company "jumped off in attack, crossed Rhine River 0230. Are now engaged in clearing out town" (R7-8; Pros.Ex.C). The testimony of accused's platoon sergeant and first sergeant shows that on 26 March 1945, accused was present at an orientation relative to an attack involving a crossing of the Rhine River. The attack was made later that day against enemy resistance and casualties were sustained in the company. Accused was present with the platoon before it crossed the river but was not present after the crossing, and had no permission to be absent. He was not present for duty between 26 March and 20 April 1945 (R11-15). In his written statement made on 15 May, accused stated that at the Rhine River crossing he had just returned from the hospital and did not have a helmet. Not wanting to go into combat without one, he first tried without success to obtain one from the supply sergeant, and then left the company area. He wandered around for some time and later surrendered to the military police at Marseille, France, on 11 April 1945 (R16-17; Pros.Ex.D).

4. After his rights as a witness were explained to him, accused elected to remain silent (R21-22).

For the defense, Major J. Robert Campbell, the division neuropsychiatrist, testified that he had examined accused on several occasions over a period of a year, and again on 14 May 1945, and in his opinion accused was at all times able to distinguish right from wrong and to adhere to the right, and was fully able to understand the charges and assist in his defense. However, accused has a schizoid personality which is "poorly adapted to successful social, occupational or mechanical adjustment", and he is "chronically inclined to withdraw into his own shell and partake little in the activities of his associates and fellow soldiers". He does not possess the aptitude to serve the army adequately, regardless of what rehabilitation procedure might be tried, and, although he is mentally responsible, in the opinion of the witness, "accused should be ultimately discharged from the army through the procedure of AR 615-369 on the basis of inaptitute" (R18-20).

5. The testimony for the prosecution, the competent morning report entries, and accused's voluntary statement clearly establish that he left his organization without leave at each of the times and places alleged in the three specifications, when his company was engaged in

actual combat with and attacks against the enemy. The evidence shows without doubt that he was fully aware of the tactical situation of his company, and the court was fully warranted in inferring that he absented himself with the intent to avoid the hazardous duty alleged in each specification (CM ETO 7413, Gogol; CM ETO 5953, Myers; CM ETO 5293, Killen; CM ETO 11116, Purnell; CM ETO 10955, Volatile). Each offense was committed at the moment accused absented himself with the requisite intent, and it was not necessary that the place of termination of the respective desertions be proved (CM ETO 9975, Athens et al; CM NATO 2044, III Bull. JAG 232). Nothing in the testimony of the division neuropsychiatrist, or in the other evidence in the record, raises any legal issue as to the mental responsibility of accused, since it affirmatively appears that he could distinguish right from wrong and adhere to the right, and was capable of cooperating in his defense (CM ETO 11265, Murray, Jr.).

6. The charge sheet shows that accused is 21 years of age and enlisted 2 November 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. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

[signature] Judge Advocate

Malcolm C. Sherman Judge Advocate

[signature] Judge Advocate

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(25)

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

BOARD OF REVIEW NO. 3

16 OCT 1945

CM ETO 17232

UNITED STATES	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 10 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Disciplinary Barracks, Greenhaven, New York
Private SAM DAVIS (35541122) Company K, 30th Infantry Regiment	

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

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

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

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

Specification: In that Private SAM DAVIS, Company "K", 30th Infantry, did, at or near Anzio, Italy, on or about 25 January 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at an unknown place, on or about 4 May 1944.

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

Specification: In that * * * did, without proper leave, absent himself from his organization, at or near Mad di Quarto, Italy, from about 29 June 1944, to about 14 July 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I, guilty of Charge II and Specification, and, of the Specification of Charge I, guilty except the words "25 January 1944", substituting therefor the words "28 January 1944", of the excepted words, not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 25 January 1944, Captain John E. Dwan, as transportation quartermaster of a landing ship enroute from the Naples area to the Anzio beachhead, was placed in charge of a group of men who were to be transported to the beachhead and there returned to their respective units (R7). Shortly before the time for departure, Captain Dwan assembled the men and informed them that He was "taking them to the Anzio beachhead where they were going to join their company then in combat" (R9). Roll was then called and as the name of each man was called he responded and boarded the ship. When the name "Sam Davis" was called a soldier answered, "'Here', or words to that effect", and Captain Dwan personally observed that the soldier who responded to the name Sam Davis went aboard the landing craft (R7,9,10,12,13). The men disembarked at the Anzio beachhead at about 0330 hours on 28 January 1944 and proceeded to the division quartermaster area where, at about 0800 hours, roll again was called (R9,10,23). At this time artillery fire could be heard and there had been "considerable air activity that morning" (R23). When the roll was called at 0800 hours, three men were missing (R10). Captain Dwan, who was the only man who could have given accused permission to be absent, had given none of the men permission to absent themselves (R10).

On 29 June 1944, at a time when Company K, 30th Infantry, was located near Mad Di Quarto, Italy, the company clerk received a report concerning accused and as a result of that report made a complete search of the company area for him. Accused could not be found in the area. By reason of the nature of his duties, the company clerk would have known whether accused had permission to be absent and, according to the clerk, accused had no such permission. He did not see accused in the organization from 29 June 1944 to 14 July 1944 (R14,15). An extract copy of the morning report of Company K, 30th Infantry, for 29 June 1944 shows accused "Fr ar in qrs to AWOL" as of 0600 hours on that date (R13; Pros.Ex.B).

It was stipulated that if First Lieutenant Louis A. Tritico were present in court he would testify that on 11 March 1945, accused voluntarily made a sworn statement to him as investigating officer reading as follows (R16,Pros.Ex.C):

> "On or about 25 January 1944, I was on board an LST returning to my outfit, then on the Anzio Beachhead. While on board the boat another soldier talked me into not getting off of the boat but remaining on it and returning to Naples. When we arrived back at Bagnoli, Italy, I got off of the boat went to Caserta, Italy, then returned to Naples to see a friend of mine, when I was picked up by the MP's on or about 4 May 1944.
>
> I returned to my company on 9 June 1944. One evening about 28 June 1944 a soldier in my platoon asked me to go to town with him, which I did. We went to Rome, Italy. While there I became very sick and turned myself into the MP's, and was hospitalized for malaria.
>
> I am very nervous and have always been so. I just can't take the Infantryman's life. When I work doing something strenuous, my heart pounds very hard and my breath becomes very short and difficult" (Pros.Ex.C,R16).

4. After being advised of his rights as a witness, accused elected to make an unsworn statement through his defense counsel. The unsworn statement reveals that accused was inducted on 12 March 1943 at the age of nineteen, shortly after his graduation from high school, and joined Company K, 30th Infantry, in Italy in September of 1943. He stated that he "must have been born with a nervous condition because my father was always bawling me out for biting my nails and always fidgeting with something". Because of the nervousness, his parents never permitted him to attend funerals, moving pictures wherein killings were portrayed or to witness anything of a "brutal" nature. He first went into action along the Volturno river and was detailed as a rifleman although his previous training had been in mortars. He described his nervousness in combat and related several unnerving and harrowing battle experiencss in which he had seen other members of his company killed and his best friend wounded. On one occasion, he was one of the "only three men left" in his squad after an attack. He further told of serving under adverse battle conditions involving cold,rain and mud. On about 17 November he was incapacitated by trench foot and was "laid up in a tent" for approximately two weeks. While at the front he became ill many times because of the odor of men who had been killed (R18-21). Defense counsel also included in the unsworn statement excerpts from a psychiatric report with reference to the accused dated 10 March 1945 which indicated "exposure

to a psychoneurotic mother and slight experience of patterned neurotic symptoms in his own history". The report also indicated that accused had chronic mildly psychoneurotic tendencies, manifested by too much interest in body functions which normally are ignored (R21,22).

5. With reference to Charge I and its Specification, the evidence adduced by the prosecution, including accused's own pre-trial statement, showed that accused absented himself without leave from his place of duty from 28 January 1944 to 4 May 1944 as found by the court. Since the man had been informed that they were to rejoin their units then in combat on the Anzio beachhead, and in view of the evidence of enemy activity on the morning when he commenced his unauthorized absence, the court could find that he absented himself with the then existing intent to avoid hazardous duty: Hence, the record amply supports the court's findings that accused was guilty of desertion as alleged (CM ETO 15881, Halverson; CM ETO 1664 Wilson; CM ETO 5396, Nursement; CM ETO 7148, Giombetti). The record of trial also clearly supports the court's finding that accused was absent without leave from his organization from 29 June to 14 July, as alleged(MCM, 1928,par.132,pp.145,146).

6. The charge sheet shows that accused is 21 years of age and was inducted 12 March 1943. No prior service is shown.

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

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

BR Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
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APO 887

BOARD OF REVIEW NO. 1

5 OCT 1945

CM ETO 17259

UNITED STATES	THIRD UNITED STATES ARMY
v.	
Private First Class PONZY SMITH (32862491), 3910th Quartermaster Truck Company	Trial by GCM, convened at Bad Tolz, Germany, 27 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused, having acted as a guard of the parents while their daughter was raped, aided and abetted in the crime and was liable as a principal (section 332, Federal Criminal Code, 18 USCA 550; IV Blackstone's Commentaries, pp.35-36; CM ETO 5068, Rape and Holthus; Dig.Op. ETO, sec. 450(4), p.450; cf. CM ETO 10860, Smith and Toll).

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

Wm. J. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

RESTRICTED

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

Board of Review No. 5

13 OCT 1945

CM ETO 17260

UNITED STATES	SEVENTH UNITED STATES ARMY
v.	Trial by GCM convened at Marburg, Germany, 1 September 1945.
Private ADOLPH R. VENEZIA (32219575), Attached-Unassigned, 451st Reinforcement Company, 86th Reinforcement Battalion	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Adolph R. Venezia, attached-unassigned, 451st Reinforcement Company, 86th Reinforcement Battalion, did, at Saint Clair, France, on or about 30 July 1944, desert the service of the United States and did remain absent in desertion until apprehended at Boulogne, France, on or about 13 January 1945.

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

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Specification except the words "apprehended", "Boulogne, France", and "13 January 1945", substituting therefor, respectively, the words "surrendered himself", "Paris, France", and "22 December 1944" of the excepted words "not guilty", of the substituted words "guilty", and guilty of the Charge. Evidence was introduced of one previous conviction by special court-martial for absence without leave from 16 August 1943 to 15 February 1944 in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that on 28 July 1944, accused was a member of (attached unassigned) the 451st Reinforcement Company, 86th Reinforcement Battalion. On the morning of 28 July 1944, accused was told by his company commander to pack his equipment and go to the assembly area, that after dinnerhe would be shipped out to the 35th Division (R7,8). This took place at Saint Clair, France, approximately two miles from the front line and within sound of small arms fire "most any time of the day" (R8). The shipment of men, which accused was to accompany, went out to the 35th Division that afternoon, 28 July. The shipping sergeant "reported" that accused was not there when the men left. A "check" was then made with the Adjutant General of the 35th Division to see if accused "had gotten on the truck and missed the roll call". It was reported that accused "was not in the Division". On 30 July 1944, a thorough search was made of the area to find accused. He could not be located anywhere. A morning report entry of 9 August1944 of the 451st Reinforcement Company, described accused as "AWOL 0800 hrs as of 30 July 1944". This entry was delayed purposely to give accused an opportunity to come back (R8,9; Pros.Ex.A). Accused surrendered himself at Paris, France, about 22 December 1944 (R9).

4. Advised of his rights as a witness, accused elected to remain silent. The defense called no witnesses.

5. Accused was found guilty of having deserted the service of the United States on or about 30 July 1944. The competent evidence shows that on 28 July accused was a member of the 451st Reinforcement Company

86th Reinforcement Battalion, and that on the morning of that day he was told by his Company Commander to pack his equipment and go to the assembly area for shipment after dinner to the 35th Division. It is presumed that his meant detachment of the accused from the 451st Reinforcement Company and his transfer, physically and on paper. to the 35th Division.

The "report" of the shipping sergeant that accused was not there (at the assembly area) when the men left was hearsay. This sergeant did not testify. The record does not show to whom the report was made or whether it was oral or in writing. The same may be said of the "check" made with the 35th Division and the resulting "report" from there. This evidence was, accordingly, incompetent.

> "Hearsay is not evidence. By this rule is meant simply that a fact cannot be proved by showing that somebody stated it was a fact" (MCM, 1928, par.113a, p.113; see also CM 178446, Dig.Op.JAG, 1912-40,sec.395(21),p.216).

Nor is this testimony admissable under any recognized exception to the hearsay rule. If this incompetent testimony is disregarded, there is no evidence, then, that accused did not report as ordered and that he did not leave for his new command, in which case the fact that accused was not present with his old command two days later, 30 July, the day when the search was made, is utterly without significance or materiality. His old company and camp were not his place of duty on 30 July. The morning report entry of 9 August 1944 was without materiality. Wrongful and significant absence is only that which occurs in connection with the soldier's place of duty, or his command, guard, quarters, station, or camp (MCM, 1928, par.132,p.146). For the foregoing reasons, the allegations of the Specification are totally unsupported by the proof.

6. The charge sheet shows that accused is 28 years of age and that he was inducted 25 February 1942 at Camp Upton, New York. No prior service is shown.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 4

19 OCT 1945

CM ETO 17272

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ELMER A. ROSHEISEN (15099328) Reinforcement Company, X-A-223-H, 11th Replacement Depot	Trial by GCM, convened at Tidworth, Wiltshire, England, 2 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania

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

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

2. Inasmuch as the record of trial contains no competent evidence of the value of the property alleged to have been stolen in the Specification to Charge I, it is legally insufficient to sustain the court's finding that such property had a total value as specified and is legally sufficient to support only a finding that such property was of some value not exceeding $20 (See companion case, CM ETO 14212, Healan).

3. Confinement in a penitentiary is authorized upon conviction of the crime of taking and using without the consent of the owner a motor vehicle by Article of War 42 and section 22-2204 District of Columbia Code (CM ETO 6383, Wilkinson, 4 Bull. JAG 237). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place

of confinement is proper (Cir.229 WD, 8 June 1944,Sec.II pars. 1b (4), 3b).

(ON LEAVE) Judge Advocate

William A. Sweeney Jr. Judge Advocate

John R. Anderson Judge Advocate

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(36)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 19 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ELMER A. ROSHEISEN, 15099328, Reinforcement Company X-A-223-H, 11th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to sustain only so much of the findings of guilty of the Specification to Charge I as finds the accused guilty of larceny, at the time and place alleged, of the property alleged of some value not exceeding $20 and legally sufficient to support all other findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence, as commuted.

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 17272. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17272).

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

IN
30 OCT 1945
AG M&R
USFET

(Findings vacated in part in accordance with recommendation of The Assistant Judge Advocate General. Sentence as commuted ordered executed. GCMO 633, USFET, 20 Dec 1945).

ETO 17272 ROSHEISEN, ELMER A.

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

BOARD OF REVIEW No. 1

27 OCT 1945

CM ETO 17275

U N I T E D S T A T E S	FIFTEENTH UNITED STATES ARMY
v.	
Private BEN GALMON (34079809), 4007th Quartermaster Truck Company	Trial by GCM, convened at Bad Neuenahr, Germany, 4,5,9 June 1945. Sentence: To be shot to death with musketry.

HOLDING BY BOARD OF REVIEW No. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

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

Specification 1: In that Private Ben Galmon, 4007th Quartermaster Truck Company, did, at or near Niederesch, Rheinprovinz, Germany, on or about 25 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Maria Wilbert, a human being, by shooting her with a rifle.

Specification 2: In that * * *, did, at or near Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Helena Sikorska.

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

Specification 1: In that * * *, did, at or near Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, with intent to do him bodily harm, commit an assault upon Joseph Sikorska by striking him on the head with a dangerous instrument, to wit: - a hammer.

Specification 2: In that * * *, did, at or near Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, commit the crime of sodomy by feloniously and against the order of nature, having carnal connection per anus with Helena Sikorska, a human being.

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 two previous convictions, one by special court-martial for breaking arrest in quarters and being found drunk on duty as a sentinel in violation of Articles of War 69 and 85, and one by summary court for violation of a traffic regulation by speeding in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot with musketry. The reviewing authority, the Commanding General, Fifteenth United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

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

a. Specification 1 of Charge 1: At about 2000 hours on 25 April 1945 accused came to the house of Bernhard Wilbert, a 73-year-old man, in Alte Heck, a community near the village of Niederesch, Germany, talked to his daughter, Maria Wilbert (the deceased) who was 33 years old, and motioned with his hands in a manner indicating that he wanted her to wash his laundry (R32,33,43), but Bernhard Wilbert "gave him to understand" that they had only one girl in the house and she was too busy to wash the laundry (R34). About 30 minutes later accused returned to the house and pulled a bottle of wine out of his pocket (R35). He forced Maria to take a drink and was always looking at smiling at her, but she did not return the smile and looked only at her child (R36). He pulled a chocolate bar out of his pocket and

said it was for mademoiselle and the baby. Later Maria left and accused started asking "where mademoiselle was", getting very angry (R37). Accused, holding a carbine in his hands, became angrier and angrier because Maria had left and, holding his rifle in ready position, chased Wilbert, a neighbor named Ferdinand Mombauer, and Clemens Bertram the 14 year-old grandson of Wilbert, into a bedroom (R34,37,40,44,46,60,61). He told Clemens to go out and look for Mademoiselle, and the boy left (R37,41). Accused then left also, but returned about a half-hour later and knocked against the door with the stock of his rifle (R39). A shot was fired, apparently in the kitchen (R41).

Clemens went to a neighbor's house, where he found Maria, his aunt, and the two ran across a field toward the nearly community of Moensch-Escher-Hof (R51) and about a half hour later they, together with a friend, Mrs Johann Brauweiler, walked along a road toward Niederesch. The same soldier who had been at his grandfather's house earlier that evening appeared at the side of the road about 20 to 25 meters away (R53-55). Clemens ran across a field and heard outcries. He had run about 20 to 30 meters when he heard a shot. Later he returned to the place and found Maria lying on the road (R56).

Mrs Brauweiler testified that soon after 2130 hours she was walking about two or three meters behind Maria and Clemens on the road about 100 meters from the village of Niederesch. when she saw a negro soldier, holding a rifle, jump in front of Maria. Mrs Brauweiler went on by, called back "Maria, come on", heard a shot, and than started running toward the village (R73). She returned to where Maria's body lay and remained there from about 2200 hours until 0300 hours the next morning (R74).

An autopsy made on 26 April showed that Maria Wilbert was dead, the basic cause of death being a wound of the chest, perforating the lung, mediastinum, heart, and anterior chest wall - "presumably due to the gun shot" (R8, 122).

Sergeant Carl W. Thrasher, of the Military Police, testified that at about 0450 hours on 26 April he and Private First Class Clyde Sherman apprehended accused near Marienthal, which was about five miles by road from Niederesch (R80,82, 83). At Marienthal a carbine (Pros. Ex.B) with the serial number 1548264 was turned over to him. He determined that the rifle had been recently fired by looking in the bore and by the smell of powder. A piece of tape about four inches long was on the forepart of the stock underneath. When accused was apprehended, a Private Hamilton said, in the presence of accused, that he, accused, was the soldier from

whom he had taken the weapon (R80-83). Sergeant Thrasher had previously found a cartridge case (Pros. Ex.D) about 12 feet from the body of Maria (R80).

Witnesses who saw accused before the shooting testified that he carried a carbine (R38,43,60). Clemens testified that the carbine introduced in evidence as Pros. Ex.B. was the carbine which the colored soldier had in the house and later on the road near Niederesch, and that it had tape in the same position along the barrel (R51,52).

Private John Yurkanin testified that at about 0400 hours on 26 April, he and Private Ezra Hamilton, on outpost duty in Marienthal, stopped a 6 by 6 vehicle driven by a colored soldier (R91). Hamilton took a carbine from the soldier and told him to come back to verify the gun (R92) which had a piece of tape about two inches long on the fore-part of the stock on the underside. A sergeant and a private first class in the Military Police later stopped at the post and Hamilton handed over the gun to one of them (R93). A few hours later Hamilton was accidentily killed at his camp (R91).

Private First Class Clyde Sherman testified that he and Sergeant Thrasher stopped at an outpost in Marienthal, where Private Hamilton and Private First Class Yurkanin were. Hamilton handed witness a carbine with a broken peep sight and tape under the forward part of the stock. The carbine in evidence (Pros. Ex. B) fits this description and had the same serial number. They waited about ten or fifteen minutes to see if the soldier would return, then witness, Hamilton, and Thrasher proceeded up the road about 200 yards and challenged a person they saw. It was accused. Hamilton identified him and, in his presence, said that he (accused) was the man from whom he had taken the weapon (R87-89). No liquor was smelled on accused's breath (R90).

Witnesses testified also that several shots were fired while accused was around the house of Wilbert and houses nearby (R40,62,67,75), and three cartridge cases (Pros. Exs. C,E and F) were found in those areas (R62,96,115,116). An American officer, who was in charge of a Criminal Investigation laboratory and who was a ballistics expert (R133), testified that he had made a ballistic test with the carbine numbered 1548264 (Pros. Ex. B) and that he found that each of these three cartridge cases (Pros.Exs. C,E and F) and also the cartridge case found 12 feet from Maria's body (Pros. Ex.D) were fired from that carbine (R136).

An agent of the Criminal Investigation Division testified that after having been warned of his rights (R99-103), accused

made and signed a written statement, which was, so far as concerns the alleged murder, substantially as follows:

On the evening of 25 April 1945, while carrying a carbine which he had taken out of the room of a company mechanic, where he had also taken a loaded magazine, he walked to the top of a mountain and across a field to a house which was about two miles from his camp, and asked for wine. There were an old man, a boy about 13 or 14 years old, and a woman outside the house. Accused asked the old man about the wine and about doing laundry, but he said "No" to each question. Accused then left and went to another building about 500 or 600 yards away. A dog barked at him, he shot at it and frightened it away. He returned to the first house, where the old man motioned him into the barn and showed him some cows, after which accused left and headed directly for camp. It was getting dark, however, and he became lost and did not reach camp until after midnight. He went to his room, stayed for perhaps an hour, and then decided to take a truck and ride through a tunnel near the camp. He took a 2½ ton truck, drove through the tunnel and to the main highway, where he saw a road guard, and stopped.

> "The guard asked to see the carbine that I had, which was the same carbine I had on the mountain earlier that night, and he smelled the carbine and said it had been fired and he would keep it, and for me to go and get the corporal of our company guard. I left and went further down the highway and parked the truck. I started up the highway on foot towards camp and had just walked a short way when I was halted by some MP's. The guard who had just previously taken my carbine from me was with them. They took me back to my company and from there took me to the stockade where I now am" (Pros. Ex. G).

At a line-up a day or two later, he saw the little boy he had seen on the mountain that night and also a man who resembled the old man he had seen at the house (Pros. Ex. G).

The report of a board of officers appointed to examine into the mental condition of accused was stipulated into evidence (R141). The board found that accused was not insane at the time of the commission of the alleged offenses, that he was able to distinguish right from wrong, and that he was capable of doing the things necessary for a proper

presentation of his case (Pros. Ex. K).

b. Specification 2 of Charge I and the Specification of Charge II: The offenses described in these specifications are alleged to have occurred on 23 April 1945, two days before the commission of the murder alleged in Specification I of Charge I.

Joseph Sikorska, testifying through a Polish interpreter, stated that on 23 April accused came to his home in Marienthal, Germany, sat down in the kitchen, and took a hammer from the right side of his hip. On his left side he had a pistol in a pouch. He called to witness' wife, Helena Sikorska, to go downstairs with him. When she answered that she did not understand, he asked witness to go down with him. When witness said he did not understand, accused "padded" the gun on his hip and said "You will go down" and motioned with his hand for him to go downstairs. He and his wife then went with accused to the cellar (R11), where accused motioned for them to draw some wine from a barrel that was standing there. As witness was drawing the wine, he heard his wife say "Joseph, Joseph, he's taken to me", and witness immediately raised his hand and pushed him away with it. When he pushed him away, accused hit witness on the head with the hammer and he fell back stunned. Accused then proceeded to take the wife, Helena, away from him into another part of the cellar, pulling her by the arm (R12). A few minutes later he came back with Helena, motioned again with the hammer as if he were going to hit witness on the head, and said he would kill him if he did not stay under the barrels. A second time accused took Helena to the rear of the cellar and again threatened witness with the hammer (R13). Accused then dragged Helena to within a few yards of her husband and "proceeded to attack her from the back" (R14). The hammer used by accused was about nine centimeters long and five centimeters wide, the handle being about 15 centimeters long (R19).

Helena Sikorska testified that at about 2100 hours on 23 April, when they reached the cellar and her husband was at the wine barrel, accused put his arm on her. She shouted and her husband tried to push him away, but was hit with the hammer behind his left ear. Accused then took her into another part of the cellar (R24), motioned for her to lie down and, when she warded him off, put his pistol to her head. He put the pistol back in the holster, drew out a knife, and said, "I will cut your ear off", and grabbed her by the ear (R25). He then leaned her over a bench and proceeded to have intercourse with her. His private part entered her vagina. She tried to get away. After this episode accused put his arm around her middle, dragged her to her husband (R26), waved his hammer around, pointed his pistol at him. He took her back a second time and had intercourse with her, putting her against a barrel. She resisted again and cried out her husband's name. A second

time he brought her back to her husband, then grabbed her around the waist from the back. She felt great pain in her large intestines. His private part entered into her rear (R28,32). Afterwards she noticed that her husband's jacket had much blood on it (R29).

In his pretrial statement, previously referred to, accused said that on 23 April, after his noon meal, he had taken some food to the Polish couple, and the Polish woman had made him understand that she wanted him to return that night to get some wine with her and her husband, so that evening he returned to their home. He had with him a hammer and chisel, which he intended to use to break to lock so they could get some wine. On his left side he wore a gun holster which was empty. The man, woman and accused went to the cellar of a neighboring house which contained wine. While the man found a wine he liked in one of the barrels, the woman stopped down to hold a pail into which the wine would run, and accused put his hand on her back. The man raised up and

> "although I didn't know whether he intended to hit me I took the hammer and struck him behind the left ear."

The woman grabbed his hand and pulled him to a door. Then they returned to the man and the three of them finished getting the wine, after which the three returned to the Polish couple's house. A short time thereafter accused left (Pros. Ex. G).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R142-143). No witnesses appeared for the defense. It was stipulated that a German doctor, if present, would testify that at the time of an examination of Helena Sikorska made on 29 April, no definite signs were shown that force had been used

> "except for the weak and faint discoloration of the skin on the radial aspect of the left forearm" (Def. Ex. A).

5. Specification 1 of Charge I: Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 148a, pp 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal

Law (12th Ed., 1932), sec. 426, pp. 654-655), and an intent to kill may be inferred from an act of accused which manifests a reskless disregard of human life (40 CJS, sec.44, p.905, sec. 79b, pp 943-944).

In the opinion of the Board of Review, there is ample evidence in the record to sustain the court's finding that accused was guilty of murder as alleged. From the strictest view point, the only possible question is as to the sufficiency of the proof that it was accused who fired the shot that killed Marie Wilbert. Despite the fact that no witness testified that accused actually fired the fatal bullet, the proof is over-whelming that he did so. Previous to the shooting, he had been angrily searching for her and had been recklessly firing his carbine. He admitted having been in the Wilbert house earlier, and Clemens Bertram testified that the same soldier who had been at the house appeared with his carbine on the road just before the shot was fired.

Was the carbine (Pros. Ex. B) from which the fatal shot was fired, the rifle carried by accused? It was identified by Clemens as the same one the soldier had at the house. Accused admitted having and firing a carbine at or near the house. He admitted that after midnight his carbine had been taken from him, under such circumstances that it could not have been other than the transaction testified to by Sergeant Thrasher, Private First Class Sherman, and Private Yurkanin. Moreover, accused discharged his carbine in and in the vicinity of the Wilbert house and the cartridge case which was found there and near the body of deceased, were, according to a ballistic's expert fired from the same gun and could not have been fired from any other gun. The indentity of the accused as the murderer was proved by substantial evidence (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith).

A question arises in this connection: the admission of the evidence as to the statement made by Hamilton in the presence of accused but after his apprehension (R80,81,83,89). While, as a general rule, incriminating statements made in the presence of an accused, which he does not deny, are admissible as an exception to the hearsay rule (20 Am.Jur., sec. 570, pp.483-484), they are not admissible, under one line of authority, when such accused is in custody under a criminal charge (20 Am.Jur,sec.574, p.486). Assuming, without deciding, that it was error to admit this testimony, the admission did not, in the opinion of the Board of Review, result in prejudice to the substantial rights of accused in

view of the very strong evidence in this record.

Every element of the crime of murder was proven by competent, substantial evidence, and the findings of the court under Specification 1 of Charge I are fully sustained by competent, substantial evidence (CM ETO 969, Davis; CM ETO 16581, Atencio; CM ETO 16621, Makara and other cases therein cited).

6. Specification 2 of Charge I and Specifications 1 and 2 of Charge II. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b, p.165).

Joseph and Helena Sikorska testified to a story of violence and brutality in which accused used three different dangerous weapons against this Polish couple, in order to effectuate his purposes. Helena's testimony, corroborated by that of her husband, that accused forced her to have sexual intercourse with him, sufficiently established all elements of the crime of rape (CM ETO 12180, Everett; CM ETO 12465, Standberry; CM ETO 16622, Moore; and cases therein cited).

In his pretrial statement accused admitted having put his hand on the woman's back and hitting the man on the head with the hammer. Certainly it was within the province of the court to accept the testimony of this man and woman and reject the implied claim of accused in his statement that he had no improper relations with the woman on the night in question.

By the same reasoning, Helena's testimony, as corroborated by that of her husband, was sufficient to sustain the court's finding that accused was guilty of sodomy per anum as alleged in Specification 2 of Charge II (CM ETO 1743, Penson).

The assault upon Joseph Sikorska as alleged in Specification 1 of Charge II, was amply proven by the testimony of this victim and his wife (CM ETO 2569, Davis; CM ETO 3366, Kennedy). Accused admitted in his pretrial statement that he "took the hammer and struck him behind the left ear".

7. The charge sheet shows that accused is 28 years eight months of age and was inducted 21 July 1941 at Greensburg, Louisiana, to serve for the duration of the war and six months. He had no prior service.

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

9. The penalty for murder and for rape is death or such other punishment as a court martial may direct (AW 92).

Edward L. Adams Jr. Judge Advocate
Donald R. Covell Judge Advocate
[illegible] Judge Advocate

17275

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

BOARD OF REVIEW No. 1

CM ETO 17304

U N I T E D S T A T E S	XX CORPS
v.	
Private ESTIS L. GIBBS (34830207), Company B, 245th Engineer Combat Battalion	Trial by GCM convened at Starnberg, Bavaria, Germany, 4 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Estis L. Gibbs, Company 'B' 245th Engineer Combat Battalion, did, at 13E Upper Canal Street, Nurnberg, Germany, on or about 2345 31 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Tino Zotta, a human being, by shooting him with an automatic pistol, Caliber .32.

Specification 2: In that * * *, did, at 13E Upper Canal Street, Nurhberg, Germany, on or about 2345 31 May 1945, forcibly and feloniously,

against her will, have carnal knowledge of Christine Hempfling.

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

Specification 1: In that * * *, did at 13E Upper Canal Street, Nurnberg, Germany, on or about 2345 31 May 1945, with intent to do her bodily harm, commit an assault upon Mrs. Marie Bar, by striking her on or about the head with a dangerous weapon, to wit, a pistol, automatic, Caliber .32,

Specification 2: In that * * *, did at 13E Upper Canal Street, Nurnberg, Germany, on or about 2345 31 May 1945, with intent to do her bodily harm, commit an assault upon Christine Hempfling, by pointing and jabbing her in the body with dangerous weapons, to wit, a pistol, automatic, Caliber .32, and a knife.

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 breach of restriction, being drunk and disorderly in the company area, and attempting to assault, all in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The special order appointing the court, dated 27 June 1945, read as follows:

"1. A General Court-Martial is appointed to meet at Headquarters XX Corps, APO 340, in the vicinity of Starnberg, Germany, at 1300, 5 July 1945 or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it."

The court met on 4 July 1945. We have held the direction as to the meeting day is not jurisdictional (CM ETO 16623, Colby and authorities therein cited). It follows that the court had

jurisdiction of the person and the offense despite the fact that it met before the designated date.

4. On 31 May 1945, sometime after 2200 hours, accused entered a house at 13E Upper Canal Street, Nurnberg, Germany. He went into a room occupied by Frau Marie Bar who was in bed. He lifted the bedclothing from her, stated "you my girl friend," and pointed a pistol at her. When she jumped out of bed he hit her with the butt of the pistol about six times about the face and head. Her eyes were swollen from this beating and at the time of trial she still had a scar on her nose which she attributed to it (R7,8).

Accused then went upstairs to the apartment occupied by Marie Hempfling, her sister Christine, 17 years of age, and her father and mother. Present in the apartment in addition was Tino Zotta, the deceased, who was engaged to Marie (R10,17).

Accused sat on the girl's bed and spoke to Tino and the latter went and procured some cigarettes for him. The two talked together and Tino finally said "theres nothing doing here, because this is my wife," referring to Marie. Accused then said something to Tino, got up from the bed and poked a pistol into his ribs three times (R10). Deceased grabbed a knife from the table and advanced on accused. The latter shot three times and deceased slumped to the floor. They were then about one and one-half to two meters apart (R10,11,24,25). The father and mother and Christine tried to run out of the room. Accused stopped Christine and threw her on the bed (R16). He then shot deceased twice more. Accused ordered Marie and Christine to pick deceased up, put him in the bed and wash the blood from his wounds. There were four wounds in the body, one "just below the left hand", one just below the left breast and one in the abdomen. The location of the fourth wound is not described and the fifth bullet went into the wall (R11). At that time he was dead (R11,22).

Accused, by threatening with a knife and pistol, made Christine go into the kitchen with him but she managed to get back into the bedroom when her sister came for water. He showed Christine that the index finger of one of his hands was cut and she bandaged it for him in the hope that she would not have to go into the kitchen with him again (R21). She did not know whether deceased inflicted the wound or whether accused had cut himself when he picked the knife up (R25). When the bandaging was finished, accused put the pistol to her chest and made her go into the kitchen. By threatening her with the knife and pistol he made her fondle his penis and remove her pants. He scratched her on the arm with the knife. He then forced her to the floor and had sexual intercourse with her (R22).

(50)

Doctor Joseph Heiter testified that, on 1 June 1945, he examined the prosecutrix and found that her hymen was broken and that there were three fresh ruptures (R28).

5. After an explanation of his rights, accused elected to be sworn and testify (R31). He stated that his automobile broke down and he went into this house to see if he could get something to fix it (R37). Deceased opened the door and invited him upstairs. They entered a bedroom and witness sat on the bed. He asked for some cigarettes and deceased gave them to him. There was a noise "like a pan that fell off on the hallway" and he turned to look at it. When he looked again he saw deceased "taking out" a knife. He was unable to say why deceased did this. Witness jumped up and deceased cut his trigger finger (R31,36). He did not have a pistol in his hand at the time but he quickly drew it. Deceased advanced on him and witness, standing in the doorway, shot him. He could not run away because the hallway was narrow and dark. Deceased could not have thrown the knife at him (R33). He motioned to the girls to pick deceased up and put him in the bed. He then directed them to get some water and wash his wounds. When this was done, he started to leave but one of the girls motioned to him to come into the kitchen where she bandaged his finger. "We were just in a merry mood there" and she "was pushing into me and smearing on to me". She removed her pants and directed him to spread some clothes on the floor. She laid down on the floor and "practically pulled me down on top of her". He did not have sexual intercourse with her (R32). He did not strike Frau Bar on the head. In fact, he knew her only as a woman who watched him leave the house in the custody of the three soldiers (R34).

It was stipulated by and between the prosecution, the defense and accused that if Major Thomas L. Ball, Medical Corps, were present he would testify that he examined the prosecutrix on 4 July 1945. At that time she had a very superficial scar one and one-half centimeters long on her left elbow. There were three healed lacerations of the hymen, the remainder of which was intact. In his opinion the lacerations of the hymen could have been caused by the forcible attempt to insert a penis or even a finger into the vagina; the head of an "erect, adult, male (sic) penis" had never been fully inserted through the hymen, and it is unlikely that a male could have pushed his penis against this hymen and caused these lacerations if the prosecutrix were "fully conscious, unrestrained in any manner, and actively resisting the attempt" (R39; Def. Ex.1).

6. a. Specification 1 of Charge II

This Specification charges accused with an assault with intent to do bodily harm with a dangerous weapon on Frau Marie Bar. The evidence shows that he beat her about the face and head with a pistol when she tried to elude him after he made what can only be interpreted as a solicitation of sexual intercourse with her. The evidence also shows that she suffered physical injury from the beating. The record is legally sufficient to support the findings of guilty of this specification (CM ETO 2569, Davis; CM ETO 3366, Kennedy).

b. Specification 1 of Charge I

This Specification charges accused with the murder of Tino Zotta. Accused conceded that he shot him intentionally but pleads self-defense. To invoke the doctrine of self-defense accused must not have been the aggressor (1 Wharton's Criminal Law (12Ed. 1932), sec.614, p.828; CM ETO 15558, Mitchell). The evidence as to who provoked the affray is in conflict and the resolution of that conflict was for the court (CM ETO 895, Davis et al). They chose to disbelieve accused's version of the tragedy and, having done so, they were fully warranted in finding him guilty of murder. He was in a German house at a relatively late hour. His purpose there was clearly demonstrated by his assault on Frau Bar when she attempted to avoid his advances, by his assault on deceased when the latter refused to permit him to have sexual intercourse with one of the girls, and his subsequent rape of Christine. The court could properly find that accused provoked the incident and that he made no offer to withdraw when it became evident that deceased was not going to permit him to carry out his design (1 Wharton, supra, sec.615, p.831).

With accused's claim of self defense thus disposed of, a finding of murder was clearly justified. Murder is the unlawful killing of a human being with malice aforethought and malice may exist when there is knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, the person killed (MCM, 1928, par. 148a, pp 162, 163). While what might otherwise be murder may be reduced to manslaughter when the killing occurs in hot blood caused by due provocation (MCM, supra, par.149a, p 166), there is no suggestion that this was the case here. Moreover, as we have said, there was ample evidence that accused, not deceased, provoked the incident. The record is legally sufficient to sustain the findings of guilty of Specification 1 of Charge 1 (CM ETO 3180, Porter; CM ETO 9396, Elgin).

c. Specification 2 of Charge I and Specification 2 of Charge II.

These Specifications charge accused with rape of Christine Hempfling (Specification 1 of Charge I) and assault with intent to do bodily harm on her with a dangerous weapon (Specification 2 of Charge II). Again we are presented with a conflict in evidence which, under the principles referred to above, it was the duty of the court to resolve. We need not discuss the prosecution's evidence again nor the legal principles governing rape and the specific felonious assault here involved. The latter are familiar enough and the former, if believed, as the court apparently chose to do, obviously jusifies the finding of guilty. The record is legally sufficient to support the findings of guilty of Specification 2 of Charge 1 (CM ETO 12056, Reyes; CM ETO 16622, Moore; CM ETO 16901, Johnson et al; CM ETO 16971, Brinley) and Specification 2 of Charge II (CM ETO 1585, Houseworth; CM ETO 6522, Caldwell; CM ETO 7000, Skinner).

7. Defense counsel in summing up stated "as for the killing, I believe that this should properly be a charge of manslaughter and not murder." He then went on to develope facts in his argument which if the court believed, would certainly warrant, if not require, an acquittal on the homicide charges on the ground of self-defense. He concluded his argument by stating, "that is why I think this should be a verdict of manslaughter." Counsel obviously misstated the law and if the court had brought in a manslaughter verdict, thus furnishing some indication that they adopted this error, we might have difficulty with the case. This case, however, is clearly distinguishable from CM ETO 13222, Howard, where defense counsel admitted in open court that accused had told him two or three different stories, none of which was consistent with another. At most, defense counsel here made an error of law. The law member sat at the trial and it was his duty to instruct the court on the law of the case, a duty which apparently he performed. Moreover, we are not at all sure that defense counsel's action was not deliberate. He sat at the trial and saw the whole case presented. Certainly accused's testimony on some points bordered closely enough on the fantastic that it was not unreasonable for counsel to conclude that there was no possible hope of an acquittal and he may have taken what seemed to him to be the most effective means to try to persuade the court to return a manslaughter rather than a murder verdict. We do not think the error, if error it were, is prejudicial.

8. The charge sheet shows that accused is 20 years 9 months of age and was inducted 23 October 1943 at Fort McPherson, Georgia to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for murder and for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA, 454, 567); upon comviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567); and upon conviction of assault with intent to do bodily harm with a dangerous weapon, by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

Edward L. Stevens Jr., Judge Advocate

D. L. Lavery Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

(55) 38

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

BOARD OF REVIEW NO. 1

26 NOV 1945

CM ETO 17314

U N I T E D S T A T E S	XIX TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Bad Nauheim, Germany, 4,5,6,7,11 and 12 May 1945. Sentence as to NEWMAN: Dismissal, total forfeitures and confinement at hard labor for life. As to SIMMONS: Dishonorable discharge, total forfeitures and confinement at hard labor for life. As to FAIRBANKS: Forfeiture of $15 per month for three months and confinement at hard labor for two months. United States Penitentiary, Lewisburg, Pennsylvania, as to NEWMAN and SIMMONS. Station Guardhouse, Headquarters XIX Tactical Air Command as to FAIRBANKS.
Second Lieutenant HAROLD J. NEWMAN (O-1822717), 12th Tactical Reconnaissance Squadron, 10th Photo Group Reconnaissance, and Sergeant ROBERT M. SIMMONS (19078101) and Private DARREL B. FAIRBANKS (17016525), both of 4th Tactical Air Communications Squadron	

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

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

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

NEWMAN

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

Specification 1: In that Second Lieutenant HAROLD J. NEWMAN, 12th Tactical Reconnaissance Squadron, 10th Photo Group Reconnaissance, did, at Ober Beisheim, Germany, on or about 31 March 1945, forcibly and feloniously against her will have carnal knowledge of Anni Heder.

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

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

Specification 1: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Gerda Hehn a Zeiss Ikonta camera, No.E 97127, the property of the said Gerda Hehn, valued at about $30.00, and from the presence and custody of Karl Hestler a set of drawing instruments, the property of Hermann Sinning, valued at about $2.50.

Specification 2: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Nicholas Euler and Anna Euler two cameras, a Voightlaender and a Kodak, the property of the said Nicholas Euler and Anna Euler, valued at about $9.00, and from the presence of Else Helten a Zeiss Ikonette camera, No. 504/12, the property of the said Else Helten, valued at about $7.50.

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

Specification: (Finding of guilty disapproved by confirming authority)

SIMMONS

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

Specification 1: In that Sergeant Robert M. Simmons, 4th Tactical Air Communications Squadron, XIX Tactical Air Command, did, at Ober Beisheim, Germany, on or about 31 March 1945, forcibly and feloniously against her will have carnal knowledge of Anni Heder.

Specification 2: (Finding of not guilty)

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

Specification 1: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, by force and violence and by putting them in fear, feloniously

take, steal and carry away from the presence of Gerda Hehn a Zeiss Ikonta camera, No. E 97127, the property of the said Gerda Hehn, valued at about $30.00, and from the presence and custody of Karl Hestler a set of drawing instruments, the property of Hermann Sinning, valued at about $2.50.

Specification 2: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Nicholas Euler and Anna Euler, two cameras, a Voightlaender and a Kodak, the property of the said Nicholas Euler and Anna Euler, valued at about $9.00, and from the presence of Else Helten a Zeiss Ikonette camera, No. 504/12, the property of the said Else Helten, valued at about $7.50.

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

Specification: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, in violation of the non-fraternization policy set forth in Appendix "A" to Letter, Headquarters Supreme Headquarters Allied Expeditionary Forces, Subject: Policy on Relations between Allied Occupying Forces and Inhabitants of Germany, dated 12 September 1944, wrongfully and unlawfully fraternize with a German, in that the said Sergeant Robert M. Simmons did enter the house of a German and did have sexual intercourse with Anni Heder.

FAIRBANKS

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

Specification: In that Private Darrel B. Fairbanks, 4th Tactical Air Communications Squadron, XIX Tactical Air Command, did, at Ober Beisheim, Germany, on or about 31 March 1945, feloniously take, steal and carry away one bowl and twenty-nine (29) eggs, the property of Robert Wagner, valued at about three dollars ($3).

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

Specification: In that * * *, did, at Ober Beisheim, Germany, on or about 31 March 1945, in violation of the non-fraternization policy set forth in Appendix "A" to Letter, Headquarters Supreme Headquarters Allied Expeditionary Forces, Subject:

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Policy on Relations between Allied Occupying Forces and Inhabitants of Germany, dated 12 September 1944, wrongfully and unlawfully fraternize with a German, in that the said Private Darrel B. Fairbanks, did converse with and suggest sexual intercourse to Sophie Schanberg.

Each accused pleaded not guilty. Two-thirds of the members present at the time the vote was taken concurring, accused Fairbanks was found guilty of the charges and specifications preferred against him with the exception of the words "and suggest sexual intercourse to" in the Specification of Charge II. Three-fourths of the members of the court present at the time the votes were taken concurring, accused Simmons was found not guilty of Specification 2 of Charge I and guilty of all other specifications and all charges preferred against him, and accused Newman was found guilty of all charges and specifications preferred against him, excepting, in the case of both accused, from Specification 2 of Charge II, the words "by force and violence and by putting them in fear" and "from the presence of Nicholas Euler and Anna Euler two cameras" and "and a Kodak", and "the said Nicholas Euler and", and "9.00" and "from the presence of Else Helten a Zeiss Ikonette camera, No. 504/12, the property of the said Else Helten, valued at about $2.50"; and substituting after the words "a Voightlaender" the word, "camera", and after the words "valued at about" the figures "600". No evidence of previous convictions was introduced as to any of accused. Two-thirds of the members of the court present at the time the vote was taken concurring, accused Fairbanks was sentenced to forfeit $15 per month for three months and to be confined at hard labor, at such place as the reviewing authority may direct, for two months. Three-fourths of the members of the court present at the times the votes were taken concurring, accused Newman was sentenced to be dismissed the service, and accused Simmons was sentenced to be dishonorably discharged the service, and, in addition, each of the two accused was sentenced to forfeit all pay and allowance due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The reviewing authority, the Commanding General, XIX Tactical Air Command, in the case of accused Fairbanks approved the sentence, ordered it executed, and designated the Station Guardhouse, Headquarters XIX Tactical Air Command, as the place of confinement. In the case of accused Newman he disapproved the findings of Specification 2 of Charge I, 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 48 with the recommendation that the confirming authority commute (sic) the sentence to dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 25 years. In the case of accused Simmons he approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action purusant to Article of War 50½, stating that he intended to reduce the sentence to 20 years after final action on the case was taken by the confirming authority and this office.

The confirming authority, the Commanding General, United States Forces, European Theater, in the case of accused Newman disapproved the findings of guilty of the Specification of Charge III and Charge III, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

The proceedings as to accused Fairbanks were published in General Court-Martial Orders No. 23, Headquarters XIX Tactical Air Command, APO 141, U.S. Army, 25 May 1945.

3. On 30 March 1945 the 6th Armored Division attacked Kassel, Germany. About dusk it became evident that the city was not going to fall without resistance and elements of Combat Command B occupied the town of Ober Beisheim. They were then one-half mile from the forward elements of the division and there was sporadic firing outside the town (R137,145). The three accused slept in the house of Herr Robert Wagner that night (R10,15). About 0600 hours in the morning, Fairbanks talked with Frau Sophie Schonberg in the room where he had slept. About noon he returned and took a bowl with 29 eggs from the house. The bowl was valued at one mark and the eggs at three marks and 60 pfennings (R15-16).

Between 0800 and 0900 hours, accused Newman and Simmons, both of whom were armed, entered the Reitz home in Ober Beisheim. They asked for cameras and something to smoke, and then went upstairs (R25,28). In a short time Newman came down and went into a room occupied by Frau Knobel, her daughter Anni Heder, aged 18, and Anni Opfermann, aged 17 (R33,46,52,122). Newman gestured to the prosecutrix and Fraulein Opfermann and said "you and you, fraulein, come" (R46). The two girls were trembling and crying and implored Herr Reitz who was standing in the kitchen (R26) and Herr Knobel who had just come down from upstairs to help them (R103). When Reitz moved toward the two girls, Newman held him back with his hand and grasped his pistol which was in a holster by his side (R26). Newman constantly emphasized his orders by grasping his weapon and on one occasion pulled it from the holster and pointed it at a dog who was barking (R53,110). The two girls went upstairs hand in hand followed by Newman (R55). They were taken into a room and left there for a moment while Newman talked with Simmons (R40). Newman came into the room and sent Fraulein Opfermann out (R42). He closed the door and with a pistol in his hand indicated by gestures that the prosecutrix should undress. He unbuttoned a couple of buttons on her blouse and indicated that she should take it off. He then made her remove "several" dresses. He put his pistol on a sack of flour within easy reach of the bed, grabbed her by the shoulders and laid her on the bed. He removed her panties and had sexual intercourse with her (R47,48,57,58). When he had finished he indicated that she should dress (R48).

In the meantime, Simmons and Fraulein Opfermann went downstairs. He asked her how old she was and she replied that she was only 15. He had a small box in his hand and asked her if she "understood anything about

that". He tried to kiss her but she would not permit him (R36). When Reitz tried to leave the house, Simmons prevented him by holding him with his arm and putting his hand on his weapon. Finally Simmons permitted him and his wife to go to the stable but told them to come back immediately (R27).

Newman came downstairs and talked with Simmons for a few moments and the latter then went upstairs to the room where the prosecutrix was (R44). By this time she had put on her panties and a sweater. When he entered the room he had a pistol in his hand which he immediately placed upon the meal sack. Then he took a knife out of his pocket and put it next to the pistol. He grabbed her by the shoulders, laid her on the bed, spread her legs apart, and had sexual intercourse with her. She was so frightened that she did not try to prevent him (R60,61). Newman came into the room just after Simmons had finished and spoke to him. Both men then left the house (R50). The prosecutrix then went downstairs and told Frau Knobel what had happened. She was crying uncontrollably (R44,50,113).

The same morning Newman and Simmons entered a house occupied by Herr Georg Hessler. They asked for weapons and cameras. Newman was armed with a pistol and kept his hand on it. They went into a bedroom and Simmons in the presence of one Karl Hessler opened a closet and took a drafting set which he found there and which was the property of one Hermann Sinning. The drafting set had a value of from six to eight pre-war marks (R66-67). Accused did not threaten anyone in the house and the occupants were not afraid (R68).

Newman then went upstairs to an apartment occupied by Frau Gerda Hehn. He had his hand on his pistol and he asked for a camera. She was very much afraid of him. Frau Hehn got the key to her trunk and went to the basement, followed by Newman. Simmons joined them there. She got Newman a Zeiss Ikonta camera numbered E 97127 which had a pre-war value of 120 marks (R72-73,94,144; Pros. Ex.A).

The two accused visited the home of Frau Anna Euler the same morning. Frau Euler owned a Voightlaender camera which had a pre-war value of 25 marks. When they left her house this camera was missing. The occupant of the apartment on the second floor saw Simmons with Frau Euler's camera (R76-77,79,94-95; Pros. Ex. B).

Accused Newman and two other soldiers returned to the Reitz home about 1800 hours. He told the occupants that he would return later and that Fraulein Heder and Opfermann were to be there because they were going to sleep with them (R104,118). In the meantime American Army authorities had been notified of the day's incidents and were waiting at the house for Newman to return. When he and a soldier came to the house about 2030 hours they were apprehended. Newman was taken to Headquarters where his commanding officer, without advising him of his rights asked him what had happened. Newman said that he had gone looking for cameras and when he found two girls in a house he ordered them upstairs. He released one of them because of her youth and ordered the other to undress. In answer to a direct question he stated that

the prosecutrix did not offer "much" resistance, but that she cried a good deal. He admitted drawing his gun when he ordered the girls upstairs because one of the men in the room had made a move and he did not know what he was going to do (R138-140,146).

The same evening accused Newman made another statement to the military government officer. On this occasion he was warned of his rights. He admitted taking a camera from a house. He confirmed his earlier statement about the alleged rape (R142-143).

Accused Newman made still a third oral statement on 1 April 1945, this time to agents of the Criminal Investigation Division. He was asked whether he understood his rights under Article of War 24 and replied in the affirmative. This statement did not differ substantially from his prior statements. With a view to committing this to writing the agent asked him again if he understood his rights under Article of War 24 and accused stated that he did and that it meant that he had the right to counsel. When told that it meant he need not make a statement he then declined to make one (R86).

After being warned of his rights, accused Simmons also made a statement which was introduced in evidence. He admitted that he "went through" some of the houses in the village and "found" a set of drawing instruments and a "Voitlander" camera. He admitted being with a girl in one of the houses. The substance of his statement was that the girl voluntarily had sexual intercourse with him and co-operated fully in the act (R93; Pros. Ex 3).

Accused Fairbanks, after being warned of his rights, made an extrajudicial statement. He admitted talking to a German woman in a house where he had slept on the night of 30-31 March. He stated that he was trying to thank her for the night's lodging and when she did not understand he took her to the room where he had slept and attempted to convey his meaning by pointing at the bed. He also admitted taking about a dozen eggs from the house (R84-85; Pros. Ex. 2).

A medical examination of the prosecutrix on 2 April 1945 revealed that there was a slightly inflamed area of her vagina and a small, recent laceration of the hymen. The presence of spermatazoa in the vagina was verified (R149).

Private First Class Bert B. Meyer testified that the pre-war official rate of exchange between the German mark and the United States dollar was 1 Mark equals $.40 (R209).

4. Accused Newman, after an explanation of his rights, elected to be sworn and testify (R151-152). His testimony as to the incident with Fraulein Heder did not differ materially from the version he gave in his extrajudicial statements. He stated that when he ordered her and her companion to go upstairs they looked "frightened" (R157). When she was in the room with him she was "scared" and put her hands in front of her face (R158). She was not crying, but her eyes were "watering" (R175). She did not resist.

He penetrated only "about an inch" because she would not cooperate. Because he became "scared" and "softhearted" he desisted (R159). He was scared because he was afraid of being caught violating the anti-fraternization ban (R176). He became "softhearted" because he was "sort of sorry for her" although he was unable to explain why he felt that way (R177).

He admitted that he asked Frau Hehn for a camera and that he took the one which she gave him with the intention of keeping it. At the time he was armed but his pistol was in his holster. (R153-154,179). He remembered that while they were in the Hessler house, Simmons was "messing around" the cupboard but he did not see him take a drawing set (R168). He and Simmons went to the Euler house. Both were armed but kept their weapons in their holsters (R155-156). He denied taking a camera from the Eulers (R163). However, when they left, Simmons had a camera and a box draped over his arm (R169).

Accused Simmons, after being advised of his rights (R150-151) elected to be sworn and testify (R182). He told a detailed story of having intercourse with the prosecutrix but insisted that it was voluntary and willing on her part. He denied taking a set of drawing instruments from the Hessler home, although he admitted that he did take such a set in some house in that village but insisted he gave it back to its owner because he did not like it (R185, 198-199). He admitted taking a "Voightlaender" camera in the Euler home (R186). In fact, when he and Newman started out that morning they discussed the fact that they were going to try to get cameras or cigars in the houses in the village (R200).

Accused Fairbanks, after an explanation of his rights elected to remain silent (R150-151).

5. a. Specifications 1of Charges I, Newman and Simmons.

These specifications allege that both accused raped Fraulein Anni Heder. In determining the legal sufficiency of the record in this respect we look only to see whether it contains substantial evidence to support the allegations of the specifications, leaving the credibility of the witnesses and the weight to be accorded their testimony to the court (CM ETO 895, Davis et al). The evidence shows and both accused admit that they had sexual intercourse with the prosecutrix. The only question is one of consent. The prosexutrix testified that she was ordered by Newman to accompany him upstairs, that she openly manifested reluctance to do so, that both accused displayed guns in her presence, and that she was terrorized. Newman's testimony went far to corroborate her. He admitted she was frightened and he admitted pulling out his gun once when he was taking the girls upstairs because he thought one of the men was going to intervene. Despite the prosecutrix' failure to resist, neither of these accused had any reason to suppose that she was voluntarily submitting to intercourse. This evidence together with the surrounding circumstances - the occupancy of this German

town by American troops from which the court could infer that accused were taking advantage of their position as members of a conquering army - afford substantial evidence to support the court's findings . The record is legally sufficient to support the findings of guilty of these specifications (CM ETO 12604, Mendez and Rego; CM ETO 16971, Brinley).

b. Specifications 1 and 2 of Charges II, Newman and Simmons.

Both accused were found guilty of robbery of a Zeiss Ikonta camera from Frau Hehn and a set of drawing instruments from Herr Hessler, the property of one Hermann Sinning (Specification 1) and of larceny of a Voightlaender camera from Anna Euler (Specification 2). The evidence shows, and Simmons testified, that both accused began a systematic and preconcerted search for cameras in the homes of this village. Consequently, in this record, both can be connected as principals in any of the thefts charged (sec. 332, Federal Criminal Code, 18 USCA 550; CM ETO 5068, Rape and Holthus).

Robbery is larceny from the victim's person or in his presence effected by violence or intimidation (MCM, 1928, par. 149f, p.170).

> "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" (Ibid. p.170-171).

There is substantial evidence that Newman took a camera from Frau Hehn. In addition there is evidence that Newman had his hand on his weapon when he demanded and received the camera from Frau Hehn. She testified, in effect, that she was terrorized, testimony that is supported by the tactical situation of an occupying American Army which has already been discussed. The elements of robbery are thus established. The evidence shows, however, that it was accomplished by means of intimidation, rather than force and violence.

There is likewise substantial evidence that Simmons took the drafting set. However, the prosecution's witnesses testified that accused did not threaten them and that they were not afraid. There is similarly an utter lack of proof that the theft was effected by violence. This negatives the essential elements of the offense of robbery (CM ETO 533, Brown).

We need not discuss the competency of the evidence as to value since in robbery it is immaterial (CM ETO 15252, Lambert) and since the value of the drafting sets is alleged to be less than $20 and the sentences are adequately supported by the findings of guilty of the other specifications.

Specification 1 of Charge II is multiferious in that it alleges two distinct and separate robberies. However, no objection having been made by accused, and in the absence of evidence that their substantial rights were prejudiced, the error is harmless (CM 192530, Brown, 1 B.R.383 (1930); CM 218876, Wyrick et al, 12 B.R.157 (1942); CM 242312, Gilbert, 27 B.R. 35 (1943); CM 246884, Bruggeman, 30 B.R. 183 (1944); CM ETO 14632, Lang , and authorities therein cited.

It follows that the record is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II, as to both accused, as involves a finding that accused did at the time and place alleged feloniously take steal, and carry away a set of drawing instruments, of value and ownership as alleged, and by force and violence and putting her in fear, feloniously take, steal and carry away from the presence of Gerda Hehn a Zeiss Ikonta camera No. E 97127, with ownership and value as alleged.

Specification 2 of Charge II presents no difficulty. The evidence shows, and Simmons admits, taking the camera as alleged and found. The record is legally sufficient as to both accused to support the findings of guilty by exception and substitutions of the specifications.

c. Specification of Charge III, Simmons:

This Specification charges Simmons with fraternization with Anni Heder, a German, in violation of a SHAEF directive. The evidence shows that he raped her. We have repeatedly held that violence directed toward German civilians is not fraternization (CM ETO 10501, Liner; CM ETO 10967, Harris; CM ETO 11854, Moriarty and Sberna). The record is legally insufficient to support the findings of guilty of the Specification of Charge III and Charge III.

d. Specifications of Charges I and II, Fairbanks:

The evidence clearly established that Fairbanks stole the bowl of eggs as alleged. Since the value of the articles as alleged is less than $20 we need not discuss the proof on that point (MCM, 1928, par. 104c, p.99). The evidence likewise establishes that accused was guilty of fraternizing with one Sophie Schanberg, a German, in violation of a SHAEF directive (CM ETO 9824, Wensing; CM ETO 10419, Blankenship). The record is legally sufficient to support the findings of guilty of both charges and their specifications.

6. Accused Newman made three extra-judicial statements, the first to his Commanding Officer without any explanation of his rights, the second to a Military Government officer after an explanation of his rights, and the third to an agent of the Criminal Investigation Division in circumstances which might indicate that he had a mistaken conception of his rights. Assuming that the admissibility of these statements is to be governed by the rules applicable to confessions, we think their reception in evidence, if error, was not prejudicial. The evidence of accused's guilt of the offenses to which the statements related is compelling within the doctrine of CM ETO 1201, Pheil, and it need not be decided whether any or all of the statements were admissible.

7. The charge sheet shows that accused Newman is 24 years three months of age and enlisted on 19 June 1940 at Oklahoma City, Oklahoma. He was commissioned a second lieutenant, Army of the United States, on 11 December 1942. The charge sheet shows that accused Simmons is 25 years 10 months of age and enlisted on 20 January 1942 at Los Angeles, California and that accused Fairbanks is 21 years of age and enlisted on 5 March 1941 at St. Louis, Missouri. Neither Simmons nor Fairbanks had prior service.

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8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted herein, no errors injuriously affecting the

substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification and Charge III as to Simmons; legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II, as to Newman and Simmons, as involves findings of guilty of larceny of a set of drawing instruments, of ownership and value as alleged, and robbery of a Zeiss Ikonta Camera, No. E 97127 of ownership and value as alleged at the time and place alleged, and legally sufficient to support all other findings of guilty as approved, and the sentences.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278, 330, Federal Criminal Code (18 USCA 457, 567) and upon conviction of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Newman and Simmons is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Edward L. Stevens Jr. Judge Advocate

Judge Advocate

(DETACHED SERVICE) Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater. 26 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant HAROLD J. NEWMAN (O-1822717), 12th Tactical Reconnaissance Squadron, 10th Photo Group Reconnaissance, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II as involves findings of guilty of larceny of a set of drawing instruments, of ownership and value as alleged and of robbery of a Zeiss Ikonta Camera, No. E 97127 of ownership and value as alleged at the time and place alleged; and legally sufficient to support all other findings of guilty, as approved and confirmed, and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17314. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17314).

OUT 26 NOV 1945 BOTJAG-ET

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

(As to accused NEWMAN sentence ordered executed. GCMO 659, USFET , 21 Dec 1945).

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

BOARD OF REVIEW NO. 1

5 JAN 1946

CM ETO 17315

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private BENNIE MOORE (34229941), 94th Engineer Regiment	Trial by GCM, convened at Marseille, France, 10 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private BENNIE MOORE, 94th Engineer Regiment, did, at Nice, France, on or about 20 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class PETER RUTA, a human being by stabbing him with a knife.

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

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

3. On 20 August 1945, Private First Class Peter Ruta (the deceased), Sergeant Regis F. McCloskey and Madame Jackie Brunel, a prostitute, were sitting at the bar of the Cafe Carillon, Nice, France (R10). Accused approached Madame Brunel and asked her to "sleep" with him, but she declined (R17). Some words were exchanged between accused and Madame Brunel's companions and then accused stepped back and opened a knife which he immediately put back into his pocket. He then went to the other corner of the bar to speak to two colored French soldiers (R24). The fact that accused had opened a knife apparently went unnoticed by all but the bartender and another soldier who was present (R24,44). After speaking with the two French soldiers, accused came back to Madame Brunel and slapped her. Deceased and Sergeant McCloskey immediately got off the stools where they were sitting and moved toward accused (R19). Deceased put his hand on accused's chest and apparently accused backed toward the door (R10,41). Suddenly just inside the door, he lashed out with a knife and struck deceased in the neck. He then ran out the door, with Sergeant McCloskey and the bartender in pursuit (R26,37). After a short chase accused was apprehended. Just as he was being arrested he tried to throw a knife away (R50-51) and he said to one of the military policemen, "This seven day furlough has fucked me up for the rest of my life" (R54). In the meantime, deceased staggered out of the bar, blood pouring from his throat, and collapsed on the sidewalk (R37). He died as a result of this wound within a short time (R8).

In an extra-judicial statement properly admitted in evidence, accused admitted that he was in a bar in Nice on the evening in question and that he spoke to a woman there. He contended, however, that he ran out of the cafe when he was stabbed in the arm. He denied stabbing anyone (R72; Pros. Ex 2).

4. After an explanation of his rights, accused elected to remain silent (R73-75). No evidence was presented for the defense.

5. Accused was tried on 10 September 1945. On 9 September 1945, First Lieutenant James D. Crosson was relieved as a member of the court which tried accused and appointed an assistant defense counsel to serve before the same court. He represented accused at the trial, the defense counsel and the other assistant defense counsel having been excused. Accused, when asked whom he desired as counsel, named Lieutenant Crosson (R3). The prosecution before arraignment asked accused and his counsel if they were ready to proceed with the trial on 10 September 1945 and counsel replied that they were (R3-4).

On this record we may assume that as a member of the court until 9 September, Lieutenant Crosson did not concern himself with accused's defense, although the order of that day may have only been a formal confirmation of a previous arrangement. Accused's counsel, therefore, on the basis of that assumption had but one day to prepare for trial. However, opportunity to prepare for trial may be waived by

accused, or by his counsel in his presence, and such waiver, is effective where there is no indication of prejudice to the substantial rights of the accused (CM ETO 3475, Blackwell et al; CM ETO 4988, Fulton, CM ETO 5255, Duncan). Indeed, in some cases, failure to object has been construed as a waiver (CM ETO 3937, Bigrow; CM ETO 5004, Scheck; CM ETO 5179, Hamlin). In the instant case the issues were simple and did not of themselves necessarily demand a longer period of preparation. Moreover, there was available to accused the defense counsel and another assistant defense counsel who, although they did not appear at the trial, may well have worked in preparing his defense. To be sure, there is no showing that such was the case but counsel's waiver in accused's presence in open court should be considered against this background and, so considered, it does not appear that accused's substantial rights were prejudiced.

6. There can be no doubt that accused struck the fatal blow and that, under the facts here shown, he is therefore guilty of murder unless he acted in justifiable self-defense or unless he killed in "hot blood" after due and adequate provocation, in which latter case he would be guilty of voluntary manslaughter (MCM 1928, par 149a, p.165).

The evidence shows, however, that after accused slapped Madame Brunel, the most that deceased did was to put his hand on accused's chest. Neither deceased nor his companion was shown to have been armed and neither made a threatening gesture toward accused beyond that involved in the act to which reference has just been made. Obviously the act of deceased in merely placing his hand on accused's chest was not such due and adequate provocation as would reduce murder to manslaughter (CM ETO 292, Mickles; CM ETO 422, Green; CM ETO 2007, Harris, Jr; CM ETO 2103, Kern). Neither was it such a threat to accused that it would justify him in killing to protect himself (CM ETO 1941, Battles; CM ETO 4640 Gibbs). With these two possibilities disposed of, accused, as we have said, was properly found guilty of murder. Whether or not accused's act in slapping Madame Brunel was sufficient to constitute him the aggressor and thus deprive him of the defense need not be decided. The requisite malice may be found in the knowledge, attributable to accused, that his act in stabbing deceased in the neck would probably cause the latter's death or inflict grievous bodily harm upon him (MCM, 1928, par. 148a, p. 163). The record is legally sufficient to sustain the findings of guilty (CM ETO 292, Mickles; CM ETO 1941, Battles; CM ETO 3649, Mitchell).

7. The charge sheet shows that accused is 21 years nine months of age and was inducted 3 December 1942 at Fort Benning, Georgia to serve for the duration of the war plus six months. He had no prior service.

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

(70)

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

Edward L. Stevens, Jr. Judge Advocate

B. V. Dewey Jr Judge Advocate

Donald R. Carroll Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater ~~XXXXXXXXXXX~~
APO 887

BOARD OF REVIEW NO. 4

6 OCT 1945

CM ETO 17318

UNITED STATES v. EDWARD J. GESSNER, Merchant Seaman serving with the armies of the United States in the field	UNITED KINGDOM BASE, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM, convened at Southampton, Hampshire, England, 17 September 1945. Sentence: Total forfeitures and confinement at hard labor for five years. United States Penitentiary, Lewisburg, Pennsylvania.

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

1. The record of trial in the case of the Merchant Seaman ~~XXXXXX~~ named above has been examined by the Board of Review and found legally sufficient to support the sentence, insofar as it provides for confinement at hard labor for five years, but legally insufficient to support that part of the sentence which provides for forfeiture of all pay and allowances due or to become due from the United States Government, for a like period (CM ETO 14632, Lang).

2. Confinement in a penitentiary is authorized upon conviction of larceny of property of a value exceeding $50 by Article of War 42 and section 287, Federal Criminal Code (18 USCA 466). 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).

Leslie A. Daniels Judge Advocate

(TEMPORARY DUTY) Judge Advocate

John R. Anderson Judge Advocate

AGPO 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO. 4 3 DEC 1945

CM ETO 17328

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Geislingen, Germany, 8 September 1945.
	)	
Technician Fifth Grade FRED JOHNSON (34059218), Headquarters and Headquarters Detachment, 285th Quartermaster Battalion	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Tec 5 Fred Johnson, Hq Det 285th QM Bn (M), did at Ulm, Germany, on or about 8 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Johann Scheck, a human being by shooting him with a carbine.

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

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

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

About 0100 hours on 8 May 1945, Johann Scheck, his wife Louise, his daughters Johanna and Annaliese, Louise Steck and Karl Billon were awakened by the ringing of the door bell of their home at 29 Beyer Street, Ulm, Germany (R12,13,19,25,30,36). Johann got out of bed and opened the door, and accused, carrying a carbine on his shoulder, came inside the house. Louise Steck, Johanna, Louise Scheck and Annaliese, in the order named, joined Johann and accused in the corridor (R13,16,20,24,25,29,30,36). They showed accused an "off limits" sign, in response to which he laughed (R14). Annaliese, who could speak English, asked accused if he wanted something to eat or drink and told him he could sleep upstairs if he was tired, whereupon accused replied "Madame, sleep", during which time he was playing with his carbine and beat on the floor with it (R14,21,25,32). Annaliese and Johanna returned to their room, locked the door and, while looking through the keyhole of the door, Johanna saw accused take his carbine from his shoulder and come toward their room. She also heard him move the bolt of the carbine back and forth twice (R14,16,18). In the meantime Louise Scheck left the house and placed a ladder at the window of their room by means of which both Annaliese and Johanna left the house and hid in their neighbor's yard (R15,21,22,26). As they were leaving the house a shot came through the door of their room (R15,22,32,42). Louise Scheck returned to the house and when accused pointed the carbine at her, she and Louise Steck hid in the bathroom, after which Johann was heard to say, "Please don't shoot", and a second shot was fired, followed by a noise that sounded as if someone fell to the floor (R26,32,63). Because they were afraid accused would shoot them, they remained in the bathroom until they heard Johanna and Annaliese crying in the corridor (R27,33). Johanna and Annaliese had been in their place of hiding for approximately five minutes when the second shot was fired, after which they waited for a short time and then returned to the house where they discovered their father, Johann, lying on the floor in the corridor. There was a bullet wound over his right eye, and he was dead. Accused was not in the corridor at that time (R6,9,15,18,22,27,33). Shortly thereafter the house was searched by Billon, who had gone for help after the first shot was fired, and by two American soldiers whose aid he had solicited. They found no one other than the residents of the house (R38,39).

In a pre-trial statement, which was introduced in evidence without objection and which recited that he had been informed of his rights relative to making a statement, accused stated that during the evening of 7 May 1945 he played dice with some soldiers at another unit, and, while on his way back to his outfit about midnight, he "got lost". He stopped at a house and asked for directions to his organization and a man went upstairs for a map. However, when he looked upstairs the man was pointing a pistol at him so he fired his carbine twice at the man. He did not know whether he hit the man or not. He had not had more than one glass of wine all evening and was not drunk (R61, Pros. Ex. 1).

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4. After being advised of his rights as a witness, accused testified under oath that between 1600 and 1800 hours, on about 8 May, he saw a girl in an upstairs window in the house of Johann Scheck, which was across the street from his billet, and that by means of signs he arranged to see her at 2200 hours at her room. That evening he went to another organization where he "shot craps", drank some wine and then returned to his quarters, after which, not realizing how late it was, he went to Scheck's house, knocked on the door and entered the house when someone opened the door. He tried to explain to the people in the house that he wanted to "speak to the Madame up on the last floor". The people were "rushing" him so he "pulled my carbine back a small bit to make it make a noise and fool them". He did not think the carbine was loaded, but when he hit the butt of the carbine it "went off on me". Shortly thereafter an old man started upstairs and the carbine went "off again" as he was playing with it. After that he was so frightened that he ran back to his company. Although he had been drinking wine that evening, he was not drunk (R47,48,51). He further testified that an investigating officer came to him and said that "he had me for murder", and told him what to say in the pre-trial statement. Accused did not see a man in the house with a pistol in his hand, and he signed the pre-trial statement which contained a statement to that effect solely because the investigating officer asked him to sign it. He did not remember whether the investigating officer read to him the part thereof to the effect that his rights relative to making a statement had been explained to him before he signed it. The investigating officer did inform him that he had to make a statement (R46, 50,51,60,61).

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

The evidence clearly showed that, at the time and place alleged, deceased was shot through the head and that his death was the direct result thereof. Although no witness actually saw accused fire the fatal shot, it is not required that the offense be proved by direct evidence if the circumstantial evidence excludes every reasonable hypothesis except that of guilt (CM ETO 7867, Westfield; Buntain v. State, 15 Tex. Crim. App. 490; People v. Razezicz (1912), 206 N.Y. 249, 99 N.E. 557).

The evidence shows that on the night in question accused, armed with a carbine, went to deceased's home for the purpose of locating a "madame"; that deceased, his wife, his two daughters and two boarders endeavored to please accused by offering him food, drink and a place to sleep, which apparently did not satisfy him; that accused played with his carbine and pointed it at some of the people in the house, during which time one shot was fired, frightening them to the extent that all except deceased sought a place to hide; that accused was left alone with deceased who cried, "Please don't

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shoot", following which a second shot was fired; that shortly thereafter deceased was found dead with a bullet wound in his head and accused had disappeared; and that accused admitted firing his carbine twice while in deceased's house. The only reasonable inference to be drawn from these facts is that it was accused who shot deceased, and the court was justified in so concluding (MCM, 1928, par. 78, p. 63; CM ETO 16621, Makara). The circumstances shown by the evidence support either the inference that accused deliberately and without legal justification or excuse killed deceased, or the inference that he used his weapon in reckless disregard for human life with knowledge that death or grievous bodily harm would flow therefrom, and exclude every other reasonable inference. The necessary proof of malice aforethought is therefore provided (CM ETO 14573, Morton; CM ETO 16621, Makara), and the court was warranted in finding accused guilty of murder as charged.

Although accused's testimony casts some doubt on the voluntariness of his pre-trial statement, as the statement did not accept ultimate legal guilt of the crime with which he was charged, it was admissible without proof of its voluntary nature, and the significance to be accorded to it was a question for the court (MCM, 1928, par. 114a, b; CM ETO 2535, Utermoehlen).

6. The charge sheet shows that accused is 29 years of age and was inducted 26 November 1941 at Fort Benning, Georgia. He had no prior service.

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

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

Lester A. Danielson, Judge Advocate.

Kenneth A. Meroney, Judge Advocate.

John R. Anderson, Judge Advocate.

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 3 DEC 1945 Commanding General, 36th Infantry Division, APO 36, U.S. Army.

UNIT DEMOBILIZED LOCALLY

1. In the case of Technician Fifth Grade FRED JOHNSON (34059218), Headquarters and Headquarters Detachment, 285th Quartermaster Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17328. For convenience of reference, please palce that number in brackets at the end of the order: (CM ETO 17328).

OUT 3 DEC 1945 BOTJAG-ET

4 JAN 1946 BRANCH

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

1/ (Sentence ordered executed. GCMO 20, USFET, 18 Jan 1946).

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

BOARD OF REVIEW NO. 5

23 OCT 1945

CM ETO 17330

UNITED STATES	101ST AIRBORNE DIVISION
v.	Trial by GCM, convened at Berchtesgaden, Germany, 23 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York
Second Lieutenant PAUL J. FREUND (0493373), Company F, 502nd Parachute Infantry	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Paul J. Freund, 502nd Parachute Infantry, did, without proper leave, absent himself from his organization and duties at Camp Mourmelon, France, from about 3 March 1945, to about 14 April 1945.

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 dismissed the service, to forfeit all pay and allowances due or to become

due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of five years. The reviewing authority, the Commanding General, 101st Airborne Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that at all times mentioned in the specification, accused was a second lieutenant and a member of Company E, 502nd Parachute Infantry (R7). On 3 March and 14 April 1945, this organization was camped at Mourmelon(France)(R7; Pros.Exs. A,B). On 3 March the commander of accused's company searched the company area and could not find accused (R7). On 14 April accused returned to his organization and was seen on that day when he entered the mess tent. At that time he identified himself to a warrant officer (R9,10), who testified:-

> "I asked him when he left, and he said it was sometime between the 3rd and 5th of March. I asked him where he went, and he said he went to Nancy, and then up to the front but they wouldn't let him through the lines, and then to Paris, and that he just came back" (R10).

The morning report of Company E shows two pertinent entries relating to accused signed by the personnel officer. The first, dated 3 March 1945, shows accused on this day "Dy to AWOL"; and the second: "AWOL to arr. in Qrs" on 14 April (R11;Pros. Exs. A,B).

4. Accused was asked by the court if he wished to make a sworn statement and upon answering in the affirmative was then asked by the court if his "rights" had been explained to him. Accused answered "Yes,Sir" and proceeded to testify under oath (R11,12). He said:

> "I've thought a long time since I came back as to just why I had gone AWOL. There's a reason for everything, but unfortunately I have no reasonable excuse for it, so all I have to offer is said

in the hopes of a little leniency. I've been in the Army for three years, and I've tried to do a good job as an officer. I've been a second lieutenant all that time and haven't gotten ahead. It finally got to the point where the 502nd was planning to reclassify me. Naturally, after having tried to do my best I felt downhearted. It wasn't only the question of reclassification, but also because I love the infantry, the paratroopers, and didn't like the idea of being tossed out of the Army or being tossed back in some rear echelon outfit like the Quartermaster. I couldn't stand the disgrace of going back to some rear echelon outfit, and all this probably affected my emotional balance, and I probably wasn't able to think clearly of what my duties and responsibilities were, and for that reason I just left"(R12).

Accused stated that he was in the Holland campaign;and asked if he had been at Bastogne, he completed his testimony by the following answer:

"Yes. I think I might also state my past record in the Army in that I never have been court-martialled or tried under the 104th Article of War. I have never replied by indorsement for misconduct, and I've never been drunk. I don't drink whiskey and things like that. I did jump in Holland, and I've tried to serve my country as best I could. I was in Bastogne through the whole thing. I was wounded in Holland. I came back myself, for leniency, and wasn't apprehended, and as far as shirking any duty to the government, or the government suffering by my going AWOL, they had intended to reclassify me anyway. Naturally I admit my mistake. Even if I don't admit it they could prove it anyway. If I had it to do over again I wouldn't commit the offense I did commit. It was probably that I was feeling the disgrace of being reclassified out of the infantry, and that's what made me go over the hill"(R12).

The defense introduced no further evidence.

5. On the uncontroverted evidence offered by the prosecution, accused was shown to have absented himself without leave from his organization and duties as alleged in the specification. Such conduct was in violation of Article of War 61, as charged (MCM, 1928, par.132,p.146). Further proof of accused's guilt is found in his plea of guilty to the Specification and Charge, and in his judicial confession when on the stand.

6. The Charge Sheet shows that accused is 23 years two months of age. He was commissioned second lieutenant 1 September 1942 and was called to active duty 17 September 1942. He had no prior service.

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

8. Dismissal and confinement at hard labor are authorized punishment for violation by an officer of Article of War 61.

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 23 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant PAUL J. FREUND (O-493373), Company F, 502nd Parachute 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 CMETO 17330. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17330).

B. Franklin Riter

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

Sentence ordered executed. GCMO 551, USFET, 8 Nov 1945).

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

BOARD OF REVIEW NO. 3

17 OCT 1945

CM ETO 17339

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	
Major GORDON L. GUNNING (O-352936), Headquarters, 326th Field Artillery Battalion	Trial by GCM, convened at Weinheim, Germany, 28 June 1945. Sentence: Dismissal.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DENEY, 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 with the European Theater.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major Gordon L. Gunning, 326th Field Artillery Battalion, was at Swabisch Gmund, Germany, on or about 16 June 1945, drunk and disorderly in uniform.

Specification 2: In that * * * did at Swabisch Gmund, Germany, on or about 16 June 1945, wrongfully assault Fraulein Inge von Stein by forcing her to the floor and attempting to remove her clothing.

Specification 3: In that * * * did at Swabisch Gmund, Germany, on or about 16 June 1945, wrongfully break a door and enter the room of Fraulein Reina Simeonower.

He pleaded not guilty and was found of Specifications 1 and 2, guilty, of Specification 3, guilty, except the words "and enter", substituting therefor the word "of", of the excepted words, not guilty, of the substituted word, guilty, and of the Charge, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 84th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence was undisputed as follows:

a. Specification 1: On the evening of 16 June 1945 accused, attired in the regular officer's dress uniform, attended a dance held at the VI Corps Headquarters Officers' Club in Swabisch Gmund (R36,38,40-42), Germany (R29). He was heard to use "rather foul" language while seated in the cocktail lounge at a time when ladies were seated within a nearby radius. Among the 25 or 30 people in the lounge were officers, nurses, Red Cross girls, and a few United Service Organization civilians (R37-38). He twice fell while dancing in a manner described as "erratic", each time going to the dance floor, knocking down the bandstand and scattering the music. It was apparent he had been "drinking heavily". After the dance he refused to leave although several officers tried to persuade him to do so, including a Red Cross girl, to whom "in a very insinuating voice he said, 'Well, Mamma, I don't need to be taken care of. Just leave me alone, Mamma'". Accused was drunk (R38,40-42).

b. Specification 2: After the dance at about 0230 hours Fraulein Ingeborg von Stein, a dancer and entertainer hired by the Sixth Corps, was ascending the stairs at the hotel near the Officers' Club above described where she and other entertainers were then staying (R7,31). On the second floor she observed accused "standing there embracing Miss Negi Zenkowa", a friend of hers, who said, "Listen, this man is giving me trouble and I can't get rid of him" (R7-8,13). When Ingeborg went to aid her friend, accused pulled Ingeborg toward him and for the next half hour she and accused

> "kept running up and down between the third and second floors. I tried to get away from him but it was quite impossible for me because the man insisted on grabbing hold of me or some parts of my clothing at all times" (R8).

Two or three times he said, "Du mit mir fichen", which translated means "you fuck with me". While she continued to resist him with her hands and legs, he pushed her to her knees and then to the floor on her back. Face

down and almost on top of her, he tried to kiss her, raised her dress above her thighs and attempted to remove her underpants. One of her girl friends came to her assistance in response to her screams for help, pulled accused's hair until he released the young woman, who then made her escape upstairs (R8,10-11,16,18,20-22). Accused was "totally drunk" (R16).

c. Specification 3: Fraulein Reina Simeonower, a singer, was staying at the same hotel on the night in question (R23). At about 0230 or 0300 hours a knock on the door across the hall from her room was followed by a knock on her own door. A panel was then broken out of it near the knob (R24-25,29). Opening the door, she saw accused alone in the corridor. She was "very mad" and "screamed at him in German". He said, "I'm sorry, lady, please" (R25). She observed he was drunk (R26). At about the same time an assistant special service officer, custodian of this hotel where he had a room, "heard quite a lot of noise down the hall on the third floor". He went to investigate and found accused in a room with two of the girls hired as entertainers by the Sixth Corps. It was apparent accused had been drinking. He was not "steady in standing" (R28,29-30). The special service officer noted that the panel of the door of another room was broken (R29). After some persuasion, accused left the hotel, having said that he would pay for the door (R31-32,33).

4. His rights having been explained to him by defense counsel, accused elected to remain silent and no evidence was offered in his behalf (R44).

5. The language used in Specification 1 fails to include the allegation that at the time of the alleged offense accused was "in a public place" or that he was in command, quarters, station or camp in accordance with the sample specification set forth in the Manual for Courts-Martial, 1928, Form 136, Appendix 4, page 255. While the form used is not to be commended, sufficient facts are alleged to constitute and offense under Article of War 96 as fully discussed in CM ETO 10362, Hindmarch, in which the same question as regards a similarly drawn specification was presented. Accused was not misled in the preparation of his defense. Any greater particularity desired in the specification should have been raised at the time of arraignment by special plea as "a plea to the general issue may be regarded as waiving of any objection then known to the accused which is not asserted by a special plea" (MCM, 1928, par.69a).

6. There was abundant evidence to sustain the court's findings of guilty of being drunk and disorderly in uniform as alleged in Specification 1 (CM ETO 10362, Hindmarch, supra). His wrongful assault upon Fraulein von Stein in the manner described in Specification 2 was clearly demonstrated by evidence which fully supported the court's findings of guilty (CM ETO 3707, Manning). Substantial evidence supported also the court's findings of guilty, with exception and substitution, under Specification 3. There can be no question of any unreasonable multiplication of charges based upon a single act since his conduct at the dance, the assault and battery at the hotel and the

breaking of the door, while all disorderly, were each separate offenses not necessarily involved in the other two (Cf: CM 186486 (1929), Dig. Op. JAG, 1912-40, sec. 428 (5), p. 294). Moreover, accused could not be harmed thereby as the sentence imposed was warranted upon conviction of any of the three offenses (CM 120542, CM 122371, Dig. Op. JAG, 1912-40, sec. 428 (5), p. 294).

7. The charge sheet shows that accused is 35 years of age. He enlisted in the National Guard in June 1933, remained a member thereof until 11 January 1937 and was commissioned a Second Lieutenant 12 January 1937.

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

9. A sentence of such punishment as a court-martial may direct is authorized upon conviction of an officer of a violation of Article of War 96.

R. C. Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

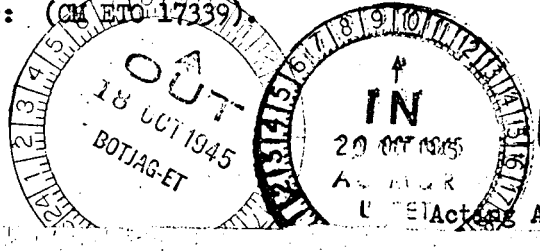
(TEMPORARY DUTY) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Major GORDON L. GUNNING (O-352936), Headquarters 326th 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 17339. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17339).



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

(Sentence ordered executed. GCMO 536, USFET, 3 Nov 1945).

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

BOARD OF REVIEW NO.4

16 NOV 1945

CM ETO 17340

U N I T E D S T A T E S	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Sergeant MILTON HOLT (34410964), Company B, 94th Engineer General Service Regiment.	)	Trial by GCM, convened at Mannheim, Germany, 16 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Sergeant Milton Holt, Company "B", 94th Engineer General Service Regiment, did, at Grotizingen, Germany, on or about 15 May 1945, forcibly and feloniously against her will, have carnal knowledge of Mrs. Emilie Patheiger.

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

Specification 1: In that * * *, did, at Grotizingen, Germany, on or about 15 May 1945, in the night time, feloniously and burglariously break and enter the dwelling house of Mrs. Emilie Patheiger,

with the intent to commit a felony, viz, rape therein.

Specification 2: In that * * *, did, at Grotizingen, Germany, on or about 16 May 1945, unlawfully enter the dwelling of Hermann Wagner and Emile Wagner with intent to commit a criminal offense, to wit, an assault upon the occupants therein.

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

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

(a) Specification, Charge I (Rape). Accused's organization in May 1945 was stationed at Grotizingen, Germany, approximately 200 yards from the home of Mrs. Emilie Patheiger and her children (R6,29). At about 2000 hours, 14 May 1945, two colored soldiers entered her home seeking wine (R6). The accused was positively identified by Mrs. Patheiger and her sone Reinhold, sixteen years of age, as being one of the colored soldiers who entered their home at that time (R7,17). Accused indicated he would like to exchange some soap for hard liquor, that he would return at about 2200 hours and then left (R7). Thereafter, at about 2200 hours accused returned with cigarettes, chocolate and soap, and she asked him if he wanted hard liquor for it and he replied that he did not (R7). At this time he asked her daughter Ester to write the names and ages of the members of the Patheiger family on a cigarette carton, which she did, and he then wrote the words "Milt Holton", purportedly his name, on the carton (R10, 15,19,20). Shortly thereafter, and after speaking privately to Mrs. Patheiger and Reinhold in a foreign tongue, he indicated that he wanted her to put the children to bed (R7,17). She refused to do so and fled with her daughter to the home of her mother-in-law(R7). Reinhold stayed in the house with accused who loaded his pistol and told him to get his mother (R17). Reinhold left and notified his mother not to return, but later, when accused had left, told her to return (R17). Shortly after

she and her daughter returned to their home, and at about 2400 hours, a knock at the door and a voice calling, "Mama, open up", were heard (R7,19). They did not open the door, and the sound of breaking glass and approaching footsteps was heard (R8). Accused was seen coming up the stairs with a pistol in one hand and a light in the other (R8,19). He approached Mrs. Patheiger and she pleaded with him not to shoot (R8). He put his arm about her, led her downstairs saying "Mama come on", took her into the bedroom, told her to undress, threatened her with his pistol, forced her to lie down, and penetrated her sexually (R8). He then ran to the door leading upstairs, and when she asked him what he wanted he replied, "Baby" (R8). She pleaded with him not to touch her daughter, who was only fourteen years old, and he then threatened her with the gun again and penetrated her sexually a second time (R8). She stated that on both occasions she felt his "penis inside my vagina" (R8). The following morning, 15 May 1945, she reported the occurrence to the American authorities (R15).

(b) Specification 1, Charge II (Burglary). The evidence with reference to the Specification of Charge I, hereinbefore summarized, comprises the facts pertinent to this offense.

(c) Specification 2, Charge II (Housebreaking). Between 2200 hours and 2300 hours, 16 May 1945, accused was seen walking toward the home of HermannWagner in Grotizingen, Germany, which was approximately 150 yards from the station of his organization (R18,22,26-29). The lower floor of this home was occupied by Emile Wagner (R24). Accused climbed over the courtyard door, and emtered the house by lifting the front door from the hinges (R22-26). Although the door was locked, it did not fit the frame (R23). Wagner and his wife went downstairs and observed accused standing inside the house (R23,26). After demanding wine and liquor, accused drew his pistol and searched the house (R23-27). He stated he was looking for a "lady" (R23). He continued to threaten Wagner with his pistol, and forced him downstairs while he searched a lower apartment (R23). Shortly thereafter he left (R24). In about fifteen or thirty minutes he returned and again went upstairs and searched the rooms (R24). Finding no one, he forced Wagner's wife downstairs, threatening her at the time with a pistol and knife, and grabbing her by the wrist (R24). She called for help and when Wagner went to aid her he struck him with the pistol, injuring his arm (R24). Accused left shortly thereafter (R27). The charge of quarters for accused's organization made a bed-check of the accused's barracks at approximately 2245 hours on 16 May 1945, but accused was neither there nor in the latrine (R44-47). Search of accused's personal effects on 17 May 1945 disclosed possession of two pistols and a ten-inch knife (R29).

4. Evidence for the defense. Accused's rights as a witness were explained to him by the court, and he elected to take the stand as a sworn witness (R30,31). He denied having seen any of the German civilians connected with thecase prior to the

investigation, and gave an account of his actions at the times in question which placed him at places other than the homes of the German civilians involved herein (R31-35). The testimony of other witnesses for the defense tended to corroborate that given by accused (R36-44).

5. (a) Specification, Charge I (Rape) and Specification 1, Charge II (Burglary). The record of trial convincingly discloses an unlawful and violent breaking and entering of the home of Mrs. Emilie Patheiger, followed by rape, and no issue of fact as to the commission of the acts is raised by the evidence.

Mrs. Patheiger was the only witness to testify as to the actual rape, but her testimony is corroborated by that of her son, and the court was justified in giving it credence. Rape being the unlawful carnal knowledge of a woman by force and without her consent (MCM 1928, par. 148b, p. 165), it became the duty of the prosecution to prove all these elements. The evidence does not indicate active resistance by Mrs. Patheiger, but her submission is shown to have been induced by the use of a pistol, and under such circumstances no inference of consent arises because of the absence of active resistance (CM ETO 3993, Ferguson et al). She testified that penetration was completed, and, there being no consent, this alone was sufficient to constitute the force indispensable in rape (MCM 1928, par. 148b, p. 165).

The evidence disclosing a breaking and entering of Mrs. Patheiger's dwelling in the night, the only question for consideration is whether the breaking and entering were done with the intent to commit rape, as alleged (MCM 1928, par.149d, p. 169). The events occurring thereafter in her home, viz, the rape, clearly support the inference that an intent to commit rape attended the unlawful entry.

The only issue of fact raised by the evidence relates to the identity of accused. Both Mrs. Patheiger and her son Reinhold postively identified accused, and, the record of trial disclosing they had ample opportunity on the night in question to observe him, the court was warranted in viewing their testimony favorably. Moreover, other evidence tends to corroborate their identifying testimony. While accused denied any connection with the offenses, and the evidence offered in his behalf tended to corroborate his recital of his activities, this only tendered an issuable question of fact which, in view of the substantial and competent evidence offered by the prosecution, is not a matter open to examination here (CM ETO 895, Davis).

The record of trial containing substantial competent

evidence on all elements of the offenses, the findings of the court are clearly supported.

(b) Specification 2, Charge II (Housebreaking). The evidence is undisputed that on 16 May 1945 a colored soldier unlawfully entered the dwelling of Hermann Wagner and Emile Wagner by removing the door from the hinges, and that thereafter he committed assaults upon Wagner and his wife. The record of trial abundantly supports the inference that the unlawful entry was accompanied by an intent to commit the assaults, and the requirements of proof for housebreaking were clearly satisfied (MCM 1928, par. 149e, p.169). Here again the only question for determination is whether the identity of accused is adequately established. Both Wagner and his wife positively identified accused as the soldier who entered their home and committed the assaults, while the testimony of accused, which is supported by evidence tending to corroborate his version of his activities, constitutes a denial of the prosecution's evidence, - accused denying any connection with the offense and otherwise accounting for his presence at the time in question. The testimony of the victims, based on an opportunity to observe, is positive and finds support in the record, however, and a conflict in the evidence has been resolved by a fact-finding body. The findings of the court, being responsive to substantial competent evidence, are supported by the record of trial.

6. The charge sheet shows that accused is 33 years of age and was inducted 26 August 1942 at Fort Benning, Georgia. No prior service is shown.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567), and upon conviction of burglary and housebreaking by Article of War 42 and section 22-1801 (6:55), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec II, pars. 1b (4), 3b).

Lester A Pamelson Judge Advocate.

Judge Advocate.

(ON LEAVE). Judge Advocate.

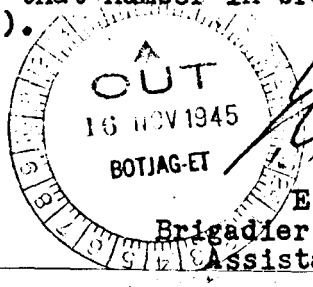
(96)

1st Ind.

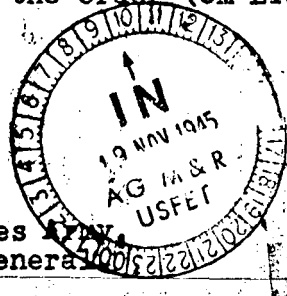
War Department, Branch Office of The Judge Advocate General with the European Theater. 16 NOV 1945 TO:Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Sergeant MILTON HOLT (34410964), Company B, 94th 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, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17340. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 17340).



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



(Sentence as commuted ordered executed. GCMO 593, USFET, 26 Nov 1945).

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

BOARD OF REVIEW NO. 5

24 OCT 1945

CM ETO 17373

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM convened at Geislingen, Germany, 17 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Corporal CLIFTON C. HOWE, (34545222), Company M, 142nd Infantry	

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

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

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

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

Specification: In that Corporal CLIFTON C. HOWE, Company "M", 142nd Infantry, APO 36, U. S. Army, did, at Kaiserlautern, Germany, on or about 12 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technical Sergeant James A. Byram, Company "M", 142nd Infantry, a human being by shooting him with an M-1 Rifle.

(98)

CHARGE II: Violation of the 86th Article of War.

Specification: In that * * * being on guard and posted as a sentinel at Kaiserslautern, Germany, on or about 12 April 1945, did leave his post before he was regularly relieved.

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

3. The evidence for the prosecution shows that at 1800 on 12 April 1945 the accused and Private First Class Henry Halicki were posted as "walking guards" in a railway yard at Kaiserslautern, Germany (R9,13). The tour of duty was from 1800 to 2200 and consisted of guarding a line of box cars, with special instructions to keep civilians out of the yard (R10,13). Shortly after going on duty Halicki started to walk along the line of freight cars but accused remained, stating that he was not going to walk the post. When Halicki returned to the place he had left accused, the latter had departed and he did not see him again that night. Halicki observed that accused had been drinking by "the look in his eyes", but he was able to stand and walk without any difficulty (R10-12). At about 1830 Staff Sergeant Sidney J. Champney, Corporal of the Guard, who had previously posted accused, brought raincoats for the guards and discovered that accused was not on his post. As accused had not been relieved from duty, Champney made a search and found him in a railway station about 75-100 yards off the post pointing a tommy gun at the back of another soldier (R10,14-15,23). He told Champney that the soldier did not have the password (R14). Only civilians were required to give the password(R19). Accused was staggering, his speech was not clear, and Champney, being of the opinion that he was drunk, took away the gun. Champney left and returned with deceased, Technical Sergeant James A. Byram who was Sergeant of the Guard, and the latter directed directed accused to accompany them to the billet (R14,20). Deceased and accused "had a few words" (R15,21) on the way and when they arrived deceased ordered accused to go upstairs to bed, asking Champney to see that the order was carried out. When Champney started up the stairs

accused threatened to throw a hand grenade down on him. Champney continued on his way followed by deceased. When they reached the top of the stairs an argument took place and accused told deceased that "if he fucked with him he blow his ass off". He said the words "kind of slow like". Deceased replied "You ain't got guts enough" and accused answered "You'll see". Accused "quite aways" ahead of the others entered the room of Private First Class Alfredo F. Rios and deceased followed along the hallway rolling up his shirt-sleeves. Champney urged deceased not to go into the room but was brushed aside (R15-16,22,25). Rios was alone in his room when accused entered at about 2000 hours and asked for a Thompson Sub-Machine Gun. Rios told him the gun was not there. After looking around the room accused picked up an "M-1" rifle. At this time deceased entered the room, unarmed but "rolling up his sleeves". Accused seeing deceased walking toward him took a few steps backward and told him to keep away "or I shoot your ass". Deceased replied "You ain't got guts to do that" (R28-32). Rios left the room and immediately eight shots were heard, "it was fast shooting" (R7,17,30). Technical Sergeant Paul F. De Martini on hearing the shots went into the hallway when he saw accused walking toward him with the rifle in his hand "talking to somebody". He disarmed accused and heard him say "The old bastard didn't think I'd shoot him, but I did. I may get the chair but I don't give a damn" (R35). Immediately following the shooting deceased was found unconscious on the floor inside the room, his head about two feet from the door. A considerable amount of blood was on the floor (R8,17,31,35). His pulse was beating very slowly and he died in a few minutes (R6-7).

Rios described deceased as a large man and "pretty rough". He believed deceased was angry when he followed accused into the room because "his face was red" (R32-33). It was stipulated (Mn.Ex.1) between the prosecution, defense counsel and accused that if First Lieutenant William Goldstein, Medical Corps, were present in court he would testify that he examined deceased at about 2010 hours on 12 April 1945 and that his examination revealed the following:

"1. Perforating wound, point of entry at Epigastrium. Point of exit, left side of abdomen, posteriorly just below the ribs.

2. Perforating wound, point of entry below point of left clavicle. Exit superior surface of left shoulder between base of neck and left shoulder joint.

3. Perforating wound through flexor surface of left forearm.

4. Macerated wound left hand.

Either number 1 or 2 of the wounds could have been fatal. Death was almost instantaneous. Soldier was dead upon my arrival. There was no breath, pulse, heartbeat, respiration or corneal reflex".

4. For the defense a witness testified that accused was quiet, never engaged in "brawls or fights" and was not known to start a quarrel (R37-38). Accused, after being advised of his rights as a witness, elected to remain silent (R38).

5. Uncontradicted evidence showed that accused was on and posted as a sentinel and that he left his post before he was relieved, as alleged. There was thus every essentialelement of the offense under Article of War 86 (MCM 1928,par.146a,p.161; CM ETO 1161,Waters;CM ETO 2131, Maguire;CM ETO 9144,Warren).

6. a. With reference to the killing of deceased the evidence showed that immediately before the shooting, accused threatened to shoot deceased and went in search of a weapon; that deceased followed accused into the room where the shooting occurred and was warned by accused to keep away or he would fire. Shots were immediately heard and although the two men were alone in the room at the time of the shooting, the circumstances clearly preclude any doubt that the shots which killed deceased were fired by accused. The fact that deceased advanced toward accused rolling back his shirt-sleeves in what might be considered a threatening manner raises the question of whether accused acted in self-defense. A person may oppose force to force in defense of himself but may only use such force as is reasonably proportionate to the danger (Winthrop's Military Law and Precedents (1920),p.674). A claim of self-defense is not convincing when it is considered that accused was armed and that deceased was not, and that accused threatened to shoot him during an argumentbefore any hostile movement was made toward accused. The question of self defense was one of fact for the court to decide. There is substantial evidence to support the court's finding that accused did not kill deceased in defense of his person, but rather with deliberation and malice. Under such state of the evidence the finding of the court will not be disturbed on appellate review (CM ETO 9410 Loran; CM ETO 15200 Bobo and authorities therein cited).

b. On the question of whether accused was so intoxicated that he could not have entertained the necessary malice aforethought so as to constitute the homicide murder, accused's actions clearly indicated that although he had been drinking and in the opinion of one witness was drunk, he knew what he was doing, especially in view of his statement immediately following the killing. This evidence of such substantial nature as to support the court's findings that accused's intoxication was not of such severe character as to replace his power of deliberation and judgement

with passion, and under such condition the court's finding is binding on the Board of Review on appellate review (CM ETO 6229, Creech; CM ETO 9422, Norris; CM ETO 12850, Philpot).

c. The question remains whether the quarrel between accused and deceased over the attempt to have accused go to bed justified or mitigated the offense committed. Such provocation as may have resulted from the sudden quarrel was legally inadequate from the evidence shown in the record either to justify the killing or to reduce the offense to manslaughter. The evidence established that accused killed deceased without legal justification or excuse and with malice aforethought and that he was therefore guilty of murder (MCM, 1928, par. 148a, pp. 162-167; CM ETO 3042, Guy, Jr.; CM ETO 4497, De Keyser; CM ETO 11059, Tanner).

7. The charge sheet shows that accused is 22 years of age and was inducted 20 February 1943 at Apalachicola, Florida. No prior service is shown.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). 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 September 1943, sec. VI, as amended).

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO 5

23 OCT 1945

CM ETO 17407

U N I T E D S T A T E S	3rd INFANTRY DIVISION
v.	
Private PHILIP E. ABRAHAM (13109712), Company L, 7th Infantry	Trial by GCM convened at Salzburg, Austria, 29 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO.5
HILL, JULIAN AND BURNS, Judge Advocates

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

2. Accused was tried upon the following Charge and Specification

CHARGE: Violation of the 58th Article of War

Specification: In that Private Philip E. Abraham, Company "L", 7th Infantry, did, at Naples, Italy, on or about 16 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy; on or about 27 January 1945.

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

designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that accused was on 16 February 1944 a private in the United States Army, and that having been transferred to the Third Infantry Division he was on that date assigned to the 7th Infantry Regiment and on the same day assigned to Company"L" of that Regiment (R8,9, Pros.Exs.A.B). Accused was not seen reporting to Company "L" on that date by the company commander nor seen by him "present for duty" during an ensuing period which ended 7 June when this officer was relieved of that Command. On and after 16 February, Company "L" was "in the line on Anzio" (R9,10). On 14 May 1945, accused made a voluntary statement to a sergeant who was then on duty at the Third Infantry Division "straggler collection point" in which "he stated that he went AWOL from the replacement depot near Naples, and stayed there approximately two months and from then he went to Rome where he stayed approximately five months where he was apprehended" (R10,11). Accused also made a voluntary statement to the investigating officer in this case in which he said "that he went AWOL from the replacement depot and that he intended to be gone only overnight and come back next day. He just kept putting it off and didn't come back" (R12,13).

4. His rights as a witness having been explained to him, accused elected to make an unsworn statement. This was in writing and was read by the defense counsel. Accused told of being inducted in September 1942, of his subsequent combat assignment and of his combat experience commencing with the drive "toward Sedjenane", including the battle for Bizerte, combat in Sicily, his assignment to the Third Division in September 1943, the arrival in Italy and the battle of the Volturno River where, he said, he was pretty well shaken "spotting blood", by a shell hitting close by. He related his participation in savage fighting that continued until his division reached the Cassino front where it was relieved and he went in the hospital (R14-17). This statement continued:

> "and after I came out of the hospital I was sent to a replacement depot and I was shifted from one company to another and I got tired of that and tried to get into the Rangers. At that time they were taking volunteers for it but I didn't pass the physical because of my eyes were bad. Rumors were going around that we were going to an Engineer outfit but they changed that also and then I got a pass to town and I started to drinking and met a girl which I really fell for and I stayed awhile and was afraid to tell an M.P. my troubles. Then I met a staff sergeant from the 34th Division and he was on pass and he told me he might be able to get me in his outfit and when we got up to his company his company commander said he would like to take me but he

couldn't and then I hung around the front there for awhile trying to get into some outfit then I couldn't do no good so I came back to Rome".

5. The specification of which accused was found guilty, in violation of Article of War 58, alleged desertion at Naples, Italy, on or about 16 February and absence in desertion until apprehension at Rome, on or about 27 January 1945.

"Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM 1928, par. 130a p. 142). Absence without leave is "when any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there" (MCM 1928, par. 132, pp.145,146).

The prosecution showed that, on paper at least, accused had been transferred to the Third Infantry Division on or before 16 February, that word of this was officially received at the Division and that on the same day accused was assigned to Company L, 7th Infantry in that division. There is some evidence that accused did not report to Company L. It is reasonable to presume that accused's ordered transfer was from a replacement depot. His routing to Company L was through Division Headquarters. It is a fair presumption that had accused reported or arrived at Division Headquarters, he would in due course have appeared for duty at Company L; and the corollary is equally reasonable that accused's failure to appear at Company L indicated that he had not arrived at Division Headquarters.

While this evidence may not convince beyond a reasonable doubt that accused in fact failed to report pursuant to his transfer and that failure to do so was willful, it is sufficient circumstantially to support the confession of accused that he willfully absented himself without leave from a replacement depot near Naples, and was absent for some months, which is all that the law requires (MCM 1928, par.114a, p. 115). The extra-judicial confession of accused is further supported by his admission in court. The approximate length of this absence, showing its inception, the place at which the inital absence occured, admitted by accused, together with the known location of the company to which accused was assigned at the time in question, form a perfect supporting pattern for each factual allegation of the Specification.

From the proven seven months of absence, the court was amply justified in inferring that accused intended to desert either at the inception of his absence at some time during its incidence. This was desertion as charged (CM ETO 1629, O'Donnell; CM ETO 7663, Williams; CM ETO 10713, Clark; CM ETO 10741, De Witt Smith; CM ETO 12045, Friedman).

6. The charge sheet shows that accused is 22 years 9 months of age and that he was inducted 17 September 1942 at Pittsburgh, Pennsylvania. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW No. 5 17 NOV 1945

CM ETO 17408

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	
Private VITO DALO (31387725) Company L, 7th Infantry	Trial by GCM convened at Wildungen, Germany, 24 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING BY BOARD OF REVIEW No. 5
HILL, JULIAN and BURNS, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Vito Dalo, Company "L" 7th Infantry did without proper leave, absent himself from his organization near Trouche, France, from about 27 November 1944, to about 20 February 1945.

Specification 2: In that * * * did, without proper leave, absent himself from his organization near Pozzuoli, Italy, from about 21 July 1944, to about 23 November 1944.

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On motion of the prosecution not objected to by the defense, after arraignment and before accused plead, the court amended Specification 1 to read "from about 27 November 1944 to a date unknown". He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved only so much of the finding of guilty of Specification 1 of the Charge as involved a finding of guilty of absence without leave from 27 November 1944 to a date unknown, and only so much of the findings of guilty of Specification 2 of the Charge as involved a finding of guilty of absence without leave from 21 July 1944 to a date unknown; 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 evidance for the prosecution showed that accused was on 21 July 1944 a member of Company L, 7th Infantry, which was stationed at Pozzuoli, Italy (R8). On the afternoon of that date the company was scheduled to take a hike, and it was discovered that accused was not present (R9). A search was made of the company area, but he was not found (R9, 10). A duly authenticated extract copy of the morning report of Company L, 7th Infantry was admitted into evidence. It showed three pertinent entries relating to accused. The first, dated 22 July 44, "Fr duty to AWOL 21 July 1944"; the second, dated 27 November 44, "AWOL to dy, 1400 this date"; the third, dated 29 November 44, "From duty to AWOL (hour unknown) 27 November 1944" (R7, Pros. Ex. A).

4. Accused, after having been fully advised of his rights, elected to make an unsworn statement. He was inducted in September 1943 when 18 years old, was at Camp Croft, South Carolina for four months and then sent overseas. He landed in Sicily in March and was assigned to the 7th Infantry when they were at Anzio. He remained with the outfit during the push on Rome and trained at Pozzuoli, Italy. In March 1945 he contracted pneumonia and was at the Fifth General Hospital for three months. On his release he was reassigned to the 7th Infantry and remained with them until 4 July. Late in March or early in April he was interviewed by the division psychiatrist who told him it was "all well and good" for him to go back to

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duty of the company commander would accept him. The company commander refused although he had never seen him. He had never before been court-martialed or received any company punishment (R11,12).

5. The reviewing authority in his action disapproved so much of the findings of guilty as involved findings that accused's absences endured for specified periods. As the offense of absence without leave is complete when the person absents himself without authority from his place of service proof of the duration is not essential to sustain a conviction of the offense (MCM, 1928, par.67, p.52). Executive order 9267, 9 November 1942 suspended limitations of punishment for absences without official leave under 61st Article of War as to offenses committed after 1 December 1942. Consequently the length of time of accused's absences was immaterial in considering his guilt (CM ETO 1249, Marchetti). The unimpeached entries in the company morning report and the testimony of the witness that accused without proper leave absented himself from his organization on 21 July 1944 and on 27 November 1944 and remained absent to a date unknown thereby established all the necessary elements of the offense of absent without leave in violation of Article of War 61 (MCM 1928, par.132, p.146).

6. The charge sheet shows that accused is 19 years and 9 months of age and was inducted 7 September 1943 at Providence, Rhode Island. 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 as approved by the reviewing authority and the sentence.

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

Judge Advocate

(DETACHED SERVICE) Judge Advocate

Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 5

24 OCT 1945

CM ETO 17409

U N I T E D S T A T E S	) 3RD INFANTRY DIVISION
v.	)
Private DAVID L. FARRADAY, JR. (33779416), Company K, 7th Infantry	) Trial by GCM, convened at Salzburg, Austria, 11 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private David L. Farraday, Jr., Company "K", 7th Infantry, did, at Naples, Italy, on or about 8 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 25 March 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of the Charge except the words, "desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 25 March 1945", substituting therefor the words, "without proper

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leave absent himself from his organization until he returned to military control at a time, place and manner unknown"; of the excepted words, not guilty, and of the substituted words, guilty; of the Charge, not guilty, but guilty of a violation of Article of War 61. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for prosecution shows that prior to 8 August 1944, Company K, 7th Infantry, the organization to which accused belonged, had been engaged in amphibious training preparatory to making a landing in Southern France (R7,10). On 7 or 8 August, when the Company left the bivouac area to embark, accused was not present. A check of the area failed to reveal his whereabouts but his equipment was found (R11). Accused was not aboard the ship when the company departed in the morning of 8 August, nor was he present when they landed in Southern France where enemy resistance was encountered (R7-10).

First Lieutenant John R. Soules, first sergeant of Company K on 8 August, testified that he did not give accused permission to be absent, that he was present in the company from that date until 25 March 1945 except for an interval totaling ten weeks, and that during that period accused was not present (R11). On information received from "S-1" rear, 7th Infantry, on 6 October 1944 that accused was being reassigned to the company, he entered him in the company morning report, but when accused did not present himself, marked him from reassigned to "AWOL" (R12).

4. For the defense. Two enlisted men who had observed accused in combat over a period of time testified that in their opinion he was a good combat soldier (R13-14).

The accused, after being advised of his rights, made an unsworn statement through his defense counsel substantially as follows: He entered the army in May 1943, arrived overseas five months later and because of physical defects was held at Oran for a time. He was then shipped to Italy and joined the 3rd Division at Anzio in February 1944. He went into action as a platoon runner and was "nearly killed" when the enemy tried to push the invaders from the beachhead. One platoon was completely surrounded and as the enemy advanced toward his position he fired clip after clip of ammunition at them. After fighting all day he was stunned by two rifle grenades

but recovered to go out with 14 others to stop opposing forces that had penetrated their lines. They killed about twelve and captured fifteen of the enemy. Accused was in the lines at that time for about two months, except for a three-day rest, when he was hospitalized for six weeks because of an infected hand. The statement further related that when accused returned to his company it suffered heavy shelling and his platoon was entirely cut off; that later, after three weeks' training, the company, in advancing toward Cisterna, was pinned down by enemy fire and he went forward to expose himself in order to ascertain the enemy position; that after being rescued from its positions it advanced through Cisterna to Valmontone where all but twelve men of his platoon were killed; and that from there the company pushed on to Rome (R15-18).

5. It is shown by the unimpeached entry in the company morning report and the testimony of witnesses that accused without proper leave absented himself from his organization on 8 August 1944 and remained absent until he returned to military control at a time and manner unknown, thereby establishing all the necessary elements of the offense of absence without leave in violation of Article of War 61 (MCM 1928, par. 132, p. 146).

6. The charge sheet shows that accused is 20 years 10 months of age and that he was inducted 5 May 1943 at Philadelphia, Pennsylvania. He had no prior service.

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

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 Sept 1943, sec. VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

(TEMPORARY DUTY) _____ Judge Advocate

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

BOARD OF REVIEW NO. 3 24 OCT 1945

CM ETO 17115

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Mahelm, Germany, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.
Private First Class VERNON C. CHESNEY (11121701), Company A, 315th Infantry	

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

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

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Vernon C. Chesney, Company "A", 315th Infantry, did, at Bochum, Westfalen, Germany, on or about 6 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Francis J. Poelluci, Company "A" 315th Infantry, a human being by shooting him with a pistol.

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

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3. Prosecution's Evidence: On 6 May 1945 the Fourth Platoon of Company A, 115th Infantry, of which accused was a member, was located in Bochum, Germany (R21). During the afternoon of that day accused drank something that "smelt like schnapps" so that "he was staggering at four thirty already" (R25-26,33). Shortly before 1830 hours Staff Sergeant Francis J. Poellnot (deceased) and Private First Class Pasquale Serafina, both of accused's platoon, upon receiving a report from two young women that "a soldier was fighting two girls", accompanied them to the place of the alleged disturbance (R6-9,34). There they found accused and another soldier with the two girls, one of whom had a black eye, the other "a hurt jaw" (R9,33-34). Accused appeared to be feeling "pretty good". He staggered a little and his speech was "pretty fair" (R18-19). Deceased asked one of the girls who had hit her. Accused said, "I hit her". Deceased requested him to "come to the CP". Accused replied, "I'm not going to the CP". Deceased said, "I have enough of your shit" and started to back away. Accused went after him, tried to grab hold of him and with the words "I'm not going to hit you. I am going to shoot you" took out a .45 caliber pistol and fired. Deceased, about four or five feet away, clutched the right side of his stomach and fell to the ground (R10-13,19,34).

At that moment Staff Sergeant William H. Dittmar, of the same platoon, who was near the scene, heard the shot and went to investigate. He saw accused apparently drunk standing two or three feet from deceased who lay on the ground. The latter said, "Help me, please help me" (R13,22). Serafina went for medical aid. Private First Class Kenneth Van Wechal, another member of Company A, arrived and asked accused for his pistol. Accused waved the weapon around and fired into the air before handing it to Van Wechal (R13-14,29). Deceased was given first aid (R14,29). Accused's conduct at this time was variously described by witnesses: He was smiling (R28); he wanted to accompany deceased in the ambulance; he was drunk, "under the influence of drink", and he did not seem to realize he had fired the shot which had hit deceased (R29-30). Later he was observed at "the 4th platoon" where he was "sitting on the steps crying". First Lieutenant Hollis M. Ketchum, of accused's company, took him to an aid station for examination and there

> "ordered him to get out of the jeep and go with me at which he responded immediately. We went into the medics, and I ordered him into the room where Sergeant Poellnot was and told him to take a seat over in the corner of the room which he did. The next thing we did, the medical officer was there with me, we had him to walk and talk. The medical officer had him to walk across the room two times, and he could walk without any wavering or staggering at all; and he had no stoppage in his speech that I could tell" (R35-36).

Accused seemed to understand everything said to him. Lieutenant Ketchum did not consider him drunk. Although he did have the odor of alcohol on his breath, he did not stagger and could speak plainly (R36-37). The medical officer who made this examination found "his speech was clear, he obeyed commands promptly, I could see no staggering in his gait and he

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was well oriented" (R38).

Later at 2130 hours a medical examination of deceased showed he was "an acutely wounded person with a gun shot wound in his abdomen and severe hemorrhage from the wounded area". He died as a result of the wound on 12 May 1945 (R43; Pros.Ex.A).

4. For the defense, Captain Bernard Goldberg, Medical Department, 314th Infantry Regiment, testified as an expert, as a result of his experience at the Bellevue Hospital, New York, New York, upon the effects of alcohol on human beings. However, he did not know accused and had not examined him in this case (R43-44,49). In the witness' opinion, a person may drink so much liquor that he is not responsible for his actions and yet appear sober when a shock causes the intoxicant to lose its effect. He described the varying effects of alcohol on different individuals (R44-45). In answer to several questions based upon hypothetical facts in a case that paralleled prosecution's evidence against accused, he expressed the opinion that such an assailant as therein described might act without malice aforethought and 20 or 30 minutes after the shooting appear sober (R48-49).

5. After his rights were explained (R50-51) accused testified that he finished a tour of guard duty at 0800 hours on 6 May 1945 and went to sleep for about an hour. At 1200 hours he obtained some schnappes and drank from 1245 hours to 1900 hours when he went to meet some girls who failed to appear at the place appointed. He resumed drinking and with the help of another soldier drank about four quarts of liquor. He then went to the place where the alleged offense occurred, but thereafter remembered nothing that took place until he awoke at 0130 hours 7 May 1945 in the regimental guardhouse. He never had any quarrel with deceased nor made any threats against his life prior to 6 May 1945. He had been drinking continuously for about four or five days before that date (R51-53).

6. The evidence showed clearly that accused fired at deceased with a pistol from a distance of a few feet, the bullet entering his abdomen and causing his death a few days later. The question is presented, under all the circumstances of this unlawful homicide, whether the offense was murder or merely that of manslaughter. Although it was shown that accused used a deadly weapon, it was apparent and not disputed that he had been drinking. There was evidence that he was drunk, that he did not seem to realize that he had fired the shot which had hit deceased. He testified he remembered nothing that took place at the scene of the shooting. On the other hand, there was also evidence that he was not under the influence of liquor at that time. He announced to deceased he was going to shoot him. There was no fumbling in the rapidity with which he then produced a pistol and fired with accuracy. The testimony of both Lieutenant Ketchum and the medical officer who observed his actions and heard his speech shortly after the shooting indicated he was not then drunk.

The Manual expressly provides that malice is presumed from the use of a deadly weapon (MCM, 1928, par.112a, p.110; and see CM 237611,

Breckins, 24 B.R. 71). However, this is a presumption of fact, not of law, and the inference of malice to be drawn from the use of a deadly weapon is obviously weaker in a case where a homicide is committed by a combat infantryman to whom the use of a carbine is commonplace than it is where a homicide is committed in a settled, peaceful community where the very possession and use of firearms is extraordinary. In any event, the use of a deadly weapon is only one piece of evidence bearing upon the question of malice and the presumption or inference arising from this fact may be rebutted by the other facts and circumstances surrounding the homicide. In other words, it is a more accurate statement of the rule to say that malice, if it exists, is to be inferred from all the facts and circumstances of the case, of which the method by which the homicide was committed is only one (United States v. King (CC, ED, NY, 1888) 34 Fed.302; 40 CJS, sec.25, p.874). The court resolved against accused the question whether his intoxication was of such degree as to deprive him of the mental capacity to possess malice aforethought. Under the evidence adduced, this was a question of fact within the peculiar province of the court for determination. Upon all the evidence the court was warranted in finding that accused's intoxication at the time of the shooting was not of such severity as to deprive him of his powers of deliberation. Such finding is binding on the Board of Review upon appellate review (CM ETO 3160, Porter; CM ETO 3932, Klumpjak; CM ETO 6229, Crouch; CM ETO 7815, Gutierrez; CM ETO 16122, Barton).

7. The charge sheet shows that accused is 21 years ten months of age, and enlisted 16 June 1942 at Camp Forrest, Tennessee. He had no prior service.

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

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

Benjamin R. Sleeper, Judge Advocate

MALCOLM C. SHERMAN, Judge Advocate

(TEMPORARY DUTY), Judge Advocate

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

BOARD OF REVIEW NO. 3

15 OCT 1945

CM ETO 17441

U N I T E D S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private First Class ARCHIE HALL, JR. (34900858), 3135th Quartermaster Service Company	)	Trial by GCM, convened at Le Mans, Sarthe, France, 14 June 1945. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Archie Hall, Jr., 3135th Quartermaster Service Company, did, at Senonches, France, with malice aforethought, willfully, deliberately, feloniously, and with premeditation, kill one Private Sidney B. Fountain, a human being, by shooting him with a rifle on or about 30 May 1945, thereby inflicting a mortal wound as a result of which the said Private Sidney B. Fountain died, at or near Chartres, France, on or about 3 June 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and

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Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Chanor Base Section, Theater Service Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 0730 hours on 30 May 1945, accused and other members of his organization, including Private Sidney Fountain, the deceased, were sitting in their barracks prior to going on duty as guards at a prisoner of war stockade at Senouches, France. While deceased was "trying to take a nap", accused rubbed him on the head, told him to wake up and teased him about "prisoner chasing" (R5-6,7). Deceased became angry and made a derogatory remark about the mother of "whoever rubbed him over the head", then arose and walked over to his bed and picked up his rifle and loaded it, after which he sat back down beside accused with the rifle on his knee, pointing toward the ceiling (R6, 11). Accused asked him several times whom he had got the rifle for. Deceased replied each time that he got it for accused (R9,10). One witness testified that deceased told accused, "If you don't stop your foolishness, I am going to shoot you" (R11). Accused acted as though he was afraid of the rifle (R14). After sitting awhile, deceased got up and laid the rifle on his bed and went out to the latrine (R6,12). He returned about five minutes later (R9,13). Accused, who had in the meantime obtained his own rifle and stepped outside the barracks, met him near the door (R7,12). Accused asked him if he meant to do what he said. Deceased answered "yes", and accused immediately shot him one time with the rifle (R13,14-15).

Deceased was a "right quiet fellow" but became angered easily (R8,15). Accused has a good reputation for "peace and quiet" and never became angry or got into trouble (R9,12,15). In the company, it was considered "a very bad thing" to play with a loaded gun (R11,15).

It was stipulated in writing that Private Fountain died 3 June 1945 as a result of a .30 caliber gunshot wound inflicted on 30 May 1945 (R17, Pros.Ex.2). A certificate of a medical officer, admitted in evidence without objection, substantially corroborates the stipulation and shows that deceased was not under the influence of intoxicants or narcotics when first observed (R17, Pros.Ex.3). An autopsy protocol relating to deceased was admitted in evidence without objection, but apparently was not read to the court (R17, Pros. Ex. 4).

On 5 June 1945, accused signed a voluntary written statement in which he denied touching deceased before the latter got the rifle for him. He further stated that he saw Fountain put a cartridge in the chamber and

"got confused" and sat still until deceased left the room. He then got his own rifle and met deceased at the door and asked him "why he wanted to draw the rifle". Deceased said to him, "Aw, man, you know I wasn't going to do anything". Accused "just shot him" and then "walked back into the barracks" (R16-17, Pros. Ex. 1).

4. After his rights as a witness were explained to him, accused elected to testify (R18). He is 20 years old and from Nashville, Tennessee. On the morning of 30 May, the members of his unit were sitting around the stove waiting to go on duty at eight o'clock, They had all been good friends. As Private Fountain sat with his head down, one of the other men walked up and put his head on Fountain's head and called him. Shortly afterwards, Fountain suddenly arose and went to his bed and got his rifle and sat with it pointing toward accused and said, "Hit me again". Accused then asked him several times if he got the rifle for him. Deceased replied "Yes" each time. Accused intended taking the rifle from Fountain, but when he leaned forward, Fountain "reversed" the rifle and loaded it. Accused was then "more afraid than ever" and "thought definitely that he meant it". Deceased got up and walked toward his bed, but accused did not notice whether he put the rifle down (R19-20). Accused testified:

> "I goes to my bed at the same time and gets my rifle. I just had in mind that I was going to shoot him. * * * I felt then that nothing could stop me. * * * I goes to the door, and he was just coming in. He was on the outside. I stopped him at the door. * * * I said, 'Pvt Fountain, why did you draw the rifle on me?' He said to me 'You know I wasn't going to do anything with the rifle'. I said 'Nevertheless, Pvt Fountain, you drew this rifle on me and I asked you three or four times did you mean to get this rifle definitely for me, and you said 'Yes'.' So Pvt Fountain stood there still saying 'You knew I wasn't going to do anything.' He made to step up into the barracks, and I said 'Don't step towards the door.' He moves, and I had my .03 lying across my right arm. I backed down off the step and I shot him. * * * I felt like I was doing right in shooting him, and I wasn't thinking about what might happen later. I just had it in mind to shoot him because I was just torn up because no one had ever done anything like that to me before, and we hadn't had arguments., We were friendly toward each other" (R20,21).

Deceased had no rifle or anything else in his hand (R22). Accused's commanding officer had instructed them not to play with rifles (R20). Accused had been arrested only one time in his life,for disorderly conduct, in civilian life (R22)

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For the defense, Major Joseph Shimpa, a psychiatrist, testified that he examined accused and heard his testimony at the trial, and was of the opinion that accused's reasoning was faulty, and that accused "perhaps thought" he was fully justified in shooting deceased. However, accused could distinguish right from wrong, both on 30 May and on the day of the trial, and was sane. His mentality is "about that of an adult" and "at least of the average of his race" (R23-24).

Chaplain Julian Sprinkle testified that from a conversation with accused he had formed the opinion that accused's "moral judgments are impaired". Accused had told him that there were no differences between him and Fountain and they had never been "even mad at one another". Accused spoke intelligently, however, and his memory was good (R24-28).

5. The evidence is undisputed that accused, at the time and place alleged, shot and killed Private Sidney Fountain, a fellow soldier, with a rifle, while the latter was returning from the latrine to his barracks, completely unarmed. The evidence further shows that shortly before leaving the barracks for the latrine, deceased had loaded a rifle and told accused it was for him, and that deceased would shoot him if he did not stop certain "foolishness" which accused apparently had been directing toward deceased. While the testimony indicates that accused was at that time afraid of deceased's rifle, no significant issue of self-defense is raised thereby because at the time accused actually fired the fatal shot, there was clearly no reasonable ground for a belief on his part that there was imminent danger of losing his life or suffering great bodily injury at the hands of deceased (MCM, 1928, par. 148a, p. 163; CM ETO 3932, Kluxdal; CM ETO 9410, Loran). Indeed, his testimony as to deceased's words and actions immediately prior to the shooting clearly refutes any issue of self-defense.

Accused's testimony does tend to raise an issue as to whether he acted in the heat of sudden or uncontrollable passion aroused by adequate provocation under circumstances which might reduce his offense to manslaughter (MCM, 1928, par. 149a, pp. 165-166). It is clear, however, that at least five minutes elapsed between the time deceased put away his gun and went out to the latrine and the time accused fired the fatal shot. Moreover, according to accused's own testimony, he had a conversation with deceased near the barracks door immediately prior to shooting him, so that there was clearly a period of time during which accused might have curbed his passion. Under the circumstances, whether he was activated by uncontrollable passion or by mere anger was a question of fact for the determination of the court (CM ETO 3042, Guy, Jr; CM ETO 292, Mickles; CM ETO 4497, DeKeyser; CM ETO 17106, Conley).

6. During the trial, defense counsel expressed some doubt as to whether accused's "mental faculties are not in fact impaired", although he specifically disclaimed pleading insanity as a defense (R17). Testimony of a psychiatrist

and a chaplain show that accused's reasoning is faulty and that his moral judgments are impaired. But the same might be said of any accused who commits a deliberate and premeditated murder. Criminal law allows for no gradations of responsibility based upon the partial impairment of either reasoning power or moral judgments. An accused must be either wholly sane or wholly insane. The testimony shows that accused could distinguish right from wrong and was legally sane. The court had the opportunity to observe him and to hear him testify, and could determine whether any doubt as to his mental responsibility existed at any time (CM ETO 739, Maxwell; CM ETO 9877, Balfour; CM ETO 11265, Murray, Jr.).

7. No prejudice resulted from the erroneous admission of the hearsay medical certificate and autopsy protocol. Essential material facts contained therein are elsewhere proved in the record, and accused's guilt is compellingly established by his own testimony at the trial (see CM ETO 438, Smith; CM 255083, Hargrove, 36 BR 29 (1944).

8. The charge sheet shows that accused is 20 years one month of age and was inducted 19 October 1943 at Camp Forrest, Tennessee. No prior service is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

(125)

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

BOARD OF REVIEW NO. 2

27 OCT 1945

CM ETO 17442

U N I T E D S T A T E S	102ND INFANTRY DIVISION
v.	Trial by GCM, convened at Arnstadt, Arnstadt, Thuringia, Germany, 28 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class WILLIAM J. BLAKELY (33699802), Company H, 405th Infantry	

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

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

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

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

Specification: In that Private First Class WILLIAM J. BLAKELY, Company H, 405th Infantry, did, at Borgholzhausen, Westfalen, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ruth Meyer.

CHARGE II: Violation of the 93rd Article of War.
(Withdrawn by direction of convening authority)

Specification 1: (Withdrawn by direction of convening authority)

Specification 2: (Withdrawn by direction of convening authority)

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CHARGE III: (Disapproved by confirming authority)

Specification 1: (Disapproved by confirming authority)

Specification 2: (Disapproved by confirming authority)

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

Specification: In that * * * , having been duly placed in confinement in 405th Infantry Regimental Stockade on or about 1 May 1945, did, at Stendal, Stendal, Prussia, Germany, on or about 15 May 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * *, did, at Stendal, Stendal, Prussia, Germany, on or about 15 May 1945, desert the service of the United States and did remain absent in desertion until he returned to his organization at Bismark, Stendal, Magdeburg, Germany on or about 29 May 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 6 days in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 102nd Infantry Division, approved the sentence, recommended that it be commuted, and forwarded the record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of Charge III and its specifications, approved only so much of the findings of guilty of the Specification and of Additional Charge II as involves a finding of guilty of absence without leave from 15 May 1945 to 27 May 1945 in violation of Article of War 61, confirmed the sentence, but owing to special circumstances in the case and recommendation of reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The undisputed evidence for the prosecution, with respect to the charges and specifications on which accused stands convicted is summarized as follows:

a. Charge I and its Specification: Accused is a member of Company H, 405th Infantry (R6). At about 0030, 9 April 1945, he entered a dwelling at 113 Moor Strasse, Borgholzhausen, Westfalen, Germany. He pointed a pistol at Wilhelm Meyer and said in German, "Daughter sleep"(R10). Meyer refused to "lead" him and he released the safety on his pistol and pressed it to Meyer's chest. Meyer turned around and then he pressed the pistol to his back. Meyer "had to go" to his living quarters (R10-11) where accused motioned Meyer and his wife to the bed in the corner of the room (R11). The accused, pistol in hand, said to Ruth Meyer, the daughter, "sleep or father and mother kaput" (R16). He threw the girl, age 17 (R19) on the divan. Then "because she did not follow his wishes" he came close to her and pushed her. Again "because /she/ did not follow his wishes" he said "Mother and father kaput" whereupon she followed his wishes, He had "sexual intercourse" with her against her will; she submitted to his wishes because of fear for her mother and father. She testified "If I had been alone, I would rather be shot than give up the honor of a virgin" (R16). On cross examination, the victim testified that he beat her on the shoulder with his hand but not very hard when she pushed him away from her; that he threatened her with the weapon because she "again and again resisted" and he "went on saying 'Father and mother kaput'" (R18-19). Every time the parents moved or coughed, the accused grabbed the pistol and turned the flashlight on them (R18). After the intercourse, the accused "appeared to feel repentant", gave the girl his pistol, told her she should shoot him, and told her mother he would marry her (R16). After 15 to 20 minutes he fell asleep (R13), was taken to the bed (R14) and the family sat in the kitchen until about 0530 (R16). At daybreak the girl, against her mother's judgment, went after an officer who came and got the accused out of bed (R17).

About 0900, Major York, a medical officer of the 405th Infantry, examined the girl and found bruises on the inner side of both thighs, in the region of the vagina, a lacerated wound from the hymenal ring into the vagina (R21). It was his opinion that there had been a forcible entry into the vagina and that the girl was a virgin previous to that entry (R21-22).

b. Additional Charges I and II and specifications: Upon orders of his company commander, the accused was placed in confinement in the regimental stockade at Bismark, Stendal, Magdeburg, Germany, on 1 May 1945 (R24, Pros.Ex.A). On 15 May, while his guard was answering a telephone, accused escaped over a fifteen-foot wall (R27-28). A search was made for him in the prison (R26), the town of Stendal and the roads surrounding it (R28). No authority had been given for his departure (R28). Without objection, there was introduced in the evidence extract copies of the morning reports of Company H, 405th Infantry, showing accused on 1 May 1945 "Fr ar in qrs to conf 405th Inf Stockade" (R24, Pros.Ex.A) and on 29 May 1945 "Fr AWOL to arrest in qrs 1430" (R24, Pros.Ex.B).

4. The rights of the accused as a witness were explained to him and he elected to testify under oath as to the charge of desertion (R31-32).

He and two others in the stockade got some whiskey, became "high", and decided to get out for a good time. They all started for Heerlen but he decided to stop when they reached Hannover (R32). He turned himself in to the military police at Bielefeld about 27 May and eventually returned to Stendal "where I escaped from" (R33). His intentions when leaving were to have a good time and come back. It took him about six days to go from Stendal to Hannover where he was sick. He went from Hannover to Bielefeld after three days (R33).

5. a. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. * * * Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b, p. 165).

The victim's testimony that accused had "sexual intercourse" with her together with the medical testimony that a lacerated wound from the hymenal ring into the vagina was still bleeding nine hours after the incident sufficiently established the penetration (CM ETO 12070, Mistler). In the absence of consent, the penetration alone is sufficient force (MCM - Ibid).

The only serious question is whether there was such consent or actions on her part indicating consent, to negative the offense of rape. It is clear from the testimony of the prosecutrix that she submitted to accused's wishes because of fear for her mother and father who were held at bay with a pistol and whom accused threatened to kill whenever she offered resistance to his advances. Her testimony, "If I had been alone, I would rather be shot than give up the honor of a virgin", conclusively negatives the theory that she submitted by reason of fear of death or other great harm to herself notwithstanding any threats or acts of violence directed toward her.

Was the victim's conduct such as to lead accused to believe that their intercourse was with her consent and not against her will? In view of her repeated resistance, neutralized only by threats to her parents, together with his repentance following the sex relation, we believe that the answer to this question is conclusively and emphatically "No". Moreover, his actions justify the inference that he intended to use such force against her as might have been necessary to accomplish his purpose if the threat of harm to her parents proved ineffective. The evidence in this case clearly distinguishes it from the Flackman case (CM ETO 9301).

Did the victim's submission to the accused's wishes in this case constitute consent? From Winthrop's Military Law and Precedents, second edition, page 678, the following, which is believed to be an accurate and proper statement of the law, is quoted:

> "Non-consent. Absence of free will, or non-consent, on the part of the female, may consist and appear in her making resistance till overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance would be useless if not perilous; in her yielding through reasonable fear of death or extreme injury impending or threatened; in the fact that she is rendered senseless and incapable of resistance by intoxicating drink or a stupefying drug; * * * * *; in the fact that her will has been constrained, or her passive acquiescence obtained by fraud, surprise, false pretence, or other controlling means or influence" (Understoring supplied).

From the same authority, the following is quoted from pages 677 and 678 on the subject of force.

> "The force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance. The intent to ravish by force, notwithstanding resistance, is the gist of the offense. It is not essential that the force implied consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threat of killing or of grievous bodily harm or other injury, or by any moral compulsion" (Underscoring supplied).

The evidence is clear and undisputed that accused came into the victim's room with his pistol held to her father's back; that he forced her father and mother at gun point into one corner of the room and repeatedly menaced them with the pistol whenever he detected any signs of movement on their part; that he offered the young girl as the only alternative to submission the death of her parents. She saw that he possessed the means of immediately accomplishing the alternative. His actions clearly justified her conclusion that he intended to carry out his threat. In view of the evidence in this case, it is our opinion that the girl's submission because of fear of immediate death or great bodily harm to her parents did not constitute such consent that it negatives the offense of rape. It is difficult to conceive of the existence of a greater duress or compulsion than found in a situation where a woman must choose between the life of a parent, or her child, and her own physical chastity. She is forced to elect between two courses of action, either of which carries tragic sequences of life-long duration. The compulsion which requires the election is in itself duress. The submission of her body to the lusts of the ravisher is not the act of a free agent. The evidence in this case presents a picture of

accused's conduct which is far more offensive to the minds of civilized people than those cases wherein passive acquiescence is obtained by fraud, surprise or false pretense. The findings of guilty as to Charge I and its Specification are justified.

b. Additional Charges I and II and specifications: The elements of proof as to the charge of escape from confinement as alleged under additional charge I are fully satisfied by the evidence and the court's findings may be sustained. In view of the action of the confirming authority, the accused stands convicted only for absence without leave under additional Charge II. The record is legally sufficient to sustain the conviction (MCM, 1928, par. 132, p. 146).

6. The charge sheet shows that accused is 24 years six months of age and that he was inducted without prior service on 12 August 1943 at Pittsburgh, Pennsylvania.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

(131)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 27 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class WILLIAM J. BLAKELY (33699802), Company H, 405th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17442. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17442).

27 OCT 1945
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IN
30 OCT 1945
AG M & R

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

(Sentence as commuted ordered executed. GCMO 582, USFET, 23 Nov 1945).

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

BOARD OF REVIEW No. 5

4 JAN 1946

CM ETO 17445

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ALBERT J. ROSE (33095512), Company E, 1317th Engineer General Service Regiment.	Trial by GCM, convened at Rheinhausen, Germany, 9 June 1945. Sentence: Dishonorable discharge (Suspended), total forfeitures and confinement at hard labor for five (5) years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

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

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

2. The initial absence of accused on 25 January 1945 was fully and competently proved by the evidence of two witnesses and the morning report of his organization. It was stipulated that he returned to military control on 9 February 1945. The record of trial discloses a number of errors and irregularities. The more serious being: An examination by the court of a

document or file of papers not received in evidence (R16,17), and the improper receipt by the court of outlawed evidence of some previous convictions for absence without leave. The document or file of papers, indicated that accused's return to military control, which was stipulated, was the result of his apprehension. Since the accused was found guilty of absence without leave only and such absence was fully proved, it cannot be said that what the court saw had any influence on its findings. In fact, the court rejected the element of intent to desert. Nor were the findings of the court influenced by the outlawed evidence of previous convictions since such evidence was not submitted until after the court had made its findings.
The errors thus committed could not have affected the substantial rights of accused on the question of his guilt of absence without leave, the evidence of which was of the most compelling character. It cannot be said that such error did not affect his sentence. Such errors are for correction by the reviewing authority rather than by the Board of Review (CM 232160, McCloudy).

The record is authenticated by a member of the court who at the time of authentication described himself as Lieutenant Colonel and as President of the court, although the record of trial shows him at the time the court was organized to have been a Major and junior in rank to the law member. It will be presumed that the record was in error on the matter of the respective grades of these two officers at the time of the trial and that the authenticating officer was a Lieutenant Colonel and acted as President of the court during the trial, in which case the record was properly authenticated, since the following appears in the record (R16):

> "The law member, by direction of the President, made the following explanation of the accused's rights as a witness."

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

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 2

24 OCT 1945

CM ETO 17446

U N I T E D S T A T E S	UNITED KINGDOM BASE, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private THOMAS E. CROFT (14078911), 529th Reinforcement Company, 98th Reinforcement Battalion	Trial by GCM, convened at London, England, 21 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas E. Croft, 529th Reinforcement Company, 98th Reinforcement Battalion, did, at London, England, on or about 4 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gordon Johnson, a human being by stabbing him with a knife.

He pleaded not guilty, and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of four previous convictions by summary court for absence without leave for 4, 5 and 1 days and one by

special court-martial for 5 days absence without leave 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 pursuant to Article of War 50½.

3. On 4 September 1945, accused, a member of 98th Reinforcement Battalion (R54) and Private Joe Devine left the hotel in London where they were staying at about 1800 hours and went to a cafe to eat (R10,11). After eating, they walked around the Piccadilly area stopping in four or five places to drink. The accused drank beer and Scotch whiskey or Scotch alone, and Devine consumed beer. At one place they had a cocktail (R11-12). At Devine's suggestion they went to Mac's dance hall near Piccadilly to look for a girl whom Devine knew as Rita. They arrived there about 2015 hours, were admitted to look around, and, not finding Rita, left (R12,32). Shortly after 2100 hours they went back and Devine was again admitted to look around but accused was asked to wait outside. When the manager's attention was diverted, he went in (R32) and joined Devine at the bar where each drank a glass of beer (R12). Devine saw Rita dancing with Gordon Johnson,(R12,22) a civilian, and, leaving accused at the bar, walked out on the dance floor where he started to "cut in" on Rita and her partner (R12-13). As Devine moved in between Rita and Johnson, with his back toward Johnson, Johnson grabbed him by the shoulder, whereupon Devine turned and struck Johnson, knocking him down. Devine testified that he then turned to Rita and apologized to her (R13) but Rita testified that he pushed her to the floor (R23). At about this time accused rushed over toward Devine but the dance hall owner, some American soldiers, and the manager took hold of him and pulled him back to the other side of the dance floor (R33, Pros.Ex.1). At the suggestion of the American soldiers who offered to take care of him, the civilians released him. Accused suddenly stepped back from them and, with "the look of a maniac" (R34) "acted vacant and crazy" (R74), drew a sheath knife with a five- or six-inch blade from the top of his boot (R33,34,40). He then walked around the outer edge of the dance floor, holding the knife in his outstretched right hand "looking like somebody might be going to harm him" (R41,75,Pros. Ex.1). When near Johnson, he paused briefly, stepped forward, grabbed Johnson by the shoulder, turned him around, and thrust the knife into his chest (R41). As accused approached Johnson, Johnson's hands were clenched but there was no weapon in them (R70). After the stabbing occurred, the accused was overpowered and the knife taken away from him (R41). Johnson was taken to the St. George Hospital (R49) and was dead on arrival at 2155 hours (R36). The cause of death was a wound, five or six inches deep in the left center of the chest, which severed several major blood vessels and had penetrated

to the point of striking a rib at the back of the body close to the spine (R36-39).

4. The accused was advised of his rights as a witness and elected to be sworn (R53) and testified substantially as follows:

He had obtained his beer at the dance hall and was about to sit down when a commotion started on the dance floor. He started forward to see what was going on. Someone hit him on the side of the head. Two fellows grabbed him and started to lead him across the floor. He felt dizzy. He looked over his shoulder and saw Devine with his back turned to the civilian who was getting up from the floor and taking something out of his pocket which accused thought was a knife (R55). He heard somebody say "He's got a knife" (R60). Thinking the civilian was going after Devine with the knife, he took his knife from his boot and moved in to keep the civilian from cutting Devine who was not aware of the civilian's actions (R55). Accused had his own knife to keep the civilian away from Devine, "to scare the civilian off because I knew he was fixing to get my partner or somebody" (R55). He saw the civilian moving towards Devine with his hand at the side of his leg clenched on something that looked like a knife. He thought the best thing he could do was to get between the civilian and Devine and by keeping his knife in his hand he could "scare" the civilian back until he could get Devine out of the place. He had no intention of killing the civilian or even stabbing him with the knife but as he walked toward him holding the knife to keep Johnson back, Johnson "stepped right into me" (R55), or "jumped right into it" (R61). The accused took a circular course across the dance floor (R57, Pros.Ex.1).

5. The accused has been convicted of the murder of Gordon Johnson by stabbing him with a knife. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way likely to produce, and which does produce, death (Underhill, Criminal Evidence (4th Ed., 1935) sec. 557, p.1090). There is no question that Gordon Johnson met his death as the result of a wound inflicted by a knife in the hand of accused at the time and place alleged in the Specification. Accused endeavored to excuse the killing on a ground similar to self-defense, that he was motivated by a belief on reasonable grounds that Johnson was about to inflict great bodily harm on Devine and that he prepared himself to prevent Johnson from doing so, but that coincidentally Johnson was stabbed by the momentum of his own advance upon his intended victim. This contention if believed by the court might have excused the killing or might have reduced the crime to some lesser degree of homicide than murder. The findings of the court are based upon substantial evidence that accused stabbed Johnson as part of a deliberate process whereby he approached his victim from the opposite side of the room, turned him to a convenient position and then brutally drove his knife into deceased's chest. Such homicide was murder (CM ETO 292, Mickles; CM ETO 1941,

Battles; CM ETO 3042, Guy, Jr; CM ETO 3649, Mitchell). The conflict in the evidence presented issues of fact which were within the exclusive province of the court for determination. Inasmuch as the court resolved the issues against the accused and its findings are based upon substantial evidence in the record, its decision will not be disturbed by the Board upon review. (CM ETO 4194, Scott; CM ETO 14048, Mason).

6. The charge sheet shows that accused is 23 years eleven months of age and that he enlisted on 6 January 1941 at Fort McPherson, Georgia. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 2

24 OCT 1945

CM ETO 17468

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Second Lieutenant ALTON S.C. HEWETT (0543674), 339th Harbor Craft Company.	Trial by GCM convened at Antwerp, Belgium, 16 and 17 June 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for 1 year. The Eastern Branch, United States, Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, 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 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 96th Article of War.

Specification: In that 2d Lieutenant Alton S.C. Hewett, 339th Harbor Craft Company, in conjunction with Technician Fourth Grade William L. Childers, 339th Harbor Craft Company, did, at or near Antwerp, Belgium, on or about 23 May 1945, feloniously receive, have and conceal three (3) cases of cigarettes of the value of about $75.00, of the goods and chattels of the United States, then lately before feloniously stolen, taken and carried away; he, the said 2d Lieutenant Alton S.C. Hewett, 339th Harbor Craft Company, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one (1) year. The reviewing authority, the Commanding General, Chanor Base Section, European Theater of Operations, approved the sentence and forwarded the record of trial for action under AW 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: Sergeant William L. Childers testified that on 23 May 1945 he and accused, a Second Lieutenant in military service, were members of the 339th Harbor Craft Company (R13-14) consisting of a crew of 4 officers and 8 enlisted men (R19), assigned to the ST (small tug) 745, docked at Antwerp, Belgium. About 9:30 PM of that date, as the two stood on the dock near the ST 745, Childers asked accused if he wanted a case of cigarettes. Accused said he did and Childers said he would try to get a case for him (R13-14). About 1 AM following Childers and two other enlisted men from a different organization, Privates Browne and Carr, went to the adjacent open storage dump for government property located on the "U.S. dock area" about 200 yards away from the ST 745 and there found and carried away two cases of cigarettes. Childers and Browne carried the two cases to accused's stateroom and awakened him. Accused opened one of the cases and put the 50 cartons of cigarettes contained therein under his bed between the slats and the mattress. Carr arrived a few minutes later with another case of cigarettes and put it in accused's stateroom (R15). The four then went to the galley of the ship and accused told Childers to take the two unopened cases of cigarettes and put them in the fidley, that is, the grating over the door of the engine room. Childers put them in the fidley. Carr and Browne said they would pick the cases up the next night. The cigarettes were government owned property (R11,16). The following day, 24 May 1945, the military police searched the boat for the cigarettes and found the two cases in the fidley (R8,11,16),and 9 cartons of the opened case in a musette bag carried by the accused while on his way to visit his "girl" at the hospital (R7,10). At that time accused stated that he had purchased the 9 cartons from a merchant seaman on the dock but could not identify him (R8). The two unopened cases were marked with requisition and shipment numbers and each had a green corner indicating that they were intended for PX use in the army (R8,11). On 27 May 1945 the accused voluntarily signed a statement, admitted in evidence without objection (R23), in which he stated that Childers approached him during the evening of 23 May 1945 and asked him if he could use a few extra cigarettes. He told Childers that he could use a few extra cigarettes. Later that night Childers came to his stateroom with a whole case of cigarettes. The following day he

took 9 cartons of these cigarettes in a bag to give to his "girl" in the hospital when he was apprehended. He never had any previous dealings with Childers. He did not know Carr or Browne (R12-13,23, Pros. Ex.1). Childers admitted that he had had no previous dealings with the accused and stated that his sole purpose was to get some cigarettes "for the boys on the boat" in addition to the 7 packs a week rationed to them (R21, 22). It was stipulated that the value of each case of cigarettes is $25 or a total of $75.00 (R23).

4. In defense Privates Browne and Carr were called as witnesses and denied any connection whatsoever with taking or carrying away any cigarettes as related by Childers (R24-36; 31-33). The accused having been advised concerning his rights as a witness elected to testify in his own behalf (R38-39). He related substantially the same facts as appeared in his pretrial statement (Pros. Ex 1). He claimed that he received from Childers only one case of cigarettes which he opened and placed the contents, 50 cartons of cigarettes, under his mattress. He removed 9 of the cartons the next day. Someone unknown to him removed the others (R42-43). He never saw either of the other two cases nor did he have any dealings or connections with Carr or Browne. He did not know either of them (R40-41). He denied that he ever told Childers to put the two unopened cases in the fidley (R41). He had no intention of selling the cigarettes (R42). He knew the cigarettes belonged to the United States and that he was receiving "illegal goods" (R45). He did not know where Childers got the cigarettes but he did not think it was from a legitimate source (R48).

5. The accused has been convicted of receiving stolen goods consisting of 3 cases of cigarettes of the value of $75.00 belonging to the United States well knowing the goods to have been stolen. The prosecution has shown and the accused has admitted that at the time and place alleged in the specification he received one case of cigarettes of the value of $25 from Childers knowing them to be the property of the United States and knowing that Childers did not obtain them in any legitimate manner. It was shown that the cigarettes were stolen. The evidence was therefore amply sufficient to support the conviction as to the opened case because the accused's knowledge that the goods were stolen may be inferred from the circumstances. It is sufficient to show that the goods were stolen and circumstances surrounding the transaction whereby the accused received possession sufficiently suspicious to put a man of ordinary intelligence on inquiry (CM 267474, Wilson, CM ETO 9258, Davis; 2 Wharton's Criminal Law (12th Ed.1932), secs.1229-1232, pp 1542-49.) The evidence clearly showed that the cigarettes were stolen; that they belonged to the United States; and that they came into the possession or control of the accused under such circumstances as to put him on inquiry. In fact he admitted that he knew Childers could not have obtained them in any legitimate manner. The court was therefore justified in inferring that he knew that the cigarettes were stolen. The only real issue raised was with reference to the number of cases of cigarettes that accused received. He denied that he received more than one case of cigarettes. The only evidence that he received the two unopened cases was the testimony of Childers, the accomplice. His

testimony regarding the two cases was impeached not only by the accused but also by Carr and Browne whom he implicated. Notwithstanding the denial of these three interested witnesses and the fact that he himself was an admitted accomplice and the thief, whose testimony should be weighed with great caution, the court accepted his version of the transaction as the true one and rejected that of the opposing witnesses. The sentence imposed would have been legally sustained by a conviction of the accused of knowingly receiving the one case of cigarettes he admitted that he received, and therefore the issue under discussion might be considered academic. We are constrained to uphold the conviction as to all three cases because the issue was one of fact and the court's finding on this point will not be disturbed on review as it was supported by substantial evidence, namely, the testimony of Childers (CM ETO 4194 Scott).

6. The charge sheet shows that accused is 31 years and 5 months of age. Without prior service he was commissioned Second Lieutenant, Army of the United States on 17 January 1944 at Camp Gordon Johnston, Florida.

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

8. Dismissal and such other punishment as the court-martial may adjudge is authorized upon a conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42: Cir. 210, W.D. 14 September 1943, Sec. VI, as amended).

Charles Fahy Judge Advocate

Ronald D. Millin Judge Advocate

(ON LEAVE) Judge Advocate

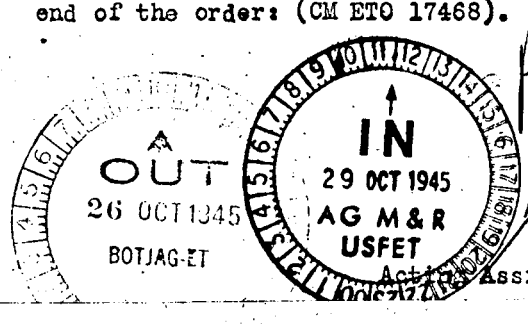
(143)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 24 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Second Lieutenant ALTON S.C. HEWETT, (0543674), 339th Harbor Craft 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 in this office is CM ETO 17468. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17468).



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

(Sentence ordered executed. GCMO 546, USFET, 6 Nov 1945).

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

BOARD OF REVIEW NO. 3

25 OCT 1945

CM ETO 17469

U N I T E D S T A T E S	) NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Second Lieutenant JAMES R. ALLEN (0-500707), 255th Port Company, 498th Port Battalion	) Trial by GCM, convened at Cherbourg, Manche, France, 28 May 1945. Sentence: Dismissal, total forfeitures, fine of $5,000, confinement at hard labor for one year and further confinement at hard labor until such fine is paid, but not for more than five additional years. United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant James R. Allen, Transportation Corps, 255th Port Company, 498th Port Battalion, did, at or near Cherbourg, Manche, France, on or about 2 January 1945, wrongfully purchase United States money orders in the name of Lieutenant Harry W. Williams, Headquarters, Normandy Base Section, in the approximate amount of $1000.00 in order to transmit to the United States funds belonging to the said Second

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Lieutenant James R. Allen, for the purpose of avoiding detection of his illegal dealings in United States and British paper currency in liberated territory under the jurisdiction of Headquarters, European Theater of Operations, as prohibited by letter of said Headquarters, dated 23 September 1944.

Specification 2: In that * * * did, at or near Cherbourg, Manche, France, on or about 9 January 1945, wrongfully purchase United States money orders in the approximate amount of $1000.00 with his personal funds in the name of Lieutenant Harry W. Williams, Headquarters, Normandy Base Section, with the intent of avoiding official investigation into the source of his funds and thereby escape detection of his activities in the black market.

Specification 3: In that * * * did, at or near Cherbourg, Manche, France, on or about 20 February 1945, wrongfully and falsely represent to Corporal John J. Haggerty that he was purchasing United States money orders for Lieutenant Harold A. Camp in order to transmit funds in the amount of approximately $2000.00 belonging to the said Second Lieutenant James R. Allen to the United States for the purpose of avoiding investigation into the source of said funds and thereby escape detection of his illegal activities.

Specification 4: In that * * * did, at or near Cherbourg, Manche, France, on or about 26 March 1945, with intent to avoid inquiry into the source of his funds, wrongfully purchase United States money orders in the name of Lieutenant Harry W. Williams, CID, APO 562, U. S. Army, in the approximate amount of $2000.00, in order to transmit funds of the said Second Lieutenant James R. Allen to the United States.

Specification 5: (Finding of not guilty).

Specification 6: (Disapproved by the confirming authority).

Specification 7: (Disapproved by the confirming authority).

Specification 8: (Disapproved by the confirming authority).

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

5 and guilty of all other specifications and the Charge. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of five thousand dollars ($5,000), to be confined at hard labor, at such place as the reviewing authority may direct, for five (5) years, and to be further confined at hard labor until such fine is so paid, but for not more than ten years in addition to the five years hereinbefore adjudged. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the findings of guilty of Specifications 1, 2 and 4 of the Charge as involves findings that the accused did at the times and places alleged wrongfully purchase money orders in the sums alleged in the name of Lieutenant Harry W. Williams, and only so much of the findings of guilty of Specification 3 of the Charge as involves findings that the accused did, at the time and place and to the person alleged, wrongfully make the false representation alleged in order to transmit $2,000 of the accused's money to the United States, disapproved the findings of guilty of Specifications 6, 7 and 8 of the Charge, confirmed only so much of the sentence as provides that the accused be dismissed from the service, forfeit all pay and allowances due or to become due, pay to the United States a fine of $5,000, be confined at hard labor for one year, and be further confined at hard labor until such fine is so paid but for not more than five additional years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution relating to those portions of the findings of guilty of Specifications 1, 2, 3 and 4 as were confirmed by the confirming authority may be summarized as follows:

a. Specifications 1 and 2: In a voluntary statement made to an investigating officer on 13 April 1945, accused stated that on 2 January 1945 he sent $2,000 home and signed his name as "Lt. Harry W. Williams". He knew Lieutenant Williams "pretty well", having met him while Williams was with the "CID" at Normandy Base Headquarters. Prior to 23 February 1945, accused possibly sent home $4,000, but he did not remember the exact dates (R9-13, Pros.Ex.G, pp.12-13).

The investigating officer testified that at the time of the interview he had true copies of money order applications which had been made at, and which were procured by him from Army Postal Unit No. 208. He identified ten of such copies, each for $100, dated 2 January 1945, and two more of such

copies, each for $500, dated 9 January 1945, all payable to "Mr. John E. Allen" of either Montgomery or Dothan, Alabama, and with "Lt Harry W. Williams, Hdqs NBS, APO 562, U. S. Army" named as sender (R10-11, 13-14, Pros.Exs. A,B). Defense objected to the admission of the applications upon the ground that they were not "tied up to the accused", or relevant (R13,14). On 20 February 1945, accused purchased money orders in the amount of $2,000 (R15,16-17, Pros.Ex.C).

An officer of the finance department testified that the signatures on the applications of 9 January 1945 were "very similar" to those on other applications dated 26 March 1945, which were shown by other testimony to have been bought personally by accused and which were sent to Mrs. D. H. or C. H. Allen at Dothan, Alabama (R19,26-27, Pros.Exs. B,E).

On 29 December 1944, special orders were issued assigning First Lieutenant Harry J. Williams from Normandy Base Section to Oise Section (R14,Pros.Ex.D.). Lieutenant Williams left the European Theater of Operations for the United States about 25 January 1945 (R14).

b. Specification 3: Corporal John J. Haggerty, of the 208th Army Postal Unit, testified that on 20 February 1945, accused was auditing books in the post office and bought some money orders pursuant to four applications of that date, identified by witness, three being in the amount of $600 each, and one in the amount of $200, each payable to "Mrs. Cleo Camp, Dothan, Alabama", with "Lt Harold A. Camp, APO 562, Hq 4th Port" named as sender (R15,16-17, Pros.Ex.C). When witness later happened to learn from accused's mail orderly that accused's name was Allen, accused came over to the window and said, "I guess you think it is sort of funny, but I'm making these money orders out to my brother-in-law" (R17).

First Lieutenant Harold A. Camp testified that he had known accused about 14 months, that they were not related by blood or marriage, and that he did not authorize accused to use his name on the money orders (R20-21).

In his statement to the investigating officer, accused admitted sending the $2000 on 20 February, and that he signed Lieutenant Camp's name because "I was under the impression that we could not send so much money home each month, so I merely used a fictitious name" (Pros.Ex.G,p.11).

c. Specification 4: Technician Fourth Grade Louis E. Willett, of the 208th Army Postal Unit near Cherbourg, identified five applications for money orders, each in the amount of $400, dated 26 March 1945, payable to "Mrs. D. H. (or C. H.) Allen, Dothan, Alabama", with "Lt Harry W. Williams, CID, APO 562, US Army" named as sender, as applications on which accused purchased money orders that date from witness (R19-20, Pros.Ex.E).

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On 29 December 1944, special orders were issued assigning First Lieutenant Harry J. Williams from Normandy Base Section to Oise Section (R14, Pros.Ex.I.). He left the European Theater of Operations for the United States about 25 January 1945 (R14).

4. After his rights as a witness were explained to him (R43-44), accused elected to make, through counsel, an unsworn statement (R45), which tends to rebut evidence of the prosecution attempting to show accused's participation in illegal or black market activities. Counsel also stated that accused desired to remain in the service and requested the court to "fine him heavily, if necessary", but to retain him in the service (R45-46).

Stipulated testimony for the defense tended to show that accused habitually made bets (R44,45).

5. a. Specifications 1, 2 and 4: The evidence for the prosecution fairly showed that accused purchased money orders at the times and place, and in the amounts, alleged in Specifications 1, 2 and 4, in the name of Lieutenant Harry W. Williams. Defense's objection to the admission in evidence of the money order applications was properly overruled in view of the correspondence between such applications and accused's admissions relating to them, as well as the testimony relating to the similarity of signatures on other applications which accused was shown to have made. The circumstances are also sufficient to warrant the inference that accused used the name of Lieutenant Williams without authority.

Under the findings of guilty as confirmed, the only question presented is whether it was an offense under Article of War 96 for accused, during January and March 1945, in the European Theater of Operations, to use another officer's name without authority in purchasing a United States money order. It is a matter of common knowledge that during this period of time, many opportunities existed within the theater for making large illegitimate profits through the exchange of American and British monies for the more unstable continental currencies, and through other so-called "black market" activities. It is also common knowledge that as a result of such activities, rigid controls were instigated with respect to the transmission of funds to points outside the theater. One of such controls, for example, was a letter dated 14 November 1944, from Headquarters European Theater of Operations (AG 123X250.1), which prohibited transmission of funds to points outside the theater through other than finance offices or army postal services, and which required transmitting officers to report attempts to transmit amounts which possibly were derived from clandestine sources, to the commanding officer of the prospective sender for an explanation or other appropriate action. Aside from the common knowledge as to such matters, accused was charged with knowledge of important and general

theater directives on the subject (see CM ETO 7553, Besdine). Indeed, his statement that he "was under the impression that we could not send but so much money home each month" leaves little doubt of his actual knowledge of the policy relative to sending large amounts of money to points outside the theater. Accused was thus aware of the fact that by using another officer's name he might divert possible suspicion from himself and that his acts might cast equal suspicion upon an innocent fellow officer whose name he used. Irrespective of whether the funds which accused transmitted were lawfully acquired by him, under the circumstances shown his conduct was clearly prejudicial to good order and military discipline, and constituted a violation of Article of War 96 (cf. CM ETO 6195, Odhner; CM 199732, Dig. Op. JAG, 1912-40, sec. 454(5), p. 348).

b. Specification 3: The evidence clearly shows that accused, at the time and place alleged, without authority, signed the name of another officer to a money order application and that he thereafter falsely stated to Corporal John J. Haggerty, an employee of the army post office at which the application was made, that he was making the money order out "to" his brother-in-law. Since the payee of the money order was a woman, he obviously meant by his statement that he was making the application for his brother-in-law, or for Lieutenant Harold A. Camp, whose name he used in making the application. In his statement accused in effect admitted his knowledge that he could not personally transmit so much money home. In the light of the circumstances heretofore discussed in paragraph a above, accused's false statement clearly was made for the purpose of allaying any suspicions which might have arisen in the mind of the postal clerk from the fact that he had falsely impersonated Lieutenant Camp in making the application, and for the ultimate purpose of insuring the transmission of the funds as alleged in the Specification. Under the circumstances, such statement was prejudicial to good order and military discipline and was a violation of Article of War 96.

6. The charge sheet shows that accused is 26 years five months of age and was commissioned 18 October 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 as confirmed.

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

R R Cleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

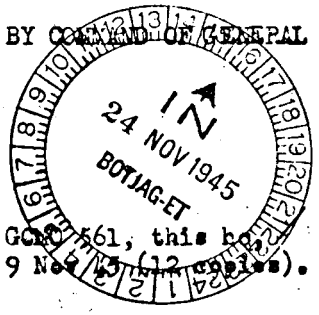
(TEMPORARY DUTY) Judge Advocate

AG 201-Allen; James R. (O)MPO 2nd Ind. LRC/hds
(25 Oct 1945)
Hq, U.S. Forces, European Theater (Main), APO 757, 21 November 1945.

TO: Assistant Judge Advocate General, Branch Office with U. S. Forces, European Theater, APO 887.

For appropriate action.

BY COMMAND OF GENERAL PATTON:



LEE R. CAIN,
1st Lt, AGD,
Assistant Adjutant General.

1 Incl:
Incl No. 1. GCM 561, this hq, 9 Nov 45 (12 copies).

RECEIVED
5 DEC 1945 1500 hrs.
BOARD OF REVIEW
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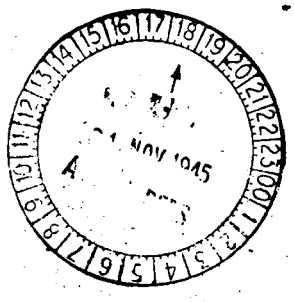

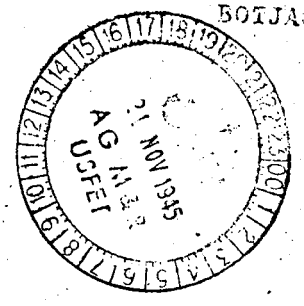

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 25 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant JAMES R. ALLEN (O-500707), 255th Port Company, 498th Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 17469. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17469).

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

(Sentence ordered executed. GCMO 561, USFET, 9 Nov 1945).

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

BOARD OF REVIEW No.4

15 DEC 1945

CM ETO 17472

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v	
Captain MALCOLM R. ANTONELLI (O-329619), 74th Ordnance Base Group	Trial by GCM, convened at Paris, France, 14 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 12 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING By BOARD OF REVIEW NO.4
DANIELSON, MEYER, and ANDERSON, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that Captain Malcolm R. Antonelli, 74th Ordnance Base Group, Seine Section, Com Z, European Theater of Operations, United States Army, did, at Paris, France, on or about 26 September 1944, wrongfully receive five thousand (5,000) francs, of the value of about one hundred dollars ($100.00) from Technical Sergeant Ivan L. Gelder, 54th

Ordnance Bomb Disposal Squadron, Seine Section, Com Z, European Theater of Operations, United States Army, well knowing that said sum had been obtained by the said Technical Sergeant Ivan L. Gelder as a result of illegal sale of United States Government gasoline.

Specification 3: In that * * *, did, at Paris, France, on or about 24 December 1944, wrongfully receive an unknown number of one thousand (1,000) Francs notes from Technical Sergeant Ivan L. Gelder, 54th Ordnance Bomb Disposal Squadron, Seine Section, Com Z, European Theater of Operations, United States Army, well knowing that this money had been wrongfully obtained as a result of the misuse of United States Government property.

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 Specifications 2 and 3 and of the Charge and not guilty of Specification 1. No evidence of previous convictions was introduced. Three - fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due to to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 12 years. The reviewing authority, The Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence, recommended the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution relative to the Specifications of which accused was found guilty may be summarized as follows:

(a) Specification 2 (Wrongful receipt of money known to have been derived from illegal sale of Government property);

On or about 26 September 1944, accused was commanding officer of the 54th Ordnance Bomb Disposal Squadron, then stationed in Paris, France, (R6,13). Shortly prior to this date, Technical Sergeant Ivan Gelder, senior non-commissioned officer of the organization, illegally sold a quantity of United States Government gasoline which had been issued for the use of the organization's vehicles, receiving between 25,000 and 30,000 francs therefor (R5,6,12,13,15). To the best of Gelder's knowledge, accused was unaware that the organizations gasoline was being sold in this manner (R15,16). (See CM ETO 17665, Miller as to further illegal activities of prosecution's witness, Gelder).

Throughout this period, the unit maintained a safe in which it was customary for the commanding officer, at the request of members of the command, to keep the money and valuables for such members (R16). On 26 September 1944, Gelder gave accused about 10,000 francs out of the proceeds of the sale of gasoline and told him "to put this money away or handed him, and assumed he would put the money in the safe same as he did in previous occasions when I won money gambling" (R6,7). He had previously given sums of money to accused for safe-keeping (R16,24). Most of this had been derived from gambling (R24), although on one of these previous occasions the money in question had represented part of the proceeds of a similar illegal sale of gasoline (R5,6). Accused however did not inquire as to the origin of the funds on that occasion and Gelder did not advise him (R6). None of the money thus previously given accused was for his own use and benefit but, on the contrary, was given for the purpose of safe-keeping it for Gelder (R7,8,16).

When Gelder gave accused the money on 26 September 1944, the latter asked him what its source had been, Gelder testified (R15):

> "I told him that at that time - rather, he asked me because I handed him a similar amount of money and I said 'This money is the same as the last time. The money I handed you is for your share of the gasoline'. When I told him that, it was just too bad.* * * Well, he hit the ceiling and he said ' I wouldn't have taken this money, I didn't know anything about it. I assumed it was gambling money you handed me before I put it in the safe. If I had known it was for gasoline, I certainly wouldn't have taken this money. I'll have nothing to do with this whatsoever'. And he threatened me with court-martial and everything else".

At the same time, he told Gelder to "go out and get those jerri-cans and bring them back, and taken them back and see that they were properly handled" (R16). The money was put in the safe, however, but subsequently returned to Gelder, as were all other sums that had previously been put there in his behalf (R20,24). None of this money had been given accused for his own use and benefit (R6,7,12,16,18). No court-martial/discipliniary proceedings were taken by accused against Gelder (R24). or other

The prosecution introduced, without objection by the defense, a written extra-judicial statement voluntarily made by accused to an agent of the Criminal Investigation Division (Pros.Ex.A). This, insofar as it relates to Specification 2, reads as follows:

> "On or about 26 September 1944 T/Sgt Ivan L.Gelder came to me and handed me some one thousand French franc notes. I don't know the exact number of one thousand French franc notes that he gave me. It was at this occasion that I asked T/Sgt Gelder what the money was for and where he had obtained it. T/Sgt Gelder told me that he had sold the weekly allottment of gasoline which was intended for the 54th Bomb Disposal Squad.. I accepted the money

that T/Sgt Gelder gave me as my share of the proceeds of the sale of the gasoline. After I took the money from T/Sgt Gelder I told him that I was not sanction any more sales of gasoline and I warned him against selling gasoline".

(b) Specification 3 (Wrongful receipt of money known to have been derived from the misuse of United States Government property):

Shortly before 27 November,1944, Gelder informed accused that he had an opportinuty to purchase some cognac and asked him whether he needed any. Accused gave him 10,000 francs with which to procure six cases for his personal use (R8,17,26-28). Gelder, thereafter and on 27 November 1944, went by Government vehicle on an official mission to Bordeaux, France, and while there bought"approximately 200 some odd cases" of cognac, six cases being intended for accused (R29) He brought the cognac back to Paris and sold all of it, including accused's six cases. Accused was unaware of this, and Gelder, when he next saw him, explained that he had forgotten about his cognac and had sold it by mistake, giving him in lieu thereof 27,000 francs, the amount he had received from the sale of accused's six cases (R8,20,27-29). Accused did not subsequently return to Gelder any of the money from the "cognac deal" and Gelder considered it as belonging to accused personally (R20). He was of the opinion that at the time he offered to get cognac for accused, the latter did not know he was going to purchase it in Bordeaux, or that a Government vehicle was to be used to transport it (R8,9,28). Nor did accused know at the time he received the money that the cognac had been transported in a Government vehicle (R27). Accused had been relieved from command of the squadron in October or November, and the cognac transaction occurred after his relief (R22,27).

In his pre-trial statement, accused stated that about 24 November 1944.

"Gelder gave me a bunch of one thousand French franc notes, he said the money was my share of the proceeds from the sale of cognac that he had purchased at Bordeaux, France and sold in Paris, France. I had not given T/Sgt Gelder any money to purchase any cognac at Bordeaux, France, with an idea in view of selling it at a profit in Paris". (R31; Pros.Ex.A).

4. After being advised of his rights, accused elected to testify under oath (R36,37). He stated that the 54th Bomb Disposal Squadron, of which he was then commanding officer, arrived in Paris on 6 September 1944. Soon thereafter he made a written request, at the instance of Gelder, for a weekly allottment of gasoline for the organization's vehicles. Thereafter, he had nothing further to do with the drawing of gasoline. About a week after arriving in Paris, he started to work with the 74th Base Group and spent ninety percent of his time with that organization. Gelder was in charge of the Squadron during his absence therefrom (R38,39). About 26 September 1944, he received some money from Gelder for safe-keeping and, his suspicions aroused by reason of the

large sums of money Gelder was spending, inquired as to its source. Upon his discovery that it came from the sale of gasoline, Gelder said "Okay, you can have that as your share". Accused told him to take it back and that he didn't want any part of it, and threatened him with the Court-Martial proceedings. He told Gelder that "he could not sell gasoline. I wouldn't have anymore to do with it" and instructed him to get back the jerricans. Gelder then "decided it was not a part of my money". However, accused "received it in as much as letting it go into the safe". He had no intention of trying to keep it from Gelder, but intended to use it as evidence, in the event that he decided to prefer charges against him (R40,44,50,54,55). Because of the impossibility of replacing him as a trained bomb-disposal technician,however, he decided not to prosecute him (R42), and about 27 September 1944, Gelder took back the money from the safe (R48,50,55).

Accused was relieved from command of the squadron on 11 October 1944. About 24 November 1944, Gelder offered to procure some cognac for him at a reasonable price, and he gave Gelder 10,000 francs with which to purchase six cases. Gelder did not tell him where or how he was going to get the cognac (R41,47,48). About the 20th or 27th of November Gelder reported that he had obtained the cognac but had sold it and gave accused the proceeds of the sale of his share, which amounted to about 22,000 francs. He accepted the money because "I had to get the cognac and I decided rather than let him have it I would take it myself" (R41,42,46,47,52). His first knowledge that Gelder had used a Government vehicle to transport the liquor came during the investigation of the incident by the Criminal Investigation Division. He did not agree with Gelder to engage in a sale of cognac which was to be transported by a Government vehicle (R42,52,53). Accused denied ever knowingly accepting any money from Gelder resulting from an illicit transaction (R55).

Other evidence for the defense was to the effect that accused was known to be perfectly honest, that he was considered one of the best technically qualified bomb disposal officers, that his reputation as such an officer was excellent, and that while bomb disposal officers are selected for technical rather than administrative ability, they are expected to be competent to perform the normal administrative functions of their units (R62,63). Although accused was actually transferred from the 54th Bomb Disposal Squadron to the 74th Ordnance Base Group, about 13 October, he went to work about the last week in September in an Ordnance Depot (R61).

5(a) Specification 2 (Wrongful receipt of money known to have been derived from illegal sale of government property)

From the point of view of the nature of the offense stated, this specification is susceptible of alternative construction. It can be read

to charge accused either with receiving the money described for his own use and benefit or with receiving it as custodian for Gelder. In this sense it is perhaps duplicitous, but this is immaterial both because no objection was made (CM ETO 7391, Young; CM ETO 11004, Evans), and because the gravamen of the offense is analagous to that of receiving stolen property, in connection with which an accused is equally guilty whether he received the property for his own use or in the capacity of an agent (53 C.J., sec. 16, p.507; see also CM ETO 9258, Davis). Or viewed in another light the offense was that of the old common law crime of misprision of felony.

> "Misprision of felony at common law is a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him as will make the concealer an accessory before or after the fact" (16 C.J. sec. 13, p.60).

Hence, it is clear that whichever hypothesis is supported by the evidence, the specification describes a course of conduct to the prejudice of good order and military discipline and states an offense within the meaning of Article of War 96.

The only question, therefore, is whether the record of trial is legally sufficient to support the finding of guilty on any of the hypotheses above mentioned. There is no doubt that accused received the money in question and that he knew at the time of receipt that it had been derived from the illegal sale of military gasoline. We are left, accordingly, with the problem of determining whether the evidence adequately proves an improper motive or purpose in such receipt. On this point, there is no substantial evidence that accused received the funds or intended to receive them for his personal use or benefit. Indeed, everything in the record - Gelder's version of the transaction, accused's description of it in his pre-trial statement and his testimony, and the fact that the money was returned to Gelder long before any charges or imputations against accused had been made in the matter - tends to negative such a conclusion. Hence, the finding of guilty could not be sustained on this basis.

However, as previously indicated, the acceptance of such funds by accused as a custodian for Gelder, combined with his extension of military facilities under his control to the safe-keeping of money known to have been obtained under the circumstances here shown (Cf: CM ETO 10418, Blacker), would constitute a "wrongful receipt" in violation of Article of War 96 (CM ETO 9258, Davis) or a misprision of felony. Since the record of trial contains substantial, competent evidence that accused did in fact accept the money on this basis, the Board of Review necessarily must hold it legally sufficient to support the finding of guilty. Accused's explanation that he held the funds only for the purpose of using them as evidence against Gelder, if true, would have constituted a defense (CM ETO 9258, Davis).

Whether it was true, however, is an issue of fact for the court. The explanation seems reasonably plausible, particularly since it is corroborated by uncontradicted evidence that prosecution was threatened but abandoned only because of a shortage of trained bomb-disposal personnel. Nevertheless, the seriousness of Gelder's offense, together with the early return of the money and the fact that no proceedings were initiated, are circumstances which make it impossible for the Board of Review to hold as a matter of law that the court erred in disbelieving accused's explanation. Hence, the conclusion that accused received the money as a custodian for Gelder or that accused with knowledge that Gelder had committed a serious felony elected to remain quiescent and not bring Gelder to justice is legally justified and the court's finding that his conduct in either of these aspects constituted a wrongful receipt of the funds described must be upheld.

(b) Specification 3 (Wrongful receipt of money known to have been derived from the misuse of United States Government property)

The essential elements of the offense charged in this specification are accused's receipt of money from Gelder and his accompanying knowledge that the money was derived from the misuse of a military vehicle. Unless these are proved, the conviction must fail since no other impropriety, in his relations with Gelder, assuming that any impropriety existed, is charged. Accused is not charged with the offense of conducting extra-military business or commercial activities in violation of AR 600-10.

As in the case of Specification 1, the receipt of the money is clearly proved. In this instance, however, it is also clearly shown that accused received the funds for his own use, and so we have left only the question whether at the time of receipt, he was aware of the manner in which the cognac, the sale of which produced the funds, was in fact transported. In this respect, the record of trial is fatally deficient. There is not only a total lack of proof that he had such knowledge, but all the direct evidence on the point is to the effect that he did not. Both he and Gelder, the prosecution's only witness, so testified. Furthermore, it is shown that at the time of Gelder's trip to Bordeaux, accused was no longer his commanding officer. Hence, the necessary knowledge of the availability and use of government transportation may not be imputed to accused by reason of any official relationship between the two. Moreover, the record is silent as to whether accused had any actual knowledge of the availability of such transportation to Gelder during this period. Likewise, there is no proof that means of transportation between Bordeaux and Paris, other than military, were non-existent at the time in question, or, assuming this to be true, that accused was aware of it. Nor is such lack of transportation the kind of matter of which either the court or the Board of Review could properly take judicial notice. The theory and basis of judicial notice is that the fact in question is so well known that it has become common knowledge and it is therefore unnecessary to prove it (CM ETO 2396, Pennington). While judicial notice might conceivably be taken of the general disruption

of French transportation facilities produced by war-time conditions, this is something quite different from judicial notice of the "fact" that Gelder could not have transported the cognac between the two specific points here involved by means other than a government vehicle (CM ETO 6226, Ealy). Since this was neither proved nor judicially known by the court, it cannot be used as the basis for an inference that accused knew or had reason to know it. In this connection, it might be added that no significance can be attached to the mere quantity of cognac transported (200 cases), since there is no evidence that accused knew that anything substantially in excess of the six cases he himself had ordered had been brought to Paris. The state of the record, therefore, is such that accused's knowledge of the use of government transportation stands unproved and, this being an essential element of the offense charged, it follows that the finding of guilty is not sustained.

In view of this disposition of the matter, it is unnecessary to discuss the confusion in the record produced by the amendment to the date of offense set forth in the specification (R7).

6. The charge sheet shows that accused is 33 years of age and entered upon active duty 28 February 1942 at Aberdeen Proving Grounds, Maryland. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Errors injuriously affecting the substantial rights of accused were committed during the trial as above described. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 3 of the Charge, but legally sufficient to support the findings of guilty of Specification 2 of the Charge and of the Charge and legally sufficient to support the sentence.

8. Dismissal, total forfeiture of all pay and allowances, and confinement at hard labor are authorized punishments, in the case of an officer, for violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

Lester A. Samelson, Judge Advocate

Trueten A. Thompson, Judge Advocate

John R. Anderson, Judge Advocate

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

BOARD OF REVIEW NO. 4

15 NOV 1945

CM ETO 17473

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
First Lieutenant MAYFORD V. CLARK, (01637745), 3138 Signal Motor Messenger Company.	)	Trial by GCM, convened at Paris, France, 26 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW No. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

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

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

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

Specification 1: Disapproved by reviewing authority.

Specification 2: Disapproved by reviewing authority.

Specification 3: Disapproved by reviewing authority.

Specification 4: Disapproved by reviewing authority.

Specification 5: Disapproved by reviewing authority.

Specification 6: Disapproved by confirming authority.

Specification 7: Disapproved by confirming authority.

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Specification 8: In that First Lieutenant Mayford V. Clark, 3138 Signal Motor Messenger Company, European Theater of Operations, did, at Paris, France, on or about 20 November, 1944, wrongfully and unlawfully dispose of nine gasoline cans and contents, each can containing five gallons of gasoline, of value about $36.00, the property of the United States, furnished and intended for military use thereof, by selling the same to U. Davesne for 9,000 francs.

Specification 9: In that * * * did, at Paris, France, on or about 30 November, 1944, wrongfully and unlawfully dispose of five gasoline cans and contents, each can containing five gallons of gasoline, of value about $20.00, the property of the United States, furnished and intended for military use thereof, by selling the same to George Vandenbossche for 5,000 francs.

Specification 10: Disapproved by reviewing authority.

Specification 11: Disapproved by reviewing authority.

Specification 12: Finding of not guilty.

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

Specification 1: Disapproved by reviewing authority.

Specification 2: In that * * *, did, at Paris, France, during January 1945, wrongfully and in violation of Letter AG 121 op GA, Headquarters European Theater of Operations, dated 23 September, 1944, Subject "Prohibition against Circulating, Importing, or Exporting United States and British Currencies in Liberated or Occupied areas, and Certain Transactions Involving French Currencies Except Through Official Channels," exchange, at a rate of exchange in excess of the official (rate of exchange of fifty French francs per $1.00 U.S.) money, and outside official channels, $60.00 United States Currency into French Francs.

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

Specification: In that * * *, did, at Paris, France, on or about 15 December 1944, unlawfully, fraudently and knowingly with intent to deceive the United States, officially make the following statement in writing in connection with and in pursuance of a Report of Survey, viz:

"S T A T E M E N T"

15 December 1944.

"On or about the 20 November 1944 at approximately 0930 hours Earnest E. Webb 35444590, a member of this organization was assigned Truck 1/4 Ton 4x4 in order to carry out a mission at Engineer Depot E-508 A, Paris, France. At approximately 1300 hours enlisted man concerned reported the vehicle was stolen. I conducted an investigation and learned that to the best of my knowledge said vehicle was lost through no fault or neglect of individual concerned.

s/ Mayford V. Clark
MAYFORD V. CLARK 01637745
1st Lt. SC 3138th SMM Co."

which statement was false, and was known by the said Lieutenant Clark to be false.

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 as alleged of all charges and specifications, except specifications 5,10, and 12 of Charge I; of specifications 5 and 10, Charge I, he was found guilty with exceptions, and of Specification 12, Charge I, he was found not guilty. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for twenty years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of specifications 1,2,3,4,5,10, and 11, Charge I, and of Specification 1, Charge II, 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 under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of specifications 6 and 7, Charge I, confirmed the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution.

The evidence for the prosecution with reference to Specifications 8 and 9, Charge I, Specification 2, Charge II, and the Specification, Charge III, those being the only specifications before the Board of Review for consideration, may be summarized as follows:

The accused, First Lieutenant Mayford V. Clark, at the times

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in question was stationed in Paris, France, as Motor Officer with the 3138th Signal Motor Messenger Company (R34). His duties required him to exercise control over military vehicles and gasoline belonging to the United States. At the same time Technician Fourth Grade Ernest E. Webb served with accused's company (R34), and Maurice Litter, a civilian, was employed in connection with the same organization as foreman and interpreter (R9).

(a) Specification 8, Charge I

Accused was charged with the wrongful disposition on or about 20 November 1944 of nine five-gallon cans of gasoline, property of the United States, furnished and intended for the military service, by sale to one U. Davesne for 9,000 francs, in violation of Article of War 94.

The record of trial discloses that Maurice Litter and accused sold nine five-gallon cans of gasoline to U. Davesne, and, in payment therefor, received 10,800 francs (R11,12,30-32). The gasoline was taken from the garage of accused's organization, was transported in a jeep, was contained in jerricans and belonged to the United States Army (R10,11,12,30). The sale took place on two occasions, accused was present each time, and they were made pursuant to his directions (R11,30,31). On the first occasion Davesne purchased four jerricans of gasoline for 4,800 francs, and on the second occasion he purchased five jerricans of gasoline for 6,000 francs (R11). Litter received the money from Davesne, and on the first transaction he kept 800 francs for himself and gave accused 4,000 francs, and on the second occasion he kept 1,000 francs for himself and gave accused 5,000 francs (R11). The time of the sales is not definitely established. Litter stated they were made about the first of November, but he was uncertain as to the exact time (R12). Davesne was uncertain as to the exact date, but testified he believed they were made the first part of October (R30). The evidence shows, however, that they were made after the sale of gasoline to Vandenbossche (discussed hereinafter), and the record of trial shows that the sale to him was made "the end of October or the end of November" (R26).

(b) Specification 9, Charge I

Accused was charged with a violation of Article of War 94 by wrongful disposition on or about 30 November 1944 of five gasoline cans and contents, each containing five gallons of gasoline, property of the United States, furnished for the military service, by sale to George Vandenbossche for 5,000 francs.

It appears from the evidence that accused asked Litter where he could obtain some wood to inclose a jeep, and Litter took him to Vandenbossche at which time five jerricans of gasoline were sold to him for 5,000 francs. The money was paid to Litter who in turn gave it to accused. The gasoline and jerricans were taken from the garage of accused's organization, and were the property of the United States Army. Accused was present at the time the sale was made (R10,11,16,25,26). The time of the sale was not definitely established by the evidence. Litter stated that

it occured during the second half of October (R10), while Vandenbossche testified that the sale was made "in October or towards the end of November" (R26).

(c) Specification 2, Charge II

Accused was charged with exchanging $60.00 in United States currency for French francs during January 1945 at a rate of exchange in excess of the official rate of exchange and outside official channels, in violation of Article of War 96.

In January 1945 accused gave Technician Fourth Grade Webb, a member of his organization, $20.00 in United States currency to be exchanged for French francs (R41). Webb in turn gave the money to Private Savoie to effect the exchange, and shortly thereafter Savoie gave Webb $80.00 in French francs which Webb delivered to accused (R42). At the time accused gave the money to Webb he instructed him to have Savoie make the exchange (R46). On two occasions in January 1945 accused gave Savoie $20.00 in United States currency to be exchanged for French francs. Savoie obtained $80.00 in French francs on each occasion and delivered it to accused who remarked that he "was getting quite a bit for it" (R51-53). The evidence further shows that on these three occasions Savoie obtained the French francs from Private Hightower, another member of accused's organization, who exchanged the money with a French civilian (R55,56).

(d) Specification, Charge III

Accused was charged with making a false statement concerning the loss of a jeep on 15 December 1945 in violation of Article of War 95.

The supply sergeant of accused's organization in October 1944 learned that a jeep belonging to the organization was missing, and later conducted an investigation which disclosed that fact (R57-59). On 15 December 1944 Technician Fourth Grade Webb signed a statement at accused's request relative to the loss of the jeep which both he and accused knew to be false (R42-44). This statement was required, it was stated, to obtain a replacement for the missing jeep (R46). Webb's statement (Pros. Ex. A) recited that on 20 November 1944 he used the jeep on a military mission, parked it and chained and locked it, and, when he returned, found it missing and the sawed chain on the ground. Accused's statement (Pros. Ex. C) recited that on 20 November 1944 Webb reported the loss of the jeep through theft, and that he conducted an investigation which disclosed that it was not lost through fault or neglect. Based on the statements of Webb and accused, a report of survey (Pros. Ex. B) was made (R57,58) and a new jeep was obtained (R61). Accused knew that his statement was false (R42,44,63,64). The true facts with reference to the loss of the jeep would not satisfy the requirements for replacements, so the false statements were prepared and signed (R64). Accused, being the Motor officer of the organization, had signed for the jeep and was responsible for it (R61), and, at the time the statement was made, said: "I'll have to make up a story" (R64).

4. Evidence for the defense.

The evidence for the defense with reference to the specifications under consideration may be summarized as follows:

(a) The rights of accused as a witness were explained to him and he elected to remain silent (R75).

(b) It was shown that unsuccessful attempts were made to requisition certain items for the company, that accused purchased such items in French establishments for company use, and that on one occasion he spent 5,200 francs for company supplies (R67-69,71).

(c) It was also shown that no one in the company knew what had happened to the missing jeep, that the false statement was made to secure a replacement, that accused made the statement reluctantly, and that his Commanding Officer knew it to be false (R72-74).

5. (a) Specifications 8 and 9, Charge I.

It is abundantly clear from the record of trial that accused wrongfully disposed of gasoline and cans belonging to the United States and furnished and intended for the military service, by sale to French civilians, as alleged in the specifications. The specifications allege the sales to have been made "on or about 20 November 1944", and "on or about 30 November 1944", respectively while the evidence does not fix the datesof sale with definiteness. With reference to the allegation of sale on or about 20 November 1944, the evidence shows that the sale was made after a sale "at the end of October or November", and with reference to the allegation of sale on or about 30 November 1944, the evidence shows the sale to have been made the "end of October or November". The phrase "on or about" apprised accused of a possible indefinitenss of time, and the failure of exactness in the proof, as to the time of the offenses, is not material in this case (CM ETO 1538, Rhodes).

The evidence substantially supports findings of guilty in violation of Article of War 94. (CM ETO 5539, Huffendick; CM ETO 6268, Maddox; CM ETO 9987, Pipes; CM ETO 11936, Tharpe et al)

(b) Specification 2, Charge II.

It appears from the evidence that during January 1945 accused on three occasions gave enlisted men of his company $20.00 in United States currency to exchange for French francs through unofficial channels and at rates of exchange in excess of the official rate of exchange. Pursuant to his instructions the United States currency was exchanged for French francs through French civilian channels, and accused received French francs at the rate of four times the official rate of exchange. The conduct of accused was clearly in violation of Letter AG 121 Op GA, Headquarters European Theater of Operations, 23 September 1944, which in pertinent part (par. 2b) prohibits the purchase of francs against other currencies except through official channels, and constituted a violation of Article of War 96. (CM ETO 14632, Lang; cf: CM ETO 7553, Besdine and Schnurr; CM ETO 10418, Blacker)

(c) Specification, Charge III.

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The evidence shows without dispute that on 15 November 1944 accused knowingly and with intent to deceive made a false official statement in writing, as alleged. That the statement was false was clearly shown, and that it was made knowingly and with intent to deceive is gatherable from the facts and circumstances surrounding its execution. Accused, being the Motor Officer of his organization, was responsible for the missing jeep, and a false statement was made to obtain a replacement. A report of survey, based in part on his statement, was made, and a replacement was obtained. The official character of his statement is apparent, and it "is presumed that a falsehood is engendered by an intent to deceive" (CM ETO 2777, Woodson).

Accused's original statement was not offered and its whereabouts were not shown, but a photostatic copy thereof was received without objection (R57,58), and in the absence of objection the probative value of secondary evidence is not open to doubt (MCM, 1928, par. 116a, p. 120). Under the modern doctrine, which has evolved with the progress in technology of reproduction of documents, this photostatic copy may well be considered as an original document within the best evidence rule (United States v. Manton, 107 Fed. (2nd)(2nd Cir., 1938). 834,845; Cert. denied 309 U.S. 664, 84 L.Ed. 1012) The evidence established that accused knowingly and with intent to deceive made a false official statement, and a violation of Article of War 95 was proved (CM ETO 1538, Rhodes; CM ETO 7246, Walker; CM ETO 8457, Porter).

6. The charge sheet shows that accused is 28 years of age, was appointed a Second Lieutenant 30 November 1942 and was promoted to First Lieutenant 4 March 1944. Prior service is shown as follows: "Enlisted service 28 March 1941 - 29 August 1942".

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

8. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for an officer convicted of violations of Articles of War 94 and 96. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

_____, Judge Advocate.

_____, Judge Advocate.

(ON LEAVE), Judge Advocate.

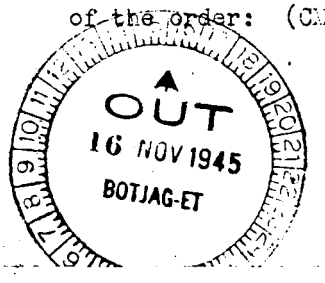
(168)

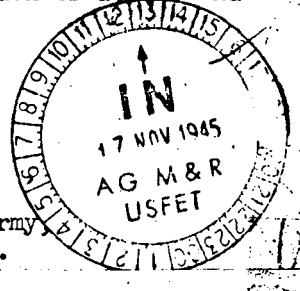
1st Ind.

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

1. In the case of First Lieutenant MAYFORD V. CLARK, (01637745), 3138 Signal Motor Messenger Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, as 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 17473. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17473).





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

)(Sentence ordered ececuted. GCMO 611, USFET, 1 Dec 1945).

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

BOARD OF REVIEW NO. 5

15 NOV 1945

CM ETO 17475

U N I T E D S T A T E S	6TH ARMY GROUP
v.	Trial by GCM convened at Heidelberg, Germany, 25 June 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York
First Lieutenant WALTER KOOCH (O-1048050), 68th Anti Aircraft Gun Battalion	

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

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

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

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

Specification: In that First Lieutenant Walter Kooch, 68th AAA Gun Battalion, did, without proper leave absent himself from his organization at Heidelberg, Germany, from about 14 April 1945 to about 11 May 1945

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

Specification: In that * * *, did, at Heidelberg, Germany, at 2300 hours on or about 14 April 1945 knowingly, wrongfully, without proper authority apply to his own use one ¼ ton reconnaissance vehicle of the value of about $1407.00, property of the United States, furnished and intended for the Military service thereof.

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

Specification 1: In that * * *, on or about 7 April 1945, did, wrongfully bring in and quarter a woman, one Mlle Jany Beltrando, in the Hotel Cosmopolitan, Contrexeville, France, said Hotel at the time being used as a Battalion billet.

Specification 2: (Finding of not guilty)

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

Specification 1: In that * * *, did, at Nice, France, on or about the latter part of October 1944, wrongfully appear at the American Bar without his insignia of rank, said place at that time being off limits to officers.

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

He pleaded not guilty and was found not guilty of Specification 2, Charge III; guilty of the Specification of Charge II, except the words and figures "of the value of about $1407.00," substituting therefor the words and figures "of a value in excess of $50"; guilty of Charge II, and of all the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 6th Army Group, approved only so much of the finding of guilty of Charge III and Specification I of Charge III as involves a finding of guilty of the offense alleged in violation of Article of War 96, approved the sentence but recommended that, owing to special circumstances in the case, the confinement at hard labor be remitted, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the finding of guilty of Specification 2 of Charge IV, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that at all times mentioned in the specifications accused was a first lieutenant assigned to Battery B, Sixty Eighth Anti Aircraft Artillery Gun Battalion (R6,7; Pros. Ex. A). In October 1944, accused and a number of enlisted men went into a bar at Nice, France. Accused was informed by a military policeman that this bar was for enlisted men and that he would not be permitted to drink or to remain there. Accused thereupon removed his insignia of rank

and remained in the bar. This bar had been declared "off limits to all officers" by accused's battalion commander in a published battalion memorandum dated 22 September 1944 (R28,35,38,39,47,48; Pros. Ex. C).

Between 17 March and 9 April 1945 inclusive, accused and his battery were billeted at the Cosmopolitan Hotel in Contrexeville, France (R31,32). On 9 April a woman was found asleep in a bed in a room on the fifth floor of the hotel. That floor was not occupied at that time by troops. Access to this floor and room was available by a stairway leading from the cellar, without passing through the other floors (R14,26,27, 29,30,34). The woman in question had been seen previously in the company of accused at the battalion officers' party at Nice (R27).

On 7 April accused went on duty at 1800 hours as officer of the day (R30,32,33). On that day accused told his company commander that his fiancee was arriving. After guard mount he was temporarily relieved from duty to meet her and "see that she was properly billeted". He returned to his duties about 2200 hours at which time he stated to his company commander that he had found a billet for the girl but there was no bedding there and that he was going to give her blankets to "tide her over" until he could more decently take care of her. His captain found him the blankets and they were sent to the girl (R9,33). After the girl was found in the hotel, accused's captain took him to one side "and asked him about this". Accused said that "he had lost the previous billet he had had and had to bring her into the building because he had no other place for her". The captain, who testified to this conversation, immediately qualified the answer embodied in the above quotation by adding "He certainly did'nt admit to having brought her there himself - but admitted he knew she was there". (R15).

Lieutenant Colonel Edwin F. Moody, accused's battalion commander, testified that he gave no one at any time authority to billet "any civilian female personnel in the Cosmopolitan Hotel" and that he had notified his adjutant that the guards were not to allow any unauthorized personnel into the hotel (R22-24). Colonel Moody did not state when he gave these orders to his adjutant. The court by a question (R24) introduced the suggestion that the order was given the night of 7 April (R22-24). However, the battalion adjutant testified that he received these instructions from Colonel Moody a few days after the middle of March and had communicated them to each officer of the day, when the latter went on duty for transmission to the guard (R26,28). It was the battalion adjutant who discovered accused's fiancee in the hotel room (R27) on 9 April (R32). Accused, as stated, had gone on duty as officer of the day at 1800 hours, 7 April (R30,32,33).

On 14 April 1945, accused was stationed with his battery in Heidelberg (R16,18). Between ten-thirty and eleven pm, the night of 14 April 1945, accused absented himself without leave from his organization. He left with two enlisted men in a "Jeep" which had been assigned to his

battery and which was known to be the battery commander's "Jeep", used by the latter personally "when he went out". No trip ticket had been issued for the use of this "Jeep" and accused had no right to take it. Its value was in excessoof $50 (R6,7,10-12,14-16,18,20,21; Pros. Ex. A). Accused went to Contrexeville and was on his way to Nice when the "Jeep" was impounded by the military police (R16). Accused was subsequently apprehended on 11 May at St. Jeannette, France, by the military police (R7, Pros. Ex.B).

4. The defense offered in evidence the report of a psychiatric examination of accused made at 180th General Hospital and dated 7 June 1945. This was received in evidence without objection by the prosecution save that the prosecution did not "concede all the statements therein made" by the accused to the examining officer (R59,60; Def. Ex.1). According to information supplied and set forth in this report, accused lost his father when he was one year old. His mother was an immigrant and there were five children whom she could not support. Accordingly accused was institutionalized until 17 or 18 years of age, in a very strict environment. He had one year of college in 1941. He was graduated from officers candidate school in December 1942, after three months as an enlisted man. He had served with his present unit for 13 months and felt that he had been doing about all the work there. He had several emotional outbursts. He was asked if he would like to take a rest, "unofficially". He thought about this for a while and then days later found himself absent without leave. He realized his status but did nothing about it and was apprehended after 25 days absence (Def. Ex.1). The summary of this report says:

> "Objectively the patient shows emotional immaturity, antagonism, aggressiveness, and opinionated, disgusted attitude with military service. He had not profited in any way recent experiences. This patient is to be considered as being of sound mind now and at the time of the commission of the alleged offenses. Final diagnosis is 'Constitutional Psychopathic State, Unqualified.'" (Def. Ex.1).

Apprised of his rights as a witness (R60), accused elected to make an unsworn statement. He said that his reason for making an unsworn statement was to clarify the psychiatrist's report (R59, 60, Def. Ex.1)" as to its not being definite about some facts." He said that the part about his home life was true, but the statement that he "resented the social and intellectual standards of the officers" was not made by him to the psychiatrist in that manner. What he did explain to the psychiatrist was that he met a girl and fell in love with her and "all of a sudden encountered a lot of antagonism, no one would agree with him on the subject and tried to discourage him from marrying the girl. He engaged in personalities with the officers on the subject and for that reason he concluded that the psychiatrist was of the opinion that he was "disgusted with the service." He denied that he had a disgusted and opinionated attitude to the service, calling attention to his perfect record until the time of his first trouble at Contrexeville. He

does not know about any outbursts as he keeps things to himself. He never at any time showed any open resistance or rebellion until aggression was shown to him when he was going with his girl. The accused concluded with the statement, "that is all I can think of, except I am not guilty as accused" (R60-61).

5. It is unnecessary to recapitulate the evidence. There is substantial competent proof in the record to support the findings of guilty as approved. Accused was absent from his organization without leave in violation of Article of War 61 (Charge I and its Specification); and in going absent he appropiated to his own use government property, a jeep, assigned to his organization and worth in excess of $50 dollars, in violation of Article of War 94 (Charge II and its specifications). In addition, he wrongfully quartered a civilian woman in a hotel used as a battalion billet, contrary to orders of his battalion commander, in violation of Article of War 96 (Charge III, Specification I) and, also in violation of Article of War 96, he wrongfully appeared in a bar, which was off limits to officers by orders duly published, without his insignia of rank (Charge IV, Specification I) (MCM, 1928, par. 132, 150i, 152a, pp 146, 184, 187).

6. Attached to the record of trial is a written recommendation for clemency for accused asking that the sentence be suspended in its entirety, or that that part thereof imposing imprisonment be vacated. Among other things this recommendation mentions the fact that accused's military record "until the time he met this woman" was excellent, that he had had exceptional ability as an artillery mathematician, and that through two arduous campaigns he had lived "upforward with the firing elements", refusing to go to the rear and rest, and that on five occasions he voluntarily undertook dangerous duty as forward observer. This and two other letters requesting clemency are signed by 23 officers, including the law member and three other members, the assistant trial judge advocate and the defense counsel of the court which tried him, the investigating officer, and the commanding officer and other officers of accused's organization. The staff judge advocate of the reviewing authority and the reviewing authority recommended that the confinement at hard labor be remitted.

7. The charge sheet shows that accused is 21 years six months of age. He entered on active duty 10 December 1942. There was prior service as an enlisted man from 9 August to 9 December 1942.

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 as approved.

9. The offense of absence without leave in violation of Article of War 61 is punishable, when committed by an officer, as a court-martial may direct

(AW61). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42, Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended.

Judge Advocate

(DETACHED SERVICE) Judge Advocate

Judge Advocate

(175)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 5 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of First Lieutenant WALTER KOOCH (O-1048050), 68th Anti Aircraft Gun Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, 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 17475. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17475).

IN 7 NOV 1945 AG M&R USFET

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

(Sentence ordered executed. GCMO 587, USFET, 24 Nov 1945).

17475

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

BOARD OF REVIEW NO. 4

1 NOV 1945

CM ETO 17479

U N I T E D S T A T E S	)	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, UNITED STATES FORCES, EUROPEAN THEATER
v.	)	
Second Lieutenant CHARLES A. MITTLER (01303006), 293rd Reinforcement Company, 4th Reinforcement Battalion, 10th Reinforcement Depot	)	Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, England, 18 July 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Charles A. Mittler, 293rd Reinforcement Company, 4th Reinforcement Battalion, 10th Reinforcement Depot, then of 321st Reinforcement Company, 49th Reinforcement Battalion, 10th Reinforcement Depot, did at Pheasey Estate, Staffordshire, England, on or about 21 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Liverpool, Lancashire, England, on or about 3 July 1945.

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17479

He pleaded guilty to and was found guilty of the Specification, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty. He also pleaded guilty to and was found guilty of a violation of the 61st Article of War, and not guilty of the Charge (AW 58). 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 20 years. The reviewing authority, the Commanding General of United Kingdom Base, Communications Zone, United States Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution.

Accused absented himself without leave from his organization (321st Replacement Company, 49th Replacement Battalion, Ground Force Replacement Command, 10th Replacement Depot) at Pheasey Estate, Staffordshire, England, on 21 January 1945, and remained absent without leave until he was apprehended at Liverpool, England, on 3 July 1945. Proof of this unauthorized absence was made by the introduction into evidence without objection of the original morning report of his organization, a duly authenticated extract copy thereof being substituted in the record (R8-9,Pros.Ex.1), and by the testimony of an officer of his organization - First Lieutenant Jacob M. Harnish. The latter, together with a non-commissioned officer, and by direction of the commanding officer of his organization, made repeated unsuccessful searches in the organization's area for accused on seven successive days after he was missed on 21 January (R8). An officer described as "Captain Fisher", accompanied by Technical Sergeant Joseph C. Delingo (who testified as a witness for the prosecution), apprehended accused in Liverpool on 3 July 1945 in a house in bed (R9-10).

4. For the Defense.

Accused, after having his rights as a witness fully explained to him, elected to make an unsworn statement (R10). His statement consisted primarily of a resume of his army career (R10-11). Inducted on 26 February 1941, he was commissioned as an Infantry officer on 8 December 1942. During two tours of duty in the "desert", he "got pretty fed up with the infantry"; he "wasn't doing anything". An application made at that time for transfer to the Army Air Force for training as a pilot failed to receive the approval of his commanding officer. He arrived overseas in the spring of 1944, entered Normandy on "D day plus 6" as platoon leader of a heavy machine gun platoon, Company "H", 314th Infantry, and continued in that capacity until 13 or 14 November 1944,

at which time he "lost" his platoon. In his words, "I had it [platoon] taken away from me through no fault of mine in the field, but for personal reasons". About two weeks later, while serving with a different company, he was wounded and evacuated to England through hospital channels. He professed his inability to explain his conduct in absenting himself after reaching the 10th Replacement Depot.

> "I don't know how it happened - why it happened. I never intended for it to happen. It is just one of those things, I guess. You make a mistake once and that is that. I had no intention of deserting, or as a matter of fact, even being AWOL. It never dawned on me. I never gave it a thought. It just happened. The time passed and I didn't know what to do. I was never absent before. I have never committed such an act. The longer I stayed away, the harder it was to come back. I tried a number of times - made up my mind to stop and come back, and just couldn't. I had no intention of remaining absent" (R11).

5. The court acquitted accused of desertion and found him guilty of only the lesser included offense of absence without leave in violation of Article of War 61. Not only did he plead guilty to this latter offense but the prosecution introduced competent evidence in the form of a morning report and the testimony of an officer who was conversant with the facts, establishing beyond doubt his absence without leave for the period of time alleged. There is therefore no question about the legal sufficiency of the record to support the findings of guilty.

6. The charge sheet shows that accused is 26 years six months of age, that he was inducted at New York City on 26 February 1941, and that he was commissioned as a Second Lieutenant on 8 December 1942. He had no prior service.

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

8. A sentence of dismissal and confinement at hard labor for life is authorized upon conviction of a violation of Article of War 61. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper

(AW 42 and Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

Lester A. Samuelson Judge Advocate

Marlin A. Mayo Judge Advocate

John R. Anderson Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 1 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant CHARLES A. MITTLER (01303006), 293rd Reinforcement Company, 4th Reinforcement Battalion, 10th Reinforcement 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 17479. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17479).

OUT 2 NOV 1945 60TJAG-ET

IN 3 NOV 1945 AG M&R USFET

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

(Sentence ordered executed. GCMO 565, USFET, 10 Nov 1945)

17479

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

BOARD OF REVIEW NO. 3

20 OCT 1945

CM ETO 17483

U N I T E D S T A T E S	)	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
First Lieutenant HUGH D. MURDOCK (01577605), 3533rd Quartermaster Truck Company	)	Trial by GCM, convened at Marseille, France, 9 June 1945. Sentence: Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Hugh D. Murdock, 3533d Quartermaster Truck Company, did, at or near St. Vallier, France, on or about 29 May 1945, unlawfully and feloniously assault First Lieutenant Carl M Amos, 66th Military Police Company, a military policeman then acting in the execution of his duty, with a dangerous weapon, to wit, a pistol.

Specification 2: In that * * *, having been ordered into arrest by First Lieutenant Carl M Amos, 66th Military Police Company, a Military Policeman then acting acting in the execution of his duty, did, at or near St Valier, France on or about 29 May 1945, refuse to obey the said order.

He pleaded not guilty to and was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as

the reviewing authority may direct, for four years. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case, remitted so much thereof as provides for confinement at hard labor for four years and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On the afternoon of 29 May 1945, First Lieutenant Carl M. Amos, 66th Military Police Company, was in command of a military police detachment in St. Rambert, France. At about 1400 hours while driving in a French automobile about five miles south of this town he stopped a truck at a traffic control point to check the driver's "trip ticket". In so doing he noticed a French .44 caliber revolver in the vehicle. He took possession of the weapon, informing the driver that he was the "MP" officer and authorized to confiscate all unauthorized weapons. A few minutes later while proceeding down the main street in St. Valliers accompanied by a French gendarme and two enlisted men (R9,29), he was brought to a stop by a "3/4 ton truck" which crowded his automobile to the side of the road. Accused who was the driver of the truck and accompanied by two soldiers left the vehicle, walked over to accused and said, "Lieutenant, I want that gun" (R6-7,20,21,24,72). Amos stated that he was the military police officer commanding the military police detachment in that area, that the weapon was confiscated and accused would have to see the "DBS Provost Marshal" to get it (R7-8,18,21). Although there was the odor of liquor on accused's breath and his eyes were bloodshot, he was steady on his feet and handled himself "pretty good". He again asked for the gun and when again informed it was confiscated (R12,14-15,23,26), he reached back and produced a German "Luger", saying, "I am going to get it back one way or the other" (R8,21). He held the weapon against his right side in front of his right hip about 16 to 18 inches from Amos and pointed at his face (R8-9,21,31,36). Amos said, "You'll be sorry for pulling a gun on me" and told him to put it down or he would get himself in trouble (R9,73). Accused returned the weapon to his hip pocket (R19,21). During their discussion that followed Amos asked accused to surrender his gun and told him he was under arrest (R21-23,31,73). Accused stated that "we were rear-echelon sons of bitches picking up souvenirs from the men fighting at the front" (R17). Meanwhile, the gendarme left with the car and soon returned with an "MP" who had been on duty as a traffic policeman. From the latter Amos obtained a .45 caliber pistol, again informed accused that he wanted his gun and that he was under arrest (R73). Accused replied, "Not while I am living" and as he "reached back" (R10,18) Amos struck him across the jaw with the ".45". Accused stumbled backward with his pistol in his hand. The gendarme took the weapon away from him. Amos told accused he would have to accompany him to "MP" headquarters. Accused refused and repeated "not while he was living" and also refused when ordered by Amos to get in the car. However, after Amos succeeded in getting a handcuff on his left hand, accused entered the vehicle "with very little trouble" (R10,11,25,28). Examination of

accused's pistol about three minutes after it was taken from him revealed it was loaded, the safety was off and there was a bullet in the chamber (R16-17).

4. For the defense, a captain in accused's company testified that since August 1944 accused's general reputation for truth and veracity and his military efficiency were excellent (R56,57).

5. After his rights were explained (R39), accused testified. On the date in question he was on duty as motor officer of a convoy with the wrecker and mechanics section which picked up trucks that had broke down on the road and repaired them. It has been a continuous trip for three and a half days. He had slept in the back of a truck two nights and "the third night we didn't sleep and the second night we didn't sleep" (R40-41). On 29th May 1945 one of his sergeants complained that a lieutenant had stopped his truck, taken a pistol from it, had "pulled" a weapon and refused to explain his actions (R42-43). Accused therefore obtained his "Luger" from his field bag, loaded it and caught up with the car in which this lieutenant was riding. The automobile contained no markings - "nothing in English" and its American occupants wore no military police brassards (R44). Accused walked over to the car and asked the lieutenant for the pistol he had taken from "these two men". The lieutenant said, "You or nobody else is going to get it" and nudged the Frenchman, who started to open the door. Accused drew his pistol and waved it at the Frenchman, telling him to get back in the car (R45,48). Up to that time the lieutenant had not told him he was a military police officer. As the Frenchman started to sit down again, the lieutenant said, "I am the Provost Marshal around here". Accused dropped his hand to his side (R45). All the occupants left the car. Accused and the lieutenant talked "almost like one man to another" in an ordinary tone of voice and no "angry words" were used (R46,53). The lieutenant explained why he had taken the pistol. He said finally, "I have you covered right now, Lieutenant". Accused was "astonished" and told him that this was not necessary and "If you are the Provost Marshal here, you don't have to have me covered". A car drove up and the lieutenant walked over to it (R46). Accused was holding his pistol in his hand with the thumb in his right side pocket (R46,52). Someone came to his left and as he looked in that direction, he received a blow on the side of his head (R46). He did not know if his hand which held the pistol had moved or not (R52,55). The lieutenant never told him he was under arrest (R48). He was perfectly sober and had not been drinking that day (R51). He did not say the lieutenant could only get the pistol over his dead body, and the lieutenant did not ask for his pistol before he was struck. The lieutenant put handcuffs on his right wrist, and three persons tried to put his left hand back of him (R54). He did not struggle, however (R53).

5. a. There was abundant evidence that accused assaulted Lieutenant Amos with a pistol as alleged in Charge I and Specification. Presenting a firearm ready for use within range of another constitutes an assault. The court findings of guilty were fully warranted (MCM,

1928, par.149, p.177). Accused's conduct constituted an offense under Article of War 96 (CM ETO 5420, Smith).

b. Concerning Charge II and Specification, Lieutenant Amos, as the head of the local military police detachment where accused's offense was committed, had the duty of preserving order and discipline among military personnel. His action in ordering accused into a status of arrest was reasonable and proper under the circumstances. According to accused's testimony, he was never told he was under arrest. However, there was substantial evidence that Amos ordered him into arrest whereupon he expressed his refusal both with words and action. The evidence sustains the court's findings of guilty and proves an offense under Article of War 96 (MCM, 1928, par.152a, p.187).

6. The charge sheet shows that accused is 25 years of age and was inducted 17 January 1941. He was commissionedin the Army of the United States 15 August 1942. He had no prior service.

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

8. A sentence of such punishment as a court-martial may direct is authorized upon conviction of an offense under Article of War 96.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

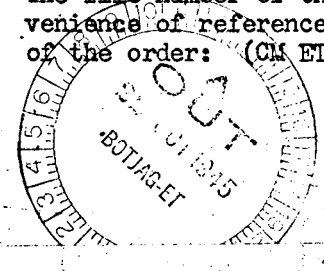
(TEMPORARY DUTY) Judge Advocate

1st Ind. (187)

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant HUGH D. MURDOCK (01577605), 3533rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17483. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17483).



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

(Sentence ordered executed. GCMO 548, USFET, 8 Nov 1945).

17483

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

BOARD OF REVIEW NO. 3

17 OCT 1945

CM ETO 17498

U N I T E D S T A T E S	) THIRD UNITED STATES ARMY
v.	) Trial by GCM, convened at Erlangen, Germany, 8 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates HAROLD W. BRESNAHAN (31262760), and ANDREW ROBINSON (34628805), both attached unassigned in the status of patients, 6th Convalescent Hospital	)

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

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

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

BRESNAHAN

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Harold W. Bresnahan, attached unassigned in the status of patient to the Sixth Convalescent Hospital, did, at or near Poxdorf, Germany, on or about 14 May 1945 forcibly and feloniously against her will, have carnal knowledge of Miss Mari Voit.

ROBINSON

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Andrew (NMI) Robinson, attached unassigned in the status of patient to the Sixth Convalescent Hospital, did, at or near Poxdorf, Germany, on or about 14 May 1945 forcibly and feloniously against her will, have carnal knowledge of Miss Mari Voit.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the votes were taken concurring, was found guilty of the Charge and Specification against him. No evidence of previous convictions of Bresnahan was introduced. Evidence was introduced of two previous convictions of Robinson, both by summary court, one for failure to obey the lawful order of a non-commissioned officer in violation of Article of War 96, and one for absence without leave in violation of Article of War 61. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the duration of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that between 0230 and 0245 hours on 14 May 1945, a white and a colored soldier, identified in court respectively as Bresnahan and Robinson, knocked on the door of a farm dwelling occupied in part by Johann Voit and his family, which included prosecutrix, Miss Mari Voit, aged 31, in Poxdorf, Germany. Herr Voit, who was 73½ years old, opened the door and admitted accused, thinking they were military police because he saw a military police brassard on the arm of Robinson, and a pistol and flashlight in the hands of each accused. Accused asked for nothing, but Robinson immediately locked the front door behind him and put the key in his pocket (R6-7,9,10,12,14,28). Herr Voit then showed them through the rooms of the house. They saw prosecutrix hiding behind a door, but continued upstairs with Herr Voit and remained about 15 minutes, then came back downstairs and continued to go through the house (R8-10,18).

At about 0415 hours they came into the room where Herr Voit, his wife, his son and prosecutrix were in bed. Robinson turned on the lights. Herr Voit got on his knees and cried and begged them to leave, but Robinson, the colored soldier, pointed his gun at Voit and said, "Poof, Poof", and Voit was forced to sit on the bed (R11,14). Bresnahan was present at this time. Robinson then grabbed Mari and pulled her from the bed in which she was lying with her mother, and threw her to the floor at the feet of her father, who testified that, although she cried out loudly and struggled, "he did then fuck her" for about five minutes. While Robinson was on top of her, Bresnahan put a cloth in her mouth, causing her mouth to bleed (R11-13,42). Mari testified that Robinson pointed a pistol at her chest. She was afraid and hit him with her hands and cried "very loud" for help, but he inserted his penis "down into the belly" and left it there for 10 minutes. During the act he strangled her with both hands so she could not breathe (R33-35).

When Robinson had finished, he left the room and Bresnahan grabbed Mari and pulled her into another room, threatened her with his

pistol and pointed it at her, threw her on the floor, and "inserted his penis into the belly", leaving it there for five minutes (R36-37). During the act she hit him with her hands and hollered (R41).

Both accused left the house at about 0430 hours, taking with them the bloody cloth which had been in Mari's mouth (R13,25,28,42). Mari was so excited she "did not say anything immediately" (R25).

A neighbor saw the soldiers enter the Voit house at about 0245 hours, and at about 0415 hours heard a girl screaming loudly, "Oh my God, oh my God", from the house (R28-29).

On the afternoon of 14 May, accused were brought to Mari's house and she identified them as the soldiers who had intercourse with her (R39, 43-45). She positively identified each at the trial (R32,40-41). During the same afternoon she was examined by a medical officer, who found no evidence of violence on her body, but found a tear of the hymenal ring, which bled on the admission of the examining finger, and which probably resulted from some type of penetration of the vaginal orifice within the preceding 24 hours. No sperm or gonorrheal organisms were found (R49-51).

Each accused signed a voluntary written statement on 15 May, which was limited by the law member as evidence against only the accused who made it (R46-48). In the statements, each accused admitted leaving the area of the 6th Convalescent Hospital, where they were patients, without permission, and going, with flashlights and pistols, to a home where they asked an old man for fresh eggs or a pistol. Each denied seeing any women at the house. Robinson admitted that he wore a military police brassard. They left the house and went to other places and towns and found some eggs. That afternoon they were arrested by the military police, who later brought a girl before them who said they looked like two soldiers who had raped her (R47;Pros.Ex1;R48;Pros.Ex.2).

4. After their rights as witnesses were explained to them, both accused elected to testify (R63-64,79).

Bresnahan testified that on 14 May he and Robinson left the hospital about midnight, avoided the guards, and finally knocked at the door of a house "quite a ways" from the hospital. An old man who resembled Johann Voit opened the door, and when witness asked for eggs or pistols, told them that he had none. Witness went upstairs and opened a door and called back that everything was all right, although he was unable to explain just why he did this. He did not know where Robinson was. He also looked in the kitchen for eggs, but found none. He did not exhibit a pistol which he carried, and saw nobody in the house except the old man. They left the house and went to another house and ate some fried eggs, then to a cafe and another house, at each of which they again ate eggs. They were arrested during the afternoon and taken to the house in Poxdorf where witness saw Mari for the first time, and she said accused looked "like the ones" (R64-78).

Robinson testified that he and Bresnahan left the hospital in search of eggs and went to the house where Bresnahan knocked at the door and called. Johann Voit came to the door and Bresnahan asked for eggs and pistols. Witness stopped inside the door of the house, but went no further, and showed Voit a military police brassard he wore on his arm, which he had found that day. Bresnahan went upstairs and said that everything was all right, and they "taken off right then". Witness saw no one except the old man, and never displayed his pistol at any time. His account of subsequent events substantially corroborates that of Bresnahan. He first saw Mari at the time she was asked to identify accused (R79-89).

For the defense, a German practical doctor testified that he examined Mari between 1200 and 1400 hours on 14 May, and found no new injury to the female organs and no bleeding. In his opinion, she had had sexual intercourse within the preceding 24 hours because she was "in great mental distress" and there were secretions present in the vagina (R56-63).

Mari's brother testified that he climbed out of a window when his sister was pulled from the bed, and hit in some bushes near the house. The room was dark and he did not see whether the white or the colored soldier pulled her from the bed. He could not describe the soldiers other than that the colored soldier had a "police band" on his arm, and each had a pistol (R53-56).

5. The evidence for the prosecution fairly shows that each accused had carnal knowledge of Mari Voit, without her consent, at the time and place alleged, and in the actual or constructive presence of her parents, by the use of physical force and violence and by putting her in fear of death or serious bodily injury. The circumstances shown by the evidence to have surrounded the commission of the acts of intercourse clearly warranted the court in finding each accused guilty of the crime of rape as charged (CM ETO 3740, Sanders, et al; CM ETO 3933, Ferguson, et al; CM ETO 9083, Berger and Bamford; CM ETO 15929, Anderson, et al; CM ETO 15679, Baker and Everett).

Both accused admitted being at the house and being armed with pistols at about the time the offenses were claimed to have been committed, but each denied seeing prosecutrix or any other woman while at the house. However, the testimony of prosecutrix relating to their acts is strongly corroborated by that of her parents, a neighbor, a medical officer, and even by witnesses for the defense. There being substantial evidence of the commission of the acts charged, whether accused in fact committed them was a question for the determination of the court, whose findings cannot be disturbed by the Board of Review (CM ETO 15274, Spencer, et al; CM ETO 14032, Andrews and Hathcock).

In view of the positive identification of accused by prosecutrix and other witnesses at the trial, it is clear that other evidence of her

identification of them prior to the trial, even if improper, did not prejudice accused's substantial rights (see CM ETO 6554, Hill; CM ETO 7209, Williams).

6. The charge sheets show that Bresnahan is 23 years eleven months of age and was inducted 20 April 1943 at Fort Devens, Massachusetts. Robinson is 22 years five months of age and was inducted 8 April 1943 at Camp Shelby, Mississippi. No prior service is shown as to either accused.

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.

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

B R Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 3

24 OCT 1945

CM ETO 17507

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	
Private First Class JOSEPH VOTODIAN (33883533), Company G, 304th Infantry, 76th Infantry Division.	Trial by GCM, convened at Erlangen, Germany, 17 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private First Class Joseph (NMI) Votodian, Company G, 304th Infantry Regiment, 76th Infantry Division, then attached to Company B, 503d Military Police Battalion, did, at Eussenheim, Germany, on or about 20th April 1945, with malice aforethought, willfully, deliberately, feloniously, and unlawfully and with premeditation kill one Heldegard Bernhard by shooting her with a carbine.

Specification 2: In that * * * did, at Eussenheim, Germany, on or about 20 April 1945, forcibly and feloniously against her will, have carnal knowledge of Frieda Muller.

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

Specification 1: In that * * * did, at Eussenheim, Germany, on or about 20 April 1945, with intent to commit a felony, viz, murder, commit an assault upon Maria Bernhard, by willfully and feloniously shooting at the said Maria Bernhard with a carbine.

Specification 2: In that * * * did, at Eussenheim, Germany, on or about 20 April 1945, with intent to commit a felony, viz, murder, commit an assault upon Hedwig Bernhard, by willfully and feloniously shooting at the said Hedwig Bernhard with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the votes were taken concurring, he was sentenced to be shot to death with musketry. 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, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the "U.S." Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that at about 2300 hours on 20 April 1945, accused went with a rifle in his hand to the home of August Muller in Eussenheim, Germany, and knocked and demanded admittance. After opening the door for him, Muller went with him into the kitchen and turned on the light, after which accused, who smelled slightly of liquor, fired his rifle out a window, under a table and into a corner (R6-9,11).

Accused, who was able to walk straight, then forced his way into a room occupied by Frau Heldegard Bernhard, deceased, and her two young daughters, Maria and Hedwig, and pulled them all into the kitchen (R8-9,13-14). Herr Muller went outside to get a stick, and accused locked the door behind him (R9). After asking questions they could not understand, accused pushed the daughters out of the kitchen, but when their mother screamed, "He wants to rape me", Maria returned and saw her mother tear herself from accused's grasp and run through the hall and up the stairs. Accused pursued her, and when he reached the second or third step, fired twice at her, holding the butt of his rifle near his hip. Frau Bernhard screamed and collapsed on the steps (R15-16,20). Maria, who was 14 years old, screamed "stop", whereupon accused pointed his rifle at her and her sister Hedwig, aged 13, who were standing at the foot of the steps, Maria jerked the rifle away and a shot "went wild into the floor" and evidently ricocheted and struck Hedwig on the

head and arm, causing bleeding. Both girls ran from the house and did not return that night (R13,16-17,18,20).

Frieda Muller, aged 31, was standing at the top of the stairs when accused shot Frau Bernhard, and pulled the latter upstairs and into her bedroom and laid her on the floor in front of Frieda's bed (R23,31). Shortly afterwards, accused entered the room and pulled Frieda from behind a door and on to her bed. She fought with him and he bit her on the thumb and tried to choke her. He jerked off her night shirt and brassiere, and was successful in penetrating her sexual organ with his penis "at least four of five times", but only "for a second or maybe a minute at a time". She never submitted to him entirely and constantly struggled and pushed him away and pulled his hair. Each time she extricated herself from his grasp, he grabbed her again. At one time he forced open her mouth and put his penis into it (R23-27).

Sometime after 2300 hours, Captain Ferdinand J. Kunkler, of accused's company, in response to information received by him, entered the room and found Frieda struggling with accused in bed. She screamed and shouted, was naked, had scratches and red marks on her neck and breast, and one or two of her fingers were bleeding (R27-29). Accused's shirt and trousers were unbuttoned (R30). Captain Kunkler ordered accused to stand in a corner of the room. Accused complied. He walked like a normal person (R29-30). Frau Bernhard, who lay groaning on the floor, was lifted to the bed and found to have wounds in her stomach and upper leg (R29). Accused stood still while he was searched by Captain Kunkler and then asked to sit down (R30). Captain Kunkler smelled no liquor on his breath (R32). Shortly afterwards, accused began to curse and shout, calling everyone "sons-of-bitches", denied shooting Frau Bernhard and demanded to be allowed to leave. His conversation "didn't make much sense". He was "kicking and thrashing around" and became so violent that he had to be held down, and was finally sent to the battalion stockade (R32,33-34). A carbine was found in the room with one round of ammunition in the magazine and one in the chamber (R30).

Upon examination of Frieda, a German doctor and an American medical officer found abrasions on her neck and breast, and below and to the side of her vagina, and an apparent bite on her thumb (R37-38,42). The medical officer found two hemorrhagic spots near the opening of the vagina, which were indicative of some penetration of the sexual organ, though not of the vagina (R43-44). No sperm was found (R38).

Frau Bernhard died from the bullet wounds the following night at a hospital (R35-36,44).

4. After his rights as a witness were explained to him, accused elected to make an unsworn statement through counsel (R50-51), which is as follows:

"The accused is at the present time 19 and a half years old, single and is not a high

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school graduate. He was inducted into the army in April 1944, and was sent overseas with the 76th Infantry Division in November of the same year and with that unit he went into action at Echlernach the first time which was the first of the year. He was wounded while serving as a rifle man in February of this year and was hospitalized for three weeks. He returned to his unit and remained with it until he was selected to be sent back for duty with the Third Army military police in April. During his service with the army he has not had charges preferred against him for any other offenses" (R51).

For the defense, a medical officer who arrived at the house shortly after the offenses were alleged to have been committed, testified that accused was struggling on the floor with a medical aid man, was profane and"disorientated", and talking about going to the aid of some of his friends he thought were in trouble. Another officer who was present stated that accused had been given some morphine (R45-46).

Accused's roommate testified that during the early evening of 20 April, accused was drinking "some kind of German whiskey", and was also still drinking at about 2230 hours. "He was pretty drunk" and"was slurring his words and he was falling all over" witness, but called witness by name and wanted the latter to drink from his bottle (R47-50).

5. a. Specification 1 of Charge I: The evidence shows without dispute that, at the time and place alleged, accused shot Frau Heldegard Bernhard two times with a rifle while she was fleeing from him up a flight of stairs in her own residence, apparently to thwart illegimate attempts on his part to engage in sexual intercourse with her. As a result of her wounds, she died the following day. The evidence fails to indicate any circumstances serving to mitigate, excuse or justify the act. Malice is presumed from accused's intentional and unlawful use of the deadly weapon in the manner shown by the evidence (CM ETO 1941, Battles; 1 Wharton's Criminal Law (12th Ed., 1932), sec.426, p. 655). The evidence fully supports the finding of guilty of murder (CM ETO 6159, Lewis; CM ETO 16397, Parent; MCM, 1928, par. 148a, pp. 162-164).

b. Specification 2 of Charge I: The testimony of Frieda Muller, prosecutrix, which is strongly corroborated by that of Captain Kunkler, a medical officer and a German doctor, convincingly shows that accused had carnal knowledge of her by force and without her consent, in spite of the most vigorous resistence by her, under circumstances clearly establishing his guilt of the crime of rape as charged (MCM, 1928, par. 148b, p. 165; CM ETO 611, Porter; CM ETO 1202, Ramsey et al; CM ETO 10103, Washington; CM ETO 15772, Arnold).

c. Specifications 1 and 2 of Charge II: The evidence is undisputed that after shooting the mother of Maria and Hedwig Bernhard, accused pointed his rifle toward them, and thereafter actually fired a shot which ricocheted and struck Hedwig on the arm and head. The pointing and firing of the rifle clearly constituted an assault in "reckless disregard of human life". If accused intended to murder either of the girls, he was guilty of assault with intent to murder each one (MCM, 1928, par. 149l, p. 179). The finding of a specific intent to murder was clearly warranted, and the evidence supports the findingof guilty of each specification (CM ETO 78, Watts; CM ETO 422, Green; CM ETO 2899, Reeves).

d. Whether accused was too intoxicated to have entertained the requisite intents required for commission of the offenses wherein proof of specific intent was a part of the prosecutions case was a question of fact for the determination of the court (CM ETO 1901, Mirandi; CM ETO 2007, Harris; CM ETO 9611, Prairie-chief). Although accused's actions during the night of 20 April might create some suspicion with respect to his mental responsibility, no real issue of insanity is raised by the evidence. Assuming such issue was raised, it was resolved against accused by the court's findings of guilty (CMETO 4194, Scott; CMETO 5747, Harrison,Jr). Moreover, papers accompanying the record of trial indicate that accused's mental responsibility was established by the findings of two separate boards of medical officers, one of which was convened before the trial and one subsequent to the trial, the latter having been convened pursuant to the recommendation of most of the personnel of the court after the trial. Although such procedure was irregular, it was intended for the benefit of accused and clearly did not prejudice his substantial rights at the trial.

6. The charge sheet shows that accused is 19 years five months of age and was inducted 12 April 1944. He had no prior service.

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

8. The penalty for both murder and rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567), for the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567), and upon

conviction of assault with intent to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II pars. 1b(4), 3b).

B K Sickel Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 24 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private First Class JOSEPH VOTODIAN (33883533), Company G, 304th Infantry, 76th Infantry Division, 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 the 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 17507. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17507).

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

(Sentence as commuted ordered executed. GCMO 577, USFET, 20 Nov 1945).

(203)

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

BOARD OF REVIEW No. 5

1 NOV 1945

CM ETO 17508

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	
Private TRENO C. MESA (39278015), Company A, 756th Tank Battalion	Trial by GCM, convened at Salzburg, Austria, 19 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW No. 5
HILL, JULIAN and BURNS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Treno C. Mesa, Company "A", 756th Tank Battalion, did, at Bischofswiesen, Germany, on or about 5 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Hildgard Von Brauchitsch.

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

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was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the orden directing execution of the sentence pursuant to Article of War 50½.

3. Accused, Private First Class Cameron, and Private Erickson, all of Company A, 756th Tank Battalion, and four other soldiers were, on the evening of 5 May 1945, at a German home in Bischofswiesen, Germany (R8,16,17,29,74). The house was occupied by Mrs Toni Boehringer, her daughter Gisela, and Miss Hildegard Von Brauchitsch (R8,29,43,48). The soldiers were drinking and about 2030 hours accused became boisterous, smashed glasses and bottles, and threatened all those present with his pistol which was subsequently taken from him by his companions (R9,18,53). They then pushed him out of the house and started down the path with him, but he warned them he had a knife and not to come near him and thereupon ran back into the house (R9). Here he followed Gisela upstairs and she jumped off the balcony to evade him as she was frightened (R30,44). He returned downstairs and commenced to molest Hildegard (R31). Cameron and Erickson, who remained behind at the request of Mrs Boehringer to protect the women, forcibly removed accused from the house. (R9,31).

Shortly thereafter he was heard outside calling for Hildegard and knocking on the doors and windows. He broke a window and Cameron, to prevent further damage, opened the door and let him in. He "barged" right in and told Erickson and Cameron not "to fool around with him" as he had a knife (R9,10,18). He commenced drinking again, got "fresh" with the women and continually said he wanted to sleep with Hildegard (R18,53). Finally accused pulled her into a room (R18,26). Erickson went to the room and tried to stop accused but left when he stated he had a knife and would knife him (R19). Accused grabbed Hildegard and threw her on a couch. She was frightened, pushed him, tried to get away, and shouted for Mrs Boehringer. When the latter came in to the room accused pushed her out and closed the door (R54). He then tore open Hildegard's jacket, and tore off her skirt, brassiere, two pairs of pants and a covering she was wearing for her menstrual period (R54, 56, 57, Pros.

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Exs.A-E). He held her by the shoulders and arms on the sofa with her legs up and her head down so that she could not move; and although she held her hands in front of her private parts, he tore them away, tore her legs apart and had intercourse with her, his penis entering her private parts (R54). She suffered "horrible" pains from her period and became "all messed up" with his semen on her legs (R55). She was "mad with fear" and shouted continually for Mrs Boehringer, who came to the room about six times and turned on the light, and each time accused pushed her out. She saw him at one time with his pants down lying on top of Hildegard who was dressed only on the upper part of her body (R33,36,54). The girl appeared quite desperate and was trembling (R32). Mrs Boehringer begged the soldiers to help but they were afraid to go in and attack accused as they thought he had a knife although they had never seen it (R12,13,33). After a period of from 20 minutes to an hour Hildegard got away from accused and ran into the adjoining room dressed only in her slip, jacket and blouse (R23,35,55). She was frightened and stood behind one of the other soldiers who tried to keep accused away from her, but he kept trying "to beat around" at her (R10,19,20,23, 55). He grabbed her and threw her on the floor but she jumped up and ran in another room and locked the door (R40, 55). He kicked the door with his feet and then went upstairs (R55). She came out of the room and Mrs Boehringer gave her a coat and they ran out into the field (R56). Although it was raining, they stayed in the woods with Gisela and another woman, who had left earlier in the evening, from two o'clock until six in the morning (R41,46,56). Hildegard was shocked and cried (R41). She did not talk to the other woman about what happened as she was too embarrassed and Mrs Boehringer had seen everything (R56,60).

4. Accused, after his rights had been fully explained to him, elected to make an unsworn statement (R73). On 5 May he and two friends went to a civilian house to see if they had any liquor and to see if they could sleep in the house. One of the three women present started to cry and shake but he told her they were not going to bother them, whereupon they then started to talk and brought out some liquor. He drank too much, broke some glasses and tried to fight with his friends. He did not remember touching the prosecutrix. All he knew was that he fell asleep and when he woke up next morning he was told he was charged with rape. He had not done anything like this since he had been in the army, nor had he ever been court-martialled. He denied he was guilty of raping the prosecutrix (R73,74).

The defense counsel read into the unsworn statement, part of a psychiatric report of 10 May relating to accused to the effect that it was apparent from the soldier's account that he had been drinking to excess on the evening

specified, and that his denial of any memory of intercourse was not inconsistant with his account of his activities on specified date (R74). Also the summary of testimony of the investigating officer was read into the record. It stated that accused was at the house where the alleged crime was committed on 5 May 1945; that he was alone with the victim, but that no facts were shown as to the length of time he was with her or that anyone actually saw him in the act of intercourse. It stated further that accused denied having intercourse with the victim (R74,75).

Captain Frank D. Gwynn, Medical Corps, testified for the defense that he went to the house on 6 May and saw the prosecutrix (R69). He did not ask her any questions; and although she was told through an interpretor that he was a medical officer and would examine her if she so desired, she neither requested nor rejected an examination. She was asked if she had any bruises and she stated she did not (R69,70).

5. "Rape is the unlawful carnal knowledge of a woman by force and without 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). There was evidence of the penetration in the clear and positive testimony of the prosecutrix which was corroborated by the testimony of Mrs Boehringer that on entering the room she saw accused lying on top of her while neither one of them had any clothes on the lower part of their bodies. There was sufficient evidence of force and lack of consent. Accused pushed the prosecutrix into a room, and when one of his companions tried to restrain him from molesting her, he threatened to kill him. While they were alone accused grabbed her, threw her on a couch, and tore her clothes off. He held her by the shoulder in such a position that she could not move, and forced her legs apart. She was "mad with fear" and kept shouting for help. Although the other soldiers were begged to go to her aid, they were afraid to do so. She tried to get away from him and held her hands in front of her private parts but he forced them aside. The record does not show the relative size of accused and the prosecutrix. They were both before the court. The court was able to determine from the appearance of the two whether there was, by reason of disparity of size and strength, grounds for overwhelming fear so as to excuse a more sturdy resistance (CM ETO 12994, Keys).

6. The charge sheet shows that accused is 22 years and six months of age, and was inducted 20 January 1943 as Los Angeles, California. He had no prior service.

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

record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

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

Judge Advocate

Judge Advocate

Judge Advocate

(208)

1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private TRENO C. MESA (39278015), Company "A", 756th Tank Battalion, APO 3, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded 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 17508. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17508).

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

IN 3 NOV 1945 AG M&R

(Sentence as commuted ordered executed. GCMO 591, USFET, 26 Nov 1945).

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TS-36

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

BOARD OF REVIEW NO. 5

16 NOV 1945

CM ETO 17521

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATION ZONE, EUROPEAN THEATER OF OPERATIONS.
v	
Private HAROLD BELL, (32228342), Detachment 69, 3rd Reinforcement Depot, Ground Force Reinforcement Command	Trial by GCM, convened at Paris, France, 12 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harold Bell, Detachment 69, 3rd Replacement Depot, Ground Force Reinforcement Command, European Theater of Operations, United States Army, did, while in route from 86th Replacement Battalion, Ground Force Reinforcement Command, European Theater of Operations, United States Army, to 3rd Replacement Depot, Ground Force Reinforcement Command, European Theater of Operations, United States Army, on or about 29 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 18 April 1945.

Upon arraignment accused entered no plea to the Charge and Specification but, at the close of all the testimony and just prior to resting his case, he pleaded not guilty to the Charge and Specification but by appropriate exceptions and substitutions pleaded guilty to absence without leave in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority the Commanding General, Seine Section, Communication Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48, recommending commutation of the sentence pursuant to Article of War 50. The confirming authority, the Commanding General United States Forces, European Theater confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and ordered the execution of the sentence withheld pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that after accused, an American soldier (R9), had been relieved on 25 August 1944 from Detachment 86, Ground Force Reinforcement Command, to which he had been attached unassigned, at APO 153, United States Army, and assigned to the 3rd Replacement Depot, pursuant to orders to that effect issued on 15 August 1944, he did not join, and was on 29 August 1944 carried absent without leave by, Casual Detachment 69, Ground Force Reinforcement Command, then stationed at Mortain, France, (R67, Pros. Ex. A, B, C).

On 18 April 1945, accused was apprehended in Paris, France, by members of the military police. At the time he was without his "dog tags" and was dressed in civilian clothes including black slippers. Accused did, however, give his name and say that he was an American soldier. Initially, accused had "approached" the military police and had given information concerning a German agent (R8,9).

During accused's absence and at Paris, France in December 1944, accused asked one of prosecution's witnesses, General Prisoner, Ciullo, to work for him as he (accused) was in a little business (R10). This business concerned "black market" activities in obtaining and selling gasoline (R11,12). This evidence was received over accused's objection (R11,12). A truck was obtained on Christmas Day 1944 (R12,13) and with it accused and witness and another, attempted to obtain gasoline but failed (R12,13). A few days later accused, Ciullo and one Suggs went to Rouen and obtained 25 cans of Army gasoline

which was sold for 1000 francs a can and the money divided between them (R13,14). All this evidence as to "black market" activities was received over accused's objection (R11-14).

Jacqueline Guignez was called as a witness against accused (R16). Objection to her testimony against accused was made on the ground she was his common law wife and incompetent to testify (R17). During the preliminary examination (R18-21) accused, after his rights were fully explained to him (R17,18), offered evidence that he and one Jacqueline Guignez, had a common law status of man and wife. They lived together 8 months, in 3 different apartments and registered as man and wife and the woman said on several octasions they were man and wife (R18,19). In fact they were not married (R19), and the woman never assumed the name of "Bell" "because it would be noticed" if a French girl went under the name of "Bell" (R19). Accused stated he wanted to marry the woman (R19). The witness Ciullo also testified that accused stated he wanted to marry the woman (R20), that accused cohabited with her as man and wife (R20) and "as man and mistress" (R21). Upon this testimony the court ruled no common law marriage existed (R22) and permitted Jacqueline Guignez to testify against accused (R22).

Jacqueline Guignez testified she always considered herself and accused as man and wife (R24). She had never seen accused with more than 5000 or 6000 francs at any time (R23). Accused always wanted to return to the Army but his comrades prevented it (R24). He had expressed a desire to return to his organization 3 or 4 days before he was arrested, (R24,25). At the time accused thus expressed himself, he was wearing civilian clothes due to his uniform being in the laundry (R24,25). Witness had obtained the civilian clothes for him (R23). Accused at all times while he was living with Jacqueline Guignez wore his uniform (R26).

4. Accused's rights were again explained to him (R27,28) and he elected to make an unsworn statement. He told his girl that he was going back to his organization so they could be married, and that when he started she put her arms around his neck and cried. He loved the girl and didn't know what to do (R28). He admitted he was picked up in civilian clothes but explained that it was because his uniform was being washed (R28). He had worn civilian clothes 3 or 4 times previously (R28). Accused expressed a desire for assignment to a combat outfit (R29).

5. On accused's plea of guilty to absence without leave for a period extending from about 29 August 1944 to 18 April 1945, over seven and a half months, and in the absence of satisfactory explanation the finding of guilty of desertion by the court was justified. "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent (MCM, 1928, par 130a, p. 143). The further facts: That accused was in Paris where he could have returned easily to military control and did not do so; that he possessed and wore civilian clothes and

failed to wear his identification tags; that he wrongfully sold Army gasoline and used Army vehicles during his absence, and that this all occurred in an active theater of war, were circumstances cumulative in establishing the alleged intent to desert (CM ETO 952, Mosser; CM ETO 1036, Harris; CM ETO 1577, Le Van; CM ETO, Green).

6. It was perfectly proper for the court to receive evidence of accused's so-called "blackmarket" activities and his profits therefrom since these facts bear directly on the question of the intent which motivated him in absenting himself (CM ETO 1577, Le Van).

The defense objected to the Guignez woman testifying against accused on the ground that she was his common law wife. The validity of this marriage rested upon a contract allegedly made between accused and this woman in Paris, France. The law of France does not recognize such a contract during the life of either party (Amos and Walton, Introduction to French Law, sec. 24, p. 59). Accordingly this witness was not the wife of accused and her testimony was competent.

7. The charge sheet shows that accused is 28 years of age, and that he was inducted 14 March 1942 at Fort Jay, New York. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

_____ Judge Advocate

(DETACHED SERVICE) _____ Judge Advocate

_____ Judge Advocate

(213)

1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater 16 NOV 1945 TO: Commanding General, United States Forces, European Theater, (Main) APO 757, U.S. Army

1. In the case of Private HAROLD BELL, (32228342), Detachment 69, 3rd Replacement Depot, Ground Force Reinforcement 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, as commuted, which holding is hereby approved. Under the provision 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 17521. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17521).

OUT 17 NOV 1945

IN 13 NOV 1945

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

Sentence as commuted ordered executed. GCMO 595, USFET, 26 Nov 1945).

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

BOARD OF REVIEW NO. 5

2 JAN 1946

CM ETO 17522

UNITED STATES	)	XXII CORPS
	)	
v.	)	Trial by GCM, convened at Cologne, Germany, 27 May 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade EUGENE R. LEWIS (32191762), and Private BEN TOMLIN (38442131), both of 3496th Quartermaster Truck Company	)	

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

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

2. Accused were tried together with the consent of each, upon the following charges and specifications:

Lewis

CHARGE: Violation of the 92nd Article of War.

Specification: In that Tec 5 Eugene R. Lewis, 3496th Quartermaster Truck Company, APO 339, U. S. Army, did, at Rhein Province Rheydt, Germany, on or about 26 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Johanna Schlosser.

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Tomlin

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt Ben Tomlin, 3496th Quartermaster Truck Company, APO 339, U. S. Army, did, at Rhein Province, Rheydt, Germany on or about 26 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Johanna Schlosser.

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

3. Evidence for the prosecution showed that Fraulein Maria Johanna Schlosser, 31 years of age, and sixteen other people, lived on a farm at 230 Urfstrasse, Rheydt, Germany, during March 1945 (R7,13,17,19). On 26 March at 2300 hours she retired for the night in her room on the second floor, which she occupied alone (R7). About 2400 hours she was awakened when the door opened, and she saw a negro, wearing an American uniform, standing with a flashlight in the doorway. She jumped up and went to the door and called out to Mr. Breuer, who occupied the next room (R8,14). The flashlight went on and off. She saw two negro soldiers. One of them hit her in the face and she fell to the floor. One of the soldiers attempted to pull off her slip and she tried to defend herself by pushing him away. She was too frightened to scream. They then put something over her mouth, pulled up her slip and pushed her back towards the couch. While one pointed his gun at her, the other pulled off her bloomers, took off his pants and laid on top of her, entering her vagina with his privates for about one or two minutes (R8,9). During the act she heard someone come up the stairs, and, thinking it was her father, she shouted "don't come up they will shoot you" (R9). When the first soldier had finished, the second one took off his pants, "put" her on the floor, and penetrated her while his companion stood looking on with his rifle. She pushed them away as much as she could but did not say anything as she was too scared (R9). When the second one had finished she arose. Footsteps were heard on the stairs and two more negroes entered. The four men talked in a quiet tone and then the two who had already had intercourse left the room (R9). Shortly thereafter one of the

two who remained took off his pants, got on top of her and entered her (R9). She did not cry out. When this act was completed, the other negro, who had been standing looking on with a rifle in his hand, put her on the couch and penetrated her (R10). The soldier remained for about ten minutes during which time one sat on the couch and the other smoked a cigarette. When they left she lighted a kerosene lamp and went out on the stairs and watched them go as she feared they would enter the room where her parents slept (R10). She then went to the room occupied by Mr. and Mrs. Breuer and spent the night (R10). This was the first time she had ever had sexual intercourse (R11).

Mrs. Breuer testified that she and her husband occupied the room next to Maria (R14). About 0100 on the night in question she heard somebody screaming and chairs being moved about. This did not continue long and she did not hear Maria say anything. Neither she nor her husband went to see what caused the trouble, as they were scared (R15). About 0200 the prosecutrix came to their room. She was crying, one of her earrings was pulled off and she was blue around the face near the neck (R15). A Russian girl lived at the house, and two American soldiers had been to call on her four different times (R16).

The following morning the prosecutrix reported the matter to the Military Government officials. The soldiers left a scarf in her room, two pieces of chocolate, a piece of soap, and a roll of drops. She did not eat any of the candy on the night in question but ate part of it the following morning on her way back from reporting the matter (R10,11).

A stipulation, agreed to by the prosecution, defense counsel and accused, concerning an examination of Maria Schlosser by Lieutenant Colonel Mervin J. Rumold was admitted in evidence (R23). The examination disclosed a bruised area measuring 4x6 cm on the right side of the face near the ear and another small area near the mouth. There was a scratch on the left ear and a slight abrasion on the left knee. The edge of the hymen had "been evidently recently torn" as it appeared swollen and bled easily during the examination. (Pros. Ex. C) An agent of the Criminal Investigation Division, who saw her on 29 March, noted that the right side of her face was swollen and was black and blue, and that her left ear lobe was torn (R19,20).

Pre-trial statements of each accused were identified and admitted in evidence (R20,21,22,23). In his statement Tomlin said that he moved in March 1945 with his organization, the 3496th Quartermaster Truck Company, to Rheydt, Germany. One night in March about 2400 hours he and another soldier entered a large house through an open window near the school where they were billeted. They went upstairs and into a room which was unlocked. Both had carbines slung over their shoulders and one of them had a flashlight. In the room they noticed a woman sleeping on the couch and Tomlin, who had his hand on his carbine as he did not know what to expect, removed his hand from the weapon and left it on his shoulder. The woman seemed frightened and jumped up. They told her not to be afraid and Tomlin started to play with her nipples. He asked her to have intercourse. She shrugged her shoulders; but after he gave her two candy bars, she motioned him to

the couch, pulled down her pants and spread her legs. He had intercourse with her during which she hugged and kissed him and appeared to enjoy the act. When he had finished the soldier with him gave her candy and cigarettes and had sexual intercourse with her. When they had finished the door opened and two soldiers entered. One of them carried a carbine and the other a pistol. Tomlin and his companion then left. They took two bicycles which they found at the rear of the house. Neither he or the soldier with him used any force in order to have intercourse, and they did not threaten her with a weapon. He did not hit the woman and did not know whether or not the soldier with him had done so (Pros. Ex. B).

In his statement Lewis said he arrived at Rheydt, Germany, about the 25 March 1945 with his unit, the 3496th Quartermaster Truck Company. That night at about 2400 hours he and Taylor, another soldier in his organization, went for a walk on the street facing the school where they were billeted. They saw a light in a house and entered. They went to an upstairs room and found Tomlin and another soldier. They asked what had taken place and Tomlin said that he had given the girl some chocolate and cigarettes for "a sexual intercourse". Tomlin and his companion left. Lewis gave the girl, who was sitting by the table eating chocolate, some cigarettes and candy and asked her if she wanted to "Zig Zig". She said "yah", went to the couch and motioned him to come over. She raised her skirt, grabbed him, took his penis and placed it in her sexual organ. After he had completed the act of sexual intercourse, Taylor had intercourse with her. At no time did either one of them use force of any kind on the girl. He did not know if Tomlin and the other soldier with him used any force (Pros. Ex. A).

4. Accused Tomlin, after his rights were explained to him, elected to make a sworn statement (R23). His testimony was substantially as given in his pre-trial statement. Further facts elicited were that he went to the house on 26 March as he had been told by a soldier that if he went there with cigarettes and candy he could have sexual intercourse (R23). The woman did not scream, or resist him (R24). He never pointed his carbine at her but kept it over his shoulder except during the act of intercourse (R26). He never hit the woman and did not know how her face became bruised (R24,25). He had not been drinking on the evening in question (R27).

Accused Lewis, after his rights were explained to him, elected to make a sworn statement (R27). His testimony was substantially as given in his pre-trial statement. It disclosed the following additional facts. He went to the house on 26 March as he had been told that it was possible to have intercourse with someone there if he took chocolate and cigarettes (R28). The girl did not appear frightened and she did not scream or resist in any way. He did not hit the girl (R28,29). He did not have any weapon with him on the night in question as he had left it in his truck. Although they were required to carry weapons at the time his division was not strict about enforcing the regulation (R29,30).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b, p. 165). Both accused testified on the stand and admitted in their pre-trial statements to having sexual intercourse with a woman under such circumstances that, when considered with the other evidence in the case, clearly indicates that the

woman was Maria Johanna Schlosser. However, both deny that the act was accomplished by force and against the will of the woman but rather that she consented and cooperated.

Tomlin

The evidence introduced against accused Tomlin showed that he and another soldier entered the prosecutrix's room around midnight while she was asleep. She was frightened and jumped up and called for the man who occupied the adjoining room. One of the soldiers hit her on the face and she fell to the floor. This fact was corroborated by the evidence of Mrs. Breuer, the agent of the Criminal Investigation Division, and the medical officer who examined her. They all testified that her face was black and blue and her ear torn. Accused Tomlin and his companion then pulled up her slip, pulled her bloomers off and while one of them pointed his gun at her the other had sexual intercourse. During the act she thought her father was coming and shouted for him not to enter as she feared they would shoot him. When the first soldier had finished the second one had sexual intercourse with her while the other stood by with his rifle. She pushed them away as much as she could but was too scared to say anything. Accused Tomlin admitted that he and his companion were both armed and that he had his hand on his carbine when he entered. The prosecutrix appeared frightened. He denied that either of them used force, but that after giving her candy, she consented to the acts of intercourse.

The total evidence in the case therefore created an issue of fact for resolution by the court. Its findings indicate its conclusion that there was not only an absence of consent, but also that the submission of the victim to the carnal connection with Tomlin was the result of fear of death or great bodily harm.

Inasmuch as these findings are supported by substantial evidence they will not be disturbed by the Board of Review (CM ETO 11267, Fedico and authorities therein cited; CM ETO 12662, McDonald). The conclusion is that substantial, competent evidence established Tomlin's guilt of the crime of rape (CM ETO 4444, Hudson et al; CM ETO 7869, Adams and Harris; CM ETO 8542, Myles; CM ETO 12869, DeWar; CM ETO 14587, Teachey)

The following comment is pertinent:

> "The case is of familiar pattern to the Board of Review which has consistently asserted in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it. Inasmuch as there was substantial evidence to support the findings, the Board of Review will accept them on appellate review - - -" (CM ETO 8837, Wilson).

Lewis

6. The evidence against accused Lewis showed that he and another

soldier arrived after the two acts of intercourse referred to above had been completed. The four soldiers talked quitely for a time and then the two who had first arrived left. Shortly thereafter one of the soldiers took off his pants and had intercourse with the prosecutrix while the other stood looking on with a rifle in his hand. Thereafter the fourth soldier had intercourse with her. She did not cry out. There is no evidence that she resisted, that any force was used or that the weapon was at any time displayed in a threatening manner. It is probable that the prosecutrix did not subjectively consent to these two acts of intercourse but submitted because she felt, as a result of the ordeal she had just been through with the first two soldiers, resistance would be useless and might result in death or great bodily harm. However, it does not appear that she indicated by word or act that she did not consent to the act of intercourse. In addition, there is nothing in the evidence to show that accused knew or was put on notice that she had just been subjected to rape by two other soldiers and that he was the legatee of the force employed by them.

The situation thus disclosed by the evidence is controlled by well established legal principles:

> "It is submitted that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance. - - - [it follows that] the guilt of the accused must depend upon the circumstances as they appear to him (1 Wharton's Criminal Law (12th Ed., 1932), n.9, pp. 943-944, citing Roscoe, Crim. Ev. 1878 Ed., p. 648; Hunter v. State (1892) 29 Fla. 486, 10 So, 730; Walton v. State (1890), 29 Tex. App. 163, 15 SW 646).

As was stated in CM ETO 9301, Flackman:

> "Moreover, at no time did she testify that he used his pistol in a threatening manner. Neither did he strike or lay hands on her. Her conduct was not such as to lead accused to believe that their intercourse was without her reluctant consent, or that such consent was induced by fear of death or other great bodily harm, with neither of which had he either expressly or impliedly threatened her. Admitting that accused's status as a member of the conquering forces added, to his knowledge, some degree of persuasive force to his unconscionable demand, such knowledge and demand alone will not support the inference that accused intended or threatened to use ultimate force if necessary to achieve his purpose. If this were the case, every successful solicitation of a German woman to

> sexual intercourse by an American soldier (certainly by any armed American soldier) would lay him liable - depending on the subsequent disposition of the woman to assert she consented through fear - to prosecution for rape. Moreover, in rape cases, to negative consent in the absence of resistance, the woman's fear, induced by conduct on the part of accused reasonably calculated to inspire it, must be of death or great bodily harm."

The Board of Review is therefore of the opinion that any lack of consent was not apparent to the accused and that the evidence is legally insufficient to support the court's findings of guilty as to the accused Lewis (CM ETO 9301, Flackman; CM ETO 10700, Smalls; CM ETO 10446, Ward and Sharer; CM ETO 13778, Nordike).

7. The charge sheets show that accused Lewis is 24 years and nine months of age and was inducted 5 January 1942 at Camp Upton, New York and that accused Tomlin is 25 years and four months of age and was inducted 13 August 1943 at Fort Bliss, Texas. No prior service is shown as to either.

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

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

John Townsend, Judge Advocate.

Jack B. Wilkerson, Judge Advocate.

(TEMPORARY DUTY), Judge Advocate.

(222)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 2 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Technician Fifth Grade EUGENE R. LEWIS (32191762), and Private BEN TOMLIN (38442131), both of 3496th 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 commuted as to the accused Tomlin, but legally insufficient to support the findings of guilty and the sentence as commuted as to the accused Lewis, 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 17522. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17522).

IN 5 JAN. 1946 AG ENI

OUT 2 JAN 1946 BOTJAG-ET

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

(As to accused Tomlin, sentence as commuted ordered executed. GCMO 19, USFET, 18 Jan 1946).
(As to accused Lewis, findings and sentence vacated. GCMO 37, USFET, 2 Feb 1946).

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

BOARD OF REVIEW NO. 3

17 OCT 1945

CM ETO 17524

U N I T E D S T A T E S	)	7TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at APO 257, U. S. Army, 28 June 1945. Sentence: Dismissal and total forfeitures.
First Lieutenant WILBUR P. TANNER (O-1298785), Headquarters Company, 23rd Armored Infantry Battalion	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that First Lieutenant Wilbur P. Tanner, Headquarters Company Twenty-Third Armored Infantry Battalion, was, at Damshagen, Germany, on or about 5 May 1945, found drunk while on duty as Company Maintenance Officer.

He pleaded not guilty to Specifications 1 and 2, guilty to Specification 3, and not guilty to the Charge but guilty of a violation of the 96th Article

of War. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found not guilty of Specifications 1 and 2, and guilty of Specification 3 and the Charge. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed from the service, 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 (5) years. The reviewing authority, the Commanding General, 7th Armored Division, approved the sentence but recommended that if it be confirmed, those portions thereof relating to confinement at hard labor and total forfeitures be remitted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but remitted so much thereof as provides for confinement at hard labor for five (5) years, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution with respect to Specification 3 shows that on 5 May 1945, accused was maintenance officer of his company, which was located at Damshagen, Germany. He had only his normal duties to perform and the company was not in contact with the enemy at that time (R9).

The company commander testified that accused was drinking during the earlier part of the afternoon of 5 May, and at about 1530 hours he was drunk. He did not perform his duties, and after supper was "in a very deep sleep" in the maintenance billets (R9).

Technician Fifth Grade William J. Strannicus testified that he saw accused at 1000 and 1400 hours on 5 May. Accused was "staggering around" and was, in witness' opinion, drunk (R20-21).

Technician Fifth Grade Joseph A. Livingston saw accused about 1500 hours at which time accused could not walk steady and was unable to speak clearly or distinctly, and in witness' opinion was drunk. At 1615 hours he was still drunk (R16-17).

Technician Fourth Grade James R. Whalen testified that at about 1500 hours accused did not stagger and his conversation was clear, but witness knew he had been drinking because his eyes were glazed and his "face indicated it". Accused was also tired because they had been travelling for two days and nights. "He had been drinking and I think he was just run out". He was not capable of satisfactorily performing his job as maintenance officer (R18-19).

Private First Class Timothy E. Crowley saw accused "washing" about

1600 hours, at which time he appeared to be sober (R14).

4. After his rights as a witness were explained to him, accused elected to remain silent, and no evidence was offered in his behalf (R21).

5. The weight of the testimony for the prosecution, together with accused's plea of guilty to Specification 3, clearly establishes the fact that he was drunk while on duty as maintenance officer of his company during the afternoon of 5 May 1945, as alleged. "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). The evidence clearly supports the findings of guilty of the Charge (CM ETO 1065, Stratton; CM ETO 1267, Bailes; CM ETO 5453, Day).

6. The charge sheet shows that accused is 29 years of age and was commissioned 4 November 1942 at Fort Benning, Georgia.

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

8. A sentence of dismissal is mandatory upon conviction of an offense in violation of Article of War 85 when committed by an officer during time of war.

B R S Deeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

(226)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant WILBUR R. TANNER (O-1298785), Headquarters Company, 23rd Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 17524. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17524).

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

(Sentence ordered executed. GCMO 534, USFET, 3 Nov 1945).

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

BOARD OF REVIEW No. 5

CM ETO 17539

U N I T E D S T A T E S	)	XX CORPS
	)	
v	)	Trial by GCM, convened at Starnberg,
	)	Bavaria, Germany, 3 July 1945. Sentence:
Private First Class WALTER	)	Confinement at hard labor for six months
PARSONS (35447056), Company A,	)	(suspended) and total forfeitures of $33.33
2826th Engineer Combat	)	per month for six months.
Battalion	)	
	)	

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

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

2. The accused was tried upon the following Chargeand Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Walter Parsons did at, Vols, Austria, on or about 12 June 1945, feloniously, and unlawfully kill Filomena Goldberger by shooting her in the abdomen with a pistol.

He pleaded not guilty 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 for three years. The reviewing

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authority approved only so much of the finding of guilty as involved a finding of guilty of battery upon an unknown female in violation of Article of War 96, and only so much of the sentence as provided for confinement at hard labor for six months and forfeiture of $33.33 per month for six months. He ordered the sentence executed but suspended the execution of the portion thereof pertaining to confinement.

The proceedings were published in General Court-Martial Orders No. 91, Headquarters XX Corps, APO 340, U. S Army 2 October 1945.

3. For the purpose of this a complete summary of the evidence is unnecessary. Briefly, it consisted of a showing that accused , in a drunken condition, became engaged in a fight at a dance and during the encounter fired a pistol, striking an unidentified woman.

The question presented for consideration is whether the approved findings constitute a fatal variance from the original Charge and Specification. Accused was charged with the unlawful killing of a named individual, and by the action of the reviewing authority he is found guilty of a battery upon an unknown person. By his action the reviewing authority found accused not guilty of a material allegation of the offense as originally charged and the variance is fatal. The Board of Review so held where a soldier was charged with an assault upon "Amos Smith private, Company A, 20th Train Headquarters and Military Police" and the court by exception and substitutions found him guilty of assaulting "a military policeman"

> "In other words, by exception and substitution, the court acquitted the accused of assaulting Amos Smith and found him guilty of assaulting an unknown man. This the court had no legal right to do. The offense with which accused was charged was an assault on Amos Smith with intent to murder him. Under that charge the accused cannot be convicted of assaulting an unknown military policeman. It is fundamental that the court may convict an accused only of the offense of which he is charged or of a lesser included offense. The crime of assaulting an unknown military policeman with intent to do bodily harm is a different offense from that of assaulting * * * Smith* * * and it is not a less included offense". (CM 128088, Lee, Dig. Ops. JAG, 1912-1940, sec. 454 (6), p. 348).

This rule is similarly established in larceny cases where the findings show ownership of the property to be in a different person than the individual named in the Specification (CM ETO 8555, Kenny and Staver, and authorities cited therein), and in sodomy cases where the accused was charged with sodomy by having carnal connection with a named individual and the reviewing authority approved findings of guilty of carnal connection with a different person or a person unknown (CM 191369, Seluskey, 1 BR. 245; CM 188432, Soderquist et al

1 BR 119; CM 204461, Fisher 8 BR 11) Dig. Op. JAG 1912-40, sec 451 (65), p. 333).

4. For the foregoing reason, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as approved and the sentence.

John Bownhill Judge Advocate

Anthony Julian Judge Advocate

John A. Burns Judge Advocate

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

3 NOV 1945

BOARD OF REVIEW NO. 2

CM ETO 17541

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM convened at Ingolstadt, Germany, 6 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private DEWEY L. FOX, 33531744, Company "A", 39th Infantry	)	
	)	

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

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

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

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

Specification: In that Private Dewey L. Fox, Company "A" 39th Infantry, did, at Stolberg, Kreis Harz, Sachsen, Germany, on or about 14 April 1945, forcibly and feloniously, against her will have carnal knowledge of Elsbeth Muller, a German civilian residing in Stolberg, Kreis Harz, Sachsen, Germany.

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

Specification: In that * * * did, at Stolberg, Kreis Harz, Sachsen, Germany, on or about 14 April 1945, wrongfully fail to obey the standing orders of the Commanding General 9th Infantry Division, found in letter, 250.1, GNMEQ, Headquarters 9th Infantry Division, subject: Fraternization, dated 23 March 1945, not to fraternize with the inhabitants of Germany, in that he did fraternize with inhabitants of Germany.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½. This is a companion case to CM ETO 17542, Cox.

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

On 14 April 1945 accused was a sergeant and a squad leader of Company "A", 39th Infantry (R8). His squad was performing outpost duties in and about a civilian house near the Stolberg Castle in Stolberg, Germany (R9), occupied by a Mrs. Elsbeth Muller and her two children. Two other adult females were also present (R11,23). During the noon meal time, the soldiers and the civilians gathered in the kitchen and everybody was talking, laughing and joking. Mrs. Muller heated the soldiers rations for them (R22). About 4:30 P. M. the outpost was withdrawn and all of the soldiers left the house with the exception of accused and a Private Cox. Accused was armed with an M-1 rifle. Cox had a pistol (R11,12). After the squad had gone, accused grasped and held one of the adult females and kissed her. She then "ran out" (R23), and ran to her home (R28). This female had come over to Mrs. Muller's house several times during the day because Mrs. Muller was afraid of the soldiers (R26).

Mrs. Muller testified that after the squad of soldiers had gone Fox (accused) and Cox returned to the house and "pushed and pulled" her from her kitchen into the living room and there accused threw her on the couch, pulled up her skirt and "tore up" her pants. Cox sat by holding one of the children. She screamed and begged and pushed accused away. The child also screamed and Cox made a motion with his hand of pointing at his pistol and then at the child's mouth. She was afraid that "they would shoot my child" (R36-37). Fox got on top of her and motioned her to open his trousers. She refused (R37). He then "put his penis into my vagina". She could hardly move. Accused "was finished very quickly" and got up. Cox then got on top of her (R38) loosened her garters straps, pulled her pants further down her leg and inserted his penis in her vagina while accused sat by with the screaming child in his lap. She continued to scream and cry aloud while this was happening. After Cox had finished, as quick as a flash, the accused was on her again and inserted his penis. She was then too weak to resist much (R40). She feared for the safety of her child and told "them" to shoot her with the child as she would rather have been shot than raped. They did not understand her. Within two minutes after accused got on her the second time, the door opened and the Princess of Stolberg and an American officer entered. Accused jumped up (R41,42). She did not scratch, bite, kick, or hit the accused because she was afraid that he would shoot her son or shoot her (R46).

The American officer testified that when he entered the Muller

house accused was standing in the doorway of the room. There was nothing unusual about his appearance (R52). Cox, Mrs. Muller and a child were in the room. Mrs. Muller was very emotionally upset, crying, and weeping and moaning. He asked accused what was going on there and accused said there was no trouble. Mrs. Muller told the Princess, who also came in with the officer, that soldiers had attacked her twice and was about to attack her the third time when they arrived (R49-50). The officer did not realize then that she was accusing Cox and the accused (R50-53). Cox was drunk and surly and had walked out when he questioned the accused. As he and the Princess approached within 15 feet of the house they heard Mrs. Muller's cries of distress consisting of moaning and wailing (R51,56). She was crying, nervous and hysterical. Her hair was mussed up and her clothing disarranged and wrinkled (R51,58). The Princess stated that as she approached the house, she heard "groaning and moaning". She entered the room about a half a minute after the officer (R56). At that time she saw accused standing in the door that leads out to the garden (R58,59). Mrs. Muller was sobbing, her hair was down, her pants and stockings were hanging down and "she was not quite dressed". Mrs. Muller immediately said to witness, "They have been violating me three times". The prosecution asked the court to take judicial notice of the letter on fraternization, Headquarters Ninth Infantry Division, dated 23 March 1945, which was the letter referred to in the Specification, Charge II (R63).

4. In defense four members of accused's squad were called as witnesses and testified that they were present at the Muller home from time to time during the day of 14 April 1945 until about 4:30 p.m., that accused was not armed with a pistol as he had loaned his pistol to another soldier (R64,66), that nothing unusual occurred in the Muller home while the squad was stationed there (R67,72,75), and that Mrs. Muller and her family and guests seemed to enjoy their presence and were not frightened (R67,72,75). An enlisted man who accompanied Captain Clark to the house saw accused as he himself entered the house (R78). Accused appeared to be calm and normal in every respect. He was fully clothed and sober (R79). Mrs. Muller was crying. Her pants were on the couch and she put them on in "a couple of seconds flat" (R80).

The accused having been advised concerning his rights as a witness, elected to testify in his own behalf. He admitted that he "started messing" with Mrs. Muller in the kitchen after he returned to the house to get the squad to return to the command post (R84). He played with her breasts and legs (R89). Mrs. Muller then walked to the living room and sat down on the couch. He followed her and sat down beside her (R84). He fondled her for awhile (R94). "A few minutes later she laid down and I screwed her". He then got off her and started to check his equipment when Captain Clark arrived and told him that he had a report that something was "going on" and had come to investigate (R85). He at no time threatened the woman or the child. Mrs. Muller did not resist but cooperated (R87), and removed her pants (R84). She did not start to cry until he had finished and gone into the kitchen (R88). Earlier in the day he had intercourse with one of the female adults in the house on the same couch (R92).

Cox was not in the room when he had intercourse with Mrs. Muller (R94,99), but entered the room after accused had returned to the kitchen (R100). About 5 minutes elapsed from the time he got up from the couch until Captain Clark arrived (R102).

5. The accused has been found guilty of the crime of rape which is defined as the unlawful carnal knowledge of a woman by force and without consent. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM 1928,par.148b,p.165).

The evidence for the prosecution and the admission of the accused clearly establishes that the accused had "carnal knowledge" of the female named in the Specification at the time and place alleged therein. She testified that it was without her consent. Sufficient force was used to effect a penetration. The only question deserving consideration is whether there was sufficient evidence of her lack of consent.

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

The accused contended that she voluntarily engaged in sexual intercourse with him and then started to cry when she heard the Princess and the American officer approaching. She contended that she resisted to the best of her ability under the circumstances, but was afraid to resist any more than by screaming, pushing and withdrawing, because she was dealing with two armed soldiers who might shoot her child and who were too strong for her. The court heard all of the evidence and concluded from it that she did not consent. Its decision is based upon substantial evidence. The courts' decision thus based on substantial evidence will not be disturbed by the Board upon review (CM ETO 4194 Scott; CM ETO 10742, Byrd; CM ETO 13898, Jay).

With reference to Charge II and its Specification the accused has been found guilty of wrongfully failing to obey "the standing orders of the Commanding General, 9th Infantry Division, found in letter 250.1 GNMEQ, Headquarters, 9th Infantry Division" on the subject of fraternization with the inhabitants of Germany. A court martial of the 9th Division may judicially notice such orders. It was clearly shown that the accused did at the time and place alleged fraternize with an inhabitant of Germany when he had sexual intercourse with the woman identified as Gertrude Muller about noon time. He admitted this conduct in his testimony. The accused's conviction of failing to obey the order and of thereby violating the 96th Article of War is sustained.

6. The charge sheet shows that accused is 22 years 5 months of age. Without prior service he was inducted at Abingdon, Virginia, on 30 January 1943.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567).

(ON LEAVE) Judge Advocate

Donald D. Miller Judge Advocate

John J. Collins Judge Advocate

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

BOARD OF REVIEW No. 2

26 OCT 1945

CM ETO 17542

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	
Private TOMMY D. COX, (34948325), Company A, 39th Infantry.	Trial by GCM convened at Ingolstadt, Germany, 5 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private TOMMY D. COX, Company "A", 39th Infantry, did, at Stolberg Kreis Harz, Sachsen, Germany, on or about 14 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elsbeth Muller, a German civilian residing at Stolberg, Kreis Harz, Sachsen, Germany.

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

Specification: In that * * *, did, at Stolberg,

Kreis Harz, Sachsen, Germany, on or about 14 April 1945, wrongfully fail to obey the standing orders of the Commanding Ganeral, 9th Infantry Division, Subject: Fraternization, dated 23 March 1945, not to fraternize with the inhabitants of Germany, in that he did fraternize with inhabitants of Germany.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of two previous convictions, one by a summary court for absence without leave for 6 days, the other by a special court-martial for absence without leave for 12 days, both in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½. This is a companion case to CM ETO 17541, Fox.

3. The evidence for the prosecution may be summarized as follows: On 14 April 1945, Company A, 39th Infantry, of which accused was a member, was temporarily located at Stolberg, Germany (R6,9,12). During the day the accused and the other members of his squad performed outpost duty in and about the civilian home of the Mullers located about 200 yards from the Castle of Stolberg (R6,7,9-10). Sergeant Fox was the squad leader (R6). About 4 pm the squad was recalled. All of its members left the house but Fox and accused returned to the house in a short time (R13). Accused was slightly under the influence of liquor and feeling "a little high" (R10). In the house during most of the day and at that time were Elsbeth Muller, her two sons aged 11 and 5 years respectively, a Gertrude Muller and Gertrud Gottschlich. Upon entering the house the two soldiers "grabbed" the two Gertrudes. They were able to tear themselves away (R13). One ran home and the other went to secure help (R18). Accused then chased the 11 year old Muller boy with his pistol and then grabbed Mrs Muller who did not expect this treatment because she was a married woman with 2 children. He pushed her into the kitchen. She started to cry because she knew "what was coming". Fox followed them there and tried to kiss her and lifted her skirt. She struggled, the children screamed and she pleaded with Fox and accused to let her go. They were both drunk and were armed. She was terribly frightened. Accused had previously,

during the afternoon, fired his pistol through an open window from inside the kitchen. The two soldiers then forced her into the living room and then, while accused held the child, Fox threw Mrs Muller on the couch, pulled her skirt up and her pants down, lay on top of her and forced his penis in her vagina. He was finished rather quickly and appeared happy. No sooner had he arisen than accused laid himself on her, and, in spite of her struggles by pushing him back and withdrawing, he effected a penetration of her genitals against her will. She was afraid to resist more because "he kept pointing to the pistol and to the child's mouth and my mouth". (R13-15). After accused had completed his intercourse with her, Fox commenced again but was interupted by the arrival of Princess Stolberg and Captain C.J. Clark, Medical Detachment, 39th Infantry (R15) who came to the house to investigate a rumor that two soldiers were attacking a woman in the house (R22). When they were about 15 feet from the Muller house they could hear a high pitched wailing or cry of distress coming from the house (R23, 28). They entered and found Sergeant Fox in the doorway of the room in which were the accused and Mrs Muller. Accused was buckling his pistol belt on. After Captain Clark twice asked accused what was going on accused told him that his squad sergeant would answer all questions and left. Sergeant Fox gave a negative answer (R23). Mrs Muller told the Princess that the soldiers had attacked her three times (R23,28). She was very upset emotionally, crying, moaning and wailing in a hysterical manner. Her clothing was disarrayed and her hair mussed (R23, 28).

4. The accused having been fully advised concerning his rights as a witness elected to testify in his behalf. He claimed that he returned to the Muller house with Sergeant Fox to get his cartridge belt, bandoleer and gas mask which he had left earlier in the day. He recalled seeing only Mrs Muller and "one kid" there. Mrs Muller was crying, so for a few minutes they tried to pacify her. When he was about to leave and was putting on his equipment Captain Clark arrived. He asked accused some questions but accused referred him to Fox because he did not know what Captain Clark meant. He had consumed a half of a pint of liquor and was somewhat confused (R30-31).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM 1928, par 148b. p. 165). Mrs Muller's testimony presented a clear picture of rape containing all of the necessary elements of that offense CM ETO 16873, Brooks et al and authorities therein cited). She related that the accused without her consent and against her will forcibly had sexual intercourse with her. She was corroborated by strong circumstantial evidence consisting of her appearance immediately after the attack and the sound of her cries and moans. The evidence disclosed an uninvited sexual attack upon a married woman in the presence of her

small child under circumstances which justified the court in concluding that any submission to the act of the ravisher was reduced through fear for her life or of great bodily harm. There was no legal consent (CM ETO 3740, Sanders, et al; CM ETO 5584, Yancy; CM ETO 12180, Everett). The accused in effect denied having any relations with the woman thereby raising an issue of fact. The court resolved that issue against him and as its findings are supported by substantial evidence they will not be disturbed by the Board upon appellate review (CM ETO 4194, Scott).

6. The court's findings of guilty of Charge II and its specifications is legally supported by the accused's plea of guilty. The evidence showed that prior to the commission of the criminal acts accused was guilty of fraternization as defined in CM ETO 10501, Liner and CM ETO 10967, Harris.

7. The charge sheet shows that the accused is 20 years and 4 months of age and, he was inducted 31 May 1944 at Fort McPherson, Georgia to serve for the duration of the war plus six months. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 5

24 OCT 1945

CM ETO 17551.

U N I T E D S T A T E S	3RD INFANTRY DIVISION.
v.	Trial by GCM, convened at Salzburg, Austria, 26 June 1945, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private SEYMOUR YANOFSKY (42062158), Company B, 30th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Seymour Yanofsky, Company "B", 30th Infantry, then Private First Class, Company B, 30th Infantry, did, at St. Helene, France, on or about 14 November 1944 desert the service of the United States and did remain absent in desertion until he returned to Military control at Bourbonne - Les Bains, France, on or about 9 May 1945.

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

(242)

3. The prosecution showed, through the testimony of the first sergeant of accused's organization and by the introduction of a duly authenticated copy of the morning report, that accused absented himself without leave from his organization, Company B, 30th Infantry, on 14 November 1944, while the company was stationed at St. Helene, France (R8, Pros.Ex.A). The accused was returned to his company for duty about 1 June 1945 (R.8). On 20 June 1945 accused, after having been advised of his rights, made a sworn statement to First Lieutenant Tritico, investigating officer, which was introduced in evidence without objection (R10). In it accused stated that on 14 November he left his company while it was in a rest area at St. Helene, France. At Bourbonne, France, he met a girl who became pregnant. He had no intention to desert but every time he wanted to turn himself in the girl would threaten to kill herself. On 9 May he surrendered to the military police. He at all times wore his uniform, had no intention of staying away, and if it had not been for the girl he would have come back much sooner (Pros. Ex. B).

4. The accused, after his rights were fully explained to him, elected to make an unsworn statement which may be summarized as follows: He joined the 30th Regiment around October and went into combat with them near Le Tholy and then moved around Bruyeres. He acted as 4th Platoon runner and came in direct contact with the enemy. As a result of being slightly wounded in the arm by a very small piece of shrappel he was recommended for the Purple Heart. When they were relieved by the 103rd Division, they "pulled back" for a rest at St. Helene. Up until that time he had been a good soldier, done his job to the best of his ability, and never got in any trouble whatsoever (R12,13).

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

6. The charge sheet shows that accused is 20 years of age and was inducted 23 December 1943. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a

penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 5

9 NOV 1945

CM ETO 17553

U N I T E D S T A T E S	)	NINTH AIR FORCE
v.	)	
Lieutenant Colonel JOSEPH F. SHARPE (01703807), Headquarters and Headquarters Squadron, Ninth Air Force.	)	Trial by GCM, convened at Chantilly, Oise, France, 15-16 June 1945, Sentence: Dismissal

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

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

2. Specifications 1 and 2, Charge I (drunk on duty):

The evidence in support of Specification 1 shows that on 7 April 1945 accused was on duty in command of a reconnaissance and requisition mission in Wiesbaden, Germany, and that he was found drunk as alleged.

With reference to Specification 2, it is shown that on the morning of 8 April accused was relieved from duty by the arrival of another officer sent to take charge of the mission. At that time accused appeared to be sober but was intoxicated a few hours later when he went to inspect "headquarters" building with the new commander. The Board of Review is of the opinion that although accused had been relieved as commanding officer of the mission he was still "on duty" within the meaning of Article of War 85; that when he went to inspect the building he was performing a function in connection with his work as departing commanding officer; and that his duties were not ended as long as the new commanding officer required any

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information from him with reference to the work accused had been engaged in doing. (MCM, 1928, par. 145, p.159-160; Winthrop's Military law and Precedents (Reprint, 1920), pp. 613-614; CM ETO 3577, Teufel; CM ETO 4339 Kizinski; CM ETO 5010, Glover; CM ETO 1065 Stratton; CM ETO 9423, Carr; CM NATO 1045, III Bull. JAG 284; CM 264727, Maki, 42 B.R. 229).

Charge III: (Assault): The evidence in support of this charge although uncorroborated is sufficient to justify the courts finding of guilty of simple assault.

3. A sentence of dismissal is mandatory on conviction of an officer of being drunk on duty, in time of war, in violation of Article of War 85, and is authorized upon conviction of a violation of Article of War 96.

Judge Advocate

(DETACHED SERVICE) Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater ~~of Operations~~ 9 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S.Army.

1. In the case of Lieutentant Colonel JOSEPH F. SHARPE (01703807), Headquarters and Headquarters Squadron, Ninth Air Force,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17553. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17553).

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

(Sentence ordered executed. GCMO 576, USFET, 20 Nov 1945)

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

5 NOV 1945

CM ETO 17554

U N I T E D S T A T E S	CHANOR BASE SECTION, COMMUNICATIONS ZONE, UNITED STATES FORCES EUROPEAN THEATER
v.	
Private CHARLES H. FIELDS (33520464), 3871st Quartermaster Truck Company (TC)	Trial by GCM, convened at Le Havre, Seine Inferieure, France, 24 and 29 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life, United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

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

(Nolle prosequi)

Specification: (Nolle prosequi)

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

Specification: In that Private CHARLES H. FIELDS, 3871st Quartermaster Truck Company (TC), did, at or near Hericourt-en-Caux, S. I., France, on or about 12 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Germaine Levaillant, a human being by stabbing her with a knife.

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(250)

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

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

On 12 February 1945, accused, a negro soldier, was a member of the 3871st Quartermaster Service Company, then stationed approximately one mile from the village of Hericourt-en-Caux, France (R10,11). On the crest of a hill near Hericourt stood a small building or chapel containing a crucifix and known in the region as the "Calvary" (R11,24, Pros.Ex. 2). At about 1830 hours on 12 February, as Madame Georgette Lecouteux was returning to her home in Hericourt from a neighbouring village, she passed a colored soldier on a road a short distance from the Calvary (R11,14,15). At about 1840 hours a Frenchman named Gustave Eno saw a colored soldier standing near the Calvary "marking a tree" with a knife (R15,16,38). A photograph of the terrain surrounding the Calvary, introduced into evidence by the prosecution, shows that the tree near which accused was standing bears the marks of a knife and the letter "A" carved into the bark (R38; Pros. Ex.2). Shortly after 1830 hours, as Mademoiselle Paulette Deveaux was passing near the Calvary on her way to her home outside Hericourt, she heard a woman's voice crying, "Help, I have been attacked by a nigger, Police" (R17). Shortly thereafter, Madame Germaine Levaillant (the deceased) approached her, repeated, "I have been attacked by a nigger", and "fell down very slowly and then said, 'I am going to die'" (R19). At about this time or possibly shortly thereafter, the deceased's bicycle and shoes were found along the roadside near the Calvary (R20,21). At about 1930 hours, the body of Madame Levaillant was examined by a French doctor and pronounced dead from three wounds in left side of the back which appeared to have been caused by a knife or dagger (R37). The body was still warm at the time of the examination (R38).

At about 1330 or 1400 hours on the afternoon of 17 February 1945, accused was brough to French Police Headquarters in Rouen for questioning. Present at the time of the questioning were Criminal Investigation Division Agents Charles V. Jamison and Max H. Weinberg, Staff Sergeant Roland Norton,

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Provost Marshall's Office, 11th Port, and an interpreter (R23,30). After first being advised of his rights under Article of War 24, accused was subjected to a preliminary questioning lasting approximately thirty minutes (R23,26,31). At the outset of the questioning, he asserted that he had not left his company area on the evening of 12 February but had remained in his quarters watching other members of his unit play cards (R26,32,33). However, as the result of "a process of about 30 minutes of interrogation", during which accused made "two or three slips", he gave information which Weinberg then started to reduce to writing in the form of a statement (R32,34,54). At about this time Jamison left in search of an officer who was empowered to administer oaths and returned some 20 minutes later accompanied by the officer. Upon their return, the statement was virtually complete and, after again being advised of his rights, accused signed and swore to the statement thus prepared (R23,24,34). During the questioning, the interrogators had put questions to the accused based upon information already in their possession, which information accused admitted to be correct, and the statement consisted of this information as well as certain additional information not theretofore known to the agents and given by the accused in response to questioning (R28,32). Jamison testified that, during the time he was in the room, no force was used to extract information from the accused and stated that accused made the statement "of his own free will" (R28). Weinberg, who was with accused from the time the questioning started until the time he signed the statement, testified that no promises, threats or force were used to induce the confession (R31,33).

Accused then took the stand for the purpose of testifying as to the voluntary nature of the confession. He admitted that he signed the statement but asserted that the recitals contained therein were false. He stated that at the outset of the questioning he had denied complicity in the crime but was told he was lying and then kicked in the leg by the "big staff sergeant" (Staff Sergeant Norton). After kicking him, Norton told him that he, Norton, "was really going to get tough". Accused was kickedon the right shin eight or ten times, hit in the stomach, and knocked out of the chair in which he was sitting during the questioning. He still had scars on his right shin as the result of the kicks he received at the time (R40,41,44,48). His interrogators continued to ask leading questions and, after being beaten for about half an hour, he admitted that the information they had was true - "after he was beating me for half an hour I said 'Yes' to the questions he asked me" (R41,46). When the officer entered the room toward the close of the questioning he made no complaint to him because he was confused and "in misery" (R43). Neither did he complain to one of his company officers when that officer took him to the stockade the following day (R46). The Provost Sergeant of the stockade testified that on 14 February, accused made a complaint to him and at the time he noted that accused had "sores" on one of his legs upon which scars had not yet formed (R50,51).

Staff Sergeant Norton, recalled by the court, testified that accused's testimony was false and stated that he did not strike or kick the accused or at any time knock him out of his chair (R53).

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On the basis of the showing thus made, the court admitted accused's statement into evidence. In his statement, accused recited that he left his company area by "the back road" on the evening of the 12 February and, as he reached the outskirts of Hericourt, walked across a field to"the crucufix". While he was standing near the crucifix, he took a dagger from his pocket and carved the letter "A" in the tree and also "picked at the tree a little with my knife". While he was engaged in this activity, he saw a woman who was wearing a black overcoat and pushing a bicycle walking towards the crucifix from the village. He stated that

> "No one else was around, just the two of us. I went over to her and she was frightened. I didn't talk to her at all, I just tried to get a piece of tail. I tried to throw her to the ground, I had my left arm around her and my knife was in my right hand. She tried to get away from me and it was then that I stabbed her two or three times, quickly, in the back of the left side. I threw her down and she was screaming, "Police" or something. * * * I got scared when she screamed and I turned and ran away".

He ran across a field, crawled under a barbed wire fence, reached the main highway and, after crossing it, threw his knife away. He then hurried back to camp and went to his billet where he found some of the members of the company playing cards. He spent the remainder of the evening there and decided that if he were questioned he would say he had been "playing cards with the boys" (R55,Pros.Ex.3).

4. Accused, whose rights as a witness were explained to him at the time he testified concerning the confession, thereafter took the stand to testify generally on his own behalf. He stated that he remained in camp on the night of 12 February and expressly denied that he stabbed Madame Levaillant (R55). He asserted that he was not familiar with the region where the killing was alleged to have taken place (R55,56). He had no knowledge of the detailed information contained in his confession; the information was supplied by his interrogators and, because he was beaten, he merely answered "yes" to the questions put to him (R56,59,60). The truth was that he had spent the evening in his quarters watching a poker game (R56,58,61). He did not leave camp on the night in question and, in fact, had not had a pass since coming to France (R62).

Staff Sergeant Price, accused's platoon sergeant, testified that to the best of his recollections accused did not have a pass to go to Hericourt on 12 February (R63-65). On cross examination, Sergeant Price testified that passes had been issued to the accused during the time he had been in France (R65).

5. The prosecution's evidence, exclusive of accused's confession, shows that on 12 February 1945, Madame Germaine Levaillant died as the results of wounds produced by a knife or dagger. That she had been attacked by a negro shortly before her death was properly shown by her dying declaration

(cf. CM ETO 3649, Mitchell). The remaining evidentiary details, without which responsibility for the homicide could not have been fastened upon the accused, are supplied almost entirely by his confession. It therefore becomes necessary to determine whether such confession was properly admitted into evidence.

A reference to the evidence summarized above will demonstrate that there is sufficient proof that the crime charged probably was committed, or proof of the corpus delicti, to permit the introduction of the confession provided it was otherwise admissible (cf. CM ETO 559, Monsalve; CM ETO 2007, Harris; CM ETO 7518, Bailey et al). Whether it was otherwise admissible depends, of course, upon whether it was voluntarily made. Accused asserted it was not voluntarily made and testified that it was extorted by the use of physical violence. On the other hand, there was explicit testimony that accused's assertions were false, that no physical violence, threats or promises were employed to induce him to speak, that he was properly advised of his rights, and that he made the confession of "his own free will". The question whether a given confession was or was not voluntarily made is essentially a question of fact for the court and, on the evidence here presented, its determination that the instant confession was a voluntary one will not be disturbed by the Board of Review (cf. CM ETO 2007, Harris; CM ETO 3499, Bender et al; CM ETO 4055, Ackerman; CM ETO 7518, Bailey et al). The remaining questions raised by the record of trial do not require extended discussion. Once it is decided that the confession was properly admitted it is clear that the record contains ample evidence from which the court could find that accused unlawfully killed Madame Germaine Levaillant with malice aforethought, at the time and place and in the manner alleged, without legal excuse or justification, and hence properly was found guilty of murder (MCM,1928, par. 148a,pp. 162-165). It is the conclusion of the Board of Review that the record of trial is legally sufficient to support the findings.

6. The charge sheet shows that accused is twenty-three years one month of age and was inducted 28 December 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 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 and the sentence, as commuted.

(254)

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

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

(255)

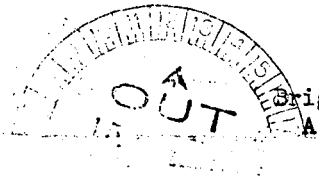
1st Ind.

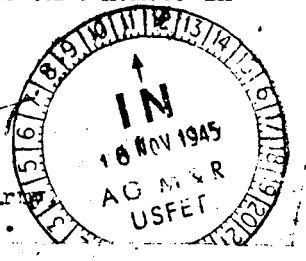
War Department, Branch Office of The Judge Advocate General with the European Theater 14 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CHARLES H. FIELDS (33520464), 3871st 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 the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17554. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17554).

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





(Sentence as commuted ordered executed. GCMO,604, USFET, 28 Nov 1945).

17554

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

BOARD OF REVIEW NO. 3

24 OCT 1945

CM ETO 17555

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHN W. BRADY (33801231) Attached Unassigned, 489th Replacement Company, 67th Replacement Battalion, 19th Replacement Depot	Trial by GCM, convened at Etampes, France, 21 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John W. Brady, attached unassigned 489th Replacement Company, 67th Replacement Battalion, 19th Replacement Depot, European Theater of Operations, United States Army, did, at or near Chamarande, France, on or about 13 February 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Philadelphia, Pennsylvania on or about 2 May 1945.

He pleaded guilty to the Specification except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent

himself without leave from" and "without leave", 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 Specification and the Charge. Evidence was introduced of two previous convictions, both by special court-martial, one for absence without leave for 23 days in violation of Article of War 61, and one for willful disobedience of a non-commissioned officer and disrespect toward a commissioned officer in violation of Articles of War 63,64, and 65. 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 shot to death with musketry". The reviewing authority, the Commanding General, Seine Section, Theater Service Forces, European Theater, approved the sentence but recommended that it be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed only so much of the sentence as provides that accused be shot to death with musketry, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosectuion consists of an extract copy of the morning report of accused's organization, located at Chamarande, France, for 13 February 1945, showing him "fr dy to AWOL 0630", and also for 21 June 1945, showing that he was placed in confinement as of 16 June (R5,Pros.Ex.A). An extract copy of the guard report of the 19th Reinforcement Depot Stockade for 16 June 1945 corroborates the morning report entry in showing confinement of accused on 16 June (R7,Pros.Ex.C).

On 25 June accused voluntarily signed a sworn statement in which he admitted going to Paris on a one-day pass on 9 February 1945, after which he did not return to his company for duty. During the latter part of March he departed from France at Le Havre by boat and landed in New York City, from which he went to Philadelphia, where he was "picked up" by the military police on 2 May 1945 (R6,Pros.Ex.B).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was offered in his behalf(R7).

5. The documentary evidence introduced by the prosecution, together with accused's sworn statement and his plea of guilty of absence without leave, establishes without doubt his unauthorized absence from 13 February to 2 May 1945, as alleged in the Specification. From such prolonged absence of 78 days, during which accused left an active theater of

operations and returned to the United States, where he was finally apprehended, the court was clearly authorized to infer an intention on his part to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 15901, Hicks).

6. The charge sheet shows that accused is 27 years of age and was inducted 5 October 1943. He had no prior service.

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

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

R R Cooper, Judge Advocate

Malcolm C Sherman, Judge Advocate

(TEMPORARY DUTY), Judge Advocate

(260)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army

1. In the case of Private JOHN W. BRADY (33801231), Attached Unassigned, 489th Replacement Company, 67th Replacement Battalion, 19th 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 17555. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 17555).

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

(Sentence as commuted ordered executed. GCMO 614, USFET, 4 Dec 1945).

U-143

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

BOARD OF REVIEW NO. 3

24 OCT 1945

CM ETO 17556

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private HORACE HOUSTON, (14051912), 17th Replacement Depot	Trial by GCM, convened at Paris, France, 20 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

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

Specification 1: In that Private HORACE HOUSTON, 17th Replacement Depot, European Theater of Operations, United States Army, did at APO 873 on or about 14 September 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 1 October.

Specification 2: In that * * * did at Paris, Detention Barracks on or about 7 October 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 3 December 1944.

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

Specification: In that * * *, did, at Paris, France, on or about 3 December 1944, with intent to do him bodily harm, commit an assualt upon Private Howell E. JONES, Detachment A, 17th Base Post Office, European Theater of Operations, United States Army, by shooting him in the abdominal region with a caliber 7.65m/m automatic pistol.

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 Specification 1, Charge I, and all of the members of the court present at the time the votes were taken concurring was found guilty of Specification 2, Charge I, and Charge I, and Charge II and Specification. Evidence was introduced of one previous conviction by special courts-martial for two absences without leave of one and four days respectively and two breaches of arrest, in violation of Articles of War 61 and 96. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence, recommended commutation and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave from 23 September 1944 to 1 October 1944, in violation of Article of War 61, confirmed the sentence but, owing to special circumstances in this case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution showed that on 14 September 1944 an entry was made on the morning report of "Detachment 93 GFRS" showing accused's change of status from "duty to AWOL 14 September 1944" (R4; Pros. Ex."A"). About midnight 1 October 1944 accused was brought into the Paris Detention barracks "as one of the prisoners to be held for the C.I.D. Division" (R7). On 2 October 1944 he made a voluntary statement to an agent of that division reciting that he went absent without leave from his organization near Fontainebleau 23 September 1944, stayed in a nearby village for several days, went to Fontainebleau "around the 29th of September", thence to Paris, where he was apprehended by the military police (R5-6; Pros. Ex."B"). He had not been released from the Paris Detention Barracks on 6 October 1944 when a non-commissioned officer in charge of a work detail of prisoners brought his detail back from the warehouse where they had been working with two of its members missing. The following morning a careful check of all prisoners in the detention barracks revealed that accused was absent (R7-8).

At approximately 2300 hours 3 December 1944 accused, who had been living at a hotel in Paris for about a month, accompanied his "girl-friend" to a Parisian dance-hall. There, according to the girl,

"All was going very well when all of a sudden a white American soldier started an argument with accused",

hitting him in the face and threatening him with a chair. Accused drew his revolver and the girl hid behind a cupboard. Five minutes later she heard two shots fired. She did not see what took place at the time. After the shooting, she left the dance-hall alone (R9-10).

Two French eyewitnesses testified that accused was the original aggressor, hitting the white soldier first, and that, fifteen minutes after they were separated, accused again sought out the white soldier and fired his pistol into the floor near the latter's feet. The white soldier then picked up a chair and accused fired a second shot, hitting the white soldier in the stomach (R14-16,18-20).

A French police officer who was summoned to the scene, found on the floor of the dance hall a white American soldier wounded in the left hip (R21). After taking him to the hospital he accompanied American military police to accused's hotel room. Accused was not there but was soon discovered hiding under a bed in a nearby room (R21-22,24). A gun was found under the covers of accused's own bed (R22,24). He admitted it was the gun with which he shot the white soldier (R24,28).

In the course of the investigation, military police ascertained that Howell Jones, 17th Base Post Office, was the individual who was shot at the cafe on the night in question (R26). It was stipulated that if Captain August H. Saegert, Medical Corps, was present, he would testify that Private Howell E. Jones was admitted to the 217th (US) General Hospital, Seine Section, Paris, 3 December 1944, and that he - Saegert - examined him at the time of his admission and found a "Gun shot wound of abdomen entering on the left lateral wall" (R8; Ex.C).

4. The only evidence for the defense was accused's unsworn statement to the effect that when he left the 17th Replacement Depot he "went off" trying unsuccessfully to "Look for his outfit". He caught a ride to the outskirts of Paris, did not know the way back to Fontainebleau, but started anyway and was "picked up by the MP's" (R29). When he left the Paris Detention Barracks he went to Fontainebleau only to find that his organization had moved. He obtained a hotel room in Paris where he spent most of his time gambling. He never intended to desert the service (R30). In the cafe, on the night of the shooting, Jones called him a "nigger" and hit him, whereupon accused drew his pistol. Jones started toward him with a chair. "After I shot him, the MP's picked me up. * * * he hit me first; I never did hit him. * * * I went down, started to get up, /he was/ coming towards me then. I pulled out the gun and started to shoot at the floor, or wall. He picked up his chair after I fired the first shot. * * * /He/ had it over his head coming towards me; that is how it happened" (R31).

5. Accused's pre-trial statement admits that he went absent without leave from his organization on or about 23 September 1944. While the

extract morning report entry showing initial absence 14 September 1944 was admissible despite the irregularity of failing to disclose the signature or initials of the person responsible for the original entry (CM ETO 15850, Miller; CM ETO 12151, Osborne), the reviewing authority, as weigher of the evidence, was authorized to reduce the conviction of desertion under Specification 1, Charge I, to absence without leave commencing 23 September 1944.

Accused's second unauthorized absence, commencing with escape from confinement, lasting for 57 days and terminated by apprehension as the result of his commission of a criminal offence, involved circumstances, shown by competent evidence, which adequately sustain the inference of intent not to return, constituting an essential element of the offence of desertion as alleged in Specification 2, Charge I (MCM, 1928, par.130a, pp.143-144; CM ETO 1629, O'Donnell; CM ETO 12045, Friedman; CM 1737, Mosser; CM ETO 12239, Blackshear).

6. With reference to the Specification, Charge II, the uncontradicted evidence shows that accused shot Jones, and a preponderance of the competent evidence shows that accused was the aggressor. Under the circumstances, it is wholly unnecessary to consider whether or not his unsworn statement, with the slight corroboration furnished by his "girl-friend's" testimony, presented a case of exculpatory self-defense, for here "the question of the credibility of the witnesses, as well as to the question of fact as to whether accused acted in self-defense, was for the sole determination of the court" (CM ETO 5451, Twiggs). Assault with a dangerous weapon with intent to do bodily harm, in violation of Article of War 93, was adequately proved (MCM, 1928, par.149m, p.180; CM ETO 3812, Harshner; CM ETO 7000, Skinner).

7. The charge sheet shows that accused is 22 years seven months of age and enlisted at Fort Screvew, Georgia, 15 January 1942. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of 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. Penitentiary confinement is authorized for desertion in time of war by Article of War 42, and for assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and Section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. ~4 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private HORACE HOUSTON (14051912), 17th 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 as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17556. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17556).

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

(Sentence as commuted ordered executed. GCMO 572, USFET, 17 Nov 1945).

TS-180

17556

RESTRICTED

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

BOARD OF REVIEW NO. 5

17 NOV 1945

CM ETO 17557

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 29, U.S. Army, 29-31 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CLYDE SALTER (34440379), Company G, 116th Infantry Regiment	

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

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

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

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

Specification 1: In that Pvt Clyde Salter, Co G, 116th Infantry, did, at Geseke, Germany, on or about 16 April 1945, unlawfully enter the dwelling of Hans Loer, with intent to commit a criminal offense, to wit, robbery therein.

Specification 2: In that * * * did, at Geseke, Germany, on or about 16 April 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Hans Loer, a watch, two rings and a knife, the property of said Hans Loer, value Twenty ($20.00) dollars.

Specification 3: (Nolle Prosequi)

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Specification 4: In that * * * did, at Geseke, Germany, on or about 18 April 1945, at or about, to wit, 0230 hours with intent to commit a felony, viz, rape, commit an assault upon one Elli Witzel.

Specification 5: In that * * * did, at Osterwohle, Province of Sachsen-Anhalt, Germany, on or about 25 April 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Robert Nieman, a key ring, and keys, a cigarette lighter and Fifty (50) marks in German paper money, the property of said Robert Nieman, value Twenty ($20.00) dollars.

Specification 6: In that * * * did, at Osterwohle, Province of Sachsen-Anhalt, Germany, on or about 25 April 1945, with intent to commit a felony, viz, robbery, commit an assault upon one Katie Weber.

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

Specification 1: In that * * * did, at Geseke, Germany, on or about 18 April 1945, at or about 0030 hours, forcibly and feloniously, against her will, have carnal knowledge of Elli Witzel.

Specification 2: In that * * * did, at Geseke, Germany, on or about 18 April 1945, at or about 0100 hours, forcibly and feloniously, against her will, have carnal knowledge of Elli Witzel.

Specification 3: In that * * * did, at Geseke, Germany, on or about 18 April 1945, at or about 0145 hours, forcibly and feloniously, against her will, have carnal knowledge of Elli Witzel.

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

Specification: In that * * * did, at Osterwohle, Province of Sachsen-Anhalt, Germany, on or about 25 April 1945, wrongfully and unlawfully grasp one Katie Weber by her clothing, saying, "I am going to fuck you."

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all the charges and specifications. Evidence was introduced of three previous convictions: one by special court-martial for failing to appear for the formation of

guard relief in violation of Article of War 61, and failing to obey a lawful order in violation of Article of War 96; one by special court-martial for absence without leave for one day in violation of Article of War 61; and the third by summary court for discharging a weapon in public in violation of Article of War 96. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 29th Infantry Division, approved only so much of the findings of Specification 5, of Charge I, pertaining to value, as involved a finding of a value of six dollars ($6.00), approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, The Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence, pursuant to Article of War 50½.

3. The following evidence was adduced for the prosecution:

At all times mentioned in the specifications, accused was a private in Company G, 116th Infantry. At about 2330 hours, 16 April 1945 someone knocked at the door and rang the bell at the house of Hans Loer, in Geseke, Germany (R6), calling out, "Here are Americans. Open the door." (R6). Loer opened the door and the accused, accompanied by two Russians, entered (R6). The accused was armed with a rifle (R6). He pointed the rifle at Loer and asked, "You have any pistols?" The Accused searched Loer's pockets and took from him a watch, a knife and two rings (R7). The value of these articles was $20.00 (R96). Loer did not prevent him from taking the property because the accused had a weapon (R7). The accused pushed Loer down a staircase (R8), hit him repeatedly with a rifle butt (R9), and finally left (R12). The accused was not sober (R14,18). The watch and the two rings which he took from Loer (R12) were found on his person on 18 April 1945 by his platoon leader (R86,87; Pros. Exs. 1,2,3).

About midnight 17-18 April 1945, Frau Elli Witzel, a Germany civilian, age 20 (R27), married (R59), and the mother of a baby born 7 February 1945 (R30), was awakened by someone knocking on the door of her house at Geseke, Germany (R28). She opened the door and accused pointing a pistol at her entered the house with two Russians who were with him (R28, 29). Accused demanded schnapps and fried eggs and continually brandished his pistol (R29,76,77). After the eggs were cooked, he forced Frau Witzel to drink about a half a glass of schnapps by pointing his pistol at her (R29,30). She poured most of the schnapps into the sleeve of her robe because she did not want to drink (R31). Accused again pointed his pistol at her, pulled her out into the hall and tried to get her into a room, but she led him out into the street, thinking she could thereby get rid of him (R31). Frau Witzel was crying (R67). They walked a "short stretch" on the street and then she tried to run away but had gone only a few feet when accused stopped her by using his pistol (R31). He then threw her to the ground, held

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his hand over her mouth to prevent her from yelling, and again pointed his pistol at her (R31). With his trousers open, he threw himself on her and inserted his penis in her private parts (R31,32). She had her legs pressed firmly together but he spread them apart with his knees (R47). She was unwilling to have intercourse and she defended herself as much as she was able to (R32). She pressed her hands against his shoulders and tried to roll over several times (R46,47). The act of intercourse was repulsive to her (R59). After he finished, Frau Witzel, who was crying, managed to run back to the house (R32). She closed the door and tried to hold it shut with the aid of Frau Schukert but the accused pushed the door in and entered the house again (R33, 78). He threw her on the floor and again inserted his penis in her vagina, but only for a minute or so because she kept defending herself and resisting (R33). He kept threatening her with his pistol (R33). She got up off the floor and again went out into the street with the accused, hoping to get help there (R33). She testified, "He dragged me along. I was crying and he gave me to understand that if I didn't come along with him, he would shoot me". The accused then fired his carbine (R34). He again threw Frau Witzel to the ground, removed her clothing the same way as before, and, holding his hand over her mouth as she was crying and trying to scream, inserted his penis in her (R34). After the accused finished this act of intercourse, which lasted only a few minutes because Frau Witzel continued to resist, she ran away crying into the arms of her mother who came running toward her (R35). The accused came after them and kicked and hit Frau Witzel's mother (R35, 68). Her mother ran back into the house but Frau Witzel could not get away because he dragged her with him and laid her down again (R35). She managed to reach for his pistol and his carbine and she threw them away (R35). When the accused discovered his pistol was missing he jumped up, shook Frau Witzel and wanted to know what she had done with his pistol (R35). The accused did not succeed in having sexual intercourse with her this time (R36). Some guards then arrived and one of the guards accompanied Frau Witzel to the house (R36) where she was put to bed by her mother (R69). Frau Witzel was sober and not drunk (R71). It was then about 0400 hours (R60). Frau Witzel got up about 0600 hours and reported the occurrences to the town commandant (R60,61). That same morning a search was made for accused by his platoon leader and he was found sleeping in a home on the outskirts of the town of Geseke (R85,86). Frau Witzel did not receive satisfaction from any of the acts of intercourse (R59). Accused at no time hit the woman with his hand, but he did push and pull her (R65).

On the night of 25 April 1945, accused, accompanied by a Pole, knocked at the door of the home of Robert Nieman in Osterwohle, and entered when Nieman opened the door (R92). Accused demanded schnapps, pushed Nieman and brandished a knife (R93). Accused was drunk and Nieman was afraid of him (R94). He hit Nieman "right and left" and then by threatening him with his knife, forced Nieman to give him a ring which he was wearing (R94). Accused put the ring in his pocket and then took a wallet, containing about fifty marks, some keys, a key ring and a lighter from Nieman's trousers which were in his bedroom (R94,95). He finally left taking the articles with him (R95). Nieman surrendered his property because the accused continuously threatened

him with the knife (R95). The value of the keys, key ring, lighter and fifty marks was stipulated at $6.00 (R96).

On the night of 25 April 1945, Katie Weber, who resided in Osterwohle, Germany, was awakened by the noise of someone going around her house (R97,98). She dressed and found the accused in the hall (R97,98). He said, "Where is whiskey. Where is schnapps" (R98). He drew out his knife and said, "I'll try that on you" (R98). He took a few bottles of wine and gave them to two Polish boys who were with him (R98,99). Accused grabbed Katie by her clothing and said, "Now, I am going to fuck you" (R100).

4. Accused having been warned of his rights by the law member, elected to remain silent (R105).

The defense introduced in evidence, without objection, a pre-trial signed statement of Frau Elli Witzel which statement was the same in substance as the testimony she gave during the trial (R101, 102; Def. Exs. A, A1).

It was stipulated that if Lieutenant Meyer were present in court, he would testify that he was present and acted as an interpreter during the questioning of Frau Witzel's mother on 6 May 1945 and that he would testify as to various questions asked her and to the answers she gave. According to the stipulated testimony, Frau Witzel's mother made substantially the same statements on 6 May as she made during her testimony at the trial with the exception that she stated that "the guard had to take my daughter up to her room because she was so drunk" (R103,104).

It was stipulated that if Private First Class Ahr were present in court, he would testify that he was present and acted as an interpreter during the questioning of Frau Elli Witzel on 28 May 1945 (R104). This stipulated testimony was to the effect that at that time Frau Witzel had stated she had received satisfaction from each of the three acts of intercourse with the accused (R104).

5. The evidence before the court fully sustained all the charges and specifications of which accused was found guilty as approved by the reviewing authority.

a. Specification 1, Charge I: Accused entered the house of Hans Loer with an intent to commit a criminal act. He did not make forcible entry, but he was charged with "housebreaking", not burglary. The alleged intent is inferable from the robbery which he committed after obtaining admission. This was housebreaking (MCM, 1928, par. 199e, p.169; CM ETO 3679, Roehrborn).

b. Specification 2, Charge I: After entering the house of Hans Loer, accused covered Loer and kept him covered with a rifle, repeatedly hitting him with the butt thereof. Later accused took the property mentioned in the specification from Loer. At that time accused was still armed with

the rifle. It constituted a continuing threat, and because of the rifle, Loer did not resist accused when the latter took this property. Robbery is larceny with the element of violence, actual or threatened, added. Here the property was shown to have been the property of Loer and to have been of some value. Every element of robbery was established (MCM, 1928, par. 149f, pp.170, 171).

c. Specification 3, Charge I (Nolle Prosequi).

d. Specification 4, Charge I: The conduct of accused involved in this Specification occurred after he had already thrice raped Elli Witzel (see discussion under Specification 1, 2, 3, Charge II). His prior conduct toward the same woman the same night, shows the intent with which he pulled her out of doors and laid her down again. Her resistance and the arrival of guards frustrated clear attempt to rape the woman for the fourth time. This was assault with intent to rape, as alleged (MCM, 1928, par. 149l, p.179).

e. Specification 5, Charge I: Accused, as alleged, took a ring valued at $6.00 from his victim after striking him with his fists and threatening him with a knife. This charge of robbery was fully proved (see discussion under par. 5a, Supra)

f. Specification 6, Charge I: Accused drew a knife and threatened Katie Weber with it, at the same time demanding schnapps and whiskey. This was an assault with intent to commit robbery as alleged and charged (MCM, 1928, sec. 149L, pp 179, 180).

g. Specification 1, 2 and 3 of Charge II and Charge II. Here accused was charged with three rapes on Elli Witzel, three successive acts of rape on this woman, at the time and place alleged in each specification, respectively. This offense so alleged, in violation of Article of War 92 was established by competent, substantial evidence. An adequate and able dissertation on the elements of the crime of rape and the application of the law governing this offense to the present case will be found in paragraph 6g of the review of the Staff Judge Advocate, United States Forces, European Theater, which is attached to the record in this case, and which portion of said review is incorporated in this holding by reference.

h. Specification, Charge III and Charge III: Here accused is charged with using language which was foul and obscene toward Frau Katie Weber and at the same time grasping her by her clothing. This conduct was proved as alleged, and constituted as charged a violation of Article of War 96. Such conduct was in the nature of a simple assault and was service discrediting (AW 96; CM 188606, Dig. Op. JAG, 1912-40, sec. 454 (15) p.349).

6. The charge sheet shows that accused is 23 years of age. He was inducted 4 September 1942 at Fort McPherson, Georgia, without 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 as approved and to support the sentence.

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

_____ Judge Advocate

(DETACHED SERVICE) Judge Advocate

_____ Judge Advocate

(274)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private CLYDE SALTER (34440379), Company G, 116th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 17557. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17557).

IN 21 NOV 1945 AG M&R USFET

OUT 19 NOV 1945 BOTJAG-ET

IN 20 NOV 1945 AG PHL FILES

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

(Sentence as commuted ordered executed. GCMO 629, USFET, 20 Dec 1945).

17557
787

(275)

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

BOARD OF REVIEW No. 2

24 OCT 1945

CM ETO 17558,

U N I T E D S T A T E S	45th INFANTRY REGIMENT
v.	
Private FLETCHER L. DeLOZIER, (34881293), Company "G", 179th Infantry Regiment	Trial by GCM convened at APO 45, United States Army, 19 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Fletcher L. DeLozier, Company "G", 179th Infantry, did, at or near Osteriacci, Italy on or about 1 June 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Naples, Italy, on or about 1 December 1944.

Specification 2: In that * * *, did, at or near Rothbach, France, on or about 19 January 1945 desert the service of the United States and

did remain absent in desertion until he returned to military control at Munich, Germany, on or about 26 May 1945.

He pleaded not guilty, and all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 45th Infantry Division, approved the sentence and forwarded the record of trial for action under AW 48 with a recommendation that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution, as accurately summarized by the Staff Judge Advocate, United States Forces, European Theater, is substantially as follows:

a. Specification 1 of the Charge: The accused, a private in the infantry, was present with his organization (R4) which occupied a front line position near Osteriacci, Italy, on 31 May 1945 (R8,10). His organization was shelled throughout the day (R5) both by enemy troops and artillery of another American division (R7). As it was getting dark something like a mine "going up" was heard (R5). Soon the "fellows all started moving around, saying counterattack, counterattack" (R6). The accused came past the "hole" of Staff Sergeant Zadnich and said, "Well, it looks like it is going to be a counterattack and I'm going to take off". The accused was last seen going in the direction of the rear (R5). His platoon was ordered to withdraw but later that night reoccupied its former position. The next morning the men were counted and the accused was missing (R8). He was not seen from 1 June 1944 until 1 December 1944 (R9). The only two witnesses who testified as to this offense identified the accused, but one fixed the time the accused was last seen as on or about 1 June 1944 (R4) and the other as 31 May 1944 (R8). An extract copy of the morning report entry of the accused's organization dated 8 December 1944 (correcting an entry of 19 June 1944 which showed the accused "MIA, 1 June

1944", which was also a correction of a prior entry showing the accused "WIA 1 June 1944 and absent sick hospital unknown"), shows the accused from "duty to AWOL 1800, 1 June 1944", and from AWOL to confinement 1 December 1944 (R4; Pros Ex A). An extract copy of morning report entries of "Disciplinary Training Stockade, P.B.S., South, APO 782, United States Army" shows the accused was received as an AWOL prisoner 2 December 1944, and released on 18 December 1944 (R4; Pros Ex B). Although the accused testified as a witness, he was silent as to the allegations of this specification.

b. Specification 2 of the Charge: On 16 January 1945 the accused rejoined his former unit, then near Althorn, France (R13). On the evening of 19 January 1945 (R11) the accused's unit moved to Wingen by truck and, after halting approximately 30 minutes, moved on to Rothbach, France (R13,14). The accused was present with his unit at Wingen, but not at Rothbach. His platoon guide checked the trucks in which the unit rode and the accused was missing (R13). At Rothbach the foxholes were checked by the first sergeant and the accused was not found (R9). The weather was cold with about 8 or 10 inches of damp snow on the ground (R11, 14). The accused was dressed in OD's and the "old type" Field jacket (R12). His unit was then engaging the enemy and was subjected to considerable artillery and mortarfire, some small arms fire and there were engagements with enemy patrols. The physical condition of the accused was good, but all were nervous and "he was more so, possibly his nerves were shaken". Several times the accused said, "he was going to try and stick it out but his nerves blew up and he couldn't do it" (R11). The accused was not seen again until 26 May 1945 when he came into the CP of his unit in Munich and said, "he had been in France and was coming back voluntarily" (R9,11). An extract copy of the morning report entry of the accused's unit for 20 January 1945 shows the accused "from duty to AWOL" 0600 hours, 19 January 1945, and the extract copy of the entry for 26 May 1945 shows the accused from AWOL to confinement in the regimental stockade (R4; Pros Ex A).

4. The accused after his nights as a witness were fully explained to him elected to testify under oath (R16). He testified that on 18 or 19 January 1945 he had been issued and was wearing light underwear, low shoes and a light field jacket. He had no overcoat or first aid kit. As a result, he suffered from the cold and was wet. On the last day "he was there" he picked up an overcoat (R16-17).

5. Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service (MCM 1928, par 130a, p.142). The uncontradicted evidence showed that the accused at the times and places alleged in the specifications absented himself without leave from his organization while it was actually engaged in combat with the enemy and that he remained away

for the respective periods of six months and four months and seven days. Both the intent not to return and to avoid hazardous duty at the time of each departure could properly and legally be inferred from the circumstances shown to exist at the time of departure and the length of the unexplained absences and proof of either or both specific intents was proper under the specification. (CM ETO 16880, Ferrara and the numerous cases cited therein).

6. The charge sheet shows that the accused is 34 years of age and, was inducted at Fort Oglethorpe, Georgia, 24 July 1943.

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

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

Earle Hepburn Judge Advocate

Randel Dreidler Judge Advocate

(ON LEAVE) Judge Advocate

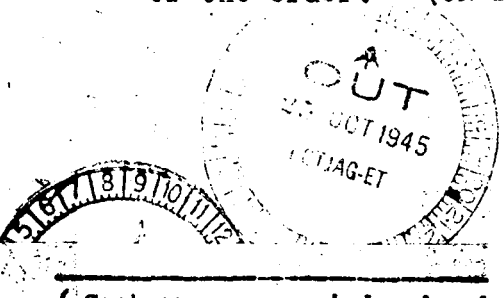
(279)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private FLETCHER L. DeLOZIER, (34881293), Company "G", 179th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17558. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17558).



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

(Sentence as commuted ordered executed. GCMO 571, USFET, 17 Nov 1945).

17558

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

BOARD OF REVIEW NO. 2

17 NOV 1945

CM ETO 17589

U N I T E D S T A T E S	7TH ARMORED DIVISION
v.	Trial by GCM convened at APO 257, U.S. Army, 10 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Staff Sergeant ELLIS C. ROBBINS (6668419), Battery C, 434th Armored Field Artillery Battalion	

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

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

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

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

Specification: In that Staff Sergeant Ellis C. Robbins, Battery C, 434th Armored Field Artillery Battalion, did, at Dramfeld, Germany, on or about 18 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Liebet Schuls.

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

Specification: In that * * *, having been duly placed in arrest at Dramfeld, Germany, on or about 18 April 1945, did, at Dramfeld, Germany, on or about 18 April 1945 break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 7th Armored Division, approved the sentence with the recommendation that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in this case and the recommendation of the reviewing authority for clemency, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution is substantially as follows:-

On the night of 17-18 April 1945, Lisbet Schuls, age 41, Mr. and Mrs. Klinge, their daughter Mrs. Heur, the latter's two children, Hildegard Jaskasch, Marie Schackaw, her husband and two children and an older couple with a young man, occupied house number 27, Dramfeld, Germany (R7,19,27). On that evening Lisbet Schuls occupied a room upstairs (on the right) in which Mr. and Mrs. Klinge also slept (R19). About 0100 hours (R16) someone knocked at the door and Mrs. Schackaw, who had retired, got up, opened the door and admitted accused (R7,51). She called upstairs and asked Mrs. Klinge to awaken her husband. Accused asked for cognac and cigarettes and at this point Mr. Klinge came downstairs (R8). Accused pushed him "in the stomach" with something hard and then motioned to Mr. Klinge to accompany him upstairs (R8,55). They went upstairs and entered the Klinge bedroom, where accused searched the beds in the room and made thrusting motions with a knife toward all the occupants of the room (R8, 20,55). There was no light in the room at this time (R55) but later on it was lighted by a small lantern (R8,12,18). Accused then went to the room occupied by Mrs. Heur, her two children, and Hildegard Jaskasch (R11,13,15,55). He held a flashlight, knife and a pistol and flashing the light at them, motioned for them to be quiet (R16). He placed the pistol on the table and standing in front of Mrs. Heur's bed he "wanted" to get in it with her. Mrs. Heur called her mother and when the latter appeared, accused left the room (R17) and went downstairs (R55). He entered the room occupied by Mrs. Schackaw, her husband and their daughter (R8, 9). He searched the room thoroughly, his flashlight furnishing the only illumination at this time (R9). While doing this he touched Mrs. Schackaw's baby's cheek and remarked that he had a small baby in America (R9). He then made Mrs. Schackaw "understand" she was to remain in the room and he returned upstairs (R9, 55), where he again entered the Klinge bedroom. He banged on the bed with his knife and forced Mr. Klinge to accompany him while he searched the closets in another room (R55). They proceeded downstairs where accused entered the Schackaw Bedroom and ordered Mrs. Schackaw at the point of a pistol upstairs into the Klinge

bedroom, where she remained awake for the rest of the night (R9,10,51,55). Accused, still accompanied by Mr. Klinge, after several more trips between the upstairs and downstairs of the house (R10,11), entered the downstairs living room, where Lisbet Schuls had gone after accused's first visit to the Klinge bedroom (R20,21). Accused thoroughly searched this room and then proceeded to another room, occupied by the three people who were staying overnight. He asked for their passports, searched the room, and "motioned the three people to stay in there and closed the door".

Accused forced Mr. Klinge to remain in the front room with Mrs. Schackaw and her children and returned to the living room, where he was now alone with Lisbet Schuls (R21, 55,56). He "sat" her on the sofa, touched her "all over" and "motioned" her to take off her clothes. At first she removed only part of her clothes and kept telling accused, "not me, I am old". He pointed a knife at her, held her down and kept "motioning" for her to undress. She did not completely undress as she still retained her "skirt and panties". He "layed" her down on the sofa and "tried to do it on the sofa" and she always protested "not me, not me". Accused then forced her to get up from the sofa and accompany him upstairs where they entered the room, which Mrs. Jaskasch and Mrs. Heur had vacated. He walked behind her "with his dagger or knife" while they went from the downstairs to the upstairs. [One witness testified accused carried a pistol in his hand in a raised position at this time (R11,12,50)] (R11,22,23,52). This occurred about 0200 hours (R49) and after entering this room accused pushed her on the bed, kept playing with his knife and "put it in my chest". He told her to get undressed and continued to threaten her with his knife until she was completely naked. When she told accused she was afraid, he put his knife on the table, together with a pistol, a pair of binoculars and a flashlight (R23,26,27,53). She tried to sit up but accused pushed her down again, got in the bed and placing his penis in her genitals had sexual intercourse with her "against my consent" (R23, 27). She testified she was "like paralyzed", that she pushed him "very lightly" and "couldn't yell, I was so afraid". She further stated "I have heart trouble and when you have to get a deep breath, it was just like I was paralyzed" (R23,26). After the act of sexual intercourse was completed he told her something she did not understand except for the words "Comrade, American and baby", took her wedding ring from her, placed it on his little finger and fell asleep (R24, 55). When she observed he was asleep she moved into another bed, that was "tight together" with the bed in which the sexual intercourse took place. She remained awake in this bed until about 0600 hours (R13,15,24,25). She waited until "it was a little light outside", got dressed and went to the Klinge bedroom. She remained in the room after accused went to sleep because "I didn't know what was going on outside and was too afraid". Accused was asleep and his knife, pistol and flashlight were on the table when she left the room (R24,25). Between the time accused had intercourse with her and the time she saw him in the morning no other soldier entered the room, as she was awake through the entire period. No other American soldier entered the house that night (R12,25,54). Accused was identified by Mrs. Schackaw as the soldier she admitted into the house on the night in question and prior to trial she selected him from a line up of seven men (R7, 51). She admitted some uncertainty with reference to her identification of accused in this line up because "his hair was over his face" (R14). He was further identified by Hildegard Jaskasch as the soldier who entered the house that night about 0[illegible] hours and by Lisbet Schuls as her assailant (R16, 20). Mr. Klinge identified accused as the soldier who entered the house that evening and testified he was the same person who left the house the next morning with two other soldiers (R56,57).

Earlier in the night after accused "wanted to go into Mrs. Hours bed" she and Mrs. Jaskasch fled to the barn, when accused left their room (R17,18). About 0615 hours the next morning these two women reported the happenings of the night before to the burgomeister and about 0700 hours, at the suggestion of the burgomeister, they went to the "Commandant" in the village. Accompanied by an interpreter and a military policeman they returned to the house, where they observed the interpreter and the military policeman lead accused from the house (R18). On 10 April 1945, as a result of a complaint made by Mrs. Jaskasch, Captain Brown ordered Technician 5th Grade Alfred Ettinger "to get an MP and go down to that house and get the man who was still sleeping there". Ettinger, accompanied by Private First Class Anthony Ashrut, a military policeman, were led to a house by three women, including Mrs. Jaskasch. They went up a flight of stairs in this house and found accused sleeping in a bedroom located to the left of the stairs and toward the front of the house. He was fully dressed, all his clothing was completely buttoned and there were no stains on his trousers (R28, 29,31,32). Accused was wearing a pistol in a holster on his right side and there was a German dagger and an American trench knife on a table in the room (R29). The military policeman woke accused up and told him he was under arrest, to which accused replied, "what the hell". They left the house and when they had not gone very far in the direction of the Military Government Office, accused asked for permission to uninate. The military policeman granted this request and accused went to the side of the road and uninated against a fence. When he had finished he suddenly dashed off in the direction of a stream. Although he was ordered to halt by the military policeman he waded across the stream. Ettinger fired several shots over his head but he did not stop and the military policeman pursued him. After a chase of about 300 or 400 yards the military policeman finally caught him along the side of a barn, where he had stopped in an exhausted condition. He was then taken to the military government office. The military policeman did not set him at liberty nor did he do or say anything that would indicate to accused that he had been set at liberty (R29, 30-32).

4. Defense witnesses identified a German knife as a knife seen in the room where "this crime was supposed to have been committed" (R33; Def. Ex.A), an American trench knife also seen in the same place (R33,34; Def.Ex.B), a pistol that Private First Class Ashrut took from accused (R34 Def. Ex C), a flashlight identified by Mrs. Hour as being similar to one she saw on a table in the room when "they took the soldier out of the bed" (R35, 36; Def.Ex.D), and a pair of field glasses of the same size that she observed on the night table the morning of the 18 April 1945, and that did not belong to any of the occupants of the house (R35, 36, Def. Ex. E). Mrs. Hour testified that she gave the flashlight she found on the night table to the "Commandant" and Technician 5th Grade Ettinger testified this flashlight was the same one that Mrs. Hour and Mrs. Jaskasch gave to Captain Brown (R36). Private Victor A. Royal testified he has known accused for more than three years and that he (accused) does not own the knives, flashlight or the field glasses admitted in evidence (R37). Three soldiers who worked with accused testified they never saw the above described knives, flashlight, or field glasses in his possession (R40,41,43). Accused, however, did own the pistol admitted in evidence (R40; Def Ex. C). When the military police brought accused back to the kitchen on the morning of 18 April 1945 he was not wearing a wedding ring

on his finger. He does not speak German and never mentioned having a baby back in the United States (R40). He was seen in his bed at 0130 hours on 18 April 1945 by one of the other occupants of his room (R37).

Accused after his rights as a witness were explained to him by the president of the court (R44), was sworn and testified substantially as follows:-

Late in the morning of 17 April 1945 his organization moved into the area. Until about 1830 hours, he was busy feeding the men and, at the direction of his commanding officer, finding a suitable location for the kitchen trunk. Having completed these duties he went to his quarters, where "quite a few" soldiers were gathered in the room. They (including accused) drank until about 2300 hours, at which time they "ran out of something to drink". All these present but Private Royal and accused left the room. This group returned about 2330 hours looking for "something to drink". They left again, once more returning at 0030 hours. He wrote a letter to his girl friend and his mother and at 0130 hours he went to bed. About five minutes after he retired Private Royal got up, left the room for about five minutes, and upon his return, "shined the light" at accused and "wanted to know if I was sleeping". At 0445 hours he woke up and, wanting something to drink he sat up on the bed and smoked a cigarette. He then left his quarters and walked down the road looking for something to drink. After proceeding about two and a half blocks he saw a soldier coming out of a house and he entered this dwelling. He looked to his right and left and, not seeing anyone, he walked upstairs and entered the room on the right side of the stairs "as you go up". Upon entering the room he noticed a knife on the pillow of the bed and another knife on a table on the right of the bed. He put the knife that was on the bed under his belt, and "layed down on the bed and went to sleep". When the military policeman woke him up, he (military policeman) told him to get up and he (accused) replied "what the hell", "what is this all about". He was not told nor did he at any time understand that he was under arrest. They walked downstairs and went out in the road. Knowing he had not done anything to be arrested for and being "all confused", he ran over in the Service Battery area. When he reached the kitchen he sat down and the military policeman walked over to him and took him to the captain (R45). He has no children, does not speak German and, of the exhibits introduced in evidence, the pistol is the only item he carried into the house with him. He did not see a wedding ring (R48).

On cross examination, he testified he was looking for something to drink and that he did not enter any other room in the house than the one he slept in. He did not return to his own bed because he felt "pretty bad". When he saw the other soldier he passed within six feet of him "right in front of the house" but he did not speak to him. This other soldier was wearing "O.D. Clothes" and was carrying a helmet underneath his arm (R46). He heard the shots fired in his direction but he did not halt because he was "scared". When questioned by the president of the court, he stated someone said "Halt or I'll shoot" to which he replied "I haven't did anything to be shot for". He did not have a flashlight when he entered the house and when he ascended the stairs therein he used a cigarette lighter for illumination (R47). During the course of this examination he stated that he passed within twenty to twenty-five feet of the soldier he saw leaving the house and did not speak to him (R48).

Mrs. Schachow recalled as a witness by the court testified that the soldier she admitted to the house was not wearing a helmet nor did he have one in his hand (R61).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b, p.165). All the essential elements of the offense charged in the Specification of Charge I are sufficiently established by the evidence. That an American soldier had carnal knowledge of Lisbet Schulz by force and without her consent is proved by her uncontradicted testimony corroborated in many details by the testimony of the other residents of the house.

The only serious question requiring consideration is the identity of accused. Four witnesses, including the victim, identified him as the soldier who entered the house about 0100 hours, and the following morning he was found asleep in the room where the attack took place. Contrasted to this is accused's contention that he did not enter the house until about 0445 hours at which time he asserts another soldier was leaving the premises and his attempt to establish an alibi by the testimony of a fellow soldier to the effect he was in his room about 0130 hours. The court resolved the issue of fact thus presented against accused and inasmuch as there is substantial evidence to support their decision it may not be disturbed by this Board upon appellate review (CM ETO 15559, Thomas; CM ETO 14338, Reed).

Concerning the offense charged in the Specification of Charge II the evidence clearly discloses that accused was placed in arrest by the military policeman who found him sleeping in a German civilian home. Captain Brown's order to Technician 5th Grade Ettinger "to get an MP and go down to that house and get the man who was still sleeping there" clearly implied the necessary authority to make the arrest. When accused violated the special permission given him to step aside for the purpose of urinating, the breach of arrest was complete. There is substantial evidence of all the essential elements of this offense (MCM, 1928, par. 139a, p.154; CM 228394, Jarbeck, 16 B.R. 139 (1943)).

6. The charge sheet shows that accused is 27 years of age and enlisted 24 October 1939 at Fort Hayes, Columbus, Ohio. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, Sec.II, pars. 1b (4), 5b).

EARLE HERTZOG, Judge Advocate

CLARENCE W. HALL, Judge Advocate

JOHN J. COLLINS, JR., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Staff Sergeant ELLIS C. ROBBINS (6668419), Battery C, 434th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 17559. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17559).

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

(Sentence as commuted ordered executed. GCMO 594, USFET, 26 Nov 1945).

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

BOARD OF REVIEW NO. 3

26 OCT 1945

CM ETO 17560

U N I T E D S T A T E S	) 9TH AIR DIVISION
	)
v.	) Trial by GCM, convened at Brussels,
	) Belgium, 22,23 June 1945. Sentence:
Sergeant JAMES B. ENGLAND	) Dishonorable discharge, total
(35655991) 451st Bombardment	) forfeitures and confinement at hard
Squadron, 322nd Bombardment	) labor for life U.S. Penitentiary,
Group (M)	) Lewisburg, Pennsylvania

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

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

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

CHARGE: Violation of the 92nd Article of War

Specification: In that Sergeant James B. England, 451st Bombardment Group (M) did, at Heverlee, Belgium on or about 6 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Yvonne Nackaerts.

He pleaded not guilty and, all 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. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence, but, owing to special circumstances, in this case, commuted the sentence to dishonorable discharge from the service, forfeiture of all

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pay and allowances due or to become due, confinement at hard labor for the term of his natural life, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. It was twilight about 2130 or 2145 hours on 5 May 1945 when Yvonne Nackaerts, age 19, started from Louvain on her bicycle to return to her home at 26 Bierbeekstraat, Blenden, Belgium. Accused and Karel Decoster, of 50 Naamsche Steenweg, Heverle, Belgium, were at the Cafe do la Chasse, situated on Yvonne's route to Blenden (R9,11). Accused, who had been drinking but did not appear drunk, borrowed Decoster's bicycle and was riding it in the vicinity of the cafe when Yvonne passed. As she continued on her way, accused followed her (R28-30). After she had proceeded about 500 or 600 meters he caught up with her, gave her a shove and said "Stop". She fell and he fell upon her with his bicycle. Yvonne testified in detail regarding the manner in which he then put something around her neck, threw her up an embankment, pulled her up the incline using as a handle whatever he had secured about her neck and dragged her some ten meters into the woods. She cried, pushed and "hollered", but could not do much because he "just took me as if I was a child" (R10-11,23). He tied her neck to the ground in some manner; tore off her clothing. She resisted but could not do much since she was tied (R11,14,18; Pros. Ex.1, 2, and 3). He "pronounced at least a hundred times the word 'pistol'", although he did not show such a weapon (R12). He undressed except for his socks and shoes and used a piece of his clothing to tie her around the belly (R11,18,19). He then "kissed my breasts and everything, my body, where he could reach me" (R11), "opened my legs and then pulled them up and then he laid upon me" and "put his vital member into me" (R12), inserting "his sexual parts into my female genital parts" (R69). While these

> "facts happened,the bicycles were laying on the road and somebody who came there spoke with the accent of Louvain, and apparently intended to take the bicycle with him but the soldier with me began to yell, to cry loud so the other fled away, saying with his accent 'I thought there was no one here'"

After accused finished his intercourse and was looking for something, an Englishman then came along whom she asked if he spoke French. Accused said something to him. The Englishman laughed. Accused "apparently had gone off and the Englishman handed me some matches to make light to look after my clothes." She said nothing further to him and he left. She obtained her bicycle and rode home where she reported her experience to her mother and father (R13) at about 0030 or 0100 hours.

She was "very tired and in full trouble". She wept and was "in an emotional condition" (R24). She returned with her father to the scene of the attack upon her to search for her raincoat and handbag. They found the raincoat and also accused's undershirt, drawers and his service cap (R13-14, 16,27; Pros. Ex. 5,6 and 7). She had scratches and blue

stains on her legs and thighs. Her shoulders and neck were stiff the following day (R21). In her opinion accused was drunk (R69).

On 9 May 1945 she was examined by a physician who found "the hymen was torn to the "southeast" and there were stains of blood at that place" (R5-6). He testified that "the hymen I found was truly a hymen just recently torn, less than ten days".

Accused was questioned between 1000 and 1100 hours on 9 May 1945 by First Lieutenant Robert J. Sullivan, Company "A", 707th Military Police Battalion, in the presence of other military personnel. He was not threatened and was warned of his rights under Article of War 24 (R30-31, 33,38). He was told "it would be much better for him if he would tell the truth right off and that if he did come clean, they would do all that they could for him" (R42). He then made a statement which was admitted in evidence over objection by the defense (R52; Pros. Ex 8). This describes his drinking during the day, his following on a borrowed bicycle a girl who cycled passed a cafe where he had been drinking. Overtaking her, he asked if he could ride along with her. After a casual conversation he asked her for sexual intercourse. She replied "Yes for two hundred francs". They had intercourse at a spot near by and thereafter he returned to camp (Pros. Ex. 8). About 1500 or 1530 hours on the same day when confronted with articles of clothing found at the scene of the alleged crime (Pros. Ex. 5,6 and 7) accused said "All right, I'll admit I'm guilty" (R31-32). He thereupon made a second statement, which was also received in evidence over defense objection (R52; Pros. Ex. 9). In this statement accused said he was drunk on 6 May 1945, did not give the girl 200 francs;that she did not have intercourse with him of her own free will. He took off his clothes and did not remember whether she took her clothes off or if he tore them off.

5.For the defense, First Lieutenant Thomas E. Mattox, of accused's squadron, testified that accused entered the lieutenant's tent about 0230 hours on the morning of 7 May 1945, wearing an overseas cap, blouse and tie. His clothing showed no signs of disorder and contained no grass stains. He did not appear drunk and talked normally. He had flown 22 missions. The lieutenant "couldn't have asked for a better tail gunner" (R65-66).

On the morning of 7 May 1945 accused said to a corporal in his squadron that

> "he had a hell of an experience the night before. He said he was awful drunk, drunker than a son-of-a-bitch. He said the last thing he could remember was riding a bicycle in circles by a pub, and the next thing he knew he was walking back to camp" (R70).

When accused, after being told by Lieutenant Sullivan about the clothes that were found at the scene of the alleged crime, admitted it and said he paid two hundred francs (R46), the lieutenant said, "You should be beaten. After doing what you did, you should be beaten" (R47).

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6. After his rights were explained (R53), accused testified that on 6 May he was

> "with Lieutenant Stanley Adelman at the airfield and we were drinking, and we go to town and we have some drinks in town, and I borrows - I remembered borrowing a kid's bicycle and I was riding it around the street, and I don't remember anything after then until I was walking back to camp and catched a ride with someone in a car"

Two days later he was taken to the guard house at Military Police Headquarters in Louvain where a lieutenant after looking him over for cuts said to a staff sergeant "Let me have a baseball bat and I'll beat his brains out". Accused then made a statement that he just made up because he was scared. Then the "CID men went out to the girl's house" and obtained a statement from her. They came back and said to him "This statement is no good. Let's throw it away" and added, "We'll do all we can to get you out of this". So accused made another statement (R54). However it was "just a statement" - he remembered nothing concerning the alleged incident (R54-55). He heard Yvonne's testimony, but had no knowledge whether or not it happened as she alleged (R57-58, 62,63). On 27 May 1945 he did sign a request that Yvonne be questioned "as to civilian who rode by on bicycle and who started fooling around with one of the bicycles" but who went away when accused spoke to him (R60; Pros. Ex.10). He made such a request because the "CID man told me while we were there, that in her statement two guys went by", but he himself did not "remember a civilian" (R61).

7. That accused accomplished carnal knowledge of Yvonne against her will as alleged was clearly established by her direct testimony and by circumstantial evidence which afforded sufficient corroboration thereof. The defense offered no evidence to contradict nor did accused, in his testimony, dispute her description of the brutal manner in which he attacked her. His defense was that he was drunk and as to anything concerning Yvonne his mind was blank. Questioned if he remembered seeing her or assaulting her, he was emphatic - "I don't remember nothing, I didn't remember ever seeing the girl" (R62). In the light of all the circumstances shown, including accused's testimony, the court would have been fully warranted in disbelieving his testimony that his drinking caused him to suffer such an unusual abberation, expecially peculiar when compared with his otherwise sober, considered and well remembered conduct on that date.

In any event, his voluntary drunkenness did not constitute an excuse for the crime of rape nor destroy his responsibility for his misconduct. In CM ETO 9611, Prairiechief in which accused was found guilty of rape and other offenses, it was stipulated that three medical officers would testify that they made a diagnosis of acute alcoholism and pathological intoxication and that they were of the opinion that at the time of the commission of the offenses accused's mental state was such that he was unable to differentiate between right and wrong, to adhere to the right and to appreciate the consequences of his acts. In finding the record of

trial legally sufficient, the Board of Review said:

> "* * *, it was the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behaviour under certain conditions and to find upon all the evidence that at the time of the offense accused was capable of distinguishing right from wrong and of adhering to the right (CM NATO 2047, III Bull JAG 228). Such a finding was inherent in the findings of the court in this case and accused was guilty as charged."

The function of the Board of Review upon appellate review with respect to the findings of the trial court on the issue of an accused's mental responsibility was considered further in CM ETO 9877, Balfour wherein the principle announced in the holding in the Prairiechief case was affirmed. In the instant case, the evidence contains all the elements of the crime of rape and fully supports the court's findings of guilty CM ETO 611, Porter, 2 BR (ETO) 189; CM ETO 774, Cooper, 2BR (ETO) 317; CM ETO 4661, Ducote, and authorities therein cited; CM ETO 9611, Prairiechief supra).

8. While without consideration of accused's two written statements (Pros. Ex. 8 and 9), the evidence of his guilt is sufficiently compelling to sustain a conviction, an examination of the record of trial shows that the first statement (Pros. Ex 8), does not purport to be a confession, but does contain important admissions as to his connection or possible connection with the offense charged. Such statements are admissible in evidence without any showing they are voluntarily made (CM ETO 2535, Utermoehlen).

> "Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement" (MCM,1928, par. 114b p. 117).

The fact that accused was told "that it would be much better for him if he would tell the truth right off, and that if he did come clean, they would do all they could for him"(R42) was not means of such character as to be the cause of accused's making a false statement. As regards the second statement (Pros. Ex. 9), there was no evidence of any threats or force used. When the Criminal Investigation Division agents showed accused apparel of Yvonne, he admitted his guilt and made the statement accordingly. In the opinion of the Board of Review both statements were properly admitted in evidence and that, even disregarding them, the evidence is sufficient to compel a finding of guilty.

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9. The charge sheet shows that accused is 21 years two months of age and was inducted 25 March 1943 at Huntingdon, West Virginia. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater 26 OCT 1945 TO:Commanding General, United States Forces, European Theater (Main), APO 707, U.S. Army.

1. In the case of Sergeant JAMES B. ENGLAND (35655991) 451st Bombardment Squadron, 322 Bombardment Group (M), 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 17560. For convenience of reference, please place that number in brackets at the end of that order: (CM ETO 17560).

OUT 30 OCT 1945 BOTJAG-ET

IN 29 OCT 1945 AG M&R USFET

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

(Sentence as commuted ordered executed. GCMO 589, USFET, 24 Nov 1945).

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

BOARD OF REVIEW NO. 3

13 NOV 1945

CM ETO 17586

UNITED STATES	)	IX AIR FORCE SERVICE COMMAND
	)	
v	)	Trial by GCM, convened at Fulda, Germany,
	)	15 September 1945. Sentence:
Private CECIL D. SKINNER (18163294), 1957th Ordnance Depot Company (Aviation), 42nd Depot Group.	)	Confinement at hard labor for six months and forfeiture of $33.33 per month for a like period. Oise Intermediate Base Section Guardhouse, Metz, France.
	)	

OPINION BY BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN AND DEWEY, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War

Specification: In that Private Cecil D. Skinner, 1957th Ord Dep Co (Avn), 42nd Air Depot Group, did, at Polish Displaced Person Camp, Hanau, Germany, on or about 29 July 1945, with intent to do her bodily harm, commit an assault upon Christina Kospszak, Polish displaced person, by willfully, and feloniously grabbing the said Christina Kospszak on the neck with hands.

He pleaded not guilty, and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "with intent to do her bodily harm, commit an assault upon Christina Kospszak, Polish displaced person, by willfully and feloniously grabbing the said Christina Kospszak", substituting therefor the words "willfully grab", and not guilty of the Charge but guilty of a violation

of the 96th Article of War. Evidence was introduced of one previous conviction by general court-martial for assault and battery 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 confined at hard labor, at such place as the reviewing authority may direct, for six months, and to forfeit $33.33 of his pay per month, for a like period. The reviewing authority approved the sentence and ordered it executed, and designated the Oise Intermediate Base Section Guardhouse, Metz, France, as the place of confinement. The proceedings were published in General Court-Martial Order No. 163, Headquarters IX Air Force Service Command, APO 149, U.S. Army, 2 October 1945.

3. The evidence, a/consideration of which is unnecessary, showed detailed that accused, at the time and place alleged, while grossly drunk, grabbed Christina Kospszak, a 10-year-old Polish girl, by the throat, pushed her on a bed and choked her until a number of persons entered the room and caused him to desist.

The court, by exceptions and substitutions, apparently intending to find accused guilty of a simple assault because of his drunken condition, found nothing more than that accused, at the time and place alleged, did "willfully grab on the neck with hands", in violation of Article of War 96. But such substituted specification clearly fails to state any offense under Article of War 96 or under any other article of war. It does not appear therefrom that accused grabbed or otherwise assaulted any named or described person, an essential element of the offense (MCM 1928, par. 149l pp. 177-178). Even if the name or description of an assaulted person did appear, there still would be nothing in the finding to indicate that the grabbing was wrongful, felonious or unlawful, and the legal presumption would arise that the act was lawful or innocent (Dig. Op. JAG, 1912-30, sec. 1559, p. 771; CM 187548, Burke et al, 1 BR 55 (1929); CM 218667, Johns, 12 BR 133 (1941)). Accused was acquitted of all material allegations excepted by the court in its findings (Dig. Op. JAG, 1912-40, sec. 454 (6), p. 348). Since the substituted specification of which accused was found guilty does not state an offense, the findings of guilty cannot be sustained (see CM 232190, Lester, 19 BR 13 (1943)).

4. The charge sheet shows that accused is 20 years ten months of age and enlisted 10 December 1942 at Tulsa, Oklahoma. He had no prior service.

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

(ON LEAVE) Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Geary Jr Judge Advocate

RESTRICTED

1st Ind

War Department, Branch Office of the Judge Advocate General with the European Theater 13 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 726; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private CECIL D. SKINNER (18163294), 1957th Ordnance Depot Company (Aviation, 42 Depot Group.

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

3. The serious error which invalidates the sentence in this case was not commented on in the review of the Staff Judge Advocate.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO. 17586

OUT 3 NOV 1945 BOTJAG-ET

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

dings and sentence vacated. GCMO 616, USFET, 13 Nov 1945).

RESTRICTED

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

BOARD OF REVIEW No. 3

5 NOV 1945

CM ETO 17598

U N I T E D S T A T E S	HEADQUARTERS SPECIAL TROOPS 12TH ARMY GROUP
v.	
Private RUSSEL D. THOMASON (36010974), Battery A, 749th Antiaircraft Artillery Gun Battalion (Semi-Mobile).	Trial by GCM, convened at Wiesbaden, Germany, 16 July 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Loire Disciplinary Training Center, Le Mans, Sarthe, France.

HOLDING BY BOARD OF REVIEW No. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

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

Specification: In that Private Russel D. Thomason, Battery "A", 749th Antiaircraft Artillery Gun Battalion (Semi-Mobile), did, at Wiesbaden, Hessen-Nassau, Prussia, Germany on or about 7 June 1945, with intent to do him bodily harm commit an assault upon Kurt Lamberti, a German

civilian, by threatening to shoot him with a dangerous weapon, to wit a service carbine, after having pointed and loaded said weapon.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that * * *, was, at Wiesbaden, Hessen-Nassau, Prussia, Germany on or about 7 June 1945, drunk and disorderly in uniform in a private home, occupied by Kurt Lamberti, a German Civilian, in such manner as to bring discredit upon the military service.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I except the words "with intent to do him bodily harm", substituting therefor the words "wrongfully attempt to", not guilty of Charge I but guilty of violation of the 96th Article of War, and guilty of Charge II and its specifications. Evidence was introduced of two previous convictions,both by special courts-martial, one for being drunk in quarters and striking a non-commissioned officer in the execution of his office in violation of Articles of War 96 and 65 respectively, and one for absence without leave in violation of Article of War 61. 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 confined at hard labor, at such place as the reviewing authority may direct, for one year. Following announcement of the findings and sentence, and a recess, the court reconvened upon its own motion to reconsider the findings and sentence and, two-thirds of the members of the court present at the time the vote was taken concurring, found accused guilty of the Specification of Charge I except the words "with intent to do him bodily harm commit an assault upon" and the words "by threatening to shoot him", substituting therefor the words "wrongfully attempt to shoot", not guilty of Charge I but guilty of a violation of the 96th Article of War, and guilty of Charge II and its specifications. 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, at to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge II, approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from

confinement, and designated the Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 22, Headquarters Command, United State Forces, European Theater, APO 757, U.S. Army, 28 September 1945.

3. The evidence for the prosecution showed that accused, at the time and place alleged, while grossly drunk, entered a German apartment, loaded a carbine which he carried, pointed it at Kurt Lamberti, threatened to kill Lamberti and the other occupants of the apartment, and then fired the carbine immediately after a German woman knocked it to one side. The woman threw him to the floor and helped to hold him until other American soldiers arrived and took him in custody (R9-10, 13-15, 19-20). Accused testified in effect that he was drunk and was unable to remember any of the alleged incidents (R33-34). A question arises as to the legality of the findings as to Charge I and its Specification.

After the court had announced its findings in open court and considered evidence of previous convictions, it had no legal authority to reconsider such findings upon its own motion (CM 251451, IV Bull. JAG 5-6; MCM 1928, par. 78d. p. 65). Therefore, it is necessary to consider only the original findings of the court, which, with the exceptions and substitutions made, recite that accused did, at the time and place alleged,

> "wrongfully attempt to commit an assault upon Kurt Lamberti, a German civilian, by threatening to shoot him with a dangerous weapon, to wit a service carbine, after having pointed and loaded said weapon",

in violation of Article of War 96.

Since an assault is itself only an attempt to commit a crime, it is said that an attempt to commit a simple assault was not recognized as an offense at common law (CM 274869, IV Bull. JAG 90; 5 C.J., sec. 222, p. 741; see also CM ETO 8163, Davison). It does not necessarily follow that there may not be an attempt to commit the type of assault shown in the instant case (see 5 C.J., sec. 222, p. 741, note 55). It is unnecessary, however, to decide that question here. For the purposes of this holding, it will be assumed that if the original findings of the court constitute only a finding of guilty of an attempt to commit the assault, such finding must be disapproved as a finding of guilty of a non-existing offense.

That the court actually intended to find accused guilty of an assault with a dangerous weapon is clearly evident from the findings improperly made by it upon reconsideration of the original findings, viz., that accused did "wrongfully attempt to shoot Kurt Lamberti, a German civilian, with a dangerous weapon, to wit a service carbine, after having pointed and loaded said weapon". Moreover, considering the original findings made by the court "not in their technical, legalistic aspect but as a factual statement of accused's actions" (see CM ETO 10967, Harris), such findings fairly show that accused was found guilty of wrongfully loading and pointing his carbine at Kurt Lamberti and threatening to shoot him with it. Such acts, which are shown beyond doubt by the evidence to have been committed by accused, clearly constitute an assault with a dangerous weapon in violation of Article of War 96 (CM ETO 5561, Holden et al; CM ETO 5420, Smith).

In the civil courts, the rule is well established that a verdict of a jury will be construed according to the intention of the jury, and in ascertaining such intent the verdict will be given a liberal and reasonable construction and with reference to the pleadings, the evidence and the record of trial as a whole (23 C.J.S., sec1409, pp. 1107-1108). And the Board of Review, in an early case, stated that in making findings by substitutions and exceptions, a court-martial

> "must act in closed session, speedily, without opportunity for reflection or consultation of authorities other than the Manual for Courts-Martial. Among the members there is seldom a lawyer. Under the circumstances the Board of Review thinks that it ought not to be too technical in weighing the words retained, eliminated, or substituted by the court. To do so would defeat the ends of justice and tend to make the court-martial system impracticable and unworkable" (CM 202027, McElroy, 5 BR 347,349 (1934)).

That the court in this case has inadvertently described accused's conduct as an attempt to commit an assault upon Lamberti, rather than as an attempt to shoot him, or as an assault upon him, should not require a disapproval of such findings; for it is clear that the court was employing the legal term "assault" in its not uncommonly used meaning of an actual battery. Accused was not prejudiced in any manner by the mistake of the court in giving a misnomer to the acts which he was at the same time found guilty of committing. The findings describe a lesser offense than that

originally charged. There is no likelihood that accused can be tried again for the acts described by them. In interpreting findings as distinguished from specifications, the Board of Review has not been too technical and has not demanded excessive preciseness and punctiliousness in the wording of such findings (CM ETO 11987, Johnston; CM ETO 16970, Veilleux et al). Since an assault with a dangerous weapon is otherwise described in the findings, the description of such assault as only an attempt to commit an assault may be rejected as surplusage (cf. CM 240318, Ratcliffe, Jr., 26 BR 15 (1943)).

4. The evidence indicates that the disorderly conduct of which accused was also found guilty consisted chiefly in the assault with the carbine. Since the Manual provides that

> "a soldier should not be charged with disorderly conduct and for an assault when the disorderly consisted in making the assault" (MCM 1928, par. 27, p. 17),

the wisdom of adding Specification 2 of Charge II to the case may well be questioned. However, since the sentence is clearly authorized for the more serious offense of assault with a dangerous weapon (CM 230478, Maynor, 17 BR 375 (1943)), accused's substantial rights were not prejudiced by the addition of such specification (CM ETO 11729, Held).

5. The charge sheet shows that accused is 28 years five months of age and was inducted 19 March 1941 at Chicago, Illinois. 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 as approved.

7. Confinement at hard labor for one year is an authorized punishment for the offense of assault with a dangerous weapon (sec. 22-502, D.C. Code 1940). The designation of the

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Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement is proper (Ltr, Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug 1945).

(ON LEAVE) Judge Advocate

Malcolm C. Sherman Judge Advocate

E. L. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 5

7 DEC 1945

CM ETO 17601

UNITED STATES	)	SPECIAL TROOPS, 12TH ARMY GROUP
v	)	Trial by GCM, convened at Wiesbaden, Germany, 20 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade LAWRENCE C. WADE (38642643), Company B, 25th Signal Heavy Construction Battalion	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Lawrence C. Wade, Company B, 25th Signal Heavy Construction Battalion, did, at or near Wiesbaden, Hessen, Germany on or about 2300, 25 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Kathe Pfeiffer.

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

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

3. The evidence for the prosecution shows that on 25 May, 1945 at about 1930 hours three negro soldiers arrived at a German civilian house at 9 Petersburg, Mainz-Katsel (R26,34). Accused, then a member of Company B, 25th Signal Heavy Construction Battalion, was identified as one of the three soldiers (R12,28, Pros. Ex. 1). The other two were described by witnesses, one as having a flat nose, puffed up lip, and being a large "black" man (identified as Gillion), the other as being of mixed blood, yellow (identified as McKnight). Accused was a "black one" but not the large "black" one (R15,16,17,27). These soldiers stated they were looking for German prisoners and searched the house (R27,35). They then left, but returned shortly and entered the kitchen of the apartment occupied by August Pfeiffer and his family (R29,35). The "yellow one" said something to the other two soldiers and took hold of his rifle. They pulled out their pistols and forced all the occupants out into the yard. Shortly thereafter they were ordered back in the house and directed to go upstairs. Kathe Pfeiffer, seventeen year old daughter of August, attempted to leave with the rest but "the yellow one" grabbed her and threw her behind the sewing machine. August was hit on the small of the back with a rifle butt and forcibly led from the room (R30,36,37). The "yellow one" grabbed Kathe and threw her on the bed (in the kitchen (R61)). She resisted and beat him so he called the larger colored soldier who had remained downstairs. He came over, held her hands and pointed his revolver at her chest. The "yellowone" pulled her pants off, and although she resisted and screamed, he pulled her legs apart and "raped" her. During the act of intercourse she screamed and the tall soldier left the room (R38,77,78). Eventually the "yellow one" let go of her and got up. She tried to get off the bed but was slapped across the chest and on opening her eyes saw a "black" soldier. She felt his sexual organ inside her vagina, and tried to resist, but he took her head and beat it against the wall until she lost consciousness (R38,76). When she regained consciousness she found him on top of her and heard her aunt's voice (R39,77). She felt pain, screamed and tried to "lash out" at him (R39). The "yellow one" and "black one with the gold tooth" (accused has a gold tooth (R45)) kicked her, beat her on the face, threw gum at her and left (R39,40). She attempted to identify the second one who had intercourse with her apparently, pointed to Gillion referring to him as the short soldier. She made another attempt to point out the second assailant, said he was the small one with a narrow face, pointed to accused, and said she was pretty sure she recognized him (R78,79).

Katherine Pfeiffer, the prosecutrix's aunt, testified that on the evening in question there were only two negroes and one "yellow one" present at the house (R20). While the "yellow one" was upstairs, Gillion, the tall black one, forced her to accompany him downstairs (R18). There she saw the small black one, whom she identified as the accused, lying on top of Kathe. On cross-examination she admitted that she was not positive it was accused as she did not see his face (R20). Kathe was lying on her back, her legs were spread apart and her dress was folded up (R24). She was screaming before and after, but not during the time, the aunt was in the room (R24,25).

The prosecutrix was examined on the following day by Proffessor Doctor Richard Krauter. He found various lacerations of the hymen and two large lacerations towards the rear of the vagina (R9).

4. Accused, after having been fully advised of his rights, elected to take the stand and testify (R46). He stated that he finished the eighth grade in school and had been in the military service fifteen months (R47). He was at the Pfeiffer house on 25 May where he saw Kathe. However, he never touched her or had intercourse with her and was carrying no weapon that night (R47,48). He stayed on the stairs or by the door during the time he was at the house and refused to walk guard for the others while they werehaving intercourse (R52,53,56,61). He saw Gillion come downstairs with the aunt at the time McKnight was having intercourse with the prosecutrix. When McKnight finished with her he went upstairs and Gillion got on the girl (R54,58). There were only three soldier present that night namely: accused, Mcknight who is yellow color and Gillion who is black and larger than accused (R55).

5. Evidence for the prosecution showed that accused in company with two companions was present at the prosecutrix's house on the evening of 25 May 1945. He was identified as being the smaller "black one" another as the tall "black one " and the third was identified as the "yellow one". She positively testified to the fact that one of the "black" soldiers penetrated her vagina with his sexual organ and that she heard her aunt in the room. Although her identification of accused was not positive, it was corroborated by her aunt. The latter testified that there were only three soldiers present, that the yellow one was upstairs when she was forced downstairs by Gillion and there saw the small"black"one on top of the prosecutrix. Although she did not see his face, she identified him as the accused. As stated the prosecutrix heard her aunt's voice in the room at the time the "black" negro was having intercourse with her. Accused testified there were only three soldiers present that night. The direct identification of accused, although not positive, coupled with the circumstantial evidence was sufficient to establish the identity (CM ETO 1202, Ramsey and Edwards; CM ETO 2002, Bellot).

Immediately after the prosecutrix had been raped by one of his companions and while she was still on the bed, accused slapped her across the chest and had intercourse with her. When she tried to resist he beat her head against the wall until she became unconscious. This was sufficient evidence of force and lack of consent to support the court's finding of guilty (CM ETO 16711, Mobley: CM ETO 17508, Mesa).

6. The charge sheet shows that accused is 19 years and 7 months of age and was inducted 31 January 1944 at Camp Wolter, Texas. He had no prior service.

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

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

23 NOV 1945

CM ETO 17602

U N I T E D S T A T E S	HEADQUARTERS SPECIAL TROOPS 12TH ARMY GROUP
v.	
Private SAMMIE GILLION (38389790), Company B, 25th Signal Heavy Construction Battalion	Trial by GCM convened at Wiesbaden, Germany, 20 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Sammie Gillion, Company B, 25th Signal Heavy Construction Battalion, did, at or near Weisbaden, Hessen, Germany, on or about 2300, 25 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Kathe Pfeiffer.

He pleaded not guilty and, two-thirds of the members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 10 days in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay or allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action

under Article of War 50½.

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

About 7:30 PM on 25 May 1945, three negro soldiers came to the house of August Pfeiffer at 9 Petersberg, Mainz-Kastel, Germany. One was the accused (R11-12), who, at the time, was in the military service and assigned to Company B, 25th Signal Heavy Construction Battalion (R9, Pros. Ex. 1). The soldiers informed Mr. Pfeiffer that they were police and were looking for prisoners. He admitted them and they searched the house (R11-12). Shortly thereafter they left and went to a neighboring home (R12-13). About 10 minutes later they returned and again entered the Pfeiffer home and sat down in the kitchen. The civilian occupants of the house gathered in the same kitchen. One soldier asked if Mr. Pfeiffer's 17 year old daughter, Kathe, was a "Miss or a Mrs". Mr. Pfeiffer said she was a "Mrs", but Kathe corrected him and said she was a "Miss". That soldier then ordered all of the civilians in the room to go outside. This included Mr. Pfeiffer and Kathe and his other 12 year old daughter, Hanna. All went outside (R14) and the same soldier ostentatiously loaded his carbine and pointed it at Mr. Pfeiffer (R30). Hanna screamed and ran away. The soldier pointed the carbine at Hanna but Mr. Pfeiffer knocked the weapon down with his hand. The same soldier then ordered them back into the kitchen of the house (R14, 24,31). They went inside. The three negroes conversed among themselves and then the two (including the accused) who were armed only with pistols drew their pistols and the three at the point of their weapons forced all of the occupants except Kathe out of the room and upstairs to another room (R15,25). The accused accompanied them upstairs brandishing a pistol in his hand and stood at the door of the room into which they were herded. Kathe's screams could be heard from below (R15,18,19,26). In the meantime the colored soldier with the carbine had grabbed Kathe as she attempted to follow her father upstairs and threw her behind a sewing machine. She called "Papa". The soldier beat her on the face, handed the carbine to the accused and threw Kathe on the bed. She resisted and the accused came over and held her two hands down and "set his revolver on" her chest. The other soldier pulled up her skirts and took off her pants, beat her head against a piece of iron at the head of the bed, strangled her, and then "raped" her (R32) by getting on top of her and penetrating her body. The accused let go of her hands and she continued to fight and scream until the negro on top of her choked her again. He remained on her 5 to 6 minutes, then let her go. She tried to arise but received a slap across the chest and fell back on the bed. She lost consciousness and when she regained consciousness the other colored soldier (not the accused) was on top of her (R33-34). The three soldiers then left and Kathe went upstairs and told her father that she had been raped (R17,35). She was taken to a hospital, examined and remained there 5 days (R36). The examination disclosed severe lacerations of the hymen. Two of the lacerations entered the vagina from which blood was oozing (R8). Kathe had never had intercourse with any man previously (R36-37).

4. The accused having been fully advised concerning his rights as witness elected to testify on his own behalf (R38). He stated that on the evening of 25 May he accompanied Privates Wade and McKnight to the Pfeiffer home. Inside the house Wade said, "lets get the girl". McKnight said, "It's up to you".

Accused said "I don't have anything to do with it". McKnight then pulled the girl toward the bed. Wade "showed" the others up stairs and told accused to "come on". Accused went part way up the stairs and sat on the step. No one came down. Later McKnight came upstairs and told him to go down where Wade was. He went down and saw Wade standing by the bed. Wade said "Do you want to have her?" Accused said, "No, I don't want anything to do with it". He then left. He denied that he ever touched the girl (R40). He heard Kathe crying but denied that he saw what was taking place (R51). He denied that he had any pistol but stated that he carried the carbine slung over his shoulder as he sat on the steps and thereafter until he returned to camp. Wade had a pistol (R51-53) and waved it around in his hand as he forced the people upstairs (R52). He himself got the carbine from McKnight (R53). As he came out of the room McKnight "throwed her on the bed there" (R54). Both Wade and McKnight were in the room when the girl was crying (R54).

On recross-examination he admitted that on 28 May 1945, he voluntarily signed a pre-trial statement of the occurrence which was admitted in evidence by stipulation (R58, Pros. Ex. 2). It read in part as follows:-

> "Wade closed the door going outside. Wade then ran the old man and woman and the small children upstairs. Wade told me to stay on the steps and guard the people whom he had run upstairs. I stayed on the steps but no one tried to come back downstairs. I could hear the girl crying downstairs, while I stood on guard. After five or ten minutes, Wade called me. McKnight came upstairs and told me to go down where Wade was".

5. Wade and McKnight were called as witnesses by the President of the court but refused to testify (R59-60). Kathe was recalled and asked to point out the soldier whom she said had held her hands down as the other soldier got on top of her. The three were lined up. She pointed at the accused (R61-62).

6. The accused was found guilty of raping Kathe Pfeiffer. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. The evidence clearly establishes that at the time and place alleged in the Specification, the accused's companions raped Kathe Pfeiffer. The only question presented for determination is whether the accused aided or abetted either one of his companions to commit that crime. If he aided or abetted either one of his companions in the commission of the crime charged then he too may legally be held responsible and guilty as a principal (CM ETO 4234, Lasker and Harrell; CM ETO 5068, Rape and Holthus; CM ETO 15091, Gallahan et al; CM ETO 18165, Lucero and Miller). The victim of the assault positively identified the accused as the one who held her hands and thus prevented her from resisting to a greater extent the consummation of the sexual connection forced upon her by one of the other negroes. In his pretrial statement accused admitted that he stood on guard while the crime was committed by his companions. This implies that he was ready to prevent the parents from assisting their daughter. In defense he admitted his armed presence on the stair separating the parents from their

daughter at the time she was being raped and loudly crying. An issue of fact was thus raised which was within the exclusive province of the court to determine. As its findings are amply supported by substantial competent evidence, they will not be disturbed upon review (CM ETO 895, Davis et al; CM ETO 4194, Scott).

7. The charge sheet shows that the accused is 21 years ten months of age. He was inducted 5 March 1943 at Camp Beauregard, Louisiana. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW42; Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Parle d. Flynn Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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

BOARD OF REVIEW No. 3 27 OCT 1945

CM ETO 17609

U N I T E D S T A T E S	1ST ARMORED DIVISION
v.	
Second Lieutenant GEORGE R. WOOD (01018857), Company B, 14th Armored Infantry Battalion	Trial by GCM, convened at Schwabisch, Hall, Germany, 23 July 1945. Sentence: "Dishonorable discharge" and total forfeitures.

HOLDING BY BOARD OF REVIEW No.3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

CHARGE I: Violation of the 64th Article of War (Disapproved by the confirming authority).

Specification: (Disapproved by the confirming authority).

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

Specification 1: In that Second Lieutenant George R. Wood, Company B, 14th Armored Infantry Battalion, did, without proper leave, absent himself from his organization at or near Albiano, Italy, from about 1830 hours 20 June 1945 to about 2400 hours 20 June 1945.

Specification 2: In that * * *, did, without proper leave, absent himself from his organization at or near Albiano, Italy, from about 2200 hours 22 June 1945 to about 0130 hours 23 June 1945.

Specification 3: In that * * *, did, without proper leave, absent himself from his organization at or near Albiano, Italy, from about 1330 hours 23 June 194 5 to about 1830 hours 24 June 1945.

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

Specification 1: In that * * *, having been restricted to the limits of his company area, did, at or near Albiano, Italy, on or about 20 June 1945, break said restriction by leaving the company area.

Specification 2: In that * * * having been restricted to the limits of his company area, did, at or near Albiano, Italy, on or about 22 June 1945, break said restriction by leaving the company area.

Specification 3: In that * * * having been restricted to the limits of his company area, did, at or near Albiano, Italy, on or about 23 June 1945, break said restriction by leaving the company area.

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 one year. The reviewing authority, the Commanding General, First Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of Charge I and its Specification, confirmed the sentence, but owing to special circumstances in this case, remitted so much of the sentence as provides for confinement at hard labor for one year, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. a. Charge II, Specification 1 and Charge III, Specification 1.

On 18 June 1945, accused was restricted to his company area at Albiano, Italy for a period of seven days by order of his company commander under the provisions of Article of War 104. At about 1830 hours on 20 June, his company commander personally searched for accused in the area without being able to find him. A bed check at midnight disclosed he had not returned at that time. He was

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seen in his bed at 0630 hours the following morning. He had no authority to be absent (R10-14).

b. Charge II, Specification 2 and Charge III, Specification 2.

On 22 June 1945 at about 2130 hours, accused with a female civilian was seen by his company commander at a party given for the company in Ivrea, Italy, near Albiano. Accused had not returned to his own or the headquarters tent by 0130 hours the next morning. However, he was again seen in the company area later at about 0630 hours (R11-12).

c. Charge II, Specification 3 and Charge III, Specification 3.

On 23 June 1945 at 1400 hours, his company commander made a search for accused in the company area without success. Accused did not spend the night in his tent and was next seen in the company area when he returned on the afternoon of the following day. He had no authority to be absent. His seven day restriction to the area imposed on 18 June 1945 was then still in effect (R10-13).

4. The rights of accused as a witness were explained to him by defense counsel (R14). He elected to make an unsworn statement which concerned only Charge I and Specification, under which the court's findings of guilty were disapproved by the confirming authority. No evidence was offered in his behalf as regards Charges II and III and their specifications.

5. Accused's three absences without leave as alleged in Charge II and specifications and his breaking his restriction to the limits of the company area on three occasions, as alleged in Charge III and specifications were established by abundant evidence, which was not disputed. The court's findings of guilty were clearly warranted.

The words "dishonorable discharge" as used in the sentence were inappropriate in the case of an officer. However, the effect is the same as if the proper word "dismissed" had been used (CM 249921, III Bull. JAG 281).

6. The charge sheet shows that accused is 26 years eight months of age. His service is set forth as follows: "N.Y.N.G.5 Nov 38 to 15 Sept 40 - AUS fr 16 Sept 40 to 13 Nov 41 - ERC fr 14 Nov 41 to 7 Dec 42 - AUS fr 8 Dec 42 to 23 July 43-Commissioned AUS fr 24 July 43 to Present."

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, as approved, and the sentence as confirmed.

8. A sentence of dismissal and total forfeitures is authorized upon conviction of an officer of offenses in violation of Article of War 61 and 96.

B R Sleeper Judge Advocate

Malcolm C. Thurman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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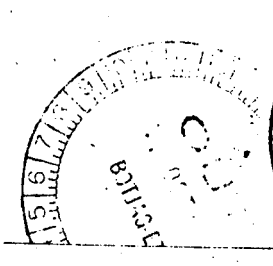
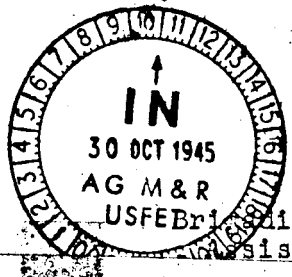
1st Ind.

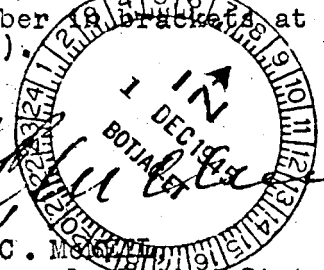
War Department, Branch Office of The Judge Advocate General with the European Theater. 27 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Second Lieutenant GEORGE R. WOOD (01018857), Company "B", 14th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the 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 17609. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17609).







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

(Sentence ordered executed. GCMO 586, USFET, 24 Nov 1945).

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

17 NOV 1945

CM ETO 17622

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Gutersloh, Germany, 13,17,27 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ROBERT R. BOYD (32962613), 1053rd Engineer Port Construction and Repair.	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Robert R. Boyd, 1053rd Engineer Port Construction and Repair, did, at Hamm, Germany, on or about 17 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elisabeth Schopmann.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for disobeying an order of a noncommissioned officer and for behaving in an insubordinate and disrespectful manner toward him in violation of Article of War 65. 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. Prosecution's evidence:

Frau Anna Schoppmann and her daughter Elisabeth, age 33 (R13), were both asleep in bed in their respective rooms in their home at Nordenstiftsweg 27, Hamm, Germany, when at 0100 hours on 17 April 1945, they heard a noise downstairs. Frau Schoppmann went down to investigate. She opened the door and saw accused standing before her holding a rifle under his left arm and a lighted lamp in his right hand (R6-7). He pushed her aside and entered the house. He went first to her room and then to Elisabeth's. While Elisabeth was still in bed he pulled back the bed covers, said, "Nix, Nix" and then went to the top floor of the house. He came downstairs again, returned to her room said "Ausziehen" as he made a motion indicating the taking off of clothes (R7-8,18). She cried and begged to be spared. Her mother said, "Nein, Nein" and tried to pull accused back, but he pushed her, "was furious", said "gehe raus" and ordered her to her room. Then he closed the door and Frau Schoppmann was "crying and calling out for help." She "had to remain in my room and the door was closed" (R9). She testified she could not "say it exactly according to minutes" how long the soldier was in her daughter's room, but after she had gone downstairs and returned to hear accused (sic) call "Mother, Mother" she again entered her daughter's room. She saw her daughter in bed "lying completely bare and he was on top of her." He made motions with his hands as though to ask her what she wanted and she tried once more to pull him back (R10). When she took hold of his shoulders and tried to pull, he pushed her in such a manner that she fell to the floor. He remained on top of Elisabeth while her mother, after having "broken down" and suffered "cramps at my heart", "awoke because of the moaning of my daughter." The mother arose, called for help and "Then my daughter got convulsions and the soldier let go of her" (R11). He then looked for his cap but "He could not find it and we could not see it either; then he went downstairs and outside" (R12). Elisabeth got up, put on her clothes and went to the kitchen to clean up because she was bleeding "At her sex organ" (R13). In the afternoon of the same day Frau Schoppmann again saw accused in a line-up of soldiers "at the railroad installation" (R15).

Elisabeth testified that when accused entered her room after his return from the top floor of her house, she was afraid because he "had a ferocious look" and because, even after he had placed a weapon which she indicated was about 12 inches long on the "night cupboard", he was still armed with a rifle which he "had standing in front of him." Although he did not touch her, she did remove, because of his persistent demands, a knitted blouse she was wearing (R18,27-28). Her remaining garment was a slip which she tried to hold at the top. She did not know "how it happened, but he pulled it off." She could not say with certainty whether his rifle was then in his hand or not. Her slip was so wide it just slipped down off her shoulders and then "All I know is that suddenly I was lying like that and the gentleman was on top of me." She remained with her arms crossed in front of her and with her hands palms down on her breasts. She was

"going to cry and he placed his hand on my mouth" (R19,28). She testified that

> "I was in such a condition that I don't know myself what I did. My nerves were down to such an extent that I did not know what I was doing" (R19).

She saw that accused "had something very long and he worked down below to enter" (R19). She could not "account for everything that happened because I was too exhausted." She testified that "The whole time I had my hands on my breasts. I could not resist". She "felt that his chest was exposed and I saw this long red thing". She could not "tell you exactly" what it was because she "never saw anything like that before". She knew only "it was a long red thing of meat." He

> "laid on top of me and kept on trying to enter with his long red thing * * * It did hurt me and I was moaning and my mother came inside to help me and he got excited and threw her back" (R19).

Her description of accused's initial and repeated carnal knowledge of her is set forth in the following colloquy:

"Q. What was he doing that he continued doing?
A. First he let go and then he entered anew.

Q. Entered what anew?
A. His organ.

Q. Where did he enter with his organ?
A. In my sexual organ.

Q. How far, if you know?
A. I can't say that. I only know that after that I was bleeding very much and I was also wet.

Q. Where were you bleeding?
A. The blood was trickling down my feet.

Q. Where was the blood trickling from?
A. From top to bottom.

Q. Where was the top?
A. Out of my sexual organ.

Q. Where did you feel that wetness that you referred to?
A. When the gentleman let go.

Q. I did not say when, I said where did you feel this wetness?
A. I felt that I was wet at the sex organ and also something was wet on the bed sheet.

Q. What were you doing at this time?
A. When he let go he fixed himself up again and went into the hallway where he buttoned his pants, touched his own head and said, 'nix, nix'.

Q. What were you doing before he let you go?
A. I was only lying there.

Q. Why were you only lying there?
A. Because I was not in a position to do anything.

Q. Why were you not in a position to do anything?
A. You must understand my predicament, for one hour I did something that I never did before and the excitement" (R20-21).

Asked further why she did this, she answered, "Why I did this I do not know. I did not call for him" (R22).

Flight Lieutenant Alexander Mitchell, Royal Air Force, testified that on 17 April 1945 he visited the home of Anna Schoppmann and received from her an American cap which contained inside the number "1053" in ink (R23). Thereafter, he communicated with the commanding officer of the 1053rd Railroad Operating Battalion and following their conversation an identification parade was held on the same date in the railroad yard at Hamm, Germany where 20 to 25 men were drawn up in three ranks. Five witnesses were asked to pass down the line of paraded troops and it they saw the man whom they were asked to identify they were requested to touch him. Mitchell identified the witnesses only as women named "Stille", "Wiebusch", "Westerwalbersloh", "Beilenhoff" and "Cichosz" (R24). His testimony did not disclose whether or not accused was a member of this parade or that any of these witnesses there identified any soldier as "the man they were asked to identify." Another identification parade of 13 men was held the following day in the back of the police station in Hamm, Germany. Accused was brought there and allowed to stand anywhere he cared to during the parade. He was dressed in fatigues, while the other men wore "ODs". Frau Schoppmann walked past the parade followed shortly thereafter by her daughter (R24-25). Whether or not either identified anyone did not appear.

4. On motion of the defense the court adjourned to grant "a ten (10) day extention to the defense to produce alibi witnesses" (R31). The court again met on 27 August, accused's rights were explained to him (R32-33) and he testified in substance as follows:

On 16 April 1945 he was sick in quarters (R33) suffering with a carbuncle in the small of his back and a boil on his thigh. His condition was entered in the company's sick book by his first sergeant. He talked with some fellows until about 2215 hours. Soon thereafter he went to his 17622
quarters where he read until the lights went out, then lighted a candle

and read until 2300 or 2400 hours, when he dozed off to sleep (R34). He attended two parades, one on 17 April and one on 18 April, at each of which he was the only man wearing fatigues, the others being dressed in "ODs" (R35).

The court then denied a motion of the defense for a continuance "until such time" as certain desired witnesses could be brought before the court (R37-38).

5. In rebuttal for the prosecution, Frau Hedwig Cichosz, 33 Nordenstiftsweg, Hamm, Germany, testified and identified accused as the soldier who at about 0100 hours on 17 April 1945 knocked at the door of her house. She let him in and turned on the lights in all her rooms. He went through them all and after leaving repeated the same procedure in the apartment of the family living on the ground floor at her address. He carried at the time a rifle over his right arm and in his left a lamp. Her house was about 50 meters from that of Frau Schoppmann (R39-40). She was asked by a member of the court, "The day you identified the accused at the identification parade, did he have that mustache?" She answered, "Yes, he still had the mustache then" (R41).

Dorothea Westerwalbersloh, 31 Nordenstiftsweg, Hamm, Germany, testified and also identified accused as the "gentleman" who entered her apartment around 0100 hours on 17 April 1945 (R42). With a rifle on one arm and a lamp underneath the other (R43), he

> "went into my apartment and came right back and then he grabbed at the knob to the adjoining apartment, a family by the name of Stille who had locked themselves in, but they also opened up. From there he went up stairs. The lady there also opened up; he went through all the rooms there and then he came downstairs and left" (R42).

Her house was about 25 meters from Frau Schoppmann's (R43). She was asked by a member of the court, "You speak of a mustache that the accused was wearing, was he wearing that at the time of the identification parade?" She replied, "Yes, he still had it" (R44).

Frau Anna Beilenhoff, 36 Nordenstiftsweg, another near neighbor of Frau Schoppmann, also recognized accused in court (R46) as the soldier who at about 0100 hours on 17 April 1945

> "went through my three rooms and then he went to another apartment which is downstairs and after that he went upstairs and looked through my father-in-laws two rooms" (R45)

After he left her house he

> "went to the Cichosz house and from Cichosz he went to Westerwalbersloh and from Westerwalbersloh he

went across the street again to a house that is kaput. I heard Mr. Westerwalbersloh call out to him that that house was kaput. I then saw him cross the street once more and where he went I don't know" (R46).

6. There is both direct and circumstantial evidence to support the court's conclusion that accused was the man who entered the Schoppmann home on 17 April 1945. Although accused's defense was an alibi, he was positively identified in court by Frau Schoppmann and her daughter as the man who entered their home on 17 April 1945. He was also positively identified in court by Frau Cichosz, Frau Westerwalbersloh and Frau Beilenhoff as the man who entered their homes at about 0100 hours on the same date. Their description of him at that time with his rifle and lamp and manner of going through their rooms strongly indicates that he was the same man who in similar fashion entered the Schoppmann home at about the same time. It is clear therefore that there was no impropriety in admitting the evidence relating to pretrial identification of accused by these witnesses at the identification formations held on 17 and 18 April (CM ETO 3837, Bernard W. Smith; CM ETO 6554, Hill; CM ETO 7209, Williams; CM ETO 8270, Cook).

7. Trial of this case commenced 13 August 1945. A continuance of four days was granted in order to give the prosecutrix a period of recovery following what the prosecution described as her "obvious emotional condition" that developed during her testimony (R22). The prosecution completed its case in chief on 17 August. The defense then requested a ten day continuance to secure witnesses, which was granted (R31). The court reconvened on 27 August and the defense, after recalling the prosecutrix to the stand and allowing accused to testify, moved for a further continuance until such time as three witnesses, whose testimony would substantiate that of accused, could be brought before the court. The prosecution stated that it

"has again gone through regular channels and has attempted to locate the outfit of the accused and the necessary witnesses, namely, by TWX, and by contacting our Headquarters, the Adjutant General, and G-3 and there is no information forthcoming as to the location of the unit and we have no indication when the unit, if it can be located, will be located" (R37).

The court denied the motion. Under the evidence here, such action was not unreasonable. The granting or denying of a motion for continuance is within the sound judicial discretion of the court and its action in denying the same will not be disturbed upon appellate review in the absence of a showing of abuse of that discretion (CM ETO 895, Davis et al, and authorities therein cited).

8. It was here adequately shown that an armed American soldier had carnal knowledge of Elisabeth Schoppmann at the time and place alleged and, as indicated above, the record of trial also contains substantial evidence to support the court's conclusion that accused was the soldier involved.

Further, while the prosecutrix did not at any time testify in so many words that she did not consent to the act of intercourse, and while the resistance offered by her to prevent accused from accomplishing his purpose was extremely weak, it cannot seriously be contended that the intercourse took place with her consent. On the evidence adduced, the court clearly was justified in concluding that she submitted only through fear. She cried and protested as did her mother. Also, while under some circumstances lack of effective resistance may with justice be interpreted by the male as evidencing the female's essential willingness to perform the act, no such conclusion was justified in the instant case. In the setting under which the act was here performed, accused certainly had no reason to suppose that he was accomplishing a seduction. On the basis of the whole record, the Board of Review is of the opinion that the record of trial is amply sufficient to support the court's finding that accused had carnal knowledge of the prosecutrix by force and without her consent, as alleged (CM ETO 8837, Wilson; CM ETO 10700, Smalls; CM ETO 12329, Slawkawski; CM ETO 14875, Swain; CM ETO 15620, Eagans and Copeland).

9. The charge sheet shows that accused is 20 years four months of age and was inducted 28 May 1943 at New York City, New York, to serve for the duration of the war plus six months. He had no prior service.

10. 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.

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

Edward L. Stevens Jr., Judge Advocate.

B C Dewey Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

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

BOARD OF REVIEW NO. 5

1 DEC 1945

CM ETO 17629

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Marburg, Germany, 21 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private CHESTER W. GUYETTE (11047069), Attached-Unassigned, 480th Replacement Company, 69th Replacement Battalion, 3rd Replacement Depot	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Chester W. Guyette, attached-unassigned to the 480th Replacement Company, 69th Replacement Battalion, did, at Dison, Belgium, on or about 9 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended in Verviers, Belgium on or about 20 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions by special court-martial each for absence without leave in violation of Article of War 61 for a total of 546 days. 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. An extract copy (Pros. Ex. A) of the morning report of Casual Detachment 69, Ground Forces Replacement Company, shows the accused from duty to absent without leave 9 February 1945. It was stipulated (Pros. Ex. B) between the prosecution, defense counsel and the accused that accused was apprehended in Verviers, Belgium on or about 20 May 1945. On 9 February 1945 Casual Detachment 69, 480th Replacement Company was located in Dison, Belgium. Roll calls were made at least twice daily as well as physical searches to check on absentees (R7-8).

The court took judicial notice of the fact that the alleged absence of accused began in an active theater of operations (R8).

4. No evidence was offered by the defense.

The accused after being advised of his rights to testify as a witness elected to remain silent (R9).

5. The evidence is uncontradicted that accused was absent from his organization from 9 February to 20 May 1945, a period of one hundred days, and that his absence was terminated by apprehension. Desertion is absence without leave accompanied by an intention not to return. If the condition of absence without leave is prolonged and not satisfactorily explained the court will be justified in inferring an intent to remain permanently absent (MCM, 1928, par. 130a pp. 142-143). The unexplained absence of accused for a period of a hundred days in an active theater of operations terminated by apprehension was sufficient for the court to find him guilty as charged (CM ETO 1629, O'Donnell; CM ETO 3963, Nelson; CM ETO 17551, Yanofsky).

6. The charge sheet shows that accused is 24 years, ten months of age, and that he was inducted on 16 February 1942 at Boston, Massachusetts. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 5

5 NOV 1945

CM ETO 17635

U N I T E D S T A T E S	) OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
Private BOOKER T. EMMERT (18002911), 648th Quartermaster Truck Company	) Trial by GCM, convened at Camp Washington, France, 7 - 8 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Booker T. Emmert, 648th Quartermaster Truck Company, did, at Laon, France, on or about 20 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Marcel Painvin, a human being by shooting him with a pistol.

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

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

3. About 1830 hours 20 June 1945 accused and another colored soldier, both members of the 648th Quartermaster Truck Company (R49), entered the house of Monsieur and Madame Painvin, at 8 Rue Du Ponceau, Laon, France. They went directly into the dining room and called "Madame, Madame" (R7,8,11). Mme Painvin, who was in the kitchen, told them to go away. Accused entered the kitchen, and when again told to go away said "no" and pointed at his pocket. She became frightened, told her husband she was going to get the military police, and left the house (R8). Monsieur and Madame Van Der Clissen were, on the evening in question, in the courtyard of their house which adjoined the Painvin's courtyard. Madame Van Der Clissen heard "speaking in American" in Madame Painvin's house and then saw her come out of the door of her courtyard. A few minutes later Monsieur Painvin came out of the same door into the Van Der Clissen yard followed by accused and the other colored soldier. Accused had a revolver in his hand (R14). In order to having nothing to do with them Madame Van Der Clissen went into the cellar of her house (R14). Accused followed her, pointed his revolver at her chest and said "come here, come here". Her husband went over to the cellar and told her to come out, and when she did accused left her and walked over toward Monsieur Painvin who was stepping backwards to reenter his courtyard (R15,16). Monsieur Van Der Clissen then told her to leave as he feared they would shoot her and she ran out to the street (R16,28).

Painvin entered his yard and the soldiers went up to the door and tried to open it. Accused then fired a shot at the door and entered. His companion went away. Monsieur Van Der Clissen climbed on a door which was lying against the wall, which separated his yard from the Painvin's, so that he could see what was going on. M. Painvin retreated to the stairs of his basement to hide but accused followed him. When he was standing on the first or second step of his cellar and accused was about seventy or eighty centimeters from him, accused pointed his gun at Painvin's chest and fired two shots. He fell backwards into the cellar and accused went away in the direction of the street (R29-31). Van Der Clissen called his brother and together they carried the victim, who was not "breathing much" and in a dying condition into the house and put him on a bed (R31). Mme. Painvin saw the two colored soldiers going up the street in the direction of the military police as she was returning home after an effort to get the police to come to her house (R8). When she arrived home they were carrying her husband to the bed room. He had two small holes near his heart and there was blood on the front and back of his underwear (R9,18). "He was changing color, his nose pincing", and "his head was going backwards" (R18). M. Van Der Clissen told her to get a doctor and he remained with the victim until the doctor came (R31). He died that evening and his funeral was held 23 June (R9-11).

About 1900 hours 20 June three military policemen were dispatched in a jeep to investigate a disturbance at the foot of the hill towards Rue du Ponceau. They drove to a point about 300 yards from the foot of the hill and were stopped by a crowd of French civilians. The driver was told that the one causing the disturbance had gone on down the hill so he got in the jeep and drove in that direction until he saw two colored soldiers, one of whom had a gun. He backed the jeep up the hill to get the other two policemen, but not being able to find them returned to the point where he had seen the soldiers. When he arrived they had been taken into custody by two French policemen and an American soldier. Accused was put in the jeep and driven to the military police headquarters (R33,34).

Accused was described as drunk by those who saw him when he was at the Painvin's house. "His eyes seemed to be going out of his head", he looked like a "wild animal" and appeared very angry (R10,19,32). The soldier who drove him to the police station testified that his breath smelled of liquor but that he was not staggering, that he spoke coherently and had complete control of his senses (R35). The officer on duty at the station described him as drunk, as his face was flushed and he looked disheveled. However, he walked straight and talked coherently except for two spells when he broke down and became hard to handle. One of the spells occurred on arrival at the station when he wanted to fight with everyone. The second spell was after he had been questioned on his actions during the past hour or two (R39,40). He looked wild and said "Why don't you shoot me? Go ahead and kill me. I don't care if I did kill a Frenchman. I will kill all of them I can get hold of" (R41). During the questioning he was very vague on the details of his actions but remembered the occurrence (R40).

Mme. Painvin testified that when she returned to the house, her husband was dead. His body was removed from the house at 1500 hours 21 June and returned during the evening of 22 June (R9). The driver from the Hotel Dieu, Laon, France on 21 June about 1500 hours went to the Rue du Ponceau and there asked for the house of M. Painvin. He was directed to a house on that street where he then picked up a body which he delivered at the morgue of the Hotel Dieu (R21,22). Doctor Rene Lemarchal testified that on 22 June he performed an autopsy on a man's body in the morgue of the Hotel Dieu in Laon (R23). He did not know exactly as to whether or not there were other bodies in the morgue but was certain that it was the only one wounded by a weapon (R25). He found two holes in the body on the left side between the second and third ribs and two holes in the back. His opinion was that the wounds were caused by bullets of about nine millimeters. One bullet went directly from one side to the other through the body. The other entered the same place and came out at the lower part of the right side of the back and was the cause of the death as it had gone through the artery below the heart (R24,25).

1st Lieutenant Pilant made an examination of No. 6 and 8 Rue du Ponceau (R37). He found on the cellar steps a bullet and several blood stains. He also found a bullet in another house on the other side of the courtyard (R38). A ballistic expert testified that these two bullets had been fired by the same weapon (R47).

4. Accused, after having been fully advised of his rights, elected to remain silent (R50). It was stipulated between prosecution, accused and his counsel that if Private Alonzo Wade was called he would testify that about 1400 hours 20 June 1945 he and accused came from Camp Washington into Laon. For three or four hours they drank beer, cognac and wine in a cafe. About 1800 hours they were both pretty drunk and wandered down the street looking for women (R49).

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

The accused, without legal justification or provocation pursued the deceased as he retreated to his cellar and at a distance of seventy or eighty centimeters pointed his gun at deceased's chest and fired two shots which caused the death. He was chargeable with knowledge that such act might cause death or grievous bodily harm and when, as here, death results a finding of murder is justified (CM ETO 8630, Williams; CM ETO 10714, Turner; CM ETO 12331, Johnson).

There was evidence that accused had been drinking and he was described as drunk by those who saw him. However, he was not staggering, spoke coherently, and although vague on the details of his actions, he remembered the occurrence when questioned a few hours after the shooting. The evidence was such that the Board of Review will not disturb the court's findings that accused was not too intoxicated to have entertained the requisite malice to constitute the homicide murder instead of manslaughter (CM ETO 1901, Miranda; CM ETO 14141, Pycko; CM ETO 15340, Lozano).

6. The charge sheet shows that accused is 23 years and ten months of age, and that he enlisted 23 August 1940, at Oklahoma City, Oklahoma. He had no prior service.

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

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

_____ Judge Advocate

(DETACHED SERVICE)

_____ Judge Advocate

_____ Judge Advocate

Branch Office of the Judge Advocate General
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European Theater
APO 887

BOARD OF REVIEW NO. 2

12 NOV 1945

CM ETO 17663

U N I T E D S T A T E S	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM convened at Amberg, Germany, 28 September 1945. Sentence: Dishonorable discharge, (suspended), total forfeitures and confinement at hard labor for 2 years. Delta Disciplinary Training Center, Les Milles Bouches du Rhone, France.
Sergeant HAROLD R. TAYLOR (35807886), Company H, 359th Infantry	)	

OPINION by BOARD OF REVIEW No. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant Harold R. Taylor, Company H, 359th Infantry, did, in the vicinity of Sulzbach, Germany, on or about 11 September 1945 through culpable negligence, unlawfully kill Werner Gotz, Sulzbach, Germany, by shooting him in the body with a United States Army caliber .45 Pistol.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two (2) years. The reviewing authority approved the sentence, ordered it exe-

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uted but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Delta Disciplinary Training Center, Les Milles Bouches du Rhone, France, as the place of confinement. The proceedings were published by GCMO No. 133, Headquarters 90th Infantry Division, 4 October 1945.

3. The evidence for the prosecution, accurately summarized in the Military Justice Division of this office, is substantially as follows:-

At about 2000 hours, 11 September 1945, in a park at Sulzbach, Germany, accused was approached by some children who asked him for cigarettes and candy (R7,8). The accused drew his pistol, pointed it at one of the young boys in the group and it discharged (R7,8,9). A child was shot (R8). The medics came and removed the child (R7). The child was approximately 12 years of age (R8).

A German medical doctor testified that at about 2015, 11 September 1945, he was called to the hospital to treat a boy who had been shot (R9, 10). When the doctor arrived at the hospital, the boy had been dead about ten or twenty minutes. He had been shot in the right side of the chest (R10). In the opinion of the doctor the wound was sufficient to be fatal (R10).

4. The accused having been advised concerning his rights as a witness elected to make the following unsworn statement:

> "On the night of the accident I went to my quarters and checked my weapon to see that it was clear. It was clear and I started out for a little stroll. After returning from my stroll, I went to the park and a gang started to follow me asking me for cigarettes and candy. I told him "No, please leave me alone." He kept hanging around. I tried to get away from him. He kept saying "Candy, cigarettes." I told him "No" four or five times. I thought I could frighten him still thinking that the gun was clear and pulled my pistol out and to the side and told him to move and go home. At that time he jumped in front of me and after the gun went off he grabbed his chest and started falling to the ground. When he fell, I looked to see if I had hit him and seeing that I had hit him I rushed to H Company Orderly Room and phoned the Battalion Medics and looked for the Battery Medics. By the time I returned there were several officers around giving first aid. After I saw I

could not be of help I returned to the Company and turned myself in."

Questions by Defense:

"Q. When did you first learn of the death of the child?

A. I didnt know it until yesterday, sir (R14)."

5. The evidence for the prosecution and the unsworn statement of the accused clearly show that at the time and place alleged in the Specification, the accused shot a boy in the chest or body with a pistol. There was evidence that a boy of about the same age with a wound in his chest was received at a hospital in the same town and died almost instantly. There is nothing in the record to identify the boy who was shot and who died as a result of gunshot wounds as Werner Gotz, the person named in the Specification. (CM 191369, Seluskey (1930) 1 B.R.245). The identity of the person killed with the person alleged to have been killed must be fully established. While this may be accomplished by proof of circumstances "found in the correspondence of peculiar physical characteristics, or in clothing or articles found in connection with the remains "(30 CJ, sec. 532, p.288; CM ETO 16187, Rollins,) such evidence is entirely absent in this case. Such failure in proof is fatal to prosecution's case.

6. The charge sheet shows that the accused is 25 years 7 months of age. Without prior service he was inducted 18 October 1943.

7. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

(ON LEAVE) Judge Advocate

Judge Advocate

John J. Collins, Jr. Judge Advocate

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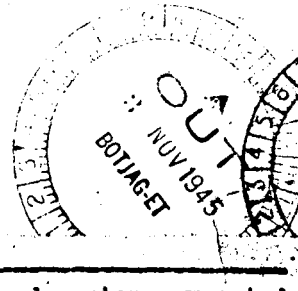
1st Ind.

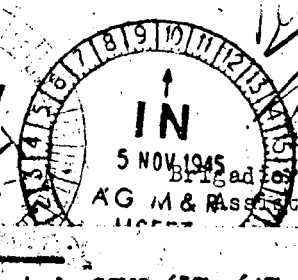
War Department, Branch Office of The Judge Advocate General with the European Theater 2 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Sergeant HAROLD R. TAYLOR (35807886), Company H, 359th Infantry.

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

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





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

(Findings and sentence vacated. GCMO 617, 647, USFET, 7 Dec 1945).

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

BOARD OF REVIEW NO. 3

27 OCT 1945

CM ETO 17664

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Captain LEONARD M. NIANICK (O-470336), 198th General Hospital	Trial by GCM convened at Paris, France, 11, 12 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

CHARGE I: Violation of the 94th Article of War

Specification: In that Captain Leonard M. Nianick, Medical Corps, 198th General Hospital, European Theater of Operations, United States Army, did, at Paris, France, between about 1 February 1945 and about 1 April 1945, wrongfully and knowingly dispose of eleven (11) bottles of Penicillin, of the value of more than fifty (50) dollars, property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War (Disapproved by the reviewing authority)

Specification: (Disapproved by the reviewing authority).

He pleaded not guilty and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, United States Forces, European Theater, disapproved the findings of guilty of the Specification and Charge II, approved the sentence and forwarded the record of trial under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that, on the morning of 30 March 1945, six bottles of penicillin, containing 100,000 units (cc.) each were issued to the operating room of the 198th General Hospital (R10, 28, 31, 32; Pros. Ex E). In the afternoon, accused who was in charge of the hospital's central supply section and operating rooms, personally obtained from the supply section six more similar bottles of penicillin (R13,14,43; Pros. Ex E). The total amount of penicillin actually used in the operating room on 30 and 31 March was slightly less than two bottles (R49,54, 55). No part of the excess was returned (R28,31,43,44). On 10 April 1945, ten bottles of penicillin were found in the possession of Zenon Merenlender, a French civilian, who testified they were given to him by accused, who had given him, in all, thirteen bottles (R57,60,63,64; Pros. Ex. H). Accused also gave Merenlender a prescription for the use of the drug (R64,65,114; Ex. I). On 11 April two bottles of penicillin were found in accused's locker and, on the same date, he voluntarily confessed that during February and March 1945, he had taken approximately 22 bottles of penicillin from the hospital and sold them to Merenlender for an agreed price of 60,000 francs of which 30,000 francs had actually been paid (R72-78,85; Exs. B,J). According to the published army price list, the value of the drug during the period in question was $6.00 a bottle (R11,13,68,69, 70).

4. For the defense, his commanding officer and others associated with accused, testified as to his good character and competent and efficient service as a medical officer (R100,102,104,108). Two medical officers testified, one to the effect that in March 1945 the value of penicillin was "about $2, somewhere in there" (R98), the other "roughly" a dollar a bottle (100,000 cc.) (R101). On April 1945 accused gave a demonstration to a "team" of enlisted men organized for the purpose of administering penicillin, of the methods which he (accused) wanted used in its administration (R123,124).

Accused testified twice, first for the limited purpose of refuting testimony as to the voluntary character of his confession (R79); later, after his rights were explained to him, on the merits of his case (R110). As to the circumstances of his extra-judicial confession, he testified in effect that it was made under duress without explanation of his rights under the 24th Article of War, induced by promises of assistance and leniency, transcribed by the agent who procured it, and was not read by accused before he signed it (R79,84).

On the merits, he testified that Merenlender, who was his personal friend, represented to accused that he (Merenlender) was afflicted with a veneraal disease and thus prevailed upon accused to obtain six bottles of penicillin from the hospital to be used by Merenlender in the treatment of his disease (R110-112). Thereafter he saw Merenlender several times and in March gave him additional supply to treat a very sick woman whose physician had requested it (R112). Merenlender gave accused 30,000 francs merely as an expression of appreciation for his professional services in advising him how to take care of a venereal disease, but not in payment for the penicillin (R116,117). Accused was under the impression that he had a right to treat French civilians and thought that penicillin was so abundant that it was of no importance (R120). The statements in his confession, that he sold Merenlender 22 bottles of penicillin for which Merenlender still owed him 30,000 francs in addition to the 30,000 already paid, were

> "in the wording of the agent. That was purely in his mind * * * he told me that Mr. Merelender had said that was the amount * * * I said at that time it was an inaccurate statement * * * [and signed it] under marked duress" (R116).

As for the bottles found in his locker, he had taken them solely for the purpose of instructing a penicillin team in methods of administration (R117).

6. The uncontradicted evidence shows that accused, during February and March 1945, obtained at least 13 bottles of penicillin, property of the United States furnished and intended for the military service from the government hospital where he was on duty, and wrongfully and without authority, delivered them to a French civilian, who, during the same period, paid accused the sum of 30,000 francs. Regardless of the admissibility of the confession - and there is substantial though controverted evidence of its voluntary character - the proof of wrongful disposition of government property, as alleged, in violation of Article of War 94, is clear, compelling and uncontroverted. (MCM, 1928, par 150i, p.185; CM ETO 9288, Mills; CM ETO 9987 Pipes) the specification alleged facts sufficient to constitute an offense under the ninth paragraph of the 94th Article of War (CM ETO 9288, Mills, supra).

Competent evidence introduced by the prosecution shows the value of the eleven bottles at the time of the wrongful disposition, to have been $6.00 apiece (MCM, 1928, par 125, p.135). The court, charged with the determination of all factual issues raised by the evidence, accepted the prosecution's testimony as to value according to published army price lists (Cf: CM ETO 5539, Hufendick) and rejected defense testimony that the value was "about $2"and "roughly one dollar" a bottle. The court's determination of any disputed issue of fact, when based on substantial competent evidence, is binding on the Board of Review in this theater in all cases, including those requiring confirmation under the provision of Article of War 48 (CM ETO 1631 Pepper). The period of confinement included in the confirmed sentence is less than the maximum sentence prescribed for a similar offense committed by a civilian (Secs 35c and 36 Federal Criminal Code, 18USCA, 82,87).

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 charge sheet shows that accused is 27 years six months of age, and entered military service 20 July 1943 at Chicago, Illinois. No prior service is shown.

9. Dismissal, total forfeitures and confinement at hard labor is authorized punishment for an officer convicted of violation of the 94th Article of War. The Table of Maximum Punishments does not apply to officers (MCM, 1928, par.104a, p.95). Confinement in a penitentiary is authorized upon conviction of unlawful disposition of property of the United States furnished or to be used for the military service by Article of War 42 and Section 36, Federal Criminal Code (18 USC 87). (See CM ETO 1764, Jones and Mundy). 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, par. 1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

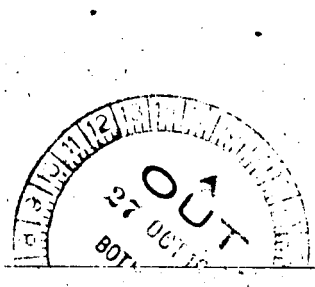
(TEMPORARY DUTY) Judge Advocate

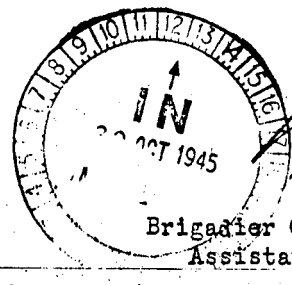
1st Ind.

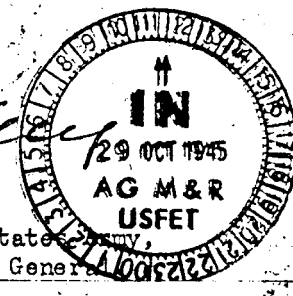
War Department, Branch Office of The Judge Advocate General with the European Theater 27 OCT 1945 TO: Commanding General United States Forces, European Theater, APO 757, U.S. Army.

1. In the case of Captain LEONARD M. NIANICK (O-470336), 198th General 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 17664. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17664).







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

(Sentence ordered executed. GCMO 552, USFET, 8 Nov 1945).

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

BOARD OF REVIEW NO. 5

13 DEC 1945

CM ETO 17665-

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Captain GLENN E. MILLER (01552752), 54th Ordnance Bomb Disposal Squadron	Trial by GCM, convened at Paris, France, 24,27 February 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Captain GLENN I. MILLER, 54th Ordnance Bomb Disposal Squadron, Seine Section, Com Z, European Theater of Operations, United States Army, Technician Fifth Grade Albert KELLY, 54th Ordnance Bomb Disposal Squadron, Seine Section, Com Z, European Theater of Operations, United States Army, Technical Sergeant Ivan L. GELDER, 54th Ordnance Bomb Disposal Squadron, Seine Section, Com Z, European Theater of Operations, United States Army acting in concert and common purpose, did, at Paris, France on or about 11

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December 1944, conspire to misappropriate a Government motor vehicle a 2½ ton truck #4188370, to be used to haul cases of Cognac from Bordeaux, France, to Paris, France and Brussels, Belgium.

Specification 2: In that * * *, acting in concert and common purpose, did, at Paris, France on or about 21 December 1944, conspire to misappropriate a Government motor vehicle a 2½ ton truck #4188370, to be used to haul cases of Cognac from Bordeaux, France to Paris, France and Brussels, Belgium.

CHARGE II: (Finding of guilty disapproved by Reviewing Authority).

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

He pleaded not guilty and was found guilty of the charges and specifications except for a minor change made in Specification 2 of Charge 1. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. The reviewing authority the Commanding General, Seine Section, Communications Zone, European Theater, disapproved the findings of guilty of Charge II and the Specification thereunder, approved the findings of guilty of Charge I and the specifications thereunder, in violation of Article of War 96, approved the sentence but reduced the period of confinement to four years, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence as approved but, owing to special circumstances in this case, reduced the period of confinement to one year, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that accused was a Captain in the Army, and during November and December 1944 was in command of the 54th Ordnance Bomb Disposal Squadron which consisted of accused and six enlisted men. The squadron was stationed in Paris (R17, 23,36,37,81,82). Technical Sergeant Ivan L. Gelder, the senior non-commissioned officer in the organization was witness in chief for the prosecution (R17,23). On 27 November, Gelder went to Bordeaux on written orders from the Seine Section to assist in the disposition of an unexploded bomb. He was accompanied by "Corporal Kelly" of his squadron and they used a truck that belonged to their unit. While there they "picked up" several cases of cognac and brought them back to Paris where they disposed of the brandy (R24-32). Prior to this episode Gelder had made a trip to Marseilles to investigate the operation of the bomb disposal squad in that territory. On that trip he took along a "Mr. Coninck" and another man. One

was a horse owner and the other a jockey. Incident to this trip to Marseilles, he attended the races at that place (R32).

Gelder made another trip to Bordeaux on 11 December 1944. He was accompanied by Corporal Kelly. They used their squadron's "government 2½-ton truck" (R19,20,23,84,87). A partial purpose of this trip was to buy cognac (R19,34). Gelder also had in mind the fact that he "was supposed at all times to look out for bomb disposal work" (R19). On his previous trip to Bordeaux he had done actual bomb disposal work and had seen that there was quite a bit of work to be done in that neighborhood. However, he had no "specific" orders to make this particular trip (R19). But on that occasion there had been rumors of the enemy's use of V-1's and V-2's in that territory and he and Kelly looked for signs of that type of operation. Also there were in Bordeaux five or six of a specific type of bomb and one was supposed to be shipped to America for experimental work (R34). While on this trip, Gelder brought 250 cases of cognac for which he paid 190 francs per bottle. He returned to Paris where he remained for a few hours, after which he proceeded to Brussels with the truck and cognac. In that city, by previous arrangement, he sold the cognac to a farmer, Francois de Kerchove de Denterghem, for 550 francs per bottle (R20,27,79,80). This trip, broken by the stop in Paris, required three days (R42).

On 21 December 1944 Gelder used his squad truck to transport 250 cases of cognac from Paris to Brussels for delivery to the same civilian with whom he had dealt previously. He was paid for this service at the rate of 150 francs per bottle. Kelly again accompanied him. While in Brussels he made inquiries and reconnaissance concerning bomb disposal and viewed "signs of explosives" from which it was possible to tell whether new types of bombs were used in that locality (R21,22,23,35,36,38,39,80,84,88).

On these trips, it was customary for Gelder to use trip tickets which he signed as dispatcher, and on which he "could go anywhere he liked", or which were signed by the company commander (R42,84,85). Gelder said he actually had trip tickets when he went to Bordeaux and Brussels (R42). He testified that he did not remember whether or not he informed accused he was going to Bordeaux on the 11 December trip (R38). When he returned to Paris from Bordeaux he did not see him before departing for Brussels (R37), nor did he leave word for the accused as to where he was going (R38). He said that he was always in fear that he would be called absent without leave on these trips to Bordeaux and Brussels (R38). Gelder personally gave accused a sum of money which he rather inexactly described at different times as approximately 200,000 francs, or 250,000 francs or 300,000 francs. This came from the money he received from the sale and the transportation of cognac (R21,22,23,28,39). As to the accused's knowledge of the source of this money: Gelder did not

> "know if he knew it was for cognac or not" (R21). "I was in the practice of giving Captain Miller money, my commanding officer, at various times. I mean I would gamble at various times. I was in the habit of giving him money. Now whether he knows which was which or

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anything like that, I do not know" (R22).

He was not sure whether accused knew he was carrying cognac (R22). The squad experienced mechanical trouble with its truck. It was in and out of the shop so much of the time that Gelder did not know whether his use of the truck on these trips would put the accused on notice that the truck was not available to the squad (R22,23). Accused never asked Gelder where he had secured this particular large sum of francs nor did Gelder tell him (R24). Accused had been given this money either prior to the second trip to Brussels on the 21 December (R40) or prior to Christmas, 25 December (R40).

Accused moved from the Brighton Hotel, an army billet, to the Claridge Hotel in Paris which was privately operated where Gelder also lived for a period of time. They occupied separate rooms on different floors. Gelder's room "with tips and all" cost him about 450 francs per day. Gelder never visited accused in the Claridge, but on one occasion, for a Christmas dinner, accused went to Gelder's "quarters" in the Claridge. Accused moved to the Claridge after Gelder had been established there (R39,40).

Corporal Kelly, a member of this squad, who accompanied Gelder on the trips, testified that he made two loans to Gelder. First he loanded $400 and was returned $800. He next loaned $800 and was repaid $1,750. Gelder told Kelly that he was doing nothing wrong and that the source of the money was none of Kelly's business (R38). Kelly asserted as a witness that he did not know the purpose of these trips (R85). One time, however, they carried "cases" (R86) and another time cognac (R84).

Two items of prosecution evidence require separate consideration.

a. After prosecution witness, Gelder, had testified that he did not know if accused knew that the money came from the sale of cognac, or that he was carrying cognac, and that accused had not asked him the source of this large sum of money, the trial judge advocate attempted to impeach Gelder by procuring from him an admission that he had, previously and before the trial, sworn to a statement which contained the following:

> "Captain Glenn E. Miller knew that I was going to Bordeaux, France to purchase cognac" (R25,26,27,28).
>
> "Captain Glenn E. Miller received approximately 200,000 francs as his share in the sale of the cognac that was hauled to Paris and Brussels (R26,28).

b. The court received in evidence a signed, sworn statement, made by accused about 1 January 1945, in which he admitted that he sanctioned use of the truck by Gelder to transport cognac and his participation in the purchase of the cognac (R59,60; Pros. Ex. A). The circumstances surrounding the taking of this statement were as follows: agents of the Criminal Investigation Division, including Second Lieutenant Robert P. O'Reilly, Corps Military Police, interviewed accused during a period that extended from the morning or afternoon of 31 December until 10:30 or 11 o'clock that

night, and again the next morning (R45,48-50). The interview started at "C.I.D. headquarters" (R44). When accused was "hesitant to make a statement" (R45), it then adjourned to the Brighton Hotel where they all started drinking intoxicants. "Accused was the host". He drank cognac and Lieutenant O'Reilly was supplied Scotch whisky by accused - "a few drinks" - (R46,47,51), after which accused was taken to "C.I.D., headquarters" where he was restrained, incommunicado, for the night (R84). Accused was fed at headquarters after which he was questioned by O'Reilly until the latter went to bed at 10:30 or 11 o'clock (R48,51). O'Reilly did not know whether accused was questioned all night (R50). O'Reilly insisted that accused was not drunk, but very nervous that evening (R50), although one agent was disturbed because accused had been permitted to drink (R34). Two incidents occurred during "this interview" with accused, each of which must find place in this holding:

(1). Accused wanted - "had requested to see" - his colonel. Accused called the colonel by telephone, and according to O'Reilly

> "I was becoming impatient, and maybe I did take the telephone out of Captain Miller's /accused's/ hand, but I did talk to the colonel and told him that Captain Miller was being held for investigation and he would like to see him" (R53).

O'Reilly said that the colonel then called at headquarters but did not see accused. The colonel was told "Yes, everything is all right". O'Reilly then informed the court "It was New Year's Eve, sir, and the colonel was not anxious to stay" (R52). That was O'Reilly's version. (The colonel, not permitted by the court to testify prior to the receipt of the "confession", appeared later as a defense witness. His testimony is hereinafter summarized (R93,99)).

Before the confession was received by the court and after the defense had concluded its cross-examination of O'Reilly, on whose testimony the "confession" (R57; Pros, Ex. A) was subsequently received in evidence, defense counsel stated:

> "Now, we would like to call on the colonel * * *. It is my contention that Miller called for his colonel to get advice and that the C.I.D. refused to let the colonel see him" (Underscoring supplied).

(In contravention of O'Reilly's version that the colonel was anxious to get away and that it was the colonel and not the "C.I.D." who was responsible for the failure of accused to see his colonel) (R55). Opposed to this request the prosecution urged: "I object to the calling of the defense's witnesses at this time, there is a set time". Defense replied: "I am offering this solely on the question as to the circumstances as to how the statement was obtained". The court then ruled: "* * * the motion of the defense counsel to introduce a witness at this time is overruled" (R55).

(2). Accused's room was searched when these agents accompanied him there, and 160,000 francs were found. That night accused made a statement in writing about the money. O'Reilly considered this statement "fantastic" (after it had been sworn to), and told accused "he would be charged with

perjury" for having made it. Defense counsel three times asked O'Reilly if he had not told accused that he would be charged with perjury "if he didn't make another statement". The implications in this question were obvious. O'Reilly did not answer that question any of the three times it was put to him (R48,49). Accused was kept in headquarters the day of his arrest and all that night, and the next day he made the "confession", "insisting that it (the first statement" be torn up and burned, sir")(R49).

4. Advised of his rights as a witness accused elected to remain silent (R104).

The defense called Colonel Thomas J. Kane, Ordnance Department, Theater Bomb Disposal Office, who testified that at about 6 o'clock P.M. the night of 31 December 1944, he received a telephone call from accused saying that he (accused) was in some sort of trouble and wanted to see him. Accused's voice stopped and someone else continued "explaining the nature of the trouble". He went to C.I.D. headquarters about 8 o'clock to see accused, but was told then that accused was badly in need of sleep - that he was in bed - but every thing would be taken care of (R94). He was told that he could not see accused (R96). Witness asserted he was in no hurry that night although it was New Year's Eve. He did not engage in any festivities. He called on friends, returned to the hotel and stopped in at a party to see a Captain Gregory, but not finding him went to his room (R94,95). He further testified that accused's work was very hazardous, entailing a 6% or 7% casualty rate. All officers engaged in such work were volunteers and difficult to obtain. Accused was "one of the best" (R95).

Captain Charles E. Gregory, Ordnance Department, testified that when a certain port was in "pretty bad shape" with picric acid and gunpowder out in the open, accused was selected as the only man who could safely handle the situation and he was sent there as the temporary commanding officer (R100). After accused assumed command of his squad the men became and looked like soldiers, which they had not before. Accused's ratings had been superior up until 16 December 1944 (R101). He had lived with Ordnance officers at the Brighton Hotel, but when company grade officers were moved out of the hotel, accused moved to a private billet (R104).

5. Gelder, in his testimony obviously disappointed the prosecution when he did not testify that accused knew what was going on and the source of the money he received from Gelder. Instead he stated that accused never asked and was never told the source of the money (R24). The prosecution invited Gelder's attention to his extra-judicial, prior statements which indicated that accused did know that Gelder brought cognac and received the francs "as his share" from the sale of cognac (R25-28). The statements were read into the record and Gelder was asked if he made them. Gelder substantially admitted having made these prior statements (R26-28). This interrogation was permitted for the purpose of impeaching Gelder, a hostile witness, a proper procedure but subject to definite rules and limitations. These prior statements were obviously hearsay except for impeachment purposes, but they were introduced into the case without proper foundation for their use. The court was not warned to consider them only for their impeaching effect and not to con-

sider them as evidential and proof of any issues. Since these pretrial statements (except for accused's alleged confession which will be hereinafter discussed) alone show scienter, thereby tending to incriminate the accused, the failure of the law member or trial judge advocate to warn the court as to the specific purpose and use of said statements was serious error.

> "A witness called by the opposing party can be impeached by proving that on a former occasion he made a statement inconsistent with his statement made in trial, provided such statement is material to the issue, even though such inconsistent statements tend to incriminate the defendant, if the jury is instructed to consider only their impeaching effect" (3 Wharton's Criminal Evidence, (11th Ed. 1935), sec. 1355, p. 2236).

The situation here revealed was discussed at length in Ellis v. United States (CCA, 8th, 1943), 138F(2nd) 612,616 wherein the court wrote:

> "It does not follow, however, that the admission of the witness "B" that she had formerly made both orally and in writing, both informally and under oath, statements inconsistent with her testimony before the trial court may be received as substantive evidence of the facts indicative of appellant's guilt asserted in the earlier statements. And we reject the contention of the appellee that it should be so received."

In 133 ALR at page 1454 et seq. will be found a most satisfactory annotation of this rule of law which indicates definitely that the courts supporting this doctrine, heavily preponderate. The Board of Review in CM ETO 4581, Ross adopted and applied it with comment that portions of the pretrial statement of a witness (not accused), properly introduced for "impeachment" purposes: "can have no evidentiary weight and must be entirely disregarded". These incriminating pretrial statements sounded most probably to the court in this trial, in the absence of any warning like competent, direct evidence. The court may very well have regarded Gelder's confession as valid, independent and substantial corroboration of his testimony in court. Indeed the court may further have accepted it as a confession and used it as a confession against the accused for there was not even given the customary warning employed where the confession of a joint accused is introduced, namely: that the confession be considered only as against the maker. Were the technique thus employed in this case permitted, the prosecution would be enabled in any similar case to squeeze in the pretrial confession of an accomplice against a fellow conspirator, a practice wholly illegal (MCM, 1928, sec. 76,114c, pp. 61,117; CM ETO 1764, Jones-Mundy), and as improper as it is to read the inadmissible confession of an accused himself into the record on the pretext or in aid of cross-examining that accused (CM ETO 2625, Pridgen). There was therefore committed a most glaring error which cannot be ignored by the Board of Review.

6. The evidence given by O'Reilly shows that accused's confession was not voluntary. It was secured after O'Reilly had "sneaked" his way into accused's

confidence, accepting the latter's hospitality and drinking his liquor, while accused was under restraint or arrest not shown to be legal (CM 269690, Williams, 45 BR 67; 4 Bull. JAG 135), after a long interrogation, after he had been threatened with prosecution for perjury allegedly committed in a prior statement and after he had been denied the right to talk freely by telephone to his commanding officer and subsequently to see and to confer with that officer. The court should on this evidence alone have refused to admit this confession in evidence (McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819 (1943).

The Board of Review said in CM ETO 13279, Tielemans et al:

> "Compulsion or coercion in whatever form or shape it may be exercised renders a confession involuntary. Whether it be by direct application of physical violence or through a long course of inquisitional persecution which eventually breaks the will of the suspect or whether it is applied by subtle or concealed means whereby the accused is put in fear and his will subjected to the wishes of his inquisitor, the result upon the judicial process is the same."

We find in this case that the confession was the result of coercion as defined in the above quotation. This finding is made on evidence which stands undenied in the record. The confession was clearly involuntary. The Federal Courts upon habeas corpus proceedings will undo convictions by court-martials when violation of an accused's constitutional rights is shown or when the proceedings disclose the lack of "due process of law" as guaranteed by the Fifth Amendment. And in examining into a court-martial trial, the Federal Courts will in proper cases interpret "due process" under the Fifth Amendment in the light of the interpretation it has applied to "due process" under the Fourteenth Amendment. Convictions in the state courts have been set aside by the Supreme Court when coerced confessions were used as a means of obtaining verdicts of guilty in violation of the Fourteenth Amendment. The Board of Review has the obligation to search trials before court-martial for abuse of "due process" and applying the same tests and rules as are applied in the Supreme Court is constrained to afford relief when it believes the record of trial before it discloses a violation of constitutional safeguards (see CM ETO 13279, Tielemans et al supra, and the cases therein cited).

7. Furthermore, it was serious error for the court to refuse to permit accused to call witnesses to present the defense's version of what actually occurred prior and at the time accused signed his alleged confession before it ruled on accused's objection to the introduction of the confession (McNabb v. United States supra; CM ETO 110 Bartlett, 1 BR(ETO)115; CM ETO 6302, Souza). O'Reilly told an entirely different story concerning the reason accused did not see his colonel than the colonel would have told had he been permitted to testify. Colonel Kane's subsequent testimony, after the confession had been admitted and the damage done, proves this asseveration. He testified that he wanted to see accused and was refused an interview. O'Reilly said Colonel

Kane was not anxious to see accused, just wanted to inquire about him, and then departed. By this ruling excluding defense testimony on the question of the voluntariness of the confession, the law member precluded himself from making a fair ruling on the admissibility of the confession itself.

Immediately prior to his adverse ruling on accused's objection to the confession, the law member made a highly prejudicial statement, erroneous in its concept of the law, and detrimental to accused's rights to have the question of the voluntariness of the confession passed on by a court which possessed a proper understanding of the law. The defense had stated its contention that accused called for his colonel to secure advice and that the "C.I.D." refused to let the colonel see him (R55). Whereupon the law member "ruled":

> "He is an officer of the United States Army. He is supposed to make up his mind as to whether or not he will make a statement, whether he will sign the statement, and so on" (R55).

This statement was contrary to decisions of the Supreme Court of the United States which, as pointed out, "has on constitutional grounds, set aside convictions, both in the Federal and State courts, which were based on confession" secured from persons "who have been unlawfully held incommunicado without advice of friends or counsel" (McNabb v. United States, supra). It may well have prejudiced the court on the entire question of the "confession".

The fact that Colonel Kane ultimately took the stand, after the "confession" was admitted in evidence neither corrected nor ameliorated the error involved in his exclusion from the stand before the confession was admitted (CM ETO 110, Bartlett, supra). It might be argued that his testimony, finally given to the effect that the accused had been kept incommunicado caused the court to disregard the confession as involuntary, under the law. To assume such a happy result would be to assume too much. Even though the law member had reversed himself and ruled the confession out after hearing the Colonel's testimony, which he did not, the error would not have been cured. It was too late. The confession had been read to the court. The effect involved is not of a kind that "is removable from the minds of a court by a mere direction to the reporter to strike it out" (CM 124907, Dig. Op. JAG, 1912-40, sec. 395 (10), p. 205). The ruling of the law member in denying the right of Colonel Kane to testify on the preliminary hearing on the admissibility of the confession was ombinus. He ruled:

> "The motion of the defense to introduce a witness at this time is overruled" (R55).

It is possible that this ruling kept the accused from the stand as it indicated that the defense would not be permitted to present witnesses on the question of the admissibility of the confession.

> "The refusal of the court to permit accused to testify as to the voluntariness of the confession, or to present other evidence on that issue is error. The testimony of accused to show improper influence should be offered and received before the confession is admitted" (CM ETO 9128, Houchins et al and authorities cited).

8. In addition to the foregoing, it appears that the law member of this court had sat on the court which had previously tried Gelder. In the trial of Gelder the day before, he heard testimony damaging to the accused in this case (R6). The defense challenged the law member of this court for cause. The challenge was not sustained (R6,7). The Board of Review will not pass upon the question as to whether the court committed error in its decision or the challenge because the errors above noted form a sufficient basis for a disposition of this case. However, no inference of approval or disapproval of the practice should arise because of the Board's election to disregard the question in reaching its conclusion herein.

9. The above mentioned errors, cumulative in effect, require the elimination of accused's confession and also the testimony of Gelder that he had made prior statements to the effect that accused did know of Gelder's cognac buying and that accused received the francs "as his share" in the sale. These errors also require that if the record of trial is to be held legally sufficient to support the findings of guilty the remaining competent evidence against accused be

> "Of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (CM ETO 9128, Houchins et al).

Omitting the incompetent evidence, these are the facts: Gelder was under the command of accused as one of six enlisted men on a bomb disposal squad working out of Paris. This squad used an army truck which went out on trip tickets signed by either Gelder or by accused. Gelder made two trips, 11 and 21 December, with his truck into territory where there was bomb disposal work to be done, at which time he did more or less of this duty work. One of the trips required three days, but was broken by a few hours spent in Paris, when he did not see accused. Gelder used this truck on these two occasions to transport cognac and made about 1,250,000 francs on the two transactions. Gelder gave accused approximately 200,000 francs a short time before 25 December. He was not sure whether or not accused knew that he was transporting cognac. On the three day trip he had not told accused he was going to Bordeaux; nor when he returned to Paris, that he was leaving for Brussels. Gelder did not know whether accused knew the source of this money. Accused never asked him and he never told him. Gelder had been in the habit of giving accused, his commanding officer, money at various times. Gelder would gamble and give money to accused. Gelder lived at the Claridge, a private hotel, where he paid 450 francs a day for his room and service. Accused had lived at the Brighton Hotel but had been moved to a private billet. When arrested, he lived at the Claridge but on a different floor than that on which Gelder lived. Gelder never visited accused, but accused visited Gelder once, to eat Christmas dinner with him. When accused was arrested on 31 December he had 160,000 francs in his possession.

This is all the competent evidence in the record to prove accused guilty of conspiring with Gelder to misappropriate unlawfully a government truck. It is very doubtful that this evidence would establish the corpus delicti of a conspiracy so as to admit a confession in evidence. The prosecution did not produce a trip ticket signed by accused, nor show that on any occasion

accused participated in or was present at the actual improper use of the truck. There is no evidence that accused ever used the truck himself. Accused had 160,000 francs in his possession when arrested and he paid a relatively substantial sum for a room at a private hotel for a period which, from the evidence, may have been either long or short. However, there is evidence that accused was privately billeted. The army may have paid for this in whole or in part. There is no evidence of accused's private means or income. In this evidence there is no direct proof of any scienter, let alone participation, by accused. But put the worst construction on Gelder's evidence and it is not compelling. It is less so when consideration is given to the following facts:

a. Gelder, the source of this meager testimony, was, allegedly an accomplice of accused and "while a conviction may be based on the uncorroborated testimony of an accomplice" still "such testimony is of doubtful integrity and is to be considered with great caution" (MCM, 1928, sec. 124a, p. 132). The only evidence against accused is circumstantial and the rule to be applied is that the circumstances must not only be consistent with guilt but inconsistent with innocence (CM 196619, Goyette, Bland and Curtis 3 B.R. 27, Dig. Op. JAG 1912-40, sec. 395 (9), p. 204; CM ETO 7867, Westfield; CM ETO 9306, Tennant). It cannot be said that the circumstances here were inconsistent with innocence of these charges.

b. Gelder had been tried and convicted for his offense (R28). After he was convicted he had a conversation with the trial judge advocate about his testimony in the instant case.

On cross-examination of Gelder this colloquy occurred:

> "Q. Did he (the trial judge advocate) tell you that if you played ball with him that he could do you a lot of good?
>
> A. * * * told me that he was in no position to make any exact promises to me but that clemency would be asked for and I would receive consideration" (R28).

The above is in the record, and no where is it contradicted or explained, not even on redirect examination by the prosecution.

c. Accused's prior record as an officer was most commendable.

The following quotation is an appropriate conclusion to the entire matter:

> "It was in support of this proof that the illegal confessions were introduced. Had the confessions been legally obtained they would have removed all reasonable doubt and the prosecution's case would have become invulnerable. The strength and power of the confessions would have produced a moral certainty of guilt

which the minds of 'conscientious and reasonable men' would accept without mental equivocation or reservation. It is the repercussion of this illegal evidence, possessing inherent strength and power, upon the other, but nevertheless equivocal evidence of the prosecution that would influence the court in its weighing and consideration of the other evidence. It was this influence that substantially prejudiced the rights of accused" (CM ETO 1201, Pheil, pp. 14-17).

10. For the reasons above assigned, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence. As was said in McNabb v. United States (supra) "The history of liberty has largely been the history of observance of procedural safeguards". Military justice will not forget this.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

BJR jpc (359)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 13 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Captain GLENN E. MILLER (O-1552752), 54th Ordnance Bomb Disposal Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. The accused, is of course, subject to retrial should you so order, but such order must be coincident with your disapproval of the instant sentence.

2. I invite your attention that accused has been in confinement under sentence since 27 February 1945.

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 17665. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17665).

OUT
14 DEC 1945
BOTJAG-ET

B. FRANKLIN RITER
Colonel, United States Army,
Acting Assistant Judge Advocate General.

(Findings and sentence vacated. GCMO 22 USFET, 7 Jan 1946).

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

BOARD OF REVIEW NO. 2

15 DEC 1945

CM ETO 17667

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Erlangen,
	)	Germany, 1, 2 June 1945. Sentence:
Captain EARL V. TRUEX (O-923565),	)	Dismissal, total forfeitures and con-
1306th Engineer General Service	)	finement at hard labor for one year.
Regiment	)	Eastern Branch, United States Disci-
	)	plinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 79th Article of War.

Specification 1: (Findings of not guilty).

Specification 2: In that Captain Earl V. Truex, 1306th Engineer General Service Regiment, did, at or near Clouange, France, on or about 26 February 1945, wrongfully appropriate to his own use the following public property of the United States taken from the enemy, to wit: 14 German tires, having some value.

Specification 3: (Disapproved by Reviewing Authority).

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

17667

Specification 1: In that * * *, did, at or near Clouange, France, on or about 26 February 1945 unlawfully dispose of the following captured public property of the United States, to wit, 14 German tires of some value, thereby receiving as profit, benefit and advantage to himself an unknown sum of money.

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

Specification 1: (Findings of not guilty).

Specification 2: In that * * *, did, at or near Clouange, France, on or about 26 February 1945, knowingly and willfully apply to his own use and benefit a 3/4 ton weapons carrier of the value of more than $50, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that * * *, did, at or near Aubange, Belgium, on or about 22 March 1945, knowingly and willfully apply to his own use and benefit a 2½ ton 6x6 truck, of the value of more than $50, and a 3/4 ton command and reconnaissance car of the value of more than $50, all property of the United States, furnished and intended for the military service thereof.

Specification 4: In that * * *, did, at or near Aubange, Belgium, on or about 23 March 1945, knowingly and willfully apply to his own use and benefit a 2½ ton 6x6 truck of the value of more than $50, property of the United States, furnished and intended for military service thereof.

Specification 5: In that * * *, did, at or near Rombas, France, on or about 3 April 1945, knowingly and willfully apply to his own use and benefit two 2½ ton 6x6 trucks, each of a value of more than $50, and one 3/4 ton command and reconnaissance car, of a value of more than $50, all property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that * * *, did, at or near Rombas, France, on or about 21 December 1944, wrongfully cause a French civilian, known as "Blackie", whose true name is unknown, to be transported in a 3/4 ton command and reconnaissance car, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * *, did, at or near Rombas, France, on or about 21 December 1944, wrongfully and willfully divert from their proper military duties, by utilizing them for his own interest and benefit, the following named enlisted men of the 1306th Engineer General Service Regiment: Pfc Constantin J. Stravelakis, Pfc Wayne E. Meadows, Pfc Anthony M. Mastrosmone.

Specification 3: (Disapproved by Confirming Authority).

Specification 4: In that * * *, did, at or near Aubange, France, on or about 22 March 1945, wrongfully and willfully divert from their proper military duties, by utilizing them for his own interest and benefit, the following named enlisted men of the 1306th Engineer General Service Regiment, Tec 4 Henry R. Bouchard, Tec 4 Joe Malone, Pfc Arvel L. Spears, Roger Anderson, Harold A. Graaf and James C. Alicata.

Specification 5: In that * * *, did, at or near Rombas, France, on or about 3 April 1945, wrongfully and willfully divert from their proper military duties, by utilizing them for his own interest and benefit, the following named enlisted men of 1306th Engineer General Service Regiment: S/Sgt Anthony H. Stephen, Tec 5 William S. Fite, Tec 5 Robert R. Hale, George H. Herbert, Cecil J. Short and Harry D. Turner.

Specification 6: In that * * *, did, at or near Aubange, France, on or about 14 April 1945, wrongfully and willfully divert from their proper military duties by utilizing them for his own interest and benefit, the following named enlisted men of 1306th Engineer General Service Regiment: Pfc Thomas L. Rosenberg and Tec 5 Robert R. Hale.

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

Specification 1: In that * * *, did, at or near Mainz, Germany, on or about 3 April 1945, wrongfully and knowingly, appropriate and carry away a certain German firetruck, the ownership of which is unknown, having some value.

Specification 2: (Disapproved by Reviewing Authority).

Specification 3: In that * * *, did, at or near Clouange, France, on or about 3 April 1945, while a commissioned

officer of the Army of the United States, on active duty in an active Theater of Operations, wrongfully accept from "Max", a French civilian, whose full name is unknown, the sum of about 100,000 francs, United States value of about $2,000.

He pleaded not guilty, and was found not guilty of Specification 1, Charge I and Specification 1, Charge III, guilty of Specification 3, Charge 1, except the words "and one cot", of the excepted words, not guilty; guilty pf Specification 1, Charge II, except the words "an unknown sum of money", of the excepted words, not guilty; guilty of Specification 5, Charge III, except the words "and one 3/4 ton command and reconnaissance car, of a value of more than $50", of the excepted words, not guilty and guilty of the remaining charges and specifications. Evidence was introduced of one previous conviction by general court-martial for using threatening and insulting language towards two non-commissioned officers, who were then in the execution of their duty as Military Police, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority, the Commanding General, Third United States Army, disapproved the findings of guilty of Specification 3 of Charge I and Specification 2 of the Additional Charge, approved only so much of the findings of guilty of Charge II and the Specification thereof as involved findings that the accused did, at or near the place alleged, on or about the date alleged, unlawfully dispose of captured public property of the United States, as alleged, in violation of Article of War 96, approved only so much of the findings of guilty of Specification 3, Charge III as involved a finding that the accused did, at or near the place alleged, on or about the date alleged, knowingly and unlawfully apply to his own use and benefit a 2½ ton, 6x6, truck of the value alleged, property of the United States, furnished and intended for the military service thereof, approved only so much of the finding of guilty of Specification 3 of Charge IV as involved a finding that the accused did, at or near the place alleged, on or about the date alleged, wrongfully and willfully divert from their proper military duties, as alleged, Tec 4 Henry R. Bouchard, Tec 4 Joe Malone, Roger Anderson, Harold A. Graaf and James C. Alicata, enlisted men of the 1306th Engineer General Service Regiment, approved the sentence, with the comment that it is inadequate, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of Specification 3, Charge IV, confirmed the sentence stating that it is wholly inadequate punishment for an officer guilty of such grave offenses, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Company E, 1306th Engineer General Service Regiment, of which accused was commanding officer, was stationed near Metz, France, on 19 December 1944 (R8).

a. Specification 1, Charge IV. About 19 December 1944 Private First Class Constantin J. Stravelakis and Technician Fifth Grade Robert R. Hale went from Metz to Rombas, near Clouange, France, to obtain the officers' laundry. They drove a U. S. Army command car, which was part of the organizational equipment of the company. Having obtained the laundry at the home of a girl named "Blackie", they brought her back in the vehicle to the company area. After she finished eating with accused, he told Stravelakis and Hale to take her back to Clouange, a distance of about 10 miles. They drove her back as instructed and had a trip ticket for the travel involved (R25,26,37,43,49,50). Apropos of this specification accused made the following statement to the pre-trial investigating officer:

> "On one occasion about 19 or 21 December 1945, my girl friend, Blackie, came up in a bicycle to my quarters just before we moved from Metz, and I offered to take her home in my command car to her home in Rombas. I didn't go with her in the car, but ordered Corporal Hale to take her home because it was a long distance for her to go on her bicycle" (R59; Pros.Ex.2).

b. Specification 2, Charge IV. About eight or nine days before Christmas 1944, Private First Class Wayne E. Meadows was directed by accused to pick up some coal and furniture in an army 2½ ton 6x6 truck. Private First Class Anthony M. Mastrosimone was detailed to assist loading the coal onto the truck in the company area in Metz. At the direction of Private Stravelakis the truck was then driven to the officer's quarters, where a sewing machine, a cot or davenport, a stove, some chairs and a table were put on the truck by the detail. Driven by Private Meadows the truck proceeded to Clouange to the home of a civilian named "Blackie" where the detail unloaded the coal and put the furniture in the house (R11,12,13, 21,22,26). Accused's pre-trial statement contains the following pertinent facts concerning this incident:

> "On or about 21 December 1944 we were located in a German caserne in Metz. We were about to move and there was an old davenport, some chairs, a table, a cot and some abandoned coal in the caserne area. I had these miscellaneous items of furniture and a small amount of coal loaded on one of my trucks and delivered it to my girl friend, Blackie, who was in need of coal, and she and some of the other families in and around Clouange could put it to good use. It was during the winter time and she didn't have any coal available. These items were taken from the German caserne upon our departure" (R59; Pros.Ex.2).

c. Specification 2, Charge I; Specification, Charge II; Specification 2, Charge III. About 26 February 1945 at accused's direction

Private Meadows drove a 3/4 ton weapons carrier, which was "part of the organizational equipment of Company E" from Bastogne, Belgium, where the company was stationed at the time, to Clouange, France. He was accompanied by Privates Spears and Stravelakis and the vehicle contained 12 or 14 enemy German tires, that Private Meadows had previously observed in the company area. These tires were "old, used, some had holes in them, cut". When they reached Clouange, Private Meadows parked the vehicle "at the old company motor pool". Meadows departed to visit a girl and Spears agreed to stay with the vehicle. While Meadows was thus absent, Private Stravelakis appeared and at his direction Spears drove the weapons carrier to a civilian garage about two blocks away. When Private Meadows returned to the motor pool in Clouange, the vehicle was there but it was empty (R13,14,15,16,18, 19,60,61). In his pre-trial statement accused commented as follows regarding this incident:

> "On or about 26 February 1945 relative to the fourteen German tires that were loaded on one of my weapons carriers, they were taken to Clouange. These tires were obtained from demolished German vehicles that were located along the sides of roads throughout the country. We took the tires and turned them over to civilians in Clouange for their use"(R59; Pros.Ex.2).

d. Specifications 3 and 4, Charge III; Specification 4, Charge IV. About 22 March 1945 accused's unit was stationed in Bitburg, Germany (R69). On that date Private Spears drove a 6x6, 2½ ton army truck, which was then being used by Company E, 1306th General Service Regiment. A detail consisting of Sergeant Malone, Privates Anderson, Graaf and Alicata loaded some furniture, including a piano and some chairs onto this truck. These items came partly from a warehouse and partly from a civilian home and were placed on the truck at accused's directions. The truck was then driven to Aubange, Belgium, approximately 80 to 100 miles from Bitburg. When they arrived at Aubange, where "we were supposed to meet the Captain (accused) there", the latter failed to appear and Private Spears, still accompanied by the detail, started back to the company area. On the outskirts of Bitburg they met accused, who was accompanied by Sergeant Bouchard. They were riding in a 3/4 ton command car, a United States Army vehicle, which was organizational equipment. Accused told them to return to their company area for the night, and after picking up some additional furniture at Bitburg in the morning to again take the load to Aubange. With the same detail of men as on the previous day these instructions were followed and on 23 March 1945 they met accused and Sergeant Bouchard in Aubange. At accused's directions the furniture was unloaded and placed upstairs in the Cafe de Sports. Sergeant Bouchard acted as accused's interpreter and at the latter's instructions and in his presence made the arrangements at the cafe with reference to leaving the furniture there (R62,63,64,69,70,71,73-79). With reference to this incident accused's pre-trial statement contains the following:

"On or about 21 March 1945 I secured permission from the military government at Bitburg to procure some furniture from a Nazi building. This building was to be destroyed by the military government. I asked them for some of the furniture. They gave me permission to take some for my use. I took six chairs, one baby grand piano, one divanette, two tea tables, a copper bowl and approximately six rugs. I took the clock and some of the chairs from the building where the officers were billeted in my organization. I then had the furniture loaded on one of my trucks of my organization and had a detail of Sergeant Malone, Roger Anderson, Harold A. Graaf, James C. Alicata and Arvel L. Spears to take the furniture to Cafe de Sports at Aubange where I had the furniture stored intending to give this furniture to some of the civilians around Aubange at a later date. The furniture is still stored in the Cafe de Sports. All the furniture belonged to a Nazi official of the German government. This all occurred from 21 to 22 March 1945. Sergeant Bouchard acted as my interpreter" (R59; Pros.Ex.2).

e. Specification 5, Charge III; Specification 5, Charge IV; Specifications 1 and 3, Additional Charge. About 3 April 1945 accused's company was located in Budenheim, Germany (R44,46). On that date a convoy consisting of two 2½ ton army trucks, property of accused's company, a German fire truck and accused's command car traveled from Budenheim to Clouange, France, by way of Luxembourg City (R27,28,38,47,49). Accused and Private Stravelakis rode in the command car, which was driven by Technician Fifth Grade Robert R. Hale (R27,47). The German fire truck was driven by Private First Class Turner. This fire truck was dark blue or light purple and had a German insignia on its door (R47,48,66,81). The army trucks were driven by Privates Fite and Spears (R38,47,65,66,80,81). Staff Sergeant Anthony H. Stephen was the leader of the convoy and traveled part of the way in a 2½ ton truck and the balance of the trip in a command car (R38,84). Privates Short and Herbert also made the trip with the convoy (R66,81,85). Arriving in Clouange the army trucks were parked in front of the police station and the fire truck was parked in a nearby yard (R28, 29,87). One of the trucks was loaded with linoleum, tires, bicycles and a motorcycle and the other truck contained a small German sedan type automobile that had been picked up in Germany (R48,66,81). Technician Fifth Grade Hale drove accused to "Blackie's" house and, at his direction, returned and had the other drivers follow him back to the house (R48). Here the trucks were unloaded by the enlisted men (R48,81,82). Meanwhile Private Stravelakis went to the place where the fire truck was parked. Here Sergeant Stephen, a few drivers and a civilian named "Max" were assembled. Private Stravelakis returned to Blackie's house and found accused there. The latter told him (Stravelakis) that he wanted to give the fire truck to the people of Clouange as a present, but the people did not want it as it was a German

vehicle (R29,41). Two days later Private First Class Turner drove this truck to Mayeurve, where he parked it in a garage, designated by "Max". He was driven back to Clouange by the latter (R88). The day after they arrived in Clouange, Technician Fifth Grade Hale drove accused to a mill in Rhombas to pick up some bolts that had been ordered, but they were not ready (R53). The day before they left Clouange accused and Private First Class Stravelakis went to "Max's" house because "Max" wanted to give accused a drink. Max gave them a drink of cognac and Stravelakis observed about fifty or seventy thousand-franc notes on a table in a room where Max and accused were standing near the table (R32,33,37,38). This enlisted man did not see accused or anyone handling the money while he was in the room, although he was not present at all times (R32,33,37). On previous visits to his house, "Max" had given Stravelakis some envelopes to give to accused. Sometimes the envelopes were sealed and sometimes they were open but he (Stravelakis) never saw the contents of the envelopes (R35,36,39). Concerning these specifications accused related the following in his pre-trial statement:

> "On or about 3 April 1945 relative to the sedan that I had loaded on a truck and directed to take to Clouange, this sedan belonged to the gestapo chief of police of Mainz, Germany. I asked the captain in the military government in Mainz for permission to take this German sedan. This permission was given, and I later had the sedan taken to Clouange. I intended to turn this sedan over to the chief of police of the town of Clouange for his use. Relative to the fire truck, I found this fire truck, which was a German fire truck, in an abandoned car foundry in Mainz. I also secured the linoleum from the abandoned car foundry. I had the fire truck, the sedan, and the linoleum loaded on trucks of my organization and brought to Clouange and instructed Stravelakis to turn the sedan, fire truck and the linoleum over to the police department for the use of the city of Clouange. I secured the bicycles from the military government in Frankfurt. The military police were taking them away from the civilians and burning them up. I took some of the tires that we had secured from abandoned German vehicles and had them also brought to Clouange along with the sedan and fire truck. I gave my girl friend one bicycle and told the men to give the rest away to other civilians.
>
> * * *
>
> On or about 3 April 1945, Max, a civilian in Clouange, gave me approximately 100,000 French francs as a present and only as a present. Private Stravelakis was with me at the time when Max gave me this money. I don't know Max's last name, but he gave it to me for being so nice to him and other members of the community in and around Clouange" (R59; Pros.Ex.2).

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f. Specification 6, Charge IV. On 14 April 1945 Technician Fifth Grade Hale and Private First Class Thomas L. Rosenberg made a trip in a weapons carrier, which was part of accused's company's organizational equipment, from Frankfurt, Germany, to Aubange, Belgium. They had a trip ticket for this travel, which was performed at accused's direction. The vehicle was loaded with one large barrel, one small barrel and approximately six or eight boxes containing wine. The large barrel held about 100 to 150 gallons, the small one about 25 gallons and the boxes about 250 to 300 bottles of wine. The distance between these two cities is between 100 and 150 miles and it took approximately five or six hours to make the trip. Pursuant to accused's directions the wine was taken to a home of a "Madame Lorient" in Aubange, where it was unloaded and placed in her cellar after dark. The large keg would not go through the opening into the cellar so it was returned (R44,45,46,56,57). Accused's pre-trial statement apropos of this incident is as follows:

> "On or about 14 April 1945 we were located in Frankfurt, Germany, and there was a big wine distillery there which had been abandoned. Various organizations were securing wine from this distillery and the military police captain told me I could have some, and told me to destroy it or take what I wanted of it because the displaced persons were getting drunk on it. I took about six boxes of wine, about 200 to 300 bottles, and an eighty gallon barrel and loaded it on aweapons carrier and had it delivered to a Mrs. Biver in Aubange, Belgium. She had been very nice to our men when we were billeted around that vicinity. I gave the Air Corps at Frankfurt some wine from the distillery and gave eighty gallons to the ration dump near Frankfurt" R59; Pros.Ex.2).

g. In general. Some time during the latter part of April accused was relieved of his command as the result of an investigation and First Lieutenant Edward L. Golec was instructed to accompany accused to Regimental Headquarters. While he was thus accompanying accused, the latter gave him a bundle of money and asked him to give it to Lieutenant Shaeff. This bundle contained 130,000 francs, in 1000 Bank of France franc notes (R89-91).

After evidence as to its voluntary nature was presented, accused's pre-trial statement to the investigating officer, which has been previously extracted, was received in evidence (R59; Pros.Ex.2).

It was stipulated between the prosecution, the defense and the accused in open court that the 3/4 ton weapons carrier referred to in Specification 2 of Charge III, the 2½ ton 6x6 cargo truck and the 3/4 ton C&R car referred to in Specification 3 of Charge III, the 2½ ton 6x6 truck referred to in Specification 4 of Charge III, the two 2½ ton 6x6 trucks and the 3/4 ton C&R car referred to in Specification 5 of Charge III are all property of the United States furnished and intended for the military service thereof and further that each of the vehicles referred to is of a value of more than $50 (R8; Pros.Ex.1).

4. Lieutenant Colonel Guy F. Tate, commanding officer of the Second Battalion, 1306th Engineer Service Regiment, testifying for the defense stated accused had served under him for nearly two years. Accused, who was commissioned directly from civilian life because he had been a contractor, commanded his company firmly and worked on the job as much as anybody. After his organization came to France on 6 August 1944, accused was the first man to be decorated. Accused was engaged in building roads and bridges and in general construction work in continental operations. At Thionville, France, he exposed himself to heavy mortar fire in order to complete a bridge he was then constructing. He was also responsible for restoring utilities in the town of Clouange after the Germans retreated. He was given the worst construction jobs in the regiment and frequently accomplished them without assistance from the army, using local materials exclusively. He is not "too well up" on Army regulations but "I just don't think of him as a criminal or that type of person" (R93-99).

Private Stravelakis, recalled as a defense witness, testified that he was present when accused offered the fire truck to "Max" but the offer was rejected because "Max" feared that the people of Clouange would not like it since it was a German truck (R100). Sergeant Bouchard, similarly recalled, testified he had observed some bicycles around the motor pool but he did not know if these were the bicycles that were delivered to Clouange (R102).

It was stipulated by the defense, the prosecution and the accused that if the civilian known as "Max", last name unknown, who is a resident of Clouange, France, were present in court he would testify that there never at any time existed between himself and accused any agreement, expressed or implied, for the payment or delivery to the accused of money in return for goods and services (R103; Def.Ex.1).

Accused, after his rights as a witness were fully explained to him (R103), elected to remain silent.

5. a. Charges I and II and their specifications. The rarity of a prosecution under the 79th Article of War warrants a more extended discussion of the history and purpose of this article than is usual in the opinions of this Board of Review.

The 79th Article of War is based on the rule of international law which permits an army to take possession of all movable property belonging to the enemy which may be used for military operations (Article 53, par. 1, Annex to Hague Convention No. IV of October 18, 1907; Oppenheim, International Law (6th Ed. by Lauterpacht, 1940) page 310). This rule applies only to public property, that is, property owned by the State. Private property must be respected (Article 46, par. 1, Annex to Hague Convention No. IV, supra) and can be seized only by way of military necessity for the support of or other benefit of the army or of the occupant. As between the individual captor and his state, the ultimate ownership of captured enemy property is a question of municipal law and not international law (Page 310-311, Oppenheim, supra).

In Anglo-American law booty taken on the battlefield or otherwise captured from the enemy belongs to the State and not to the individual effecting the capture (Oppenheim, supra, footnote, page 311; Dig. Op. JAG, 1912, pages 1060, 1061; Davis, A Treatise on the Military Law of the United States (3rd Ed., rev. 1913), page 362; Winthrop, Military Law and Precedents (Reprint, 1920), page 557; MCM, 1921, par. 429, page 385; FM 27-10, Rules of Land Warfare (1940), par. 327).

The earliest military enunciation of this principle that our research disclosed is in the "English Military Discipline" of James II (1686). Article XXV thereof reads as follows:

> "In What Place soever it shall please God that the Rebels or Enemy shall be subdued or overcome, all the Ordnance, Ammunition and Victuals that shall be there found, shall be secured to his Majesties use, and for the better Relief of the Army; and one-tenth part of the Spoil shall be laid apart towards the Relief of the sick and maimed Soldiers" (Winthrop, supra, page 923).

The American Articles of War of 1775, following the British Articles then in effect, provided:

> "XXIX. All public stores taken in the enemy's camp or magazines, whether of artillery, ammunition, clothing, or provisions, shall be secured for the use of the United Colonies" (Winthrop, supra, page 955).

Similar provision is found in the American Articles of War of 1776, with the added phrase "for the neglect of which the commanders in chief are to be answerable" (Winthrop, supra, page 967). In the Articles of War of 1806, the "commanding officer" is made responsible instead of "the commanders in chief". A similar provision is found as Article 9 of the Articles of War provided for in the Act of June 20, 1874, 18 Stat. 113. This was the immediate predecessor of our present Article of War 79.

In discussing the proposed revision which resulted in our present Articles of War, before the Senate subcommittee of the Committee on Military Affairs in 1916, Brigadier General Enoch H. Crowder, then The Judge Advocate General, made the following statement:

> "New article 79 restates article 9 of the existing code. Our experience in the Philippines and China has indicated that there should be emphatic declaration, and thereby a warning to all persons subject to military law, that 'all public property taken from the enemy is the property of the United States'. This has been inserted in new article 79, and immediately precedes the provision of article 9 that such property so taken from an enemy 'shall be secured

> for the service of the United States'. ... Of course, the concluding provision of old article 9 was objectionable, 'and for neglect thereof the commanding officer shall be answerable'. The new article provides that for such neglect, or for any wrongful appropriation of such property, the military offender shall be punished as a court-martial may direct" (Senate Report No. 130, 64th Congress, 1st Session, page 79 (1916)).

In spite of the wording of the articles preceding the present Article of War 79, it wasconsidered a military offense for any officer or soldier to appropriate captured property. On page 1061, Dig. Op. JAG, 1912, it is said:

> "...An officer or soldier of the Army who assumes of his own authority to appropriate such articles renders himself chargeable with a military offense".

Article of War 79 defines two offenses: neglecting to secure captured public property and wrongful appropriation of captured public property. The elements of proof of the latter offense, of which the accused is charged, are:

> "(a) That certain public property was captured from the enemy.
> (b) Acts of the accused in disposition of the captured public property, inconsistent with the United States right of complete dominion over that property" (MCM, 1921, page 386).

Accused's pre-trial statement that the fourteen tires in question were taken from demolished German vehicles which were located along the sides of roads throughout the country clearly indicates that the tires were enemy tires. It was also inferable by the court that the tires were those of the German Army, i.e. public property. This inference is strengthened by the rule set forth in FM 27-10, Rules of Land Warfare, par. 322, which states that where there is any doubt as to whether property is public or private, it should be treated as public property until ownership is definitely settled. The tires were "captured" within the meaning of the article even though they were not taken from the immediate possession of the enemy. In Military Booty, 13 Op. Atty. Gen. 105 (1869) the question of the ownership of two barges was presented. These barges formerly privately owned, had been used by the Confederacy and after Norfolk, Virginia, was captured they were found near a wharf, so far destroyed by fire as to be of little value. The Quartermaster repaired them and they were used by the U. S. Army. It was held that the barges were simply booty captured by the Army from the enemy in war and belonged wholly to the United States, not to the former owner.

The act of turning these tires over to French civilians, even

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without compensation, is clearly inconsistent with the United States right of complete dominion over them.

The pre-trial statement of the accused was amply corroborated by testimony of witnesses as to the transportation of the tires from the company area to Clouange, France, and the return of the empty vehicle.

Sec. III, Cir. 353, WD, 31 August 1944, in force at the time of the offense, provided that retention of captured equipment as war trophies is considered not to be in violation of the 79th Article of War, but of course this does not extend to the disposition of such equipment, which is present in this case. The current regulations are contained in Sec. VI, Cir. 155, WD, 28 May 1945.

From the foregoing discussion of the law and the evidence it is manifest that the findings of guilty of Specification 2, Charge I are supported by substantial evidence.

Concerning the offense charged in the Specification, Charge II, the reviewing authority approved only so much of the findings of guilty as involved the unlawful disposal of the property in question in violation of Article of War 96. For the reasons stated above the court could properly infer the tires were captured or abandoned public property and, in the absence of any authorization to do so, accused's action in giving them to French civilians, even though gratuitously, was wrongful and constituted a violation of Article of War 96. Inasmuch as the proof failed to establish that accused received any profit, benefit or advantage the reviewing authority was entirely correct in approving only so much of the finding of guilty as includes the lesser included offense of unlawful disposition of Government property (CM ETO 6226, Ealy).

b. Charge III and its specifications. Specifications 2, 3, 4 and 5, Charge III, charge that accused knowingly and willfully applied to his own use United States Army vehicles each of a value in excess of $50, furnished and intended for the military service. The essential elements of this offense are:

> (1) That the accused misappropriated or applied to his own use certain property in the manner alleged; (2) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (3) the facts and circumstances of the case indicating that the act of accused was willfully and knowingly done; and (4) the value of the property, as specified (MCM, 1928, par. 150i, p. 185).

The prosecution's evidence, buttressed by accused's admissions in his pre-trial statement, establishes that at all the times and places alleged in the above specifications, United States Army vehicles, at accused's

direction, were used for his own private purposes. Construing the evidence most favorably to accused, there is no indication that the various purposes for which the vehicles were used had any relation to his military duties. There is ample evidence of all the essential elements of these offenses, which constitute violations of Article of War 94(CM ETO 9288, Mills; CM ETO 11936, Tharpe et al; CM ETO 13276, Clower and Westbrook).

c. Specification 1, Charge IV. This Specification alleges that accused wrongfully caused a French civilian to be transported in an army vehicle in violation of Article of War 96. Inasmuch as accused in his pre-trial statement admits that he ordered enlisted men of his organization to drive his "girl friend" to her home in Rombas, a violation of the standing order in effect in this theater prohibiting this practice was clearly established (Sec. VI, AG, 451/2, Pub. GC, Headquarters, European Theater of Operations, 24 January 1944, subject: "Maintenance and Operation of Motor Vehicles). This offense is punishable under Article of War 96 (CM ETO 2966, Fomby).

d. Remaining specifications of Charge IV. Accused is charged in Specifications 2, 4, 5 and 6, Charge IV, with wrongfully and willfully diverting from their proper military duties various enlisted men of the 1306th Engineer General Service Regiment. The testimony of prosecution's witnesses and accused's admissions in his pre-trial statement clearly demonstrate that, at the times and places alleged, the services of the enlisted men in question were utilized by accused for his own personal use and benefit. The services they were required to perform at his direction had no relation whatsoever to his or their proper military duties. In each instance accused's improper conduct was prejudicial to good order and military discipline and thus constituted a violation of Article of War 96(CM 249998, Patka, 32 B.R. 265, 274 (1944); Cf: CM ETO 18339, Shermer).

e. Specification 1, Additional Charge, alleges that accused wrongfully and knowingly appropriated and carried away a German fire truck. Accused in his pre-trial statement admitted that he "found" this fire truck in an abandoned car foundry in Mainz and the evidence disclosed his attempt to give it to the city of Clouange and the subsequent disposal of it by one of his enlisted men and his French civilian friend. Inasmuch as he had no authority to exercise such dominion over this property his actions were entirely unauthorized and violative of Article of War 96. The court's finding of guilty of this offense is sustained by substantial evidence (CM ETO 6226, Ealy, supra).

f. Specification 3, Additional Charge. The court found accused guilty of wrongfully accepting 100,000 francs from a French civilian while accused was on active duty as a commissioned officer of the Army of the United States. Accused admitted receipt of the money and the prosecution presented strong corroborative evidence regarding the transaction. Accused's further contention that the money was only a present given to him by the French civilian "for being so nice to him and other members of the community

in and around Clouange" completely lacks any persuasive force. Accused's conduct in accepting this large sum of money under the circumstances disclosed by the evidence was clearly in violation of Article of War 96 (CM 234644, Cayouette, 21 B.R. 97 (1943); CM 235011, Goodman, 21 B.R. 243 (1943)).

6. The charge sheet shows that accused is 42 years, ten months of age and his commissioned service began 9 April 1943 at Oakland, California. 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 rightsof 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 confirmed and the sentence.

8. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violations by an officer of the 79th, 94th and 96th Articles of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, NewYork, as the place of confinement is proper (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

(ON LEAVE) Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 DEC 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Captain EARL V. TRUEX (O-923565), 1306th 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 as approved and confirmed and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17667. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17667).

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

(Sentence ordered executed. GCMO 1, USFET, 9 Jan 1946).

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

BOARD OF REVIEW NO. 2

5 NOV 1945

CM ETO 17679

U N I T E D S T A T E S	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, United States Army, 10 September 1945.
Private JOSEPH R. DARPINO, (32300559), Company "B", 305th Engineer Combat Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. Accused was tried on the following charges and specifications:-

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

Specification: In that Private Joseph R. Darpino, Company "B", 305th Engineer Combat Battalion, did absent himself without proper leave from his proper unit, Company A, 377th Infantry, APO 95, from about 27 December 1944 to on or about 8 January 1945.

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

Specification: In that * * * did, in the vicinity of Metz, France, on or about 8 January 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at Detachment 83, Ground Forces Replacement Center, in the vicinity of Nurnburg, Germany, on or about 31 March 1945.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications, except the words "on or about 31 March 1945" contained in the Specification of Charge II, substituting therefor the words "on or about 17 March 1945". Evidence was introduced of three previous convictions one by summary court for absence without leave of 5 months and 3 days, and two by special courts-martial for absences without leave for 3 months and 20 days, and for 8 months and 5 days respectively, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the remainder of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial under the provisions of Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: The accused at the time of trial was a private in Company "B", 305th Engineer Combat Battalion (R6) having joined that organization on 26 May 1945 by virtue of Special Order No. 126, Headquarters 80th Infantry Division, dated (R7) 24 May 1945, which assigned him to that battalion and which showed that he was a reinforcement transferred to the division on 21 May 1945 from the 53rd Reinforcement Battalion (R7, Pros. Exs. 1 and 2).

Over the objection of defense counsel, there was admitted in evidence (1) An extract copy of a morning report of Detachment 48, Ground Force Replacement System of 10 January 1945 showing that the status of the accused changed "fr conf to AWOL o/a 0130 & 0730 hrs as of 8 Jan 45." (R8, Pros. Ex. 3); (2) an extract copy of the morning report of Company "A", 377th Infantry, dated 28 December 1944 containing an entry referring to the accused reading, "28 December 1944, CORRECTION (27 Dec 44) Asgd and jd fr 48th Repl Bn SHOULD BE Asgd, not jd, fr 48th Repl Bn. AWOL fr date of Asgmt "and also an entry on 17 March 1945" fr AWOL to Ab Conf. Hq Seine Sect, Com Z ETO, U.S. Army APO 887, date unknown" (R10, Pros. Ex 5); (3) An extract copy of a morning report of Detachment 83, CFRC, containing an entry of 31 March 1945 with reference to accused,"Conf to AWOL 2400 Hr 30 Mar 45" (R10, Pros. Ex 6); (4) An extract copy of a morning report of Detachment 48, Ground Force Replacement system for 18 February 1945 with reference to accused "(Now AWOL) fr AWOL to dropped fr rolls as absentees pursuant to AR 615-300 and 1st Ind. HQ ETO file AG 251.2 dated 17 Dec 44" (R9, Pros. Ex 4).

4. The accused having been fully advised concerning his rights as a witness elected to make an unsworn statement through his counsel. He stated that he came overseas on 12 May 1944 with the 248th Combat Engineers and on 8 January 1945 became separated from his outfit and came under military control about 24 days later. He was sent to the 19th Replacement Depot for a while, then to the 17th for a while, then to the 90th Replacement Depot, from there to the 53rd Replacement Depot, and from there to his present outfit. Altogether he was out of military control about 24 days, he never intended to desert the service.

5.a. With reference to Charge I and its Specification the accused has been found guilty of absenting himself without leave from his "proper unit", Company A, 377th Infantry, from about 27 December 1944 until 8 January 1945. The only evidence offered in support of this charge was the extract copy of the morning report of that organization to the effect that the accused had been assigned to that organization from the 48th Replacement Battalion, had not joined and that he was AWOL from the date of the assignment (See Pros. Ex 5). Such evidence is totally inadequate to sustain the conviction. It is apparent that the basis of this charge was that the accused had been assigned to the 377th Infantry from the 48th Replacement Battalion and had failed to arrive there. The exhibit introduced in evidence was competent to show that he did not arrive, but there is no competent evidence that he was ever ordered to join the 377th Infantry. This case is governed by the basic principle of law relating to cases of this nature announced in CM ETO 11518, Rosati, and, CM ETO 11356, Crebessa. Knowledge of his transfer and therefore of his duty to proceed from one organization to another organization cannot be presumed from entries made in the morning report of the latter organization. The proper practice is to show the order of assignment and that the accused departed from his new organization in accordance with the order (CM 199270, Andrews 3 BR 343 (1942)). The conviction of Charge I and its Specification cannot be sustained.

b. With reference to Charge II and its Specification, the accused has been found guilty of deserting the service of the United States in the vicinity of Metz, France, on or about 8 January 1945 and remaining in desertion until he was returned to military control about 17 March 1945. The type of desertion charged here requires proof of two elements: (1) Absence without leave, and (2) intent not to return (MCM, 1928, par. 130a, p.142). The accused in his unsworn statement before the court admitted that he "became separated from his outfit" on 8 January 1945. The morning report of Detachment 48, Ground Force Replacement System on 10 January 1945 showed that he absented himself from confinement without leave from that organization on 8 January 1945 (Pros. Ex 3). Accused's absence without leave was therefore supported by substantial evidence. The evidence of intent to desert, must rest in the period of his unauthorized absence since there is no other evidence of intent shown by the evidence. If much prolonged and without satisfactory explanation, a court is justified in inferring from length of absence alone an intent to remain permanently away (MCM 1928 Par 130a, 143). The exact time of the termination of accused's unauthorized absence is not definitely shown by the evidence. The entry of the morning report of Company A, 377th Infantry for 17th March 1945 (Pros. Ex. 5) indicates that accused was confined at some time prior to 17 March 1945. The entry of the morning report of Detachment 48, Ground Force Replacement System, for 18 February 1945 (Pros. Ex 4) shows accused still in a status of absence without leave, forty-one days after his initial absence. It is unnecessary to consider how much longer accused was out of military control since, in the absence of an explanation satisfactory to the court this period itself at a time when hostile forces were active in the theater, is sufficient to justify the inference that he intended to remain away and the findings of guilty of desertion may be sustained (CM ETO 1629 O'Donnell; CM ETO 10741 De Witt Smith; CM ETO 12045 Friedman).

6. The charge sheet shows that the accused is 25 years, 10 months of age. Without prior service, he was inducted 6 May 1942 at Fort Diz, New Jersey.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification and legally sufficient to support the findings of Charge II and its Specification and the sentence.

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

(ON LEAVE) Judge Advocate

Ronald D. Mullen Judge Advocate

John J. Collins, Jr. Judge Advocate

(381)

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

BOARD OF REVIEW No. 1

26 NOV 1945

CM ETO 17696

UNITED STATES	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private VICTOR T. HORVATH (16035766), 19th Reinforcement Depot	Trial by GCM convened at Paris, France, 19, 20 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE 1: Violation of the 58th Article of War.

Specification: In that Private Victor T. HORVATH, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization, on or about 30 September 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 2 January 1945.

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

Specification 1: In that * * * did, at Paris, France, on or about 28 December 1944, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Mrs. Guillermin, goods and currency, the property of Mr. and Mrs.

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Guillermin, value about one hundred and fifty thousand (150,000) francs, or about three thousand dollars ($3.000).

Specification 2: In that ** * did, at Paris, France, on or about 2 January 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and presence of Constantin Corchanides; goods and currency, the property of Mr. and Mrs. Pierre Petrovitch, value about two hundred thousand (200.000) francs, or about four thousand dollars ($4.000).

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of both charges and all specifications. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that pursuant to Article of War 50 the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution is substantially as follows:

Specification, Charge I: Accused absented himself without leave from the 19th Reinforcement Depot on 29 or 30 September 1944 and went to Paris, France where he remained until he was apprehended there by military police on 2 January 1945 (R13, 15-17, 19-21; Pros. Ex. E). While in Paris, he obtained money by procuring soldiers as customers for girls and by gambling (Pros. Ex. E). He engaged in robberies on 28 December 1944 and 2 January 1945, as shown below. When apprehended he was wearing civilian clothes and had in his possession a pistol, 18,000 francs, and a suitcase which contained miscellaneous Army issue and other items (R7-8, 11-13, 15; Pros. Exs. D, E, F, J). His defense was in substance that he wore civilian cloths only on the day of his apprehension and then only because the French police had taken some of his uniform and he had sent his other to be cleaned (R87,93, Pros. Ex. E); and that he did not intend to desert the service but to return when the war was over (R88-89). The extended period of accused's unauthorized absence coupled with his criminal activities, civilian dress and his own admissions as to his intent fully warranted the findings of guilty of desertion as alleged (MCM, 1928, par. 130a p. 142;

CM ETO 952, Mosser; CM ETO 1629, O'Donnell; CM ETO 12224 Ciullo; CM ETO 15343 Deason; CM ETO 15512 Francis Miller).

b. Specification 1 and 2, Charge II: On the evening of 28 December 1944, accused and two Frenchmen entered the apartment of Madame Raymonde Guillermin in Paris on the pretext of wishing to communicate with her husband (R27-28, 40-41,55). After threatening her with pistols, accused and one of the Frenchmen bound and gagged the woman, and accused stood guard over her with a pistol while the other two men searched the apartment (R29,41). The three took from the apartment 17,000 francs and miscellaneous personal property, including rabbit skins, fur garments, trousers, dress, jacket and three valises, the combined value of which was substantial (R29-30,34-35; Pros. Ex. B). Accused shared in the proceeds of the sale of some of the articles (R42,55).

On the evening of 2 January 1945, accused, another apparent deserter from the American Army, and a Frenchman entered the apartment of Pierre Petrovitch in Paris on the pretext of wishing to communicate with him (R56-57,68,74-75). Accused pointed his gun at the brother of Petrovitch's wife, Constantine Corshanides, who at accused suggestion was bound and gagged by two of the men (R74-75). The three took from the apartment at least 94,000 francs, various jewelry including a "very precious" ring and two fur coats, of a substantial combined value (R76,79-80; Pros. Ex. H). Accused shared in the money taken (R68-69).

Accused's defense to each alleged robbery was a complete denial of guilt and of all connection with either (R87-88). He explained his possession of a bag containing some of the missing articles by stating that the American Army deserter delivered it to him, and his possession of 18,000 francs, by stating that this man loaned it to him (R88).

The evidence shows that accused in each instance was one of a group which by violence and intimidation and with intent to steal took money and other personal property of substantial value from the presence of members of the respective owners' immediate families. Accused actively participated by aiding to bind and gag the first victim and by intimidating each victim with his pistol while the actual initial asportations were effected by others. His guilt as a principal of robbery as alleged is clearly established (MCM, 1928, par. 149f, pp. 170-171; CM ETO 78, Watts; CM ETO 2951, Pedigo). His denial of identity as one of the guilty partners in each of the criminal enterprises raised a pure issue of fact for the court, whose determinations against him in its findings of guilty of each specification may not be disturbed by the Board of Review in view of the substantial competent evidence in the record to support them (CM ETO 16971, Brinley, and cases therein cited).

The evidence as to the value of the various stolen articles was far from satisfactory, but we need not be concerned with this as it is obvious that the goods had a substantial value which is all that is required for robbery, (CM ETO 17314, Newman et al). The statements of value in the specification were

not essential to the offenses and may thus be deemed surplusage. The money and goods in each instance were taken in the presence of a member of the owner's immediate family, whose possession or custody was clearly good against that of the takers. The property interest of the victims was thus sufficiently established (MCM, 1928, par. 149f p. 170).

4. The instant case was brought to trial originally on 7 April 1945 and proceeded until a substantial portion of the prosecution's evidence was presented. Because of the absence of certain prosecution witnesses, the case was continued, on motion of the prosecution, "until such time as the case can be brought up again" (Record, 7 Apr., p.27). By 2nd Indorsement dated 19 April 1945, the appointing authority withdrew the charges from the first court and referred them for trial to the instant court, which convened on 19 and 20 April 1945 and tried, convicted and sentenced accused as hereinbefore stated. No plea or objection on the ground of former jeopardy was made at this trial and accused pleaded to the general issue. It follows that, as in the case of other special pleas, the same was waived and that the former proceedings may not be held to affect the legality of the instant proceedings (MCM, 1928, par. 64a, p. 51; CM ETO 15320 Wade and Cooper and authorities therein cited).

5. The charge sheet shows that accused is 21 years eight months of age and enlisted 4 December 1941 at Fort Sheridan, Illinois. No prior service is shown.

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

7. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42, and upon conviction of robbery by that Article and Section 284, Federal Criminal Code (18 USCA 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II Pars. 1b (4) 3b).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

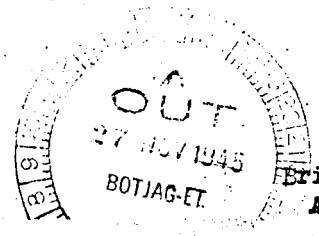
David K. Carroll Judge Advocate

1st Ind.

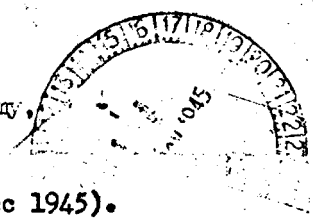
War Department, Branch Office of The Judge Advocate General with the European Theater. 26 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private VICTOR T. HORVATH (16035766), 19th Reinforcement 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 as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17696. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17696).



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



½ (Sentence as commuted ordered executed. GCMO 623 , USFET, 8 Dec 1945).

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

BOARD OF REVIEW NO. 2

27 OCT 1945

CM ETO 17697

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM convened at APO 45, United States Army, 25 June 1945.
Private LUTHER F. HOPKINS, 20838165, Company K, 157th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Luther F. Hopkins, Company K, 157th Infantry did, at or near Venafro, Italy, on or about 14 November 1943, desert the service of the United States and did remain absent in desertion until he was returned to the custody of military control on or about 7 May 1944.

Specification 2: In that * * * did, at or near Anzio, Italy, on or about 14 May 1944 desert the service of the United States and did remain absent in desertion until he was returned to military control on or about 1 March 1945 (As amended during trial (R4)).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and its specifications substituting, however, the words "17th of March 1944" for the words "7th May 1944" in Specification 1 and "26 January 1945" for the words "1 March 1945" in Specification 2. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 45th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The competent evidence for the prosecution may be summarized as follows: The communications sergeant of accused's company who was present with the company from 14 November 1943 until 7 May 1944 and who knew the accused (R4) testified that the company was located in foxholes and being subjected to air raids and artillery fire (R8) at Venafro, Italy, on Hill 769 on 14 November 1943; that his duties took him to various parts of the company and that accused was not with the organization from that date (R4-5), until 14 May 1944 when the company was at Anzio, Italy and the accused was brought there to the company by the military police (R5). At that time and place the first sergeant of the company ordered accused to go to the supply sergeant and draw his equipment and return to his platoon. From that date until 2 December 1944, when the witness left the organization on furlough, he did not see the accused with the organization (R6-7). Accused was not present during that time at the roll calls taken by the first sergeant (R7). The company commander who first joined the company on 5 June 1944 testified that the first time he saw the accused was on about 15 March 1945 when he was brought there by the military police (R12). On 14 March 1945 the accused voluntarily stated to the officer investigating the charges against the accused (R12) that "around November 1943, near Venafro, K Company was moving up and he had a stiff leg and went back to the medics.

Some shells came in and he got nervous and went to Fogia where he caught a plane to Algiers. He went from Algiers to Tunis and in March 1944 he was picked up there. He was finally returned to his company in May 1944 at Anzio. He stated he took off about a half hour later and that he stayed in a hole around the hospital area. He said he took off because some shells came in and he got nervous. He was picked up in Rome in January 1945" (R13).

4. The accused having been fully advised concerning his rights as a witness elected to remain silent (R17). The defense called a witness who testified that after accused had rejoined the organization on 15 March 1945 he did a "great job" as a machine gunner and a good job of soldiering during the following few months while the company was engaged in active combat (R15-16).

5. It was stipulated that the accused was in military control on 17 March 1944 and, in Rome, Italy on 25 January 1945 (R16).

6. The accused has been found guilty of deserting the service of the United States under two specifications. Desertion is defined as absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service (MCM,1928,par.130a,p.142). The accused voluntarily confessed that he absented himself from his organization without obtaining permission at the times and places alleged in the specifications when he and his organization were engaged in actual combat and being subjected to enemy fire. He gave as his reason that he became nervous. He admitted that he remained away at distant points until apprehended; in Tunis during March 1944 on the first occasion, and in Rome during January 1945 on the second occasion. It was stipulated as a fact that he returned to military control on 17 March 1944 on the first occasion and on 25 January 1945 on the second. The accused's confession therefore admitted all of the essential elements of the offenses of which he was found guilty.

A confession may not be considered as evidence against an accused unless there is other proof that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself (MCM 1928,par.114a,p.115). The testimony of the sergeant and the commanding officer of the accused's organization showing that he was not with the organization during the time he was alleged to be absent without leave was sufficient evidence to show that he probably was absent without leave and constituted a corpus delicti. In the ordinary course of events if he had not been absent without leave from his organization he would have been with it and would have been observed by either or both of these witnesses. His absence without leave having thus been properly established, the court could infer from the length of the absences, the distance the accused travelled away from his organization, his apprehension upon both occasions, the circumstances surrounding his departures, and the reasons he gave for departing, that he did not intend to return and that he departed with the intent to avoid hazardous duty either of which intent would be sufficient to support its finding of guilt. (CM ETO 16880, Ferrara and the authorities therein cited).

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7. The charge sheet shows the accused to be 23 years of age. He enlisted in the National Guard of Colorado on 29 January 1940 and was inducted into Federal Service on 16 September 1940. 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 accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted.

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

Earle W. Stephens Judge Advocate

Ronald D. Mills Judge Advocate

John J. Collins, Jr. Judge Advocate

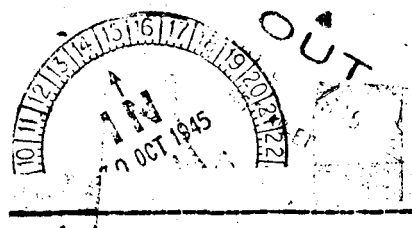
1st Ind.

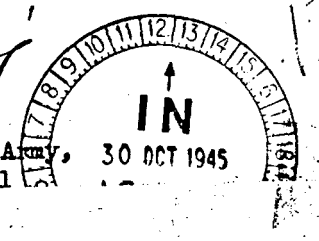
War Department, Branch Office of The Judge Advocate General with the European Theater. 27 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private LUTHER F. HOPKINS (20838165), Company K, 157th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17697. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17697).

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





(Sentence as commuted ordered executed. GCMO 590, USFET, 24 Nov 1945).

17697

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

BOARD OF REVIEW NO.3 27 OCT 1945

CM ETO 17698

U N I T E D S T A T E S	84th INFANTRY DIVISION
v.	Trial by GCM, convened at Weinheim, Germany, 30 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S.Penitentiary, Lewisburg, Pennsylvania.
Corporal JAMES W. STEWART (33745570), 3120th Quartermaster Service Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal James W. Stewart, 3120th Quartermaster Service Company, did, at 19 a Morchfeild Strasse, Neckarau, Mannheim, Germany, on or about April 21,1945, forcibly and feloniously, against her will, have carnal knowledge of Inge Nold.

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

previous convictions, both by special court-martial, for respective absences without leave of five dayseach, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 84th Infantry Division, approved the sentence, but recommended that it be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 2100 hours on 21 April 1945, a colored American soldier, later identified as accused, knocked with a carbine on the door of an apartment occupied by Frau Emile Nold and her daughter, 16-year-old Inge Nold, prosecutrix, in Mannheim-Neckarau, Germany. Frau Nold opened the door and accused entered the kitchen, in which Frau Nold, Inge, and four other persons were present, and showed them that his carbine was loaded, by removing the magazine and five rounds of ammunition, then replacing them in the rifle and operating the bolt (R6-9). He then asked for weapons and keys (R9,17). Herr Brenk, who lived downstairs, got a bottle of liquor and accused drank half a glass, then went with Brenk to his apartment for a short time, and returned and locked the kitchen door, putting the key in his pocket (R9-10,19). He was "a little drunk" (R13). Brandishing his carbine at the various persons in the room, he forced them to line up against the wall, and then went to Inge, who was hiding behind her mother, took her by the arm and pulled her into a bedroom, striking Herr Brenk before he entered (R11,19, 25). He placed a brief case in the bedroom door so that it would not close completely (R20,25). He thereafter remained in the room with Inge from one and a half to two hours, during which time her mother could hear her crying (R11-12,22).

Inge testified that after she was alone in the bedroom with accused, he removed all her clothing except her stockings (R20,25). She assisted him because he was threatening her with the carbine (R20). He then removed his pants, threw her on the bed and got on top of her. When she tried to "get him off", he held her tighter, and "from time to time" put his hand on the carbine, which was laying above her head on the bed (R21). He tried to have intercourse with her, but did not succeed the first time and went to sleep on topof her, holding her with one arm. While he was sleeping she called for help (R22-23). According to Herr Brenk, "she was crying all the time and she was asking for her mother" (R26). When accused awoke, he inserted his penis into her "a little" but "not deep". She "had heavy pains" and "tried to push him away". She had not had intercourse before. He also "pulled my head down to his penis and tried to make me kiss it" (R22-24).

Accused was interrupted when Captain Benjamin X Forester and two other officers, in response to a summons by civilians, entered the room and found accused and Inge, both naked, "wrapped around each other" in bed. Inge did not appear to be cooperating with accused, who immediately grabbed his carbine and pointed it toward the officers, one of whom hit him and knocked it from his hands. He appeared to be "under the influence of liquor". The officers turned him over to the military police, to whom he initially gave a false name(R29-32).

A German physician examined Inge the following morning and found her to be physically undeveloped. In his opinion she was a virgin prior to the incident. The entrance to her vagina was swollen and the hymen was swollen and torn in two spots. A "little blood" indicated a recent penetration (R28-29).

4. After his rights as a witness were explained to him, accused elected to make an unsworn statement (R34). He stated that during the evening of 21 April he was corporal of the guard. Some of the men had been taking bicycles from civilians, and he took one of the bicycles "up the road" about a mile for the purpose of telling "the other boys" who had bicycles to get rid of them. He saw some "DPs and soldiers" who gave him some alcohol or "buzz bomb juice" to drink, and they ended up at a "DP camp" by a lake, where they went swimming. At about 1730 hours he started to go to chow and they insisted that he have some more drinks. Knowing the effect of whiskey on him, he tried to leave, and finally did succeed in leaving. He remembered "waving goodbye or hollering to someone" and that he had a bicycle, but he could not remember anything that happened afterwards. In the stockade he found that his carbine was gone and his head was all cut up, but he had no recollection as to how it happened. Because he was not "clear" as to what happened he could not make a sworn statement (R35).

For the defense, Captain Forester testified that when accused was taken into custody,he "was able to carry on a conversation", and witness declined to judge whether he was drunk or not (R36).

It was stipulated that if they were present to testify, two members of accused's organization, a sergeant and a private, would each testify that he had observed accused on several occasions when he was drunk, and that "he has been unable to remember what his actions were and that his actions while he was drunk were not the same as when he was sober" (R36-37).

5. The undisputed testimony of prosecutrix, which is strongly corroborated by that of Captain Forester, a German physician, and other competent witnesses, showed that accused, at the time and place alleged, had carnal knowledge of her without her consent, by use of physical force and violence, as well as by putting her

in fear of losing her life or of suffering serious bodily injury. The circumstances to which she testified clearly justify the inference that she did not consent and that her resistance was overcome by force or prevented by fear, although she did not testify expressly to such effect (CM 227809, I Bull. JAG 363-364; CM ETO 3933 Ferguson et al). Her testimony that the penetration was only "a little", taken in connection with the medical testimony relating to her subsequent physical condition, is clearly sufficient to show carnal knowledge (MCM 1928, par. 148b, p. 165; CM ETO 13476, Givens). All of the elements of the crime of rape are abundantly established by the uncontradicted evidence (CM ETO 611, Porter; CM ETO 4194, Scott; CM ETO 12472, Syacsure; CM ETO 14382, Janes).

While the evidence as a whole suggests a probability that accused was drunk at the time of the commission of the offense, voluntary drunkenness alone does not constitute an excuse for the crime of rape or destroy accused's responsibility therefor (CM ETO 9611, Prairiechief; CM ETO 13476, Givens). Moreover there is evidence that he was able to lock a door, point his carbine, put a briefcase in another door, undress himself and prosecutrix, carry on a conversation, and finally to give a false name to the Military police, so that the degree of his intoxication would be only a question of fact, which the court could have resolved against him (see CM ETO 3859, Watson and Wimberly).

6. After the prosecution had rested its case, the defense moved for a continuance because of the absence of witnesses who would testify as to the effect that liquor has on accused when he drinks (R33). Voluntary drunkenness being no excuse for the offense charged, these witnesses would have added nothing to the defense. No motion was made following arraignment of accused; and, moreover, it appears that stipulations were made as to the testimony of such witnesses. Under such circumstances, the court did not abuse its discretion in denying the motion (CM ETO 8451, Skipper; CM ETO 1249 Marchatti;).

7. The charge sheet shows that accused is 23 years three months of age and was inducted 23 July 1943 at Fort Myer, Virginia. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon a conviction of the crime of rape

by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

B R Sleeper Judge Advocate

Malcolm C Thurmond Judge Advocate

(TEMPORARY DUTY) Judge Advocate

(398)

ETO 17698 Stewart, James W.

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 27 OCT 1945 TO: Commanding General, United States Forces, European Theater, (Main) APO 757, U.S.Army.

1. In the case of Corporal JAMES W. STEWART (33745570), 3120th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17698. For convenience of reference please place that number in brackets at the end of the order:(CM ETO 17698).

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

IN 29 OCT 1945

(Sentence as commuted ordered executed. GCMO 567, USFET, 16 Nov 1945).

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BY REGINALD C. MILLER, COL.,
JAGC, EXEC. ON 26 FEB 52