E. T. O.

BOARD

OF

REVIEW

OPINIONS

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VOLS. 27-28

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

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

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Volume 27 B.R. (ETO)

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BY CARL E. WILLIAMSON, LT. COL.,
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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3

27 JUL 1945

CM ETO 13482

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 31 May 1945. Sentence:
Private RUSSELL S. IANUZZO (12238460), Company A, 179th Infantry	Dishonorable discharge, total forfeitures, confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private, then Private First Class, Russell S Ianuzzo, Company A, 179th Infantry, did, at or near Wingen, France, on or about 21 December 1944, desert the service of the United States, and did remain absent in desertion until he returned to military control on or about 27 January 1945.

Specification 2: In that * * * did, at or near Reichshoffen, France, on or about 29 January 1945, desert the service of the United States, and did remain absent in desertion until he returned to military control on or about 18 February 1945.

Specification 3: In that * * * did, at or near Ibersheim, Germany, on or about 26 March 1945, desert the service

of the United States by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he returned to military control on or about 20 April 1945.

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

Specification 1: (Nolle Prosequi).

Specification 2: In that * * * after having been duly placed in confinement, did, at or near Reichshoffen, France, on or about 29 January 1945, escape from said confinement before being set at liberty by proper authority.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the 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 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 "your" natural life. The reviewing authority confirmed 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 for prosecution:

Duly authenticated extracts of Company A morning reports for 22 December 1944, 17,27, and 30 January, 20 February, and 10 and 23 April 1945 were introduced without objection (R4; Pros.Ex.A,B,C).

On 21 December 1944 accused, who was confined in the regimental stockade (R6; Pros.Ex.A), was detailed to Service Company. When the regimental military police came to pick him up, accused was absent. He was not present with Service Company or at the regimental stockade from 21 December 1944 to 27 January 1945 (R4-7). Company A morning report for 22 December 1944 shows accused from confinement regimental stockade to absent without leave as of 21 December 1944; that for 27 January 1945, from absent without leave to confinement regimental stockade (Pros.Ex.A).

On 29 January 1945, accused was in confinement in the regimental stockade near Wingen (R7-8; Pros.Ex.A,B). In the morning he and other prisoners were in the cellar of a building . The guard closed the door,

tied it with "a little string", and went upstairs to awaken his relief. When the guard returned, the string was unfastened and the accused absent. Accused was not present in the stockade from 29 January to 18 February 1945 (R8-9). Company A morning report for 30 January 1945, shows accused from confinement regimental stockade to absent without leave as of 29 January 1945; that for 20 February 1945, "fr AWOL to sk LOD (in 95th EH) is trfd to Dof P 7th Army per A&D Sheet 328th Med Bn 18 Feb 45" (Pros.Ex.B).

On 27 March, 1945, when his unit was about to cross the Rhine under enemy fire, accused, saying "I haven't got it - I just can't do it * * * turned around and run off". He was not present in the company from that day until 20 April 1945 (R10-14). The company morning report for 10 April 1945 shows accused from duty to absent without leave as of 26 March 1945; that for 23 April 1945, from absent without leave to confinement regimental stockade as of 20 April 1945 (Pros.Ex.C).

On or about 16 May 1945, accused voluntarily made a statement to the investigating officer. According to him,

> "/Accused/ opened the conversation by asking me as to whether or not I thought it would be a general court-martial. I said I didn't know for sure that it would be. Well, he said, 'I probably will deserve more than I'll get'. I said 'Is that the way you feel about it, how are you going to plead in court?' He said he guessed he would plead guilty. I asked him where he spent all of his time, all the time he was gone. He said he spent all of the time he was gone in Buchswiller. He spent most of the time with a French girl and her family until he was picked up by the MP. He said the second time he was gone he went again to Buchswiller and stayed with the same girl. He took out a picture of the girl and showed her to me. He said that while there he was sick and went to the hospital and when released he came back through proper channels. He stated he reported to Sgt. Brave of the MP Detachment who told him to "get the hell out of there - he didn't want him - to get back to his company". He said he went back to his company until the crossing of the Rhine. He said that night he got as far as the river and got in the boat and said he turned yellow and just couldn't go across. He said he reported to the MPs the next morning and Sgt. Brave told him, "Get the hell out of here, we don't want you", again. So he went back to Buchswiller again and stayed there for quite some time. Then he decided he was fed up with this AWOL business so he said he walked twenty miles to turn himself back into the MPs" (R15,16).

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

5. The record supports the finding of guilty of Specification 1, Charge I. Accused's unauthorized absence of 37 days in an active theater of operations, commenced under circumstances analogous to a breach of parole, support the court's inference and finding that at some time accused did not intend to return (CM ETO 1629, O'Donnell).

The record also supports the findings of guilty of Charge II and Specification. Though the means - a piece of string - employed to lock accused in his place of confinement - a cellar - was woefully inadequate, the "lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt" (MCM, 1928, par.139b, p.154).

The record of trial likewise supports the findings of guilty of Specification 2, Charge I. While the morning report for 20 February 1944 was patently hearsay and incompetent to show the time of accused's return to military control, it was not essential to the prosecution's case to prove the duration of his absence. Desertion "is complete when the person absents himself without authority from his place of service * * * with intent not to return thereto" (MCM 1928, par.130a, p.142). Even assuming accused returned to military control many days prior to 18 February 1945 as alleged and found, his unauthorized absence, commenced by an escape from confinement and following hard upon his previous desertion, spent with the same girl with whom he had spent his previous desertion, and terminated only by the need for hospitalization, support the court's inference and findings that accused intended not to return.

Substantial and compelling evidence support the finding of guilty of Specification 3, Charge I.

6. The charge sheet shows that accused is 20 years of age and that he enlisted, without prior service, 28 June 1943 at Buffalo, New York.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously effecting 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 the court-martial may direct (AW 58). The designa-

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Bowen II Judge Advocate

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

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 13484

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 45, U. S. Army, 4 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM P. DE VITO (32827766), Company E, 180th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private William P. DeVito, Company E, 180th Infantry, did at or near Mullerhof, France, on or about 1 December 1944, desert the service of the United States, and did remain absent in desertion until he returned to military control at or near Wildenguth, France, on or about 31 January 1945.

Specification 2: In that * * * did, at or near Wildenguth, France, on or about 2 February, 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Bad Aibling, Germany, on or about 9 May, 1945.

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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 specifications. No evidence of prior 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. In presenting its case the prosecution offered in evidence an extract copy of the morning report of Detachment No. 3, Ground Force Reinforcement Command, dated 1 December 1944, and extract copies of the morning reports of Company E, 180th Infantry, dated 2 February 1945, 4 February 1945, 10 May 1945 and 12 May 1945. Defense counsel affirmatively stated that there was no objection to the admission of these documents and they were accordingly admitted into evidence as Prosecution Exhibits A, B and C. The extract copy of the morning report of Detachment No. 3, Ground Force Reinforcement Command, for 1 December 1944 shows accused from duty to absent without leave as of 0630 hours on that date and the extracted entry is shown to have been signed by William E. Carroll, First Lieutenant, Infantry. The capacity in which he signed the original entry is not shown. The extract copy is authenticated as a true and complete copy by William E. Carroll, First Lieutenant, Infantry, and the certificate of authentication recites that on 6 February 1945, the date of the preparation of the certificate, he was adjutant of the detachment. The extract copies of the morning reports of Company E, 180th Infantry, show accused "reasgd & jd Co. 31 Jan 45 fr 3rd Repl. Bn." corrected to show "reasgd not jd Co. fr 3d Reinf. Bn., 1 December, 1944 to AWOL 0630 1 Dec. 44 to duty 31 Jan 45", "dy to AWOL 1000 hours 2 Feb 45", and "AWOL to Conf Stockade 1400 hrs 9 May 45". The extracted entries are shown to have been signed, and the extract copies authenticated, by H. G. Wells, Captain, Infantry, Personnel Officer, 180th Infantry.

First Lieutenant Paul E. Peterson, Company E, 180th Infantry, testified that on 31 January 1945, Company E was on the line near Wimmenau and that, as executive officer, he went back to the kitchen to bring accused forward. Upon reaching the kitchen, he instructed the mess sergeant to inform accused that he was to get his equipment ready and that he, Lieutenant Peterson, would return to the kitchen after a trip to the command post at which time accused was to join him in returning to the line. When Peterson later came back to the kitchen, he was informed that accused was not yet ready and that he would be sent up the following morning on the ration truck.

Lieutenant Peterson accordingly returned to the line without him. Accused was not present with the company at any time between 2 February and 9 May 1945 (R4,5).

Technician Fifth Grade Albert Carr, second cook, Company E, 180th Infantry, testified that he saw the accused around the kitchen area on or about 1 February 1945. He was not, to the knowledge of the witness, present with the company between 2 February and 9 May 1945 (R5,6).

On or about 19 May 1945, accused voluntarily made a statement to an investigating officer. In this statement he recited that he entered the army in March of 1943 and was first assigned to Company E, 180th Infantry, on 2 February 1944. He was never wounded but went to the hospital for reasons unrelated to combat shortly after he joined the unit. On his release from the hospital he returned to his organization, then "on the beachhead". He went back to the hospital because of the same complaint in April of 1944, remained there three days, and again rejoined his organization. On 25 September 1944 he went to the hospital for a circumcision and was released on 10 October. He was apparently being returned to his unit through replacement channels and went to the 3rd Replacement Depot, then on the outskirts of St. Loup. He got drunk the first night he was there and was absent from roll call the following morning. Thereafter, his name was omitted when roll was called. He remained at the Replacement Depot, usually eating his meals there but spending his nights "in town". The depot moved on or about 1 December 1944 but he remained in the vicinity. He was later apprehended and returned to the depot where he was placed in the stockade. He was released after two or three days and told he would be returned to his division. He became worried about returning to the line and "left" on a date which he did not recall. He went to Dijon but was apprehended on or about 25 January 1945 and returned to his unit. He got as far as the kitchen where he was told by "a soldier" to get ready to return to his platoon. At this time, he was afraid to go up to the line because he knew he "could not stand it" so he "left again". He returned to St. Loup, where he lived for a time with an Italian family, but was later sent to a stockade in Dijon from which he escaped. After roaming about for approximately 10 days, he was picked up in Plombieres and put in the Epinal stockade. He escaped from that stockade as well and was picked up on 23 April, about a month later, in Epinal. Thereafter, he went "from one stockade to another" until returned to the 180th Infantry (R7-9,Pros.Ex.D).

4. After being advised of his rights, accused elected to be sworn as a witness on his own behalf. He testified that while on the beachhead in Italy he told the then executive officerof his company that he "couldn't take it any more" and was advised to remain at his duties until the following morning when he would be sent to the hospital. That evening the executive officer "got shell shocked" and nothing was done. He thereafter went to his company commander who

advised him that he would try to get him reclassified "after the push". When the campaign was completed, he was told there was nothing to worry about because the fighting was over. He later accompanied his unit to France and "stuck it out until around Epinal--a little past Epinal". At the time he went to the hospital, he made attempts to be reclassified but these were unsuccessful. When he went to the hospital the last time he knew that if he returned to the line he would "just have to leave" so he "went AWOL * * * because I was getting so I couldn't stand it any more on the lines and was scared" (R10). He did not want to stay away and was not a deserter. He had tried many times to come back but "everything just turned upside down in me and I just couldn't take it any more" (R10-13).

5. The extract copy of the morning report of Detachment No. 3, Ground Force Reinforcement Command, for 1 December 1944, introduced to show accused's initial absence on that date, indicates that the extracted original entry was signed by William E. Carroll, First Lieutenant, Infantry. No indicati on of the capacity in which he signed this entry appears. When the extract copy was prepared some two months later, on 6 February 1945, it was authenticated by William E. Carroll, First Lieutenant, Infantry, as adjutant of the detachment. The Army Regulations in force at the time of the preparation of the original entry provided that morning reports should be signed by the commanding officer of the reporting unit or the officer acting in command (AR 345-400, 1 May 1944, par.42). Since it is assumed that the William E. Carroll who signed the original morning report was the same officer who executed the certificate of authentication, some question may arise whether the original entry was signed by a person having authority to do so. However, especially in view of the lapse of time between the making of the original entry and the preparation of the extract copy and the additional fact that Lieutenant Carroll was, on both dates, an officer of the same detachment, the extract copy contains nothing which affirmatively shows that he was not, on 1 December 1944, either the commanding officer of the reporting unit or the officer acting in command. The presumption of regularity in the preparation of official documents was therefore not defeated by anything on the face of the document and it may be assumed that the original entry was signed by a person having authority to do so (Cf: CM ETO 5234, Stubinski; CM ETO 5406, Aldinger; CM ETO 5414, White). Further, the defective authentication of the extract copy (in that it was not authenticated by the proper custodian, III Bull.JAG 96) was waived by the affirmative statement of defense counsel that there was no objection to the admission of the proffered document (MCM, 1928, par.116b, p.120; CM ETO 4756, Carmisciano; CM ETO 5234, Stubinski, supra; CM ETO 5406, Aldinger, supra; CM ETO 5593, Jarvis). Hence, Prosecution Exhibit A was competent evidence to show accused's initial absence on 1 December 1944. Prosecution's Exhibits B and C, extract copies of the company morning reports of Company E, 180th Infantry, were properly prepared under Circular 119, Headquarters European Theater of Operations, 12 December 1944, and are competent evidence of the facts recited therein (CM ETO 6951, Rogers). While accused may not

have been absent from military control during the entire periods of his absences from his company, both his own pre-trial statement and sworn testimony support the inference that accused intended, either at the times of absenting himself or some time during those absences, to remain permanently away from the service. The court was therefore warranted in finding him guilty as charged.

6. The charge sheet shows that accused is 21 years of age and was inducted 9 March 1943. 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 findingsof 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).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Harvey Jr Judge Advocate

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

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 13485

UNITED STATES	)	84TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at Arendsee, Germany, 23 April, 3 May 1945.
Second Lieutenant BERNARD F. BIGLEY (O-1061063), 334th Infantry	)	Sentence: Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Second Lieutenant Bernard F. Bigley, did, at Mullendorf, Germany, on or about 24 February 1945, run away from his regiment, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service and total forfeitures. 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 of Operations, confirmed the sentence "though wholly inadequate punishment for an officer guilty of such a gross offense", and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that between 23 and 26 February 1945, accused, a second lieutenant, was on temporary duty with the Service Company, 334th Infantry, as assistant to Lieutenant Pinto, S-4, 1st Battalion, whose duties carried him from the battalion to the service company (R6,7,9,10). On 23 February 1945 our troops crossed the Roer River. The next morning accused crossed this river "to bring supplies and to see about getting chow on that day". He was in a jeep driven by Private First Class Ira L. Walker. On the east side of the river the two came under shell fire and there were casualties in their immediate vicinity, one killed and four wounded. They did not remain overnight, but returned to Mullendorf on the west side (R7,8). The following morning (25 February) after breakfast, accused contacted his driver. There was some delay while the self starter of the jeep was fixed. Accused asked if there was plenty of gas; and on instructions from accused the two drove to Eygelshoven, Holland. Accused had put his bedroll in the jeep before their departure, and enroute had told Walker, "Let's go by your girl's house as I want to stay there". Arrived at Eygelshoven, accused removed his bedroll. Walker told him he would get in trouble. Accused replied, "I know it. I am just in the way and can't take it". Walker suggested a rest, offering to come back later and get him, but accused replied, "No, let them come and get me. Go tell the Sergeant and 'Capt. Steinhausen'". On this day accused's regiment was engaged with the enemy (R7,8). Not having returned the next day, 26 February, accused was entered on the morning report of the service company as absent without leave. Captain Steinhausen, commanding officer of this company, testified that he looked for accused in Eygelshoven, on either the 25th or the 26th. Although he did not specifically say so, it is obvious that he did not find accused. He said that the latter's absence was unauthorized (R9,10). Walker, accused's driver, testified that before the crossing of the Roer accused "was always jolly, joking and going on in good spirits", but that afterwards his temperament had changed, "He had very little to say" (R7,9).

4. Fully advised of his rights as a witness, accused took the stand and testified under oath. He received his commission in the Antiaircraft Artillery in which branch he served until 17 April 1944, receiving during that time efficiency ratings of "Superior" and "Excellent". He was then sent to the Infantry School at Fort Benning, after which he was transferred to the infantry. He went "into action" as a rifle platoon leader. The first day there was heavy shelling and quite a few losses. He was left as the only officer in the company. Previously, he "never had any rifle platoon work at all * * * never even had a squad". Accused said that the next morning:

> "I called the NCO's that I had and told them that I didn't know the work at all and I called Battalion to send someone who knew what he was doing. They said there was nothing they could do and I would have to go on. I told the NCO's that it was up to them and I stayed with them. Most of the time I was shaky and I didn't know what to do. I was at a loss. I had no one to tell me what to do" (R13).

A subsequent Efficiency Report on accused from 1 July to 31 December 1944 showed the following remark:

> "This office was active and an inspiring leader so long as he was mentally capable of standing the strain. At the present time he is not emotionally suited for front line, but there is every indication he would be an excellent officer in a service echelon" (R13).

Paragraph G reported accused "Stability under Pressure, Unsatisfactory". After his first engagement, he was evacuated for "trench foot". When he returned to his division he talked to "Col Craig", classification officer. He told Colonel Craig he did not think he was capable of handling a front line job, that he preferred being reclassified and going back in the line as a private, he did not want the responsibility. Accused continued his testimony, saying that after he went to Eygelshoven, Holland, on or about 24 February, he remained one night and the next day and it "seemed I walked quite a long time". On 28 February, he was brought to the 67th Field Hospital from the dispensary of the 45th Replacement Battalion with an emergency medical tag of the dispensary which stated that he was brought there by two British soldiers who had picked him up at 1400 hours that day wandering on the road between Hasselt and Diest. The tag said further that the dispensary had made a tentative diagnosis of psychoneurosis. Accused was then transferred from the 67th Field Hospital to the 25th General Hospital where, after being held until 20 March, he was discharged as fit for duty (R11-15).

On cross-examination, accused admitted the truth of his driver's testimony but said that he did not remember his conversation with Walker. He did recall that he put his bedroll in the jeep and told the driver to take him back. He "had no intention" of what he was or was not going to do. He wanted to be away from everything and everybody (R15). He first realized that what he had done was wrong when he was in the 67th Field Hospital. After leaving the hospital, he turned himself over to the military police, where he was kept in arrest in quarters until picked up by an officer of his company (R15-19).

For the purpose of showing "that at the time of the conclusion of the engagement which the specification alleges" accused was in a hospital, the defense introduced without objection an extract copy of the morning report of Headquarters 334th Infantry "Record of Events" which showed that the Rhine was "closed" and that this regiment opened Homberg, Germany, 5 March (R19).

Captain Saul S. Trevino, 67th Field Hospital, a witness for the defense, testified to accused's admission to his hospital about the end of February, after he had been picked up by a British outfit because he was wandering around the roads (R28). The captain questioned accused that night and found him somewhat drowsy, unresponsive and "very depressed". "It took a long time to answer his name". "You had to almost shake him to talk to him to keep him answering questions". "The first night I don't think he realized anything". First impression made by accused was that he had some kind of combat fatigue or that he had been subject to a strenuous type of physical endurance. "He didn't respond like a normal person, he just stood there quiet". When the captain took accused's history, it made a "different impression". The next day, accused was still depressed, he was not normal. He said he had no complaints and wanted to go back to his unit but that day when the captain talked to him he could not recall having seen the captain before. But at the third visit he recalled something about the first night. He was believed better and was transferred to a general hospital. At the time of his first interview, according to the captain's opinion, when admitted to the hospital, accused could not distinguish between right and wrong, nor was accused malingering. In saying that accused was not normal, the captain meant to say, "he was behaving like a sick person" (R24-27). On cross-examination, this witness said accused had not been diagnosed at the time of his transfer, merely "observed for psychoneurosis, reactive depression". That is what the witness thought accused suffered from. The symptoms of accused were then generally precipitated by a shocking experience. Accused "was just on the verge" of a psychosis. His condition could have resulted from an artillery barrage about three days previous - any shocking experience - "Fear of being afraid is one of the things that precipitate the condition". Had accused's condition been due to lack of food, sleep and exposure, he probably would have gone into crying, but accused did not behave like that. However, exposure could have "put him", precipitated him, into this condition. Fatigue could do it, depending on the individual. With the cause removed, after two or three days rest these psychoneurotics regain their personality and behavior. Questioned by the court, the captain said that accused had the beginnings of psychoneurosis, reactive depression type, and that for this there were sound factors, one of them that he was afraid to accept responsibility. Accused told the captain that he was "impressed" by some artillery barrage and did not know what to do, whether to go on and do his duty or to leave his post and suddenly he did not know anything about leaving; the next answer was that he had been in a jeep, traveling backwards, and then he left the jeep and walked (R27-30).

The defense introduced, without objection, a reading of a passage from the Manual of Therapy, European Theater of Operations:

> "A third type of war neurosis is the reactive depression. It is characterized by a depressed mood, loss of interest, apathy, diminished strength, insomnia, and loss of appetite. The onset is gradual and comes after prolonged period of stress"(R30).

5. For rebuttal, Major Richard H. Parks, the division psychiatrist, was recalled (R30). Major Parks had previously testified that he had examined accused on 18 April 1945 at which time he found him then able to distinguish right from wrong and to adhere to the right; but that from his examination could not tell whether accused was unable to distinguish right from wrong and to adhere to the right at a previous time (R20), that the doctor who examined accused at the time "would be more qualified to give an opinion that I" (R22). Major Parks was asked by the prosecution if he would say that a person could be suffering from psychoneurosis who showed certain symptoms, and the symptoms depicted by Captain Trevino in his description of accused were embodied in the question. Major Parks answered that it sounded to him "like he is suffering from a sort of mental illness, very likely psychoneurosis, from that group of symptoms". The Major said that depression is an outstanding symptom of the reactive depressive type. That type in a psychiatric sense would "certainly" affect the individual's ability to distinguish right from wrong. Being under artillery barrage or any fear-producing situation in 90% of these cases produces anxiety rather than depression, "but there are few cases where a man is depressed". Depression would more likely be the cause of two days' lack of sleep and food rather than the result of such privation (R31,32).

6. The evidence clearly established that accused was serving in the presence of the enemy and that he misbehaved himself by running away (MCM, 1928, par.141a, p.156). On the day preceding the commission of the offense, he came under shellfire and there were casualties. On the day of the offense, his regiment was engaged with the enemy.

The evidence relating to accused's mental responsibility at the time of the commission of the offense is conflicting. It was shown that he abandoned his unit deliberately after making intelligent plans for leaving and remaining away. Upon being cautioned by his driver he stated he knew that his conduct might get him into trouble. Upon all the evidence the court was warranted in finding that at the time of the offense, accused was so far free from mental defect, disease, or derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. Although accused was laboring under great stress, there was substantial evidence that at the time of the offense he was not suffering from such extreme mental or physical disability as to

incapacitate him for the performance of his duties. The findings of guilty, therefore, will not be disturbed upon appellate review (CM ETO 1404, Stack; CM ETO 4095, Delre; CM ETO 4783, Duff; Winthrop's Military Law and Precedents, (Reprint, 1920), p.624).

7. The charge sheet shows that accused is 26 years eight months of age. Without prior service, he was inducted 27 June 1941 at Fort George G. Meade, Maryland, and commissioned second lieutenant 7 October 1943.

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

9. Dismissal and total forfeitures are authorized punishment for an officer on conviction of violation of Article of War 75.

_____ Judge Advocate

(DISSENTING OPINION) Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 13485

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Arendsee, Germany, 23 April, 3 May 1945.
Second Lieutenant BERNARD F. BIGLEY (O-1061063), 334th Infantry	Sentence: Dismissal and total forfeitures.

DISSENTING OPINION by HILL, Judge Advocate

There is only one question in this case. That accused abandoned his regiment when it was engaged with the enemy, was fully established. The Specification alleges "run away". These words are interchangeable with "shamefully abandon" (AW 75).

The question is whether accused shamefully abandoned his regiment. His defense was that as a result of combat shock, or battle fatigue, he was suffering from psychoneurosis, reactive depressive type, at the time of his departure, which made it impossible for him to distinguish between right and wrong. Medical testimony to this effect was persuasive and uncontradicted. On the evidence, as fully summarized in the majority opinion, can it be said that his conduct was "shameful" and that he was guilty of shamefully abandoning his regiment?

Winthrop's Military Law and Precedents (Reprint, 1920, pp.623,624), in discussing the offense of misbehavior before the enemy, with which accused was charged, states as follows:

> "The act or acts, in the doing * * * of which consists the offence, must be conscious and voluntary on the part of the offender".

* * *

"He [accused, as a defense] may also show that he was suffering from a genuine and extreme illness or other disability at the time of the alleged misbehavior".

The evidence of the defense psychiatrist that he thought that accused, as the result of some shocking experience, was suffering from psychoneurosis, reactive depressive type, to the extent that he did not know the difference between right and wrong, was reinforced by the prosecution's own psychiatrist who said that the symptoms of accused, embraced in the prosecution's hypothetical question, led him to a conclusion similar to that entertained by the defense psychiatrist. A careful analysis of the medical testimony, supported by other evidence, indicates that accused was lacking in self-reliance, was given responsibility which emphasized his feeling of inadequacy, and that during this period of emotional distress he suffered shock from the sight of death by shell fire. Such a situation produces the psychoneurotic, reactive depressive type. The prosecution raised the question as to whether exposure to weather during two or three days of wandering around could not have precipitated this condition in accused. In the first place, there is no certainty, no evidence, that accused had been out of doors that long. Moreover, weather conditions and accused's appearance and story as related by him to Captain Trevino were undoubtedly considered by Captain Trevino in diagnosing accused's condition. Captain Trevino, while saying that fatigue could precipitate a condition such as that of accused, definitely ruled fatigue out in accused's case. And Captain Trevino's diagnosis was associated with an immediate knowledge of all facts as they actually existed at the time. Furthermore, Major Parks, the prosecution witness said that accused's "wanderings" would more likely have resulted from than have caused accused's illness. The illness so described is "extreme" from the standpoint of the offense charged. "Reactive depression" is a type of war neurosis specifically pointed out by the official Manual of Therapy employed in this theater. According to Winthrop, sufferers from shell shock, genuine victims of war neuroses, may not be punished under Article of War 75.

There is no direct evidence, such as expert testimony, to controvert this proof of accused's illness. There are no circumstances in the case which afford a reasonable basis for an inference by the court that accused was not ill. His past Army record affords a reasonable basis for an opposite inference. His deliberate act in preparing o leave on 25 February and his voluntary, deliberate, open

departure substantiate the conclusion of the psychiatrist that he did not know right from wrong. When his driver told accused he was doing wrong and urged him to return, the reply that accused gave showed that his mind was not functioning normally.

The Board of Review, in scrutinizing proof and the basis of inference does not weigh the evidence or usurp the functions of court and reviewing authority in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (AW 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference (CM 212505, Tipton).

As seen, Winthrop says that the act charged must be voluntary. It is fundamental in law that an act cannot be said to be voluntary when the agent is unable to make a morally binding choice because he does not know right from wrong. In this record there is medical testimony that accused did not know right from wrong.

In a case very similar to that now considered where accused defended a charge laid under Article of War 64 by expert testimony that he was psychoneurotic, and where the court found accused guilty by disregarding defense expert testimony and adopting the contrary opinion of a psychiatrist who was not immediately familiar with accused's condition on the vital date, the Board of Review refused to sustain the findings of guilty. (There was no claim in that case that accused was psychotic). Defense evidence was that because of emotional instability he was unable to adhere to the right. The Board said in part - pertinent to the present case:

> "Furthermore, the record presents no satisfactory explanation why the clearly expressed and deliberate opinion of these experts (the psychiatrists), whose unimpeached and unprejudiced testimony presents prima facie proof that the accused was unable to adhere to the right on 16 April 1942, should have been rejected by the court. * * * 'The court could not entirely disregard such evidence * * * (CM 128252, Heppberger)" (CM 223448, Riesenman, 13 B.R.402 (1942)).

In CM 124243, Harris, The Judge Advocate General held that evidence showing acute melancholia or emotional

insanity presented a valid defense against the offense charged.

In my opinion, the uncontradicted evidence in this case shows that accused's conduct was involuntary because of the type of illness from which he suffered, and that his illness itself was sufficiently serious to excuse him from punishment. The record of trial is not legally sufficient to support the findings of guilty and the sentence.

John Bramhall Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant BERNARD F. BIGLEY (O-1061063), 334th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 13485. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13485).

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

(Sentence ordered executed. GCMO 533, USFET, 1 Nov 1945).

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

BOARD OF REVIEW NO. 2 5 JUL 1945

CM ETO 13500

U N I T E D S T A T E S	) FIRST UNITED STATES ARMY
v.	) Trial by GCM, convened at Burg, Germany, 20 April 1945.
Second Lieutenant MILLARD L. TRUAX (O-1060314), Battery B, 580th Antiaircraft Artillery Automatic Weapons Battalion (Mobile)	) Sentence: Dismissal, total forfeitures and confinement at hard labor for eight years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Second Lieutenant Millard L. Truax, Battery B, Five Hundred Eightieth Antiaircraft Artillery Automatic Weapons Battalion (Mobile), having received a lawful command from First Lieutenant Louis J. Piacentino, his superior officer, to get one Eugenie Dasthy, a civilian woman not his wife, out of his command post, did, in the vicinity of Niederbriesig, Germany, on or about 1 April 1945, willfully disobey the same.

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

Specification 1: In that * * * did, in the vicinity of Niederbriesig, Germany, on or about 1 April 1945, in premises used as the command post of his platoon, wrongfully, dishonorably and unlawfully occupy a room with Eugenie Dasthy, a civilian woman not his wife.

Specification 2: (Findings 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 not guilty of Specification 2 of Charge II, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for eight years. The reviewing authority, the Commanding General, First United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Accused was executive officer of the second platoon of Battery B, 580th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), which on 1 April 1945, was stationed at Niederbriesig, Germany (R7). The platoon's command post consisted of a three-story building, located within its defensive area. There was a kitchen, dining room, orderly room and the platoon commander's room on the first floor; the enlisted men's quarters were on the second floor and accused's room was on the third floor (R7). About 1600 hours on 1 April 1945 several enlisted men of the battery observed a civilian woman in the vicinity and accused told them to bring her to the command post, where she entered the kitchen (R17, 21,22). Accused gave her a glass of wine (R18). About 1730 hours Lieutenant Piacentino, the platoon commander, entered the command post and was told by accused in private that there was a so-called Belgian refugee in the building. They went up to accused's room where Lieutenant Piacentino questioned the woman. From a pass which she presented he ascertained she was from Luxembourg. The pass had been issued in Coblenz by a German authority and was written in German. With the assistance of

an interpreter she disclosed that she had been in Germany for two or three years as a slave laborer and that her name was Eugenie Dasthy (R7,8,11,21). Lieutenant Piacentino then suggested to accused that he remove the woman from the house because she had no authority to be there and left. When he returned about 1930 hours accused informed him that the woman had been removed from the command post. Later as a result of a report he received, he and Sergeant Kent went up to accused's room, where they found the latter in bed with this woman. Her clothes were on the bedpost. Lieutenant Piacentino gave accused an order to remove the woman from the house within ten minutes to which he replied "that it was pretty low of me or something of that nature". He then went downstairs and within ten minutes accused came down alone and together they entered the kitchen, where they held a conversation. They returned to the dining room where accused asked all the men, "Did anybody object if I go to bed?". No one answered and Lieutenant Piacentino, in the presence of three enlisted men told accused,

> "This is a direct order of your superior officer. I want that woman removed from this command post".

His response was

> "So that's how it is, strictly business, eh? That in the way its always going to be from now on".

Accused left the room stating that the third floor was off-limits and he would shoot anybody who went up there unless he knew the password. These events took place about 2200 hours. After thinking the matter over for a short while, Lieutenant Piacentino went over and spoke with the first platoon commander. Together they went to see the battery commander and then the three of them returned to the second platoon command post about 2330 hours. They found accused and the woman in bed in his third floor room. As far as they could observe she was stripped from the waist up and accused was naked from the waist down. The battery commander ordered accused and the woman to get out of bed, which order was complied with, and they all went to battalion headquarters (R8,9,10,11,15,16,18,22,23). Lieutenant Piacentino has known accused since 29 July 1944 and has never had any personal trouble with him. Accused is single and not married to Eugenie Dasthy (R11,23).

4. Accused, after stating that he understood his rights as a witness (R23,24) elected to testify under oath as to the Specification of Charge I and Charge II. His testimony was substantially as follows:

Since Lieutenant Piacentino took command of the second platoon in July 1944, he has been his executive officer and they had become quite friendly. Several times direct orders were given back and forth between them when it didn't concern anything of a military nature and in this instance he had no idea that it was intended to be an order. He thought Lieutenant Piacentino was saying it to him in front of the enlisted men. He has always carried out the orders of his superior officers without question. On cross-examination, he admitted that Lieutenant Piacentino twice ordered him to remove the woman from the premises and that he replied "So it's strictly business, isn't it?" and "From now on it will be business". He repeated that he did not think it was an order and he thought Lieutenant Piacentino was kidding at the time (R24,25,26).

An officer of his battalion testified he has known accused over 18 months and that his reputation as an officer and a gentleman is very good. At one time when they had 40 second lieutenants in the battalion and were required to cut down to eight, accused was among those retained (R27).

It was stipulated by the defense counsel, prosecution and the accused that if accused's battalion commander were present in court he would testify that at various times since he assumed command of the battalion he rated accused's performance of his military duties as excellent and that he had never received any reports or information discrediting accused or indicating any conduct on his part other than that of an officer and a gentleman (R28).

5. Clear and substantial evidence establishes that accused was twice given a direct order by his superior officer and that he willfully refused to comply with the same. Under the circumstances the order was one that his platoon commander was authorized to give and a definite time limit was set for compliance therewith. Accused's contention that he thought his superior was joking and did not intend it as a genuine order presented an issue of fact, the determination of which rests exclusively with the court. Inasmuch as this issue has been resolved against accused, the findings of the court as to the offense alleged in the Specification of Charge I will not be disturbed by the Board of Review (MCM, 1928, par.134b, pp.148,149; CM ETO 8492, Winters).

Concerning the offense charged in Specification 1 of Charge II there is uncontradicted testimony by several persons that accused was found in bed in his room with a woman not his wife. Thus there is substantial evidence of all the essential elements of this offense (CM 218647, I Bull. JAG 23).

6. The charge sheet shows that accused is 34 years 8 months of age and was inducted 1 May 1941. His commissioned service began 16 September 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 willful disobedience of the lawful command of a superior officer in time of war is death or such other punishment as the court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

13500

1st Ind.

(30)

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

1. In the case of Second Lieutenant MILLARD L. TRUAX (O-1060314), Battery B, 580th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 13500. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13500).

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

(Sentence ordered executed. GCMO 252, ETO , 10 July 1945).

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

BOARD OF REVIEW NO. 1

10 OCT 1945

CM ETO 13565

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CLIFFORD J. SLOMINSKI (36764322), Reinforcement Detachment 105, 2981st Reinforcement Company (Provisional)	Trial by GCM, convened at Bad Godesberg, Germany, 4 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 15 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

OPINION by BOARD OF REVIEW NO. 1
BURROW, CARROLL and O'HARA, 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 61st Article of War.

Specification: In that Private Clifford J. Slominski, Reinforcement Detachment 105, 2981st Reinforcement Company, Ground Force Reinforcement Command, did, without proper leave, absent himself from his station, at or near Givet, France, from about 19 November 1944 to about 2 February 1945.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of two previous convictions by special courts-martial for absences without leave for six and 16 days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably

discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years and as thus modified ordered the sentence duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 410, Headquarters, Advance Section Communications Zone, European Theater of Operations, APO 113, U. S. Army, 21 June 1945.

3. Accused was transferred on 19 November 1944 in an absent without leave status to the 212th Reinforcement Company, by a published special order of the Eleventh Replacement Depot, duly identified and introduced in evidence. He never reported to the assigned company and had no permission from that company to be absent. He returned to military control 2 February 1945. The case is controlled by the opinions in CM ETO 11518, Rosati, and CM ETO 11356, Crebessa, and reference is made to the opinions of the Board of Review therein. The accused will not be presumed to have knowledge of an order transferring him in an absent without leave status, and it is not competent proof of the offense alleged that he did not have permission to be absent from a company where he had no proven duty to be.

4. The charge sheet shows that the accused is 25 years four months of age and was inducted 4 August 1943 at Chicago, Illinois. He had no prior service.

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

Wm. J. Durrow Judge Advocate

(ON LEAVE) Judge Advocate

Judge Advocate

(33)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 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 Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private CLIFFORD J. SLOMINSKI (36764322), Reinforcement Detachment 105, 2981st Reinforcement Company (Provisional).

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

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

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

(Findings and sentence vacated. GCMO 563, USFET, 27 Oct 1945).

13565

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

BOARD OF REVIEW NO. 3

31 AUG 1945

CM ETO 13568

U N I T E D S T A T E S	70TH INFANTRY DIVISION
v.	Trial by GCM, convened at Sprendlingen, Germany, 23 and 24 May 1945 and 1 and 2 June 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 JEREMIAH C. NELUMS (34387976), Technician Fifth Grade HENRY GARRETT, JR., (34646543), and Private First Class ERNEST JACKSON (38485821), all of 642d QM Truck Company	

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:

NELUMS

CHARGE: Violation of the 92nd Article of War.

Specification 1: Finding of Not Guilty.

Specification 2: In that Technician 5th Grade Jeremiah C. Nelums, 642nd Quartermaster Truck Company, did at Sprendlingen, Hesse, Germany, on or about 27 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Charlotte Wingerter.

Specification 3: In that * * * did, at Sprendlingen, Hesse Germany, on or about 27 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Katharine Wingerter.

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Specification 4: Finding of Not Guilty.

Specification 5: Finding of Not Guilty.

GARRETT

CHARGE: Violation of the 92nd Article of War.

Specification 1: Finding of Not Guilty.

Specification 2: Finding of Not Guilty.

Specification 3: Finding of Not Guilty.

Specification 4: In that Technician 5th Grade Henry Garrett, Jr., 642nd Quartermaster Truck Company, did, at Sprindlingen, Hesse, Germany, on or about 28 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Bertha Schickendanz.

Specification 5: In that * * * did, at Sprendlingen, Hesse, Germany, on or about 28 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrude Buelleis.

JACKSON

CHARGE: Violation of the 92nd Article of War

Specification 1: Finding of Not Guilty.

Specification 2: In that Private, first class, Ernest Jackson, 642nd Quartermaster Truck Company, did, at Sprendlingen, Hesse, Germany, on or about 27 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Charlotte Wingerter.

Specification 3: Finding of Not Guilty.

Specification 4: In that * * * did, at Sprendlingen, Hesse, Germany, on or about 28 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrude Buelleis.

Each pleaded not guilty. Of the respective specifications and charges pertaining to each, Melums was found not guilty of Specifications 1, 4 and 5 and guilty of Specifications 2 and 3 and of the Charge; Garrett was found not guilty of Specifications 1, 2 and 3 and guilty of Specifications 4 and 5 and of the Charge, and Jackson was found not guilty of.

Specifications 1 and 3 and guilty of Specifications 2 and 4 and of the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. As to each, the reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place for confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

At about 1945 hours on the night of 27-28 March 1945, Katharine Wingerter and her eighteen year old daughter Charlotte were at their home at No. 30 Freiherr Von Stein Strasse, Sprendlingen, Germany (R32,34,44). At this time, three negro soldiers, concerning whose identity there is a conflict in the evidence and who may or may not have been the three accused (R33,39,46,151), entered the house, scrutinized the two women by the light of a candle, and directed them to go upstairs (R32,33,38). Instead, both women fled from their home and went across the street to the home of a neighbor where they hid in the cellar. While they were there, the soldiers came to the house searching for them but left upon failing to discover their hiding place (R33,34). Becoming frightened, the neighbor refused to permit them to remain longer and they then went to the home of another neighbor where they eventually went into a room adjoining the kitchen and remained there in the dark (R34,40,45). While they were there, negro soldiers entered and looked through the house on several occasions but apparently did not discover the presence of the women (R35, 44). However, shortly after 2400 hours, the women were discovered in the room lying on a sofa by a group of three colored soldiers, which, according to Katharine Wingerter, included Nelums and Jackson (R33,37), and, according to Charlotte, Garrett as well (R44,45,147). Upon finding the women, the soldiers pushed Katharine away and pulled Charlotte from the sofa, at the same time making her understand that they wanted her to go upstairs with them (R45). She testified that at this time she

> "was calling for help and saying 'Mama, Mama', so they took my mother along. I didn't want to go so they took their rifles and daggers which they had and kept prodding me upstairs and I said I wanted to jump out of the window because I had never done anything like that but my mother said, 'Let them do what they want, just you stay alive'" (R45).

Charlotte's mother testified that she also was pulled from the sofa by one of the soldiers and that the three men walked behind the two women, prodding them with rifles, and that being afraid she did nothing

to prevent them from forcing her to ascend the stairs (R35,42,43). Upon reaching an upstairs bedroom containing two beds, Katharine was pushed on one bed and Charlotte on another (R35,36,45).

Katharine testified that Nelums removed her pants, and, after laying his rifle on the bed, "took out his penis and separated my legs and put it in" (R35,36). She was crying but made no attempt to prevent his actions. During the intercourse, she asked him if he "wasn't through" to which he replied that he was not. He was on top of her for "a good half hour" and at one time said "Fick fick very good" (R36). When asked whether she had wanted to have intercourse with him, she replied, "Under no circumstances" (R37). She was later able to recognize him as her assailant because of "his glasses and his face and because he was long enough with me" (R36). When he was finished, he went to the bed where her daughter lay (R36).

In the meantime, Jackson and Garrett had pushed Charlotte on the other bed "with their daggers" and Jackson pulled down her pants and her corset (R45). When she struggled and called for help, he slapped her and covered her mouth with his hand. Then, although he had "great difficulty" and caused her "great pain", he inserted his penis in her vagina. She kept trying to arise but he continued to push her down and to threaten her. Any further resistance on her part was "hopeless" (R45,46).

After Jackson had intercourse with her, the soldier who had been with her mother came to her and had intercourse with her as well (R46,151). On direct examination, Charlotte testified that the soldier who came to her after having been with her mother wore glasses on the night in question and was not among the accused present at the trial (R45,46). However, when later recalled as a witness, she identified Nelums as the soldier in question. At the time of her later testimony, Nelums was wearing his glasses (R150).

During the time these occurrences were taking place, Garrett was also in the room, laughing and holding a flashlight for the others (R46,148). On direct examination, Charlotte testified that when Nelums finished, Garrett also had intercourse with her (R146) but later testified that although Garrett had been present he was not among the soldiers who molested her (R147). She testified that the personnel in the room was shifting constantly during the period from 2330 and 0130 hours and that in all six colored soldiers attacked her. She especially remembered Jackson as one of her assailants because he was "very brutal and because of slapping me and also because he had a very difficult time" (R49). She identified Nelums by his glasses (R150).

Katharine Winegerter testified that at identification "line-ups" held the following day at accuseds' organization, she identified Nelums as the man who had intercourse with her on the previous night, Jackson as

one of the men who attacked her daughter and Garrett as one of the men present at the house (R147,148). Charlotte testified that she identified three men at an identification line-up the following day and, at the trial, recognized Nelums and Jackson as two of the men whom she previously identified. Her recognition of Garrett as the third man she previously identified was somewhat hesitant (R149-151).

Also on the following day, Katharine and Charlotte Wingerter were examined by Captain Lewis C. Young, Medical Corps, 76th Armored Medical Battalion (R28,31). His examination of Katharine revealed that she had an enlarged vaginal orifice and blood was observed on her underclothing (R31). On examining Charlotte, the medical officer found evidences of laceration and tearing of the hymen. This laceration had been caused by some recent entrance and, if caused by sexual intercourse, it was a "pretty painful one" (R29,30,32).

The prosecution's evidence also showed that on the night of 27-28 March 1945, the following, among others, were present at 9 Gustloffe Strasse, Sprendlingen, Germany; Herr Schneider, his wife, Frau Theresa Schneider, aged 37 (R139), Frau Bertha Schickendanz, aged 35 (R52), and Frau Gertrude Buelleis, age not shown (R15,53). Herr Schneider, who was ill, was sleeping in the basement, as were Theresa Schneider and Bertha Schickendanz, while Gertrude Buelleis was sleeping on a couch in the kitchen (R22,53,144). At about 0200 hours, Frau Buelleis was awakened by a knocking at the door and the sound of a shutter being removed from one of the windows (R16). She arose and called Frau Schneider and Frau Schickendanz (R16,53). Frau Schneider joined Frau Buelleis on the ground floor and, upon opening the door, saw two negro soldiers standing on the porch who then entered and looked throughout the house (R16,140). Of these soldiers, one was identified both by Frau Buelleis and Frau Schickendanz as the accused Garrett (R16,22,53,55). Garrett took Frau Schickendanz and led her into a bedroom leaving the other soldier, whom none of the witnesses were able to identify, with Frau Schneider and Frau Buelleis, The two women clung to each other but the soldier who remained behind pulled Frau Schneider away whereupon Frau Buelleis ran to the cellar to seek aid from Herr Schneider (R17,23,133,140,145). Herr Schneider apparently could offer little aid because of his illness but did help her to hide in the cellar (R23).

Bertha Schickendanz testified that when Garrett took her into the bedroom she thought he was searching for German soldiers and voluntarily accompanied him with a candle to show him that none were there (R55,57). She testified that, upon going into the room,

> "I didn't know what he wanted and he kept on saying something which I didn't understand. There were no beds in the room so he threw me on a bed frame which was there. I tried to get up again but he threw me back down. I tried to get up again. He then put his

> rifle between my legs and pointed his knife against my chest. He said something to me and did something which looked as if he were loading his rifle. Whether he did nor not, I am not sure. He then threw me back on the frame and pulled down my drawers. He put his rifle and the knife next to me and also his steel helmet. * * * [Then he] raped me" (R55,56).

Garrett was "very rough" and, being "almost paralyzed with fear" of being raped and shot, she did not defend herself while the intercourse was taking place (R56,57).

After the act of intercourse, which lasted about eight minutes, accused got up, slung his rifle and left (R58). When asked whether in view of the inadequate light she had been able to see her assailant clearly enough to permit subsequent identification, she replied, "Yes. I shall never forget his face, I shall never forget his eyes" (R57).

Garrett and his companion then left the house and returned about fifteen minutes later and went to the cellar where they found Frau Buelleis and pulled her from her hiding place (R17,24,140,145). While the exact sequence of events next occurring is not entirely clear from the record, it appears upon seeing them, she began to cry and also shouted for aid and that when she did so one of the soldiers pointed a rifle at her and one or both of them threw her to the floor. She stated that when she tried to get up, Garrett "kept pushing me back on the floor" and that when she tried to defend herself he "knocked her under the chin" with his hand. He then raised her dress, took down her pants, and had intercourse with her. When Garrett finished, the other soldier also "used" her. Thereafter, each soldier in turn used her again and then left the house (R17,18,132,138,142).

After the men left, Frau Schneider and Frau Schickendanz joined Frau Buelleis in the cellar, and, at about 0230 or 0245 hours, the three women went into a laundry room and locked the door (R23,24). At about 0300 hours, two other negro soldiers, one of whom was the accused Jackson, entered the house and came "directly to the cellar as if they had been told by the first group" (R19,138). They "knocked and banged" on the laundry room door with such force that Frau Schneider, fearing that they would break the lock, opened it (R19,24,140). Frau Buelleis had covered herself with some blankets but the soldiers discovered her presence there, and, despite her resistance, pulled her from the room. Frau Schneider tried to come to her aid but the soldiers pushed her back into the laundry room and closed the door. When Frau Buelleis tried to run back into the room, Jackson prevented her from doing so. He then threw her to the floor and threatened her with his "firearms". Following this, he tried to take off her coat but she prevented him from doing so. He then pulled off her dress and started to pull down her pants. She stated that her pants caught in her garters and

she helped him to remove them to prevent them from being torn. He thereafter laid on top of her and placed his penis in her vagina. She testified that she did not scream or call for help and that after Jackson got her out into the cellar she no longer resisted because, by this time, she was "much too weak" to do so. Also, Jackson was holding her by each wrist and she was "completely helpless" (R19,20). The soldier who accompanied Jackson also had intercourse with her and the two men then left the house (R132,138).

On cross examination, upon being asked whether she was certain that Garrett was one of the two soldiers who first attacked her, Frau Buelleis replied,

> "I don't remember whether he was in the first group or the second group. It was so long ago, I don't remember. I know for certain he was one of them" (R25).

She was then reminded that at a pre-trial investigation she had identified Garrett as having been in the second group. To this she replied,

> "I recognize the soldier, but I am not able to say any more who was in the first group and who was in the second group" (R26).

When recalled as a witness later in the trial, after again identifying Garrett and Jackson as two of the four solders who had attacked her on 28 March, she testified that she was positive that Jackson was one of the first two soldiers who attacked her and Garrett one of the second two (R133,135). When confronted with the inconsistencies of her testimony, she testified, "It can be that I have the two groups changed around, but I know these two I have recognized" (R138).

Frau Buelleis testified that at two identification "line-ups" held at accused's organization on 28 March she identified both Garrett and Jackson as two of her assailants of the previous night (R21,135,136) and Frau Schickendanz similarly identified Garrett as the soldier who had attacked her (R59,146). Frau Schneider was unable to identify any of the men present at the line-up as the men present in her house the night before (R140).

Frau Shickendanz and Frau Buelleis also were examined on 28 March by Captain Young. Virtually the only unusual thing observed with reference to Frau Shickendanz was that she had "an enlarged orifice to her vagina" probably caused by a "stretch or relaxation of the muscles of the vagina". Frau Buelleis was found to have "Considerable redness about the labia or lips of the vagina" evidencing "irritation from some source" (R31).

There was evidence that three other women were molested by colored soldiers in the town of Sprendlingen on the night of 27-28 March but the evidence does not establish that the soldiers involved were the accused (R10,14,52).

4. The evidence for the defense showed that at about 1600 hours on 27 March 1945 the 642nd Quartermaster Truck Company pulled into the village of Sprendlingen and went into bivouac in a field on the outskirts of the town (R62,83,162). After dispersing its vehicles, certain of the personnel of the company went into "the woods to look for snipers and souvenirs" (R62). A guard was posted that night, with each platoon responsible for the selection, posting, relief, and hours of duty of its own guard (R62,112). Nelums was a member of the first platoon, Jackson of the second, and Garrett of the third (R72,106). There was testimony that on the night of 27-28 March, Nelums was on guard duty with another guard named Dorsey from 1930 to 2130 hours (R63,72,76,83,90,93) and on guard alone from 0130 to 0330 hours (R64,70,72,92), that Jackson had one four-hour tour of duty from 2100 hours to 2400 hours (R98) and that Garrett was on guard from 2000 to 2200 hours (R102,103,106,118,124) and from 0200 to 0400 hours (R120,121,125). The corporal of the guard who testified as to Nelum's tours of duty was shown to have given testimony at a pre-trial investigation to the effect that Nelum's first tour of duty was from 2130 to 2330 hours with a man named Riley rather than from 1930 to 2130 hours with Dorsey (R66,68). The testimony of the sergeant of the guard with reference to the hours of Nelums' tours of duty was similarly impeached (R84,85). It was brought out, chiefly on cross-examination, that in general the hours and duration of tours of duty were decided upon by the members of the guard themselves (R69,92,98) and that guard rosters either were inadequately kept or not kept at all (R86,99). Certain of the personnel of the company were on details on the night of 27-28 March the performance of which required them to drive through the town of Sprendlingen (R89,111).

The defense also elicited testimony from various of the enlisted men of the accuseds' company to the effect that when the identification formations were held on 28 March the women who were attempting to identify their assailants of the previous night were urged by another civilian present to make various identifications and that in selecting the men whom they did identify they exhibited much hesitancy and indecision (R74,77,80,91,101,108,117,123).

After being advised of his rights, each accused elected to be sworn as a witness on his own behalf. Nelums testified that on the night of 27-28 March he was on guard with Dorsey from 1930 to 2130 hours, that he thereafter went to his tent until 0130 hours when he again went on guard where he remained until 0330 hours. He denied that he went into Sprendlingen that night and stated that was the first time he ever saw any of the prosecutrices was at the identification formation on 28 March. The women were mistaken in their identification of him as their assailant

(R165,166). He admitted that at a pre-trial investigation he had told the officer conducting the investigation that on 27 March he stood guard with Riley from 2130 to 2330 hours (R167). Garrett testified that he was on guard from 2000 to 2200 hours on 27 March, that he thereafter remained in the area until he again went on guard at 0200 hours 28 March and thereafter stood guard until 0400 hours at which time he was relieved (R154,155). He denied that he committed the offenses charged and felt that he was "misidentified" (R154,155,157). Jackson testified that he was on guard from 2100 to 2400 hours on 27 March and thereafter went to bed, that he did not go to Sprendlingen that night and that he never saw any of the prosecutrices prior to the identification formation (R160).

5. It was clearly shown by the evidence that carnal knowledge was had of Katharine Wingerter, Charlotte Wingerter, Bertha Schickendanz and Gertrude Buelleis by certain negro soldiers on the night of 27-28 March 1945. There also was ample evidence from which the court could find that each act of intercourse was accomplished by force and without the consent of the prosecutrix in question, thus constituting each such act rape. The only question of any substance presented by the record of trial is whether the soldiers who committed the rapes were in fact the accused. Each accused denied participation in the acts shown and sought to establish an alibi by showing that he either was on guard or at his bivouac area during the period when the rapes were committed. The defense also sought to show that the identifications made at the formations held on the day following the occurrences were indecisive and hesitant and thus of little value as proving that the accused were in fact the soldiers involved. However, it was also shown that the guard was mounted, posted and supervised in an extremely lax manner and the court could disbelieve the testimony of the accused and the defense witnesses that accused were either on guard or in the bivouac area at the times and for the periods claimed. Reference to the evidence summarized above will demonstrate that the record contains testimony by each prosecutrix clearly identifing the various accused as having been the soldiers who committed the rapes of which each was found guilty. This being the state of the evidence, the court's findings that the accused were in fact the actors in the crimes shown are conclusive. Under the circumstances shown, there was no impropriety in the admission of evidence relating to pre-trial identification of the respective accused at identification formations held at their organization (CM ETO 3837, Bernard W. Smith; CM ETO 6554, Hill; CM ETO 7209, Williams; CM ETO 8770, Cook; CM ETO 12869, Dewar). It is concluded that the record is legally sufficient to support the findings of guilty (CM ETO 3740, Sanders et al (1944); CM ETO 4172, Davis et al; CM ETO 6193, Parrott et al).

6. The charge sheets show that Nelums is 23 years of age and was inducted on 30 September 1942 at Fort Jackson, South Carolina; that Jackson is 20 years of age and was inducted 4 June 1943 at Lafayette, Louisiana; and that Garrett is 20 years of age and was inducted 20 February 1943 at Fort Jackson, South Carolina. None had prior service.

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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 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 S Leeper Judge Advocate

Malcolm P. Sherman Judge Advocate

B. [illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1

20 AUG 1945

CM ETO 13575

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Sergeant EUGENE LAMB (34489528), Corporal JASPER V. CRUMP (18149461), Private First Class ENIES PLOWDEN (33516850), and Privates LEO ROBINS (33903190) and JASPER WILLIAMS (13050539), all of 3518th Quartermaster Truck Company	Trial by GCM, convened at Marseille, France, 25,26 May 1945. Accused PLOWDEN: Acquitted. Sentence as to each accused other than Plowden: Dishonorable discharge (suspended as to LAMB), total forfeitures and confinement at hard labor, LAMB and CRUMP for five years, ROBINS for 25 years and WILLIAMS for 10 years. Places of confinement: LAMB, Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France; CRUMP and WILLIAMS, Federal Reformatory, Chillicothe, Ohio; ROBINS, United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused LAMB, CRUMP, PLOWDEN and ROBINS were tried upon the following charges and specifications:

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

Specification 1: In that Sergeant Eugene Lamb and Corporal Jasper V. Crump and Private Leo Robins and Private Enies Plowden, all of 3518th Quartermaster Truck Company, acting jointly

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(46)

and in pursuance of a common intent, did, at or near Miramas, France, on or about 28 January 1945 feloniously take, steal, and carry away about one thousand six hundred and forty-three (1643) gallons of gasoline and about thirty-two (32) fifty-five (55) gallon containers of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did at or near Miramas, France, on or about 28 January 1945, knowingly and willingly apply to their own use and benefit, one (1) five and one-half ton COE truck of a value in excess of fifty ($50.00) dollars, property of the United States, furnished and intended for the military service thereof (As amended at trial).

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

Specification: In that Private Leo Robins, 3518th Quartermaster Truck Company, did, without proper leave, absent himself from his organization at Miramas, France, from about 28 January 1945 to about 11 February 1945.

Accused ROBINS was tried also upon the following Charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Leo Robins, 3518th Quartermaster Truck Company, did, at or near Miramas, France, on or about 23 January 1945, feloniously take, steal and carry away about one thousand six hundred and forty three (1643) gallons of gasoline and about thirty-one (31) containers, of a value in excess of fifty dollars ($50.00), property of the United States and furnished and intended for the military service thereof.

Specification 2: In that * * * did, at or near Miramas, France, on or about 25 January 1945, feloniously take, steal, and carry away about one thousand

six hundred forty-three (1643) gallons of gasoline and about thirty-one (31) containers of a value in excess of fifty dollars ($50.00), property of the United States and furnished and intended for the military service thereof. (As amended at trial).

Specification 3: (Disapproved by reviewing authority).

Accused WILLIAMS was tried upon the following Charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Jasper Williams, 3518th Quartermaster Truck Company, did, at Miramas, France, on or about 21 December 1944, feloniously take, steal, and carry away about one thousand six hundred twenty (1620) gallons of gasoline and about thirty one (31) containers, of a value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * did, at Miramas, France, on or about 28 January 1945, feloniously take, steal, and carry away about sisteen hundred forty-three (1643) gallons of gasoline and about thirty one (31) containers, of a value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to the charges and specifications preferred against him. Accused Plowden was found not guilty of the Charge and specifications preferred against him. Each of accused Lamb, Crump, Robins and Williams was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced as to Lamb and Crump. Evidence was introduced of two previous convictions of Williams by special courts-martial for absences without leave for seven and three days respectively in violation of Article of War 61; and of one previous conviction of Robins by summary court for misconduct consisting of acts in public unbecoming a soldier in violation of Article of War 96. Accused Lamb, Crump and Williams were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such places as the reviewing authority may direct, Lamb for five years, Crump for five years and Williams for ten years,

and in addition Crump was sentenced to pay to the United States a fine of $1000.00 and to be further confined at hard labor until said fine is paid but not for more than one year in addition to the aforesaid term of five years, and in addition Williams was sentenced to pay to the United States a fine of $1000.00 and to be further confined at hard labor until said fine is paid but not for more than two years in addition to the aforesaid term of ten years. Accused Robins was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years, and in addition to pay a fine to the United States of $5000.00 and to be further confined at hard labor until said fine is paid but not for more than five years in addition to the aforesaid term of 40 years.

The reviewing authority:

In the case of accused Lamb, approved the sentence, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement;

In the case of accused Crump, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement;

In the case of accused Williams, approved only so much of the findings of guilty of Specification 1 of the Charge and the Charge as involved a finding that said accused did at the time and place alleged feloniously take, steal, and carry away about one thousand six hundred twenty (1620) gallons of gasoline of a value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement;

In the case of accused Robins, disapproved the findings of guilty of Specification 3 of the Charge (preferred against him individually), approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years but reduced the period of confinement to 25 years, and designated the United

States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement;

Forwarded the record of trial for action pursuant to Article of War 50½ with respect to Crump, Williams and Robins.

3. Joint charges against Lamb, Crump and Robins (Charge I, Specifications 1 and 2)(Violation of Article of War 94).

The evidence in the case independent of the voluntary extra-judicial statements of Lamb (R69; Pros.Ex.13), Crump (R75; Pros.Ex.15), and Robins (R73; Pros.Ex.14), established without contradiction that Lamb and Robins (in company with Plowden who was acquitted) were on 28 January 1945 in possession without authority of a 5½ ton "cab-over-engine" Government truck upon which were loaded 32 55-gallon containers. The containers were filled with gasoline of a total gallonage of 1760 (R57,93). The truck, containers and gasoline were property of the United States furnished and intended for the military service thereof. While traveling upon a public highway on said date in the vicinity of Miramas, France, Lamb, Robins and Plowden were halted by operatives of the Criminal Investigation Division, Delta Base Section, and were ordered to return to their camp (R55,56). Lamb fled at the approach of the officers, and Robins and Plowden during the course of the return journey left the truck and ran away. Plowden was soon thereafter apprehended, but Robins escaped (R56,57). The containers and gasoline were obtained on 28 January by Robins upon a forged requisition from POL dump No. 872, and were intended for sale to a French civilian who mounted the truck after it left the dump and rode on it at the time it was halted by the operatives (Pros.Ex.14). Robins undoubtedly was the prime instigator of the criminal enterprise but Lamb in his statement (Pros.Ex.13) admitted that, upon leaving camp to go to the POL dump, Robins had informed him that he (Robins) was engaged in a money-making operation and invited him to participate therein and that after the arrival at the dump he assisted in the loading of the truck. After the French civilian entered the truck, Robins apprised Lamb that he (the French civilian) was the purchaser of the gasoline. Lamb thereafter continued on the venture and knew that the civilian acted as guide to the place where the gasoline was to be unloaced (R55; Pros. Ex.13). Crump's participation in this illicit transaction arose out of the fact that he forged the signatures of the officers whose names appear on the requisition (R75; Pros.Ex.15), upon the authority of which Robins obtained the gasoline (R35; Pros.Ex.9-a) at the POL dump

As to Robins, Lamb and Crump, the corpus delicti of each offense for which they were charged and convicted was obviously proved. Robins and Lamb were found in possession of Government military property without right or authority (R47-48). The prosecution proved that the requisition bearing the forged signatures of Captain Young and Lieutenant Ross (Pros.Ex.9) was presented at the POL dump and the gasoline and containers were delivered to Robins and Lamb on the faith thereof (R36; Pros.Ex.10). The record of trial is replete with proof that the issue sheets of the dump were records and accounts kept in the ordinary course of business of the dump and that the entries thereon were made simultaneously with the occurence of the transactions thereon recorded by persons authorized to make the same. The sheets themselves (Pros.Exs.5 and 8) were found in the custody of the proper officer and the inference is indisputable that they had been processed and handled according to the established usage and practice of the dump. Under such circumstances they were admissible under the Federal shop book rule statute (Act June 20, 1936, c.640, sec.1; 49 Stat.1561 (28 USCA 695); CM ETO 4691, Knorr; CM 261107 (1944), III Bull. JAG pp.468,469).

The foregoing evidence constituted a sufficient corroborative basis to admit the respective extrajudicial statements of the three accused (CM ETO 8234, Young, et al).

Crump was an accessory before the fact and therefore was properly charged and convicted as a principal (CM ETO 3740, Sanders, et al; CM ETO 9643, Haymer).

In connection with the crime of larceny it is an established principle that the

> "taking should be against the will of the owner, or at least without his consent for * * * there can be no trespass when the taking was with the consent * * * of the owner" (36 CJ, sec.85, p.759).

The above rule, however, is not applicable in the instant case. It should be particularly noted that the consent of the soldier in charge of the POL dump to the delivery to the accused of the gasoline and containers was not a consent on behalf of the United States Government to transfer title to the accused. The possession of the property was delivered to them for the particular purpose of transporting to the organization which purportedly had requisitioned it.

"No public official has any power to consent to the misappropriation of the property of a state, county, or municipal corporation, so as to prevent the felonious taking of it being larceny" (36 CJ, sec.91, pp.759,760).

"But if there has been a trespass upon the right of the owner, his consent procured by fraudulent representations in ignorance of the facts will not protect the taker; nor will he be protected by the owner's consent if the latter intended merely to transfer the possession to the taker, retaining the title in himself and the taker took the possession intending not to use the thing for the purpose for which the consent was given, but to convert it to his own use" (36 CJ, sec.93, p.760).

The taking of the gasoline and containers by accused was therefore a trespass and a felonious taking.

Prosecution's evidence abundantly proved that Crump, Robins and Lamb in the operation of a joint illegal enterprise stole the gasoline and containers and wrongfully misapplied to their own use and benefit the Government truck at the time and place alleged. The misuse of the truck was within the scope of the enterprise (CM ETO 2297, Johnson and Loper, and authorities therein cited; 1 Wharton's Criminal Law (12th Ed. 1932), sec.263, pp.350-352; 16 CJ, sec.128, p.135). The record of trial is legally sufficient to support the findings of their guilt of these crimes (CM ETO 9288, Mills; CM ETO 11936, Tharpe, et al; CM ETO 12793, Crump, Underwood and Hurt).

4. Charges against Robins (a. Charge II and Specification (Violation of Article of War 61) and b. Charge and specifications (Violation of Article of War 94).

a. The evidence proved beyond doubt that after Robins had been halted on the public highway by the agents of the Criminal Investigation Department on 28 January 1945 while he was in the act of delivering the stolen gasoline and containers to the French civilian, he was ordered to return to his station. During the course of the return journey he abandoned the truck and escaped from the law enforcement agent. He remained absent from his organization without authority from that time until 11 February 1945 when he was apprehended (R20; Pros.Ex. 1; R22; Pros.Ex.2; R73; Pros.Ex.14). The finding of Robins' guilt of this Charge and Specification is supported by substantial evidence.

b. Robins in his voluntary extrajudicial statement (R73; Pros.Ex.14) admitted his procurement of 31 containers and 1643 gallons of gasoline on 23 January 1945 and the same number of containers and same amount of gasoline on 25 January by use of false and fraudulent requisitions (R78; Pros.Ex.6; R47; Pros.Ex.7). (It is obvious that

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his use of the date of 24 January 1945 in his statement with respect to Pros.Ex.7 which bears date of 25 January was erroneous. The issue sheet of the POL dump (R32; Pros.Ex.8) shows that this false requisition was honored on 25 January. The Specification was amended at trial to conform with the correct date). Proof of the corpus delicti of each of these two offenses (Specifications 1 and 2) was made by showing that two requisitions (Pros.Exs.6 and 7) were presented on 23 and 25 January 1945, respectively at POL 872 (R28; Pros.Ex.5; R32, Pros.Ex.8)and that under the usual and ordinary course of operations of the dump the gasoline and containers described in the requisitions would be delivered to the person presenting the same (R23,25, 33,38,50,51). While there is no direct evidence that the amounts of gasoline described in said requisitions were actually delivered and carried away by the person presenting the same, there is evidence that the requisitions were found in the files of the commander of 209th Quartermaster Battalion under circumstances that indicated they would not have been discovered in said files if the gasoline had not been actually delivered (R50,76-79).

In considering these charges under the 94th Article of War against Robins alone, it is a matter of primary consideration whether the above evidence sufficed to prove the corpus delicti of each offense, which is necessary to support the admission in evidence of Robins' confession. When the confession is eliminated from consideration, the requisitions stand unquestioned and unimpeached. They were prepared on QMC Form No. 400. They were honored and filled in the usual and ordinary manner in the operation of the dump. On their face they appear to be valid documents. Independent of accused's confession, there is not even a suggestion in prosecution's evidence that the transactions were other than normal and regular and there is no circumstance or condition proved by the prosecution which distinguishes them from the usual and ordinary transactions at the dump. The prosecution submitted not a line of evidence that the requisitions bore forged signatures or displayed any other irregularity. There is not even a scintilla of evidence that the person who signed his name as "Frank Jenkins" on the delivery sheet of 23 January (Pros.Ex.5) and "Edwards Jenkins" on the delivery sheet of 25 January (Pros.Ex.8) were the same persons or that either of them were in unauthorized possession of the vehicle which transported the gasoline. There is not even a suspicious circumstance or inference which impugns the integrity of the transactions. True, there is evidence that Robins was not authorized to transport gasoline or assigned a vehicle for the purpose of obtaining gasoline (R47,48), but such evidence is of no value for present consideration because there is no proof independent of Robins' confession that "Frank Jenkins" and "Edward Jenkins" were in truth the accused Robins.

In determining the quantum of the evidence necessary to prove the corpus delicti

> "it has been held sufficient if the testimony adduced in proof thereof establishes facts that are consistent with the commission of a crime although they may at the same time indicate, or be consistent with, a non-criminal causation" (2 Wharton's Criminal Evidence (11th Ed., 1935), sec.641, p.1073).

The difficulty with the application of the foregoing principle to the instant situation arises from the fact that the independent evidence is susceptible of but one inference and that is the inference of regularity and legality. It is impossible to discover in it or to infer from it the slightest suggestion of misfeasance or malfeasance.

> "* * * such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof (Forte v. United States, 68 App. DC 111, 127 AIR, 1120, at 1125, 94 F (2nd) 236, at 240 (1937) (Underscoring supplied).

The doctrine of the Forte case insofar as it does not conflict with the Manual for Courts-Martial, 1928, has been adopted by the Board of Review (sitting in the European Theater of Operations) in CM ETO 10331, Hershel Jones.

It is therefore the conclusion of the Board of Review that the prosecution failed to establish the corpus delicti of the offenses under the 94th Article of War with which Robins individually was charged. Lacking such proof his conviction based upon his confession alone cannot stand (CM ETO 1042, Collette). As to Specifications 1 and 2 and the Charge, the record of trial is legally insufficient to support the findings of Robins' guilt.

5. Charges against Williams (Charge and specifications (Violation of Article of War 94)).

At the outset of the consideration of the case against Williams, it should be noted that he was not in any detail or respect connected either with the theft of gasoline and containers committed by Lamb, Robins and Crump acting jointly or with the transactions which gave rise to the charges against Robins individually. Williams' alleged crimes were committed by him alone. Crump was the denominator common to Lamb and Robins in the one group and to Williams as an alleged

lone operator. Crump by his own confession was in the business of issuing and selling to American colored soldiers fraudulent and forged gasoline requisitions. It is manifest that individuals and groups who operated separately and apart from each other dealt with him. Underwood and Hurt composed one gang (See CM ETO 12793, Crump, Underwood and Hurt). Robins was a patron of Crump. In the theft of 28 January 1945, Robins secured the assistance of Lamb. The prosecution alleged that Williams on 21 December 1944 and 28 January 1945 committed two separate thefts of gasoline and containers. Crump was not charged as a codefendant in these malefactions although prosecution's evidence in support of Specification 1 bottomed the case against Williams upon a fraudulent requisition prepared by Crump and obtained from him by Williams. The origin of the requisition involved in Specification 2 was not shown by the evidence.

It was a mere coincidence that the Lamb-Robins theft was committed on the same day (28 January) as the second theft which it is alleged Williams committed. The fact that Williams was charged with and was tried for crimes independent of those committed by the Lamb-Robins combination and by Robins operating alone is a highly important factor in determining the legal sufficiency of the record of trial with respect to Williams.

a. The evidence with respect to the alleged offense of 21 December 1944 presents a singular situation. As a witness for the prosecution against Williams, Crump * testified that Williams presented to him the typewritten requisition dated 21 December 1944 (R79,84; Pros.Ex.16) and that he (Crump) forged the name of Captain Edward Pikus thereto and returned it to Williams (R82-83,128). The requisition was found in the files of the battalion commander by an investigator of the Criminal Investigation Department under the circumstances previously described with respect to Pros.Ex.6 and 7 (R50,76-79). The prosecution, however, did not offer in evidence the delivery sheet of either POL Dump 872 or of Berre Gasoline Dump which in the usual course of business should have shown the presentation of the requisition (Pros.Ex.4,16). Neither did the prosecution attempt to bridge this hiatus with other evidence.

*Crump's right under the Fifth Amendment to the Federal Constitution and the 24th Article of War not to be compelled to be a witness against himself was not infringed by calling him to the stand as a prosecution's witness. Nor could Williams assert Crump's privilege. Crump was a competent witness against Williams (CM ETO 2297, Johnson and Loper).

As opposed to the prosecution's evidence, Williams as a witness on his own behalf emphatically contradicted Crump's testimony with respect to Pros.Ex.16, asserted that Crump was untruthful and denied his own guilt of the crime charged (R115). He asserted that on 21 December 1944, Crump signed a dispatch ticket for the truck Williams operated to enable him to secure a load of gasoline from the Berre dump; that at the time Crump signed the dispatch ticket, he (Williams) held a regular requisition for gasoline from an authorized officer and that he did not request Crump to sign a gasoline requisition (R107,108). He further testified he then proceeded to the Berre dump, presented the valid requisition (signed either by Lieutenant Lyddle or Lieutenant McCune) and obtained the gasoline (R107). He stated he held a duplicate copy of this valid requisition in his folder which was on a mantlepiece at the 3558th Company barracks when he was taken into custody by Criminal Investigation Department agents and that he never recovered it (R107,108). The defense did not attempt to show action on the alleged valid requisition by placing in evidence the service sheet of the Berre dump for 21 December. It is significant that the prosecution offered no extrajudicial statement from Williams, who has at all times denied his guilt.

Williams' conviction under Specification 1 therefore must rest basically upon the testimony of Crump, who by the prosecution's own evidence was an accomplice, a self-admitted forger and an utterer of fraudulent requisitions.

> "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution" (MCM, 1928, par.124a, p.132).

> "A jury may convict on the uncorroborated testimony of an accomplice, if it satisfies them beyond reasonable doubt of the guilt of the defendant, but it is the usual practice for the judge to advise the jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice" (9 Am. Jur., sec.72, p.276).

(Cf: CM ETO 4172, Freeman, Davis, et al).

The testimony of Crump and Williams was in direct conflict. Notwithstanding Crump's complicity, it is evident the court elected to believe Crump, but this conclusion did not resolve the ultimate question of Williams' guilt of larceny of Government property. The acceptance of Crump's testimony as the truth did not prove the crime with which Williams was charged. It was Williams' (1) use of the forged requisition and (2) procurement of the gasoline on the faith thereof which completed the proof of larceny (See par.3, supra). The proof of the

latter fact is dependent upon inferences to be drawn from the discovery of the requisition (Pros.Ex.16) in the files of the battalion commander and upon these inferences alone. The failure to present the daily issue sheet of the dump which showed deliveries of gasoline on 21 December weighs heavily against the prosecution. It must be presumed that it did not offer the sheet in evidence because it would have adversely affected its case.

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony if produced would be unfavorable" (Graves v. United States, 150 U.S. 118,121; 37 L.Ed. 1021,1023 (1893).

(Cf: Interstate Circuit v. United States, 306 U.S. 208,226; 83 L.Ed. 611,620 (1939)).

Williams' conviction on Specification 1 is dependent upon evidence of suspicious circumstances,which is of an exceedingly weak and disconnected character. The situation thus revealed is governed by the following principles:

> "Although it is generally recognized that a conviction may be supported by circumstantial evidence alone (CM ETO 3200, Price; CM ETO 2686, Brinson and Smith), 'circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt' (CM 233766 (1943), Nicholl, 20 BR 121; II Bull. JAG, sec. 453, p.238). A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence (People v. Galbo, 218 N.Y. 283, 112 N.E. 1041, 2 AIR 1220, and authorities therein cited)" (CM ETO 6397, Butler).

The only valid substantial evidence tending to establish that Williams actually received the gasoline upon the basis of the fraudulent requisition is that the requisition was found in the files of the battalion commander sometime subsequent to 21 December. This is a suspicious circumstance but it is certainly not sufficient to exclude every reasonable hypothesis except the one of Williams' guilt (MCM, 1928, par.78,

p.63; CM ETO 7867, Westfield). It is equally logical to believe that Crump himself presented this false requisition and in view of his admitted criminality such hypothesis appears more reasonable than that of Williams' guilt.

Williams' protestation as a witness on his own behalf

> "If I was going to take a requisition or forge a requisition to get gasoline, why should I go to somebody else when I can write myself or sign some fantastic name myself instead of going to somebody else and involving him and he could give me away or something? Why should I do a thing like that?" (R120)

is cogent to this consideration when coupled with Crump's admission that he did sign a dispatch ticket for Williams on 21 December (R131), as Williams testified. In the light of these considerations, the failure of the prosecution to produce the dump's issue sheet of 21 December tells heavily against it.

The Board of Review concludes that the prosecution did not prove Williams guilty of the theft of gasoline on 21 December 1944 beyond reasonable doubt and consequently the record of trial is legally insufficient to support the findings of his guilt thereof.

b. The evidence with respect to the alleged theft of Government gasoline and containers by Williams on 28 January 1945 (Specification 2) presents another facet and requires separate consideration. The issue sheet of POL dump No. 872 for 28 January was introduced in evidence (R26; Pros.Ex.4). It showed that a certain "J. Williams" signed in acknowledgment of delivery of unstated commodities on behalf of Quartermaster Truck Company 3500. The entry reads: "3500 * * * J. Williams". There is no description of articles.

With reference to the condition of the issue sheet (Pros. Ex.4), the following colloquy between the trial judge advocate and the soldier attendant at POL Dump No. 872 (Private James C. Williams) is relevant:

> "Q. Now I call your attention again to Prosecution's Exhibit No. 4, the P.O.L. Issue Sheet dated 1 - 28 - 45, and direct your attention to line five thereof and I ask you to read what it says.
>
> A. On line five it says '3500', the next is blank -

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Q. Does it ever occur that the amount of gasoline issued is omitted from the proper column on an Issue Sheet?

DEFENSE: I object to that on the grounds that the witness has already testified that it is routine procedure to have the amount of gasoline entered on the issue sheet prior to the person receiving the gasoline.

PRESIDENT: Objection overruled.

A. Perhaps I forgot to put it down; perhaps there were a number of requisitions there and I forgot to put it down.

Q. Now reading over on line five, what else is written thereon?
A. 'J. Williams'.

Q. Now, does that signature on the right-hand column indicate the gasoline was issued to the 3500th Quartermaster Truck Company and also to somebody that signed his name, 'J. Williams'?
A. It is true, sir" (R27).

There were also admitted in evidence specimens of accused's handwriting including his signature (R43; Pros.Ex.11). A French handwriting expert testified that in his opinion the same person executed the signature 'J. Williams' on the issue sheet (Pros.Ex.4) as wrote the handwriting specimens (Pros.Ex.11) and explained the reasons for his conclusion (R41-45). There was also admitted in evidence a purported requisition on behalf of 3500th Quartermaster Truck Company dated 28 January 1945 which was purportedly executed by its commander, Captain Charles R. King (R25; Pros.Ex.3). The requisition is on QMC Form No. 400 and is dated 1 - 28 - 45. Originally the words and figures "gasoline", "1620", "1620" were written in ink. The figures were struck out by lead pencil and in lieu thereof the figures "1643" and "1643" were inserted and then was added thereto in pencil "31 drums". It was established by competent evidence that Captain Charles R. King was not the commanding officer of said unit during the relevant period (R46). This requisition was discovered by an agent of the Criminal Investigation Department in the files of the battalion commander under the circumstances hereinabove described (R76). The prosecution did not offer any evidence as to the factum of execution of the requisition (Pros.Ex.3).

Accused Williams testified that on 28 January he was a member of the 3558th Quartermaster Service Company and on that date he was ordered to proceed to ammunition dump No. 461-A near Miramas to secure a load of chains (R109). He denied he presented the requisition (Pros.Ex.3) at the gasoline dump, denied he signed the issue sheet (Pros.Ex.4) and denied he removed any gasoline from the dump on 28 January (R110). He testified, however, that sometime preceding 28 January, he secured some gasoline tanks or drums from dump No. 872 to take to the Berre dump to fill with gasoline; that he exhibited a gasoline requisition at No. 872 in order to secure the drums; that he secured the empty drums; that he proceeded to the Berre dump where he filled them with gasoline and delivered the requisition to a French woman. He signed an issue sheet supposedly for the drums but did not know whether it was complete (R110-112). He stated it was possible that the issue sheet (Pros.Ex.4) was the sheet he signed when he received the empty drums and that he obtained them either for the 3520th or 3500th Quartermaster Service Company (R123-124).

On cross-examination and upon examination by the court when shown the signature of "J. Williams" on the issue sheet of 28 January (Pros.Ex.4) and asked if it was his signature he answered: "I am not positive, sir, that this is my signature" (R114,123). "I could have signed this, sir" (R114). "I do not know /whether it is my signature/, sir" (R114). However, he denied he had previously seen the requisition (Pros.Ex.3) and denied that it was his handwriting thereon (R116). He admitted he gambled extensively and stated he had won more than $2,000. which he sent home by use of postal money orders (R117-118). Upon examination by the court, Williams stated that the reason he did not know whether the signature "J. Williams" appearing on the issue sheet of 28 January (Pros.Ex.4) was written by him was the fact that on that date he was not at dump 872 operated by the 3880th Quartermaster Service Company (R122).

It is manifest from the foregoing summary of the evidence that the legality of Williams' conviction of larceny of the gasoline and containers at the time and place alleged in Specification 2 must depend upon circumstantial evidence. The prosecution based its case primarily on the forged requisition (Pros.Ex.3) and the issue sheet of POL Dump No. 872 of 28 January 1945 (Pros.Ex.4), supplemented by evidence that the signature of "J. Williams" thereon was that of accused. In determining whether this evidence substantially proved that Williams obtained the gasoline on the faith of the fraudulent requisition, it is important to note that the issue sheet does not disclose that gasoline or any other article was delivered to "J. Williams". This fact is of peculiar and particular significance because the sheet itself shows

that the dump warehoused and distributed during the pertinent period not only gasoline but 10 other petroleum products. The issue sheet was a mimeograph form which listed each product at the head of a vertical column. Gasoline tanks and drums were not shown thereon. On 28 January, as shown by the issue sheet, there were three deliveries of gasoline, one delivery of engine oil SAE30, one delivery of kerosene and one delivery of journal grease. It is a most striking and unusual circumstance that the sheet was properly completed as to all transactions on that date except the one which involved the person who signed the sheet by the name of "J. Williams". The prosecution, over the objection of the defense, attempted to supply this deficiency by the testimony of Private James H. Williams, the dump attendant, who testified that he may have forgotten to enter it but that the entry indicated gasoline was delivered to the person who signed the name "J. Williams" on the sheet. This latter statement was secured upon a grossly leading question (R27).

As a preliminary matter and in order to prevent misunderstanding, attention is invited to the holding of the Board of Review in CM ETO 12793, Crump, Underwood and Hurt, supra, wherein the convictions of the accused of thefts of gasoline were upheld although the prosecution did not present in evidence the relevant issue sheets of the dump and relied upon the fraudulent requisitions found in the files of the battalion commander and the inferences therefrom to establish the corpus delicti of each offense in order to permit the admission in evidence of the voluntary extrajudicial statements of the several accused. There we concluded that there was sufficient proof of the corpus delicti. The prosecution's case was completed by the accused's confessions. The instant accused, Williams, never confessed and the prosecution was compelled to rely upon evidence of circumstances which it claimed were inculpatory to convict him. Were there a legally admissible confession by Williams in evidence, the holding in the instant case would be the same as in Crump, et al, supra. The problem herein is therefore distinctly different from that presented in the Crump case. The legal sufficiency of the record of trial to sustain Williams' conviction is dependent upon whether there is substantial evidence to support the findings of guilt. Here the answer to this question requires a determination whether circumstances were proved from which his guilt may be inferred beyond reasonable doubt. A difficult question is thus presented for consideration.

The following quotations from recognized authorities are helpful:

"When circumstantial evidence alone is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused. Every fact essential to the conclusion must be distinctly and independently proved by competent evidence. It is said that the circumstances must themselves be proved and not presumed, although it is recognized that a fact may be proved by reasonable inference from material circumstances, and it is not necessary that there be oral testimony. It is not essential that no inference or presumption shall be indulged by the jury that does not in their minds necessarily arise from the circumstances proved. Mere failure of proof of some collateral circumstance offered by way of corroboration does not destroy the chain.

It is not necessary in circumstantial evidence that each circumstance relied upon be proved by the same weight and force of evidence and be as convincing in its conclusiveness of guilt as though it were the main issue in the case; the circumstances may be combined together and thereby give strength to each other. If the circumstances established are dependent one upon another, each must be consistent only with the theory of guilt in order that a conviction may stand. If, however, the circumstances are independent, the prevailing view is that weak links in the chain may be strengthened by stronger ones. In no event is it essential that the evidence produce absolute certainty in the minds of the jury or exclude every possibility of the defendant's innocence. It is sufficient if the evidence produces a moral certainty to the exclusion of every reasonable doubt" (20 Am. Jur., sec.1217, pp.1070-1071).

"They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.

> Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption" (United States v. Ross, 92 U.S. 281,283, 23 L.Ed. 707,708 (1876).

> "Therefore, remembering that, while it is not necessary that any particular circumstance should of itself be sufficient to prove a criminal case beyond a reasonable doubt, yet it is necessary that each circumstance offered as a part of the combination of proofs should itself be maintained beyond a reasonable doubt, and should have some efficiency, so far as it has efficiency to a greater or less range, beyond a reasonable doubt, and at least be free from the condition of being as consistent with innocence as with guilt, we are compelled to hold that the United States hardly maintain the proposition that Adams shared in the conspiracy in any manner" (Roukous v. United States (C.C.A. 5th 1912), 195 Fed. 353,361, cert. denied (1912), 225 U.S. 710, 56 L.Ed. 1267).

Williams was charged with larceny of the gasoline and containers. As has been demonstrated above (See par.3, supra), the validity of the findings of his guilt depends upon proof that he actually obtained the gasoline as a result of negotiating the fraudulent requisition (Pros.Ex.3). There is no direct evidence that he did present the requisition at the dump or that he secured delivery of the gasoline. These vital facts must be inferred from the circumstances.

The dump attendant (Private James H. Williams) did not testify that Williams, the accused, actually received gasoline. This is the

pertinent colloquy at trial between Private James H. Williams and the trial judge advocate:

> "Q. Now, does that signature on the right hand column indicate the gasoline was issued to the 3500th Quartermaster Truck Company and also to somebody that signed his name, 'J. Williams'?
> A. It is true, sir" (R27).

Obviously, the testimony is but an inference which the witness drew from the entries on the issue sheet. He particularly disavowed acquaintanceship with a soldier named "J. Williams" (R40). The above quoted question and answer, in fact, intruded into the province of the court and were clearly objectionable on that score. They added nothing to prosecution's case. While this inference is possible it is not the only reasonable inference which may be deduced from the entries on the issue sheet. It is as plausible and reasonable to conclude that the person who signed the name "J. Williams" on the sheet did not receipt for gasoline but for some other article, such as tanks or drums. This would explain the reason the dump attendant wrote this skeleton entry because no blank or column was provided on the issue sheet for gasoline tanks or drums. The fact that all of the other signatures were opposite definite amounts of specifically named commodities or articles also makes this inference inviting to the fact finder. Particularly cogent is this inference in view of accused's assertion that he did receive gasoline tanks or drums and not gasoline at dump No. 872. While he was confused as to the time he secured the drums, he insisted both on direct and cross-examination that he secured drums and not gasoline at this dump. On this hypothesis the incomplete entry on the issue sheet is satisfactorily explained and accused's testimony is consistent with direct factual proof in the prosecution's case. The latter hypothesis destroys the evidential value of the entries on the issue sheet because it reveals that they were not

> "free from the condition of being as consistent with innocence as with guilt" (Roukous v. United States, supra).

When the entries on the issue sheet are thus neutralized, it is apparent that the prosecution's evidence is open to the fault described in People v. Razezicz (1912), 206 NY 249, 99 NE 557,565:

> "Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence, or the hypothesis of guilt; nor is it enough that the hypothesis of guilty will account for all the facts proven. Much

> less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery".

The Board of Review is therefore of the opinion that the evidence supporting the findings of Williams' guilt is legally insufficient because it is not sufficiently conclusive to exclude the reasonable and plausible inference that accused was innocent of the crime charged (CM ETO 7867, Westfield; CM 195705, Tyson, 2 B.R. 267 (1931); CM 218521, Nix, 12 B.R. 85 (1941); CM 238485, Rideau, 24 B.R. 263 (1943)).

6. No military exigency or necessity is revealed by the record of trial which compelled the consolidation for trial of the charges against Williams with those against Lamb, Robins and Crump jointly and Robins individually. As indicated above, the Williams' charges were unconnected with those against the other accused. The practice followed is a dangerous one and the present case is an illustration of the prejudice which may result to the rights of an accused when forced to defend charges against him concurrently with the trial of charges against other defendants with whom he is in no manner or degree connected. The case against Lamb, Robins and Crump jointly was one which was easy of proof and the evidence of their guilt when coupled with Crump's confession and testimony dominated the entire case. The evidence against Williams, legally insufficient as above demonstrated, was without doubt colored, in the eyes of the court, by the highly inculpatory evidence against the other accused. Williams' formal consent to trial with Lamb, Robins and Crump must be considered in the light of these surrounding circumstances. The Board of Review prefers to consider the question of Williams' guilt on its merits, but such treatment of the case should not be considered as approval of the instant practice. The following comment is appropriate:

> "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction" (McElroy v. United States, 164 U.S. 76,80; 41 L.Ed. 355,357 (1896)).

While the practice of the Federal civil criminal courts is largely governed by statute, the fundamental principles guaranteeing fair and

impartial trials of persons accused of crime (Zedd v. United States (C.C.A. 4th 1926), 11 F (2nd) 96) are applicable to Federal courts-martial, except where modified by mandates of Congress or appropriate regulations (Winthrop's Military Law and Precedents (Reprint, 1920), pp.54-55).

7. The charge sheets show that accused Lamb is 22 years six months of age and was inducted 16 December 1942 at Camp Shelby, Mississippi; Crump is 21 years of age and was inducted 21 August 1942 at Camp Beauregard, Louisiana; Plowden is 36 years five months of age and was inducted 20 November 1943 at Fort George G. Meade, Maryland; Robins is 30 years seven months of age and was inducted 12 January 1944 at Fort George G. Meade, Maryland; Williams is 23 years of age and was inducted 19 January 1942 at Baltimore, Maryland. None of the accused had prior service and each was inducted to serve for the duration of the war plus six months.

8. The court was legally constituted and had jurisdiction of the persons and offenses. As to accused Lamb, Crump and Robins, no errors injuriously affecting the substantial rights of said accused were committed during the trial with respect to Charge I and specifications preferred against them jointly. The Board of Review is of the opinion that the record of trial is legally sufficient as to said three accused to support the findings of guilty of said Charge I and specifications. As to Charge II and Specification preferred against Robins individually, no errors injuriously affecting his substantial rights 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 Robins' guilt of said Charge II and Specification. For the reasons hereinbefore stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as to accused Robins of the Charge in violation of the 94th Article of War and specifications thereunder and is also legally insufficient to support the findings of guilty as to accused Williams of the Charge in violation of the 94th Article of War and specifications thereunder and his sentence. The sentences of accused Lamb, Crump and Robins are legal.

9. Confinement in a penitentiary is authorized upon conviction of larceny of property of the United States of a value exceeding $50. furnished and intended for the military service thereof and upon conviction of knowingly applying such property to one's own use by Article of War 42 and sections 35 (amended) and 36, Federal Criminal Code (18 USCA 82,87) (See CM ETO 1764, Jones and Mundy). The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement of accused Lamb (Ltr. Hqs. European Theater of Operations, AG 252, Op. PM, 25 May 1945),

of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Crump (Cir.229, WD, 8 June 1944, sec.II, par.3a as amended by Cir.25, WD, 22 Jan. 1945), and of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Robins (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b) is proper.

B. Franklin Ritter Judge Advocate

Wm. J. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

5 JUL 1945

CM ETO 13638

U N I T E D S T A T E S	2ND INFANTRY DIVISION
v.	Trial by GCM, convened at Domazlice, Czechoslovakia, 13 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private DONALD A. KEPPLIN (36684359) Company A, 741st Tank Battalion	

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 58th Article of War.

Specification: In that Private Donald A. Kepplin, Company "A" 741st Tank Battalion, did, at Aux, Germany, on or about 6 October 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself to military control at Paris, France on or about 5 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 of the Charge, but guilty of a violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring he was found guilty of the Charge and its 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 withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused was discovered to be missing from his organization at Aux, Germany, at 0700 hours on 6 October 1944 by his first sergeant, who searched the company billets and tank park without finding him (R7-9). On receiving a report of accused's absence from the first sergeant, the company commander ordered a search made for accused, but he was not found (R10). He was thereafter seen, between 0800 and 0900 hours on 6 October 1944, walking with another soldier in a small town in Belgium, about 3½ or 4 miles from the company area. He was walking away from Aux, Germany, and toward St. Vith, Belgium (R12-13).

It was stipulated in writing that accused surrendered himself to military control in Paris, France, on or about 5 May 1945(R6-7; Pros. Ex.A).

Accused had no permission from his commanding officer or first sergeant to be absent, and he was not seen by them at any time between 6 October 1944 and 5 May 1945. He did not return to his organization for duty at any time between these two dates (R8-13). Extract copies of morning reports from his organization, introduced in evidence, show that on 14 October 1944 accused was dropped from assignment as missing as of 6 October 1944, but that on 15 May 1945 correcting entries were made showing accused "Fr dy to AWOL 6 October 1944" and "Fr AWOL to Conf at Paris Detention Barracks 5 May 1945". (R15; Pros.Exs.B and C).

4. The accused, after his rights as a witness were fully explained to him by the president of the court, elected to remain silent, and no evidence was introduced in his behalf (R14).

5. The evidence clearly shows, and by his plea accused admitted, that he was absent without leave from his organization for 211 days or seven full months. The only question presented for determination is whether the evidence shows circumstances from which an intent to desert the service of the United States may be inferred. Even though accused ultimately surrendered voluntarily to military control, the prolonged period of his wholly unexplained absence, under the conditions then existing in the European Theater of Operations, adequately supports the inference of the existence, at some time during the period of his absence, of an intent not to return to the service (CM ETO 1629, O'Donnell; CM ETO 1577, Le Van). Indeed, the circumstances surrounding accused's absence, in the light of well-known historical facts, suggest that he abandoned

his organization at a time when it was likely to become engaged in combat with the enemy, and that he returned to the service only when the more severe fighting had passed and the enemy had been virtually defeated. Under the facts shown the court was clearly warranted in inferring an intention on the part of accused to desert the service of the United States (CM ETO 6093, Ingersoll).

6. The charge sheet shows that accused is 25 years and three months of age and was inducted 12 August 1943 at Chicago, Illinois. No prior service is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

S. L. Levy Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
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BOARD OF REVIEW NO. 4

6 JUL 1945

CM ETO 13655

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIAM M. CLICK (33743839), 241st Port Company, 494th Port Battalion	Trial by GCM, convened at Paris, France, 15 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 found legally sufficient to support the sentence.

2. The evidence with reference to Specification 1 of Charge I fails to show that the absence without leave was initiated by an escape from confinement or terminated by apprehension, or other facts and circumstances indicating an intent to permanently leave the service of the United States. The absence without leave period was of but 15 days duration, and an interval of 26 days elapsed before the absence without leave alleged in Specification 2 began. The evidence is not adequate to establish an intent to desert the service of the United States, and the record of trial is, therefore, legally insufficient to support the finding of guilty of Specification 1, Charge I. Absence without leave for the period alleged is, however, shown and the record of trial is legally sufficient to support findings of guilty of the lesser included offense of absence without leave for the period alleged in Specification 1, Charge I, in violation of the 61st Article of War.

Lester A Danielson Judge Advocate

Judge Advocate

John R. Anderson Judge Advocate

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BOARD OF REVIEW NO. 3

CM ETO 13668

6 SEP 1945

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Kissingen, Germany, 22 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private LOUIS E. CAPLET (31382103), Company A, 7th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Louis E. Caplet, Company "A" 7th Infantry did, near Grandvillers, France, on or about 20 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended near Domfaing, France, on or about 30 October 1944.

Specification 2: In that * * * did, near Jacques, France, on or about 31 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit:

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Combat with the enemy, and did remain absent in desertion until he was apprehended near Grandvillers, France, on or about 6 November 1944.

Specification 3: In that * * * did, near Fremifontaine, France, on or about 19 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Thaon, France, on or about 25 February 1945.

He pleaded not guilty. 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 1, of Specification 2, guilty except the words "apprehended near Grandvillers, France," substituting therefor the words "returned to military control at a place and manner unknown," and of Specification 3, guilty except the words "apprehended at Thaon, France," substituting therefor the words "returned to military control at a place and manner unknown." 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 pursuant to Article of War 50½.

3. Evidence for the prosecution:

Accused's absences without leave commencing at the places and during the times respectively alleged in the specifications of the Charge were established by properly certified copies of morning report entries of his organization (R7-8;Pros.Exs.A & B).

Under Specification 1, additional evidence of his absence and return to military control on 30 October 1944 was shown by testimony of the company mail clerk that accused

"came in and asked me for some mail and I knew he was AWOL, according to the records, and I asked him if he was AWOL and he said, yes."

The clerk turned him over to the mess sergeant and saw him leave for the company (R12-13).

Under Specification 3, the first sergeant testified that he made a check of the company area on 19 November 1944 and accused could

not be found. He had been present "until the night we pulled out." He remained absent until 25 February 1945 (R10,14-15,16). On 20 and 31 October 1944 the company was engaged in combat with the enemy (R9,10,14). On the night of 19 November 1944 the company left its location to go into combat and crossed the Meurthe River the next morning (R10-11).

4. For the defense, accused elected, after his rights were explained (R17) to make an unsworn statement through counsel. This statement described extremely hazardous experiences of accused on and after 28 April 1944 when he joined the Third Division at Anzio, where the division broke out of the beachhead and proceeded towards Rome. During these operations accused was wounded and saw many of his comrades killed and seriously wounded in action. The statement contains no reference to the matters of which he stood charged.

5. The evidence showed that when accused went absent without leave on 20 October 1944 and again on 31 October 1944, his company was in combat with the enemy. He again went absent without leave on 19 November just before the company was about to leave its location to go into combat. This evidence was sufficient to justify the court in finding that upon each occasion he left his organization with intent to avoid hazardous duty as alleged in violation of Article of War 58 (CM ETO 11006, Mazzeo; CM ETO 7312, Andrew).

6. The charge sheet shows accused is 20 years five months of age and was inducted 10 September 1943 at Hartford, Connecticut. 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 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).

B R Cooper Judge Advocate

Malvin C. Sherman Judge Advocate

B L Gregory Jr. Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

20 JUL 1945

CM ETO 13707

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MORRIS H. HOUSEL (13073374), Attached-Unassigned Detachment 33, Ground Force Reinforcement Command (formerly Attached-Unassigned Detachment 21, Ground Force Replacement System)	Trial by GCM, convened at Marseille, France, 9 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Morris H. Housel, now attached unassigned to Ground Force Reinforcement Command, Detachment 33, then attached unassigned to Ground Force Replacement System Detachment 21, did, without proper leave, absent himself from his station at Septemes, France, from about 15 November 1944 to about 16 January 1945.

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

Specification: In that * * * in conjunction with Private John G. Monahan attached unassigned to Ground Force Reinforcement Command, Detachment 21, did, at Marseille, France, on or about 6 January 1945, knowingly and willfully misappropriate and sell eight (8) cases of roast beef of the value of about $279.36, property of the United States furnished and intended for the military service thereof.

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

Specification: In that * * * did, at Marseille, France, on or about 6 January 1945, with intent to defraud willfully, unlawfully, and feloniously attempt to utter as true and genuine a certain counterfeit American Green Seal Note in words and figures as follows: Five Hundred Dollars ($500.00), a writing of a public nature, which might operate to the prejudice of another, which said American Green Seal Note was, as he, the said Private Housel then well knew, was falsely altered and counterfeited.

He pleaded not guilty and was found guilty of Charge I and its Specification; guilty of Charge II and of its Specification except the words "in conjunction with Private John G. Monahan attached unassigned to Ground Force Reinforcement Command, Detachment 21", of the excepted words not guilty; and guilty of Charge III and of its Specification except the words "altered and", of the excepted words not guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years, and to pay the United States Government a fine of $500.00. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Charge I and Specification: There was introduced sufficient evidence of the corpus delicti of the offense charged, to-wit, absence without leave, to permit the admission in evidence of accused's statement (R30; Pros.Ex.2). The evidence thus before the court was of such substantial nature as to support the finding that he was absent without leave from his organization from 15 November 1944 to 16 January 1945 (CM ETO 527, Astrella).

4. Charge II and Specification:

a. The Specification alleged that accused

> "did * * * knowingly and willfully misappropriate and sell eight (8) cases of roast beef or the value of about $279.36 property of the United States furnished and intended for the military service thereof" (Underscoring supplied).

The ninth paragraph of the 94th Article of War provides in relevant part:

> "Any person subject to military law * * * who knowingly and willfully misappropriates * * * or wrongfully or knowingly sells * * * subsistence stores * * * or other property of the United States furnished or intended for the military service thereof, * * * shall on conviction thereof be punished".

The part of the statute above quoted denounces two separate and distinct offenses: (a) a misappropriation and (b) a wrongful sale (Winthrop's Military Law and Precedents (Reprint, 1920), pp.708,709; CM 243287, Poole, 27 B. R. 321, III Bull. JAG, pp.236,237 (1944)). The Specification is obviously duplicitous (MCM, 1928, par.29b, p.19). Winthrop's discussion of the situation thus presented is appropriate:

> "An indictment or count in which two or more separate and distinct offences, whether of the same or a different nature, are set forth together, is said to be double, and such a pleading is bad on account of duplicity.
>
> This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all

form parts of the same transaction, and substantially complete a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since 'collectively they constitute but one offence.' So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place.

A further description of cases is to be noted as not within the rule, or as constituting an exception to the rule,-viz., cases of statutory offences or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of this class it was observed by a U. S. court that the several criminal acts indicated may be regarded as 'representing each a stage in the same offence, and therefore properly to be coupled in one count.'

So in military law, the similar acts specified in the separate paragraphs of Art. 60, [94] may, in general, be joined in the same Charge without incurring the fault of duplicity. Thus it may be alleged that the accused did make and cause to be made, and present and cause to be presented, for payment, a claim, &c., knowing the same to be fraudulent,&c.; or did embezzle, and knowingly and wilfully misappropriate and apply to his own use, property of the United States,&c.

The point under consideration is illustrative of the rule of pleading statutory offences heretofore considered, that, where acts which may be charged together without duplicity are expressed in the statute disjunctively, they should, when averred together, be expressed conjunctively" (Winthrop's Military Law and Precedents (Reprint, 1920), pp.143,144).

It therefore appears that the instant Specification is within the exception noted by Winthrop, viz.

"cases of statutory offences, or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable".

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Although it was charged that accused did "knowingly and willfully misappropriate and sell", the gravamen of the offense alleged was the unlawful sale and the misappropriation alleged formed part of the unlawful transaction. The misappropriation and the sale constituted substantially a single offense. While the pleading is not to be commended as a model or as a precedent, it is not open to the objection that it did not inform accused of the nature of the offense which he was required to answer. Moreover, the failure of the defense to object to the Specification may be regarded as a waiver of any defect (MCM, 1928, par.64a, p.51).

The above conclusion is reinforced by reference to the trial proceedings. The case against accused was tried upon the theory that he was guilty of an unlawful sale. All of the evidence was directed at that issue. The prosecution, defense and court proceeded on the idea that the Specification alleged but one offense, to-wit, an unlawful sale of Government military property. Of pertinent relevance is the following analysis applicable to the instant situation:

> "While the language of this indictment is not so clear and explicit as might be desired, nevertheless it is admitted by the plaintiffs in error, or rather it is contended by plaintiffs in error that it does charge this graver offense. The trial was conducted solely upon the theory that it charged only this one offense. The court in its charge to the jury carefully defined the elements constituting this one offense, to wit, resisting with deadly and dangerous weapons persons authorized to make searches and seizures in the performance of their duties as such officers, and carefully instructed the jury that, unless it found the defendants guilty beyond a reasonable doubt of resisting the officers and persons authorized to make searches and seizures,named in the indictment, that in so resisting they used deadly, dangerous weapons, and that they used these weapons with intent to commit bodily harm upon such officers, or with the intent to deter and prevent the officers from the performance of their duties, then it should return a verdict of not guilty. It is apparent, therefore, that these defendants were not placed upon trial for two offenses charged in a single count of an indictment, and that, even if their motion to elect were well taken, they obtained the full benefit of that motion by the conduct of the trial and the charge of the court, and that their rights were

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> as fully protected and safeguarded as if the motion had in fact been sustained" (Bailey v. United States, 278 Fed. 849,853 (1922)).

The Board of Review therefore concludes that no substantial rights of accused were prejudiced by either the form of pleading or the proceedings at trial sequential thereon.

b. The evidence proved that accused at the time and place alleged sold to a French civilian eight cases of roast beef of a value in excess of $50.00 which was the property of the United States furnished and intended for the military service thereof. His guilt was established beyond reasonable doubt (CM ETO 9288, Mills; CM ETO 11497, Boyd; CM ETO 11936, Tharpe, et al).

5. Charge III and Specification: Section 151 of the Federal Criminal Code (18 USCA 265) provides as follows:

> "Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years".

The above statute has received the following construction:

> "It is obvious that the statute defines two groups of offenses: (1), passing, uttering, publishing, or selling a falsely made, forged, counterfeited, or altered obligation of the United States, with intent to defraud, and (2), bringing into the United States, possessing, or concealing, with intent to defraud, a falsely made, forged, counterfeited, or altered obligation of the United States, with intent to pass, publish, alter, or sell the same, and that the penalty for each offense is a fine of not more than $5,000 and imprisonment of not more than 15 years" (Ross v. Hudspeth (CCA 10th, 1939), 108 F.(2nd) 628,629).

This construction was applied in the earlier case of Agervais v. United States (CCA 3rd, 1934), 72 F.(2nd) 720.

It is therefore apparent that the cited statute denounced as crimes: (a) An attempt to utter, with intent to defraud; a counterfeit obligation or security of the United States, and (b) the possession of such obligation and security with intent to defraud. They are separate and distinct offenses, not one continuous offense.

Section 163, Federal Criminal Code (18 USCA 277) is a companion statute to Section 151 Federal Criminal Code. In pertinent part it declares:

> " whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish or sell, * * * or who shall have in his possession any * * * counterfeit coin or bars, knowing the same to be * * * counterfeited with intent to defraud * * * shall be fined".

The foregoing statute has been construed as follows:

> "The judgment is challenged on the further ground that the indictment charged one continuous act which constituted a single offense, for which only one sentence could be imposed. Section 163 of the Criminal Code, 18 U.S.C.A. sec.277, provides, among other things, that any person who has in his possession a false, forged, or counterfeit coin in resemblance or similitude of the silver coins of the United States, or who passes, utters, or publishes such a coin knowing it to be false, forged, or counterfeit, with the intent to defraud, shall be fined not more than $5,000 and imprisoned not more than ten years. The statute makes the possession of such a coin one offense, and the passing or uttering of it another. The two are not one continuous offense. They are separate and distinct, each complete within itself. See Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505; Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306; United States ex rel. Simkoff v. Mulligan, 2 Cir., 67 F. 2d 3al. And the power of Congress to provide that

> each shall constitute a separate and distinct crime quite apart from the other is not open to doubt. Burton v. United States, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362; Gavieres v. United States, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489; Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153; Albrecht v. United States, supra; Blockburger v. United States, supra; Casebeer v. United States, 10 Cir., 87 F. 2d 668" (Reger v. Hudspeth, Warden (CCA 10th, 1939) 103 Fed. (2nd) 825, 826, cert. denied, (1939), 308 U.S. 549, 84 L.Ed. 462).

The Specification here considered charged that accused did "with intent to defraud willfully, unlawfully and feloniously attempt to utter as true and genuine a certain counterfeit American Green Seal note".

It is obvious that he was not charged with the fraudulent possession of the counterfeit note. His voluntary extrajudicial statement (R30; Pros.Ex.2) recited in part:

> "Several days later January 9 or 10th while having a drink with EVONNE VAIENTINI (the blond) a friend of her had a $500.00 American Green Seal Note (counterfit) which he wanted to sell. He told me all I got over 22,000 frs. was mine. The blond assured him payment of this bill if I blew town. I have made several attempts to sell it. Once for 60,000 frs. and once for 70,000 frs. when they discovered it was counterfit the deal was off. I still had this bill in my possession when arrested by M.P.'s on January 16-1945".

This statement obviously showed that accused attempted to utter this counterfeit note. Prosecution's evidence independent of the extrajudicial statement with respect to this charge, however, proved merely that accused was in possession of the counterfeit note at the time he was taken into custody by the military police (R25-27). At that point the evidence stopped. There is not even a scintilla of evidence that someone attempted to utter the note. The evidence before the court and accused's statement would have sustained a conviction of the charge of possession of a counterfeit note with intent to defraud, and the case against accused should have been so laid. However, when consideration is given to the fact that Congress specifically and particularly denounced as a separate crime the possession of a counterfeit obligation and security of the United States with intent to defraud,

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and to the essential differences in the elements of the two crimes, it is manifest that proof of that offense cannot form the corpus delicti of the separate crime of attempting to utter such obligations and securities. The prosecution, therefore, failed to prove the corpus delicti of the offense charged and failing in proof of this corroborating evidence, accused's confession on this issue was not admissible and cannot be considered in determining his guilt (MCM, 1928, par.114a, p.115; CM ETO 10331, Hershel W. Jones).

There is, therefore, no evidence to sustain the finding of accused's guilt of attempting to utter the counterfeit note and the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification.

6. The charge sheet shows that accused is 27 years eight months of age and enlisted 22 June 1942 at Baltimore, Maryland, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges I and II and their respective specifications, legally insufficient to support the findings of guilty of Charge III and its Specification, and legally sufficient to support the sentence.

8. Confinement in a penitentiary is authorized upon conviction of the unlawful sale of property of the United States of a value in excess of $50.00 furnished and intended for the military service thereof, by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87) (See CM ETO 1764, Jones and Mundy). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riter, Judge Advocate

Wm. F. Burrow, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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

BOARD OF REVIEW NO. 2 14 SEP 1945

CM ETO 13708

U N I T E D S T A T E S	OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIE A. MULDROW (36004540), 57th Ordnance Ammunition Company, 100th Ordnance Battalion	Trial by GCM, convened at Reims, France, 26 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. 2
VAN BENSCHOTEN, HEPBURN and MILLER, Judge Advocates.

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

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

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

Specification: In that Private Willie A. Muldrow, Fifty-seventh Ordnance Ammunition Company, One Hundredth Ordnance Battalion, did, in or near Mazancourt-Frenes, Somme, France, on or about 3 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Rouvroy (Marie Antoinette Boitel).

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

Specification: In that * * * did, in the vicinity of Lieu St Amand, France, on or about 6 September 1944, desert the service of the United States and did

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remain absent in desertion until he was apprehended at Paris, France, on or about 10 October 1944.

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

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

a. Accused, a colored soldier, is a member of the 57th Ordnance Ammunition Company, and on 3 September 1944, his unit was bivouacked near the towns of Perrone and Mazancourt-Fresnes, Somme, France (R7,20,24,41). That evening accused, with two other soldiers of his outfit named Williams and Skipper, left their camp in an army vehicle to go to a cafe in Mazancourt-Fresnes (R8,9,20). En route they met a Frenchman on foot accompanied by three women (R8,9,20,21). The Frenchman, Mr. Longlade, spoke English and asked the soldiers to take him to Paris (R9). They talked with him and found out where he lived in the village of Mazancourt-Fresnes (R9). They then drove off down the road, but "got to wondering, and wondered why he was out that time of the night" and went to his residence to inquire (R9,20,21). He invited them in, and when they entered the house, accused and Skipper were carrying their carbines (R19,21). Mr. Longlade lived with the Boitel family, consisting of Mr. and Mrs. Boitel, their married daughter, Marie Antoinette Rouvroy, and her daughter, Genevieve (R20,24).

After a few drinks, Williams went outside and waited in the vehicle (R9,14-15). Accused and Skipper continued talking with Mr. Longlade, but after a while the "conversation became excited" (R21). The women were told by Mr. Longlade that the soldiers wanted to take them to the authorities but that he, Mr. Longlade, objected and had offered to go instead (R21). At this, the women became frightened, and Mrs. Rouvroy ran out the back door and hid in a small building in the back yard (R22,29). Skipper then loaded his gun, causing

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Mrs. Boitel and the other daughter also to run out of the house, after which he fired a shot (R9,22,29).

When Mrs. Rouvroy heard the shot fired, she left her place of concealment, and accused and Skipper discovered her and "grabbed" her (R29). Each of them holding one of her hands, they dragged her across the garden to a small woods (R29). She struggled and tried to push them and "fight them away" (R29,30). Each soldier had a knife which was exposed and in his hand, and in the struggle, Mrs. Rouvroy's left hand was severely cut (R31,36). When they arrived at the edge of the woods, they forced her to the ground (R29-30). Then, first Skipper, and then accused, forcibly had intercourse with her, each inserting his penis into her vagina (R30). She did not consent and struggled while she was being abused (R30,33). She called for help, and her mother heard her cries (R22,30).

Accused and Skipper then went out to the street where they found Williams, and the three soldiers returned to camp (R9-10). A short time afterwards, Mrs. Boitel saw her daughter at their house (R22). She was apparently exhausted, was in a very nervous state and was weeping; her skirt was torn, her hair messed up and she had bloodstains on her garments (R22,23). She told her mother that two soldiers had forced her on the ground and had intercourse with her (R24).

Doctor Billards, physician, examined Mrs. Rouvroy later that night (R37). Besides the wound in her hand, she complained of pain at her sexual parts and had bruises on the inside part of her legs and thighs (R36).

b. During the time around the 4th and 6th of September 1944, accused's unit was close to the enemy (R41). The tactical situation was fluid at that time, an armored division having been through ahead of them, but the infantry not yet having covered the area (R41). On the morning of 4 September 1944, his company engaged in a fight with some fifty-five SS troops, and on 6 September the enemy troops were still "in woods all around /its/ bivouac area and ammunition supply point" (R41).

Accused was a truck driver in his company and on 6 September 1944, when they were near Lieu Saint Amand, he and his vehicle were assigned to the mess sergeant for duty (R38,39,41). The latter sent for accused

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on the evening of that day, and when he reported with his truck, the mess sergeant and another soldier went with him to a place about four miles away for water (R61). They returned and unloaded the water, and accused then got in the truck and drove off (R61). Later that evening a search was made for him and his vehicle in the company area, but neither he nor his truck could be found, and he did not return for duty with the company until 7 March 1945 (R38,42). His absence was without leave (R42). On 10 October 1944 he was apprehended by the military police in Paris, France, having no authority to be there (R44). The truck he was driving on 6 September was never returned to his unit (R43,44).

4. Accused, after being first advised of his rights as a witness, elected to testify in his own behalf

With reference to the rape charge, he admitted being in the Boitel house (R49). Because Mr. Longlade asked many questions about their company and its movements, accused and Skipper decided to take him to their commanding officer (R50). They asked him for an identification card but he did not have one, then "Skipper walked to door and fired his rifle and everybody ran, some went one way and some another" (R50). They looked around for the French people for a short time, then found the vehicle they were riding in and went back to their company (R50-51, 58). He took part in the engagement with the SS troops on the next day, killing a few and capturing eight (R51).

On 6 September 1944, on the trip for the water, they stopped at a cafe in a town (R52). The mess sergeant and other soldiers went upstairs "to see girl", and accused left to turn the truck around so they would be ready to go (R52,53). After he got the truck turned around, he could not find the place where they had stopped (R53). He continued driving and inquiring for his outfit, stopping at Arras and Amiens and then going to Paris where he left the truck in a garage and went to a hotel (R53-54). When he returned for it the next day, he was told that the military police had taken it and thereafter he spent several days looking for it before he finally made inquiry from a military policeman (R54-55). The military policeman took him into custody (R55).

Accused's company commander testified that before his unauthorized absence occurred his efficiency rating as a soldier was satisfactory and character good (R60).

5. a. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The evidence clearly establishes the commission of this crime by accused as found by the court. Accused admitted being present at the time and place alleged and impliedly denied having intercourse with complaining witness; however, her testimony is strongly supported by the corroborating evidence and the physical circumstances (CM 227,909, Scarborough, 16 B.R.13).

b. "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).

Accused admitted being absent without leave with a government truck at a time when his unit was engaged in hazardous combat duty and had just completed an engagement with the enemy. His absence was for thirty-four days, and a substantial part of that period was admittedly spent in Paris where he had many opportunities to return to military control. The court was justified in concluding that he absented himself from his unit with the intent of permanently abandoning the military service (CM ETO 952, Mosser; CM ETO 5196, Ford; CM ETO 9333, Odom).

6. The charge sheet shows accused to be 31 years and two months of age. Without prior service, he was inducted 19 February 1941 at Chicago, Illinois.

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). The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion in time of war and 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 proper place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 14 SEP 1945
TO: Commanding General, Oise Intermediate Section, Theater Service Forces, European Theater, APO 513, U. S. Army.

1. In the case of Private WILLIE A. MULDROW (36004540), 57th Ordnance Ammunition Company, 100th Ordnance 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 13708. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 13708).

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

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

BOARD OF REVIEW NO. 2

13 JUL 1945

CM ETO 13762

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Windsheim, Germany, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class JAMES L. ALLEN (35684630), Company B, 12th Infantry.	

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

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

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

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

Specification 1: (Nolle prosequi)

Specification 2: In that Private First Class James L. Allen, Company "B", 12th Infantry, having been duly placed in arrest in quarters on or about 4 February 1945, did at Weinsfeld, Germany on or about 1700, 14 February 1945, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that * * *, did, at Gey, Germany on or about 4 December 1944 desert the service of the United States by absenting himself without proper leave from

his organization with intent to avoid hazardous duty, to wit, engaging the German forces in the vicinity of Gey, Germany, and did remain absent in desertion until he surrendered himself at Rouen, France on or about 22 December 1944.

Specification 2: In that * * *, did, at Bettendorf, Luxembourg on or about 0245, 20 January 1945 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit; engaging the German forces in the vicinity of Bettendorf, Luxembourg, and did remain absent in desertion until he was apprehended at Luxembourg, Luxembourg on or about 1940, 27 January 1945.

Specification 3: In that * * *, did, at Weinsfeld, Germany on or about 1700, 14 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; engaging the German forces in the vicinity of Weinsfeld, Germany, and did remain absent in desertion until he was apprehended at Luxembourg, Luxembourg on or about 2200, 17 February 1945.

Specification 4: In that * * *, did, at Branscheid, Germany on or about 0700, 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: engaging the German forces in the vicinity of Branscheid, Germany, and did remain absent in desertion until he was apprehended at Luxembourg, Luxembourg on or about 2230, 2 March 1945.

A nolle prosequi was entered as to Specification 1, Charge I. He pleaded guilty of Specification 2 and Charge I and not guilty to Charge II and its specifications and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of all the charges and specifications. Evidence was introduced of two previous convictions by special court-martial, one for striking a non-commissioned officer, who was then in the execution of his office, breaking restriction and being disorderly in a public place in violation of Articles of War 65 and 96 and the other for absence without leave for ten days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due

or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the 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 for action pursuant to Article of War 50½.

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

Accused was a bazooka man in Company B, 12th Infantry (R5,8). On 4 December 1944 his organization was located in the vicinity of Gey, Germany, where they were in contact with the enemy, and were receiving small arms and artillery fire. Accused was not present for duty on this day and, although his squad and the area were checked, he could not be found. He had not been given permission to be absent at this time and he was last seen by his assistant squad leader about 2 December 1944. It was stipulated by the prosecution, defense counsel and the accused that he surrendered himself at Rouen, France, on 22 December 1944 (R6,7).

On the afternoon of 20 January 1945 Company B, 12th Infantry, arrived at the town of Eppledorf, Luxembourg, on the west side of the river and were ready to attack the enemy on the opposite side of the river in the city of Bettendorf (R8,10). They were receiving occasional shells from the enemy artillery. Accused was missing on that date and although the area was searched he could not be located. He had not been authorized to be absent (R8). It was stipulated by the prosecution, defense counsel and the accused that he was apprehended at Luxembourg, Luxembourg, on or about 27 January 1945 (R9).

On the evening of 4 February 1945 accused was returned to his organization where the acting first sergeant placed him in arrest in quarters, pursuant to the orders of the company commander. On 14 February 1945 Company B was in a position ahead of Herscheid, Germany, holding the enemy back from territory already taken. They were in contact with enemy forces and were receiving some artillery and small arms fire. When the roll was taken that evening, accused was missing and could not be found by the acting first sergeant who personally searched the area looking for him. No passes were being issued and he had not been given permission to be absent (R5,6,9). It was stipulated by the prosecution, defense counsel and the accused that he was apprehended at Luxembourg, Luxembourg, on or about 17 February 1945 (R10).

Accused's company was in Branscheid, Germany, on 21 February 1945, in reserve. He was not present that afternoon when gloves were issued to the men of his unit and a search failed to disclose his whereabouts. He had not been given a pass (R11,12). It was stipulated by the prosecution, defense counsel and the accused that he was apprehended at Luxembourg, Luxembourg, on or about 2 March 1945.

It was further stipulated by the prosecution, defense counsel and the accused that if First Lieutenant Arley R. Bjiela were present in court he would testify under oath that Exhibit B is a sworn statement of accused, voluntarily made in the former's presence, that prior to making this statement, accused was warned of his right to remain silent, and that he acknowledged that he understood that anything he said could be used against him. The statement made by accused was then offered and received in evidence, defense counsel stating he had no objection thereto. His statement is substantially as follows:

On or about 5 December 1944 he left his company without permission, and about 27 December 1944 he turned himself in to the military police at Rouen. He was returned to his company through channels and placed in arrest in quarters. When the company started up into the line again, the Commanding Officer told him he was going to give him "a break" and return him to action on the line. He didn't want to go back, so he again left his organization about 18 January 1945 and turned himself into the military police at Luxembourg about 28 January 1945. Once more he was returned to his organization, which was somewhere along the Our River, west of Prum. His company went in reserve and he left again, and at a little town just north of Mersch he was apprehended by the military police. After he was again returned to his company, the commanding officer gave him a rifle and returned him to duty. He told his officer he could not stand the line and he was told he would have to stand it. The company was holding a town and he was assigned to a platoon but that same day, about 23 February 1945, he again absented himself. On 2 March 1945 the military police apprehended him at a civilian home in Luxembourg (R12,13;Pros. Ex.B).

A duty authenticated extract copy of the morning reports of accused's organization was received in evidence showing that he went absent without leave on 4 December 1944, 20 January 1945, 14 February 1945, and 21 February 1945 (R8,9; Pros.Ex.A).

4. Accused, after his rights as a witness were explained to him (R13), was sworn and testified in substance as follows:

He had gone all through the Hurtgen Forest and "just couldn't take it any longer". He just "couldn't go back to the line any more". This is what motivated him each time that he went absent without leave. He never intended not to return to his company on the various occasions that he left as he was just trying to get away from the shelling. Several times he asked the commanding officer of his company for a change of assignment but each time he was refused. On cross-examination, he admitted that at the time he left, he knew his organization was in contact with the enemy and that by leaving he was avoiding hazardous duty (R13,14,15).

5. Accused pleaded guilty to and the prosecution presented substantial evidence of all the essential elements of the offense alleged in

Specification 2 of Charge I (MCM, 1928, par. 139a, p.154).

The alleged violations of Article of War 58 as set forth in the specifications to Charge II were established by the unimpeached entries in his organization's morning reports, competent testimony as to the tactical position of his company on the dates he commenced his absences, and his own admissions both in his pre-trial statement and in his sworn testimony at the trial. The findings of guilty of each of these offenses is sustained by substantial evidence of all the essential elements thereof (MCM, 1928, par. 130a, p.143; CM ETO 10968, Schiavone).

6. The charge sheet shows that accused is 22 years of age and was inducted 27 January 1943 at Cincinnati, Ohio. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court martial may direct (AW 58). 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

(ON LEAVE) _____ Judge Advocate

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

BOARD OF REVIEW NO. 2 12 JUL 1945

CM ETO 13764

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Windsheim, Germany, 9 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN F. McGRAW (36889827), Company F, 12th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private John F. McGraw, Company "F", 12th Infantry, did, at Hurtgen, Germany, on or about 7 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engaging the German forces in the vicinity of Hurtgen, Germany, and did remain absent in desertion until he was apprehended at Brussels, Belgium on or about 28 December 1944.

Specification 2: In that * * * did, at Fuhren, Luxembourg, on or about 22 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid

hazardous duty, to wit: engaging the German forces in the vicinity of Fuhren, Luxembourg, and did remain absent in desertion until he was apprehended at Namur, Belgium, on or about 25 March 1945.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court for appearing on public streets without his steel helmet in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the 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 for action pursuant to Article of War 50½.

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

Accused was a member of Company F, 12th Infantry, which on 7 November 1944 moved from Losheimergraben, Germany, to the Hurtgen Forest to relieve elements of the 28th Division. At the time they were in contact with the enemy, receiving interdiction fire while moving up and small arms fire later that afternoon. The company was told "that it would be a tough fight getting out of the forest" and this information was passed on to the men. Accused was present on 6 November 1945 when the entire platoon was oriented as to the plan of attack (R4,5,6,7). It was reported to the first sergeant that accused was absent on 7 November 1944, and although the area was searched he could not be found. He had not been given permission to be absent on that day and he was not given a Paris pass, which was the only type pass being issued by his organization at that time (R7). It was stipulated by the prosecution, defense counsel and the accused that he was apprehended at Brussels, Belgium, on or about 18 December 1944 (R8).

Company F, 12th Infantry was engaged in an attack on a hill near Fuhren, Luxembourg on 22 January 1945, and was receiving both artillery and tank fire from the enemy. Accused was present during the early part of that day but after the attack he could not be found. He was not on a Paris pass at the time and he had not been given permission to be absent (R8,9). It was stipulated by the prosecution, defense counsel and the accused that he was apprehended at Namur, Belgium, on or about 25 March 1945 (R9). A duly

authenticated extract copy of the morning reports of accused's organization was received in evidence showing that accused commenced an absence without leave on 7 November 1944 was returned to duty on 22 January 1945 and again was absent without leave the same day (R5; Pros.Ex.A).

4. Accused, after his rights as a witness were fully explained to him (R10), elected to remain silent and no evidence was introduced in his behalf.

5. Accused's absence without leave, on the dates alleged in both specifications, was established by the uncontradicted entries in his company's morning reports. Substantial evidence was introduced showing that on both days that he left his organization, it was in contact with the enemy and was receiving artillery, tank and small arms fire. With reference to the first offense, accused had been oriented on the day preceding his absence as to the nature of the combat situation and, as to the second offense, it was established that he was present during the early part of 22 January 1945. Under these circumstances, the court was fully warranted in inferring that on both occasions, he left his organization with the intent to avoid hazardous duty. Hence, there is substantial evidence of all the elements of the offenses charged in both specifications and the findings of the court are approved (MCM, 1928, par.130a, p.142; AW 28; CM ETO 9469, Alvarez).

6. The charge sheet shows that accused is 19 years of age and was inducted 12 November 1943 at Detroit, Michigan. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). 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

(ON LEAVE) _____ Judge Advocate

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

BOARD OF REVIEW NO. 1

28 SEP 1945

CM ETO 13767

U N I T E D S T A T E S	)	83RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Harzburg, Germany, 18 May 1945.
Staff Sergeant RICHARD ALLEN (31043028), Reconnaissance Company, 643rd Tank Destroyer Battalion	)	Sentence: Confinement at hard labor for six months (suspended) and forfeiture of $35.00 per month for a like period.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Staff Sergeant Richard Allen, Reconnaissance Company, 643d Tank Destroyer Battalion, did, at Eickendorf, Germany, on or about 17 April 1945, wrongfully and by putting her in fear, induce Frau Gertrud Probst, a German civilian, to have sexual intercourse with him.

He pleaded not guilty to and was found guilty of the Charge and its Specification, except the words, "and by putting her in fear, induce" and "to have sexual intercourse with him", substituting therefor the words "fraternize with" and "by having sexual intercourse with her" respectively. No

evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The court unanimously concurred in a recommendation for clemency to the reviewing authority in view of the excellent record of accused as a soldier during combat. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for six months and forfeiture of $35.00 per month for a like period, and ordered the sentence executed as approved, but suspended the execution thereof insofar as it related to confinement. The proceedings were published in General Court-Martial Orders Number 62, Headquarters 83rd Infantry Division, APO 83, U. S. Army, 17 June 1945.

3. A detailed review of the facts is not essential to this opinion. The one essential fact, established by undisputed evidence, is that accused had sexual intercourse with a German woman (R8,25,26,29). There was some evidence of force or putting in fear, but the court by its finding determined that there was no want of consent.

4. It is alleged in the Specification that accused did

> "wrongfully and by putting her in fear, induce * * * a German civilian, to have sexual intercourse with him".

It is unnecessary to decide the doubtful question whether these allegations, if proved, would provide the elements of the offense of rape in violation of Article of War 92 (MCM, 1928, par.148b, p.165). The offense of which he was found guilty was that of fraternization with a German civilian by having intercourse with her, a contravention of directive "Policy, Relations between Allied Occupying Forces and Inhabitants of Germany" (12 Sept. 1944, Supreme Headquarters, Allied Expeditionary Forces).

The finding of guilty of an offense other than that charged should be sustained if the latter was a lesser included offense of the former (MCM, 1928, par.78c, p.65). It is established that voluntary intercourse, which the court found to have been here entered into, is certainly "familiarity and intimacy" and is sufficient in and of itself to constitute the offense of fraternization (CM ETO 14182, Malott et al;CM ETO 10419, Blankenship). The instant Specification is not inherently incompatible with and includes the lesser offense of fraternization with a German civilian by voluntary sexual intercourse with her. In the Malott case, Zapata, one of the accused, was charged with rape and fraternization. His sole association with any German civilian lay in his acts of intercourse with a German woman. It was stated that had the acts of intercourse been involuntary on her part he could not have been guilty of fraternization, but that since the court in finding him not guilty of the rape charge established such acts as voluntary, the fraternization conviction was upheld. So here, the court in its findings established the intercourse as voluntary.

5. The charge sheet shows that accused is 29 years six months of age and was inducted 25 March 1941 to serve for the duration of the war plus six months. He had no prior service.

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

7. The maximum penalty for wrongful fraternization with German civilians by an enlisted man is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (CM ETO 6203, Mistretta; CM ETO 9301, Flackman).

Wm. F. Rumor Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Cowell Judge Advocate

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

BOARD OF REVIEW NO. 3

5 NOV 1945

CM ETO 13778

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v	)	Trial by GCM, convened at Augsburg
	)	Germany, 10 May 1945. Sentence:
Private JAMES S NORDIKE	)	Dishonorable discharge, total forfeitures
(32904495), Battery C,	)	and confinement at hard labor for life.
686th FA Battalion	)	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 on the following charges and specifications:

CHARGE I: Violation of the 61st Article of War

Specification: In that Private James S. Nordike, Battery "C", Six Hundred Eighty-Six Field Artillery Battalion, did, without proper leave, absent himself from his organization at Worms, Germany from about 1500 hours, 27 March 1945 to about 2200 hours 28 March 1945.

CHARGE II: Violation of the 92nd Article of War

Specification: In that * * * did, at Heppenheim, Germany on or about 28 March 1945, forcibly and feloniously against her will, have carnal knowledge of Mrs Anna Lahr.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by

special court-martial for absence without leave for six days in violation of Article of War 61. Three-forths 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, Pennyslvania, 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:

Specification, Charge I

On 27 March 1945, Battery C, 686th Field Artillery Battalion, was located in Worms, Germany, engaged in the mission of supporting certain infantry units then in the process of effecting a crossing of the Rhine (R5,10,32). Accused, a negro member of the fifth section, Battery C, was seen at a formation held in the battery area at about 1000 hours on 27 March but could not be found a short time later, despite a search of the entire battery area, when his section chief looked for him to notify him that he was one of two men detailed to remain behind to guard certain ammunition whilethe battery moved to a more advanced position (R6,7,9). The second man detailed as ammunition guard testified that he saw accused ride away from the battery area on a motorcycle shortly after the formation was dismissed (R10). When the battery was preparing to pull out at about 1430 or 1500 hours that afternoon, it was necessary to detail a third man to take accused's place because of his continued absence (R7,8,11). A short time later, after the battery had moved out, accused's section chief checked all the vehicles in the convoy in an effort to locate accused but his search again proved unsuccessful (R6,7). He did not thereafter see accused until about 7 April (R8). One of the men who remained in Worms to guard the ammunition testified that accused did not return to this location on 27 or 28 March (R10,11). To the best of his section chief's knowledge and belief, accused had no permission to be absent during this period (R8).

On cross examination, accused's battery commander testified that the accused had served with the battery during combat, was a good worker, did his job as well as he could, and had caused no difficulty in the battery prior to 27 March (R33). His section chief testified that he was a very good worker and, to his knowledge, had never before been in trouble within the battery (R9).

Specification, Charge II

On 28 March 1945, Frau Anna Lahr, a married woman with two children five and ten years of age, resided in an apartment in a "five-family"

dwelling in Heppenheim, Germany, (R11, 12,14,15). The first or ground floor of the building was used as a restaurant, Frau Lahr's apartment was on the second floor as was that of the landlady, Frau Tusch, and, apparently, that of a man named "Arnold", while the third floor was occuped by a Frau Roschlock and a Frau Lutz (R14, 16,19,20). Four American soldiers had slept in the apartment house on the night of 27 March and American military personnel had been seen in a garage adjoining the house during the following day(R12).

Frau Lahr retired for the night at about 2000 hours on 28 March and was awakened some time later by a knock at the door. When she went to the window and asked, "Who's there", she heard someone say, "Open" (R12). She then "knocked for my neighbor and the landlady" and, receiving a response from one of them and thinking they would follow her, went down stairs and opened the door. When she did so a colored American soldier (the accused), who had a carbine slung on his shoulder and a bayonet "in the shoe", entered and lit a candle. After lighting the candle, he pointed to a door leading into the basement of the house and indicated to Frau Lahr that she should open it (R13,15,23). Thinking that the soldier was "looking for something", she did so and preceded him down into the cellar. The cellar was apparently divided into several compartments each of which was allotted to a specific tenant and the portion of the cellar assigned to Frau Lahr was apparently beyond and "around the corner" from the space allotted to the landlady, Frau Tusch. Upon reaching Frau Lahr's portion of the cellar accused tried the door and found it locked. She volunteered to get the key but accused, indicating that this would not be necessary, came to her and touched her on the shoulder (R15). When he did so, she "jerked back" and the two then returned to Frau Tusch's portion of the cellar, which contained a sofa and a refrigerator. There accused put the candle on the refrigerator and indicated to the prosecutrix that she should remove her dress and lie down on the sofa. While the exact sequence of the events which then took place is not entirely clear from the record it appears that at this time Frau Lahr refused to remove her dress, walked to the foot of the basement stairs, and "went three steps upstairs * * * and cried for Arnold" (16). She noted that the door at the top of the stairs was open at the time (R17). Accused said, "Nix", and, when he indicated by gestures that she should return to the cellar, she complied (R16,17). Either at this time or immediately before she had partially ascended the stairs, he asked her in German whether she liked him and, in the words of Frau Lahr, "I was frightened and said 'Yes'" (R16,23). He also asked her where her husband was and she told him he was in Russia (R16,17,23). He then again told her to remove her clothes, at the same time unbuttoning his trousers and taking out his penis (R16, 17,18). Frau Lahr testified that at this time his carbine was leaning against the refrigerator and his bayonet was still in his boot (R17). When she shook her head in the negative he again told her to disrobe, and "in fright", she removed all her clothing except an undershirt (R17). When asked why she did this, she answered, "Because he had

prepared himself and I knew what he wanted". When further asked whether she removed her clothing willingly, she replied "If I had not started, I would not have taken off my clothes, I refused twice" (R18). After she disrobed, accused by gestures indicated to her that she should lie down on the sofa. She said "No" but when he repeated his direction she did so because she was frightened - "he had his carbine with him and I was afraid he would shoot" (R18). Thereupon accused got on top of her and attempted to insert his penis into her vagina. He did not succeed in his first attempt and requested her assistance. Asked, "Did you insert his penis in you female organ with your hand?", she replied, "No; not the first time, At the second time he said I should do it". (R19). Accused then had sexual intercourse with her for a period of about five minutes (R17-19). Because of her fear, she did not tell him to stop nor attempt to push him away from her further,

> "I was so excited that I could not weep. I could not scream because he wouldn't let me. Besides, nobody would have heard it from the basement" (R19).

When asked whether she engaged in sexual intercourse voluntarily, she stated,

> "If he had not said so I would not have. * * * If he had not started I would not have engaged voluntarily" (R19).

While accused was in the house, he did not threaten her at any time (R23).

When the act of intercourse was completed, he asked the prosecutrix if she had another bed and the two then went upstairs where he entered her apartment. In the meantime, she "knocked for Frau Tusch and for Arnold". When neither of these two responded, she quickly ran upstairs and "knocked for" Frau Roschlock and Frau Lutz and was admitted into the latter's apartment. A moment or two later, the prosecutrix heard accused knocking at the doors outside and heard Frau Roschlock calling for help. However, she remained in Frau Lutz' room until accused left the house (R19,21). She saw accused later that evening, some time after 2200 hours, when he was brought back to the house by other American military personnel. She was examined by an American medical officer that night at about 2300 hours (R21,22).

Frau Lutz testified that at about 2130 hours on 28 March some one came to her door and rang the bell. When she opened her door, she saw the prosecutrix standing outside the door and a colored soldier ascending the stairs with a candle in his hand. She recognized this soldier as the accused because she had seen him around the premises "the whole day". When Frau Lutz opened the door, the prosecutrix entered quickly and Frau Lutz then closed and locked the door. When the prosecutrix entered she was crying and she was "very excited" (R26,27,29). Frau Lutz later heard accused knocking on Frau Roschlock's door with the butt of his rifle and saying "Monsieur, wine" (R28). She next saw him at about 2300 hours when he was brought back to the house by American military police (R28).

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The medical officer who examined the prosecutrix at about midnight that night testified that his examination revealed no marks of violence on her body but did show redness in the cervix and a small laceration near the opening into the vagina. Presence of live spermatozoa in the vagina indicated that she had had sexual intercourse within the past two days. The prosecutrix was "moderately excited" at the time of the examination. He also noted "she was pregnant approximately three and a half months" (R24, 25).

4. Accused, after having been advised of his rights as a witness, elected to remain silent and no evidence was introduced on his behalf.

5. a. Charge I and Specification

The record of trial clearly supports the court's finding that accused absented himself without leave from his organization from about 1500 hours on 27 March 1945 to about 2200 hours on 28 March 1945, as alleged in the Specification of Charge I.

b. Charge II and Specification.

From the evidence introduced in support of Charge II and Specification, the court clearly could find that accused had sexual intercourse with Frau Lahr at the time and place alleged. There also is substantial evidence to the effect that such sexual intercourse was without Frau Lahr's consent. This being true, and since the Manual for Courts-Martial provides that the force involved in the act of penetration is alone sufficient to constitute carnal knowledge rape in cases where there is in fact no consent, it might be thought that no further inquiry into the legal sufficiency of the instant record of trial is necessary.

However, the statement in the Manual that while force and want of consent are indispensable in rape the force involved in the act of penetration is alone sufficient where there is in fact no consent cannot be accepted entirely without qualification. It is, of course, an accurate statement of the law as applied to cases where, for example, the woman, by reason of low mentality or unconsciousness is incapable of consenting and the accused, knowing this fact, none the less proceeds to have intercourse with her. (Mills v. United States, 164 U.S. 644, 17 S. Ct. 210, 41 L. Ed. 584 (1897); 44 Am. Jur. sec. 11, pp. 908, 909). However, where a woman is in possession of her normal faculties, and, although subjectively not consenting, none the less fails to manifest that lack of consent to the accused, the mere fact that he proceeds to have intercourse with her will not constitute his act that of rape, even though there has been both penetration and want of consent (Mills v. United

States supra). This is true because in cases like that last mentioned, the basic underlying element of mens rea or guilty knowledge on the part of the accused is lacking andhis act thereforeis not a criminal one. As more specificly applied to the crime of rape.

> "The true rulemust 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, * * * /and/ the guilt of the accused must depend on the circumstances as they appear to him". (Wharton's Criminal Law, (12th Ed, 1932) sec. 701, p 943, ftnote 9). "Consent may be express or implied. A man will be justified in assuming the existence of consent if the conduct of the prosecutrix toward him at the time of the occurrence is of such a nature as to create in his mind an honest and reasonable belief that she has consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of thismeasure is insufficient to overcome the implication of consent. In the ordinary case, when the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. And the rule of law is well settled that although a woman objects verbally to the act of intercourse, yet if she by her conduct consents to it, the act is not rape in the man" (44 Am. Jur., sec. 12, p. 909).

The case of CM ETO 9301, Flackman, illustrates the principle just mentioned. In that case the evidence showed that at midnight of the same day American troops first entered the town of Homberg, Germany, the accused approached the prosecutrix in an air raid shelter and by means of gestures directed her to come with him. She accompanied him from the shelter, walked beside him along a dark street and followed him into the bedroom of an unoccupied house. He left her there alone for a few moments but she made no attempt to leave. When he returnedto the room a short time later and directed her to remove her clothing, she began to weep, but because she was afraid that accused might harm heror her parents, complied with his directions. Accused thenhad intercourse with herdespite her efforts to push him away and her insistence that she wanted to go home. Although accused had his pistol in his hand during part of the time he was with the prosecutrix, hedid not use it in a threatening manner nor did he strike her or lay hands on her at any time. The Board of Review held that, under the circumstances shown,

> "The most that her weeping and mild protestations, delayed until then, could have reasonably charged him with notice of, was the reluctance of the consent which her /previous/ docility seemed to demonstrate".

that her conduct was not such as to lead accused to believe that their intercourse was without her reluctant consent and that the evidence accordingly was not legally sufficient to support the court's finding that he was guilty of rape.

In CM ETO 10700, Smalls, accused was charged with two acts of rape, one occurring at about 2300 hours at night and the other occurring at about 0330 hours the following morning. The evidence relating to the first act charged showed that at about 2300 hours on the night of the second day American troops occuped the town of Kempen, Germany accused and a companion entered the prosecutrix' bedroom and that, upon entering, either the accused or his companion pointed a carbine at her. When the men entered, the prosecutrix screamed for her father but accused's companion refused to let him enter the room. Thereafter, both men in turn had intercourse with the prosecutrix, during the acts of intercourse, the prosecutrix offered little resistance because, due to German propanda, she believed that resistance would mean her death. However, she did make verbal protestations and attempted to push accused away. After the acts of intercourse at about 2300 hours, accused's companion left but accused remained in the house. From 2300 hours to about 0330 hours the prosecutrix conversed amicably with him, gave him coffee and otherwise tried to be friendly with him in an effort to distract him from his announced purpose of having intercourse with her again prior to his departure. However, at about0330 hours, when accused became especially insistent, the prosecutrix complied with his directions to lie down upon a mattress and permitted him to have intercourse with her without further protest. She was, however, unwilling to engage in the act and submitted only because of her previous exposure to German propaganda to the effect that any one who resisted the Americans would bekilled. With reference to the first act of intercourse the Board of Review held, Sherman, Judge Advocate, dissenting, that the evidence was legally sufficient to support the conviction of rape. It was unanimously held, however, that the record of trial was legally insufficient to support a conviction of rape based upon the second act of intercourse. In so holding the Board said:

> "It is probable that the prosecutrix also did not consent to the second act of intercourse but again submitted only because she thought resistance was not only useless but might result in her death at the hands of the accused. However, since accused was not shown to have had any knowledge of the misconceptions entertained by the prosecutrix as the result of German propaganda, her friendly behaviour toward him in the interval between the two acts of intercourse and the virtual absence of any resistance on her part when he ultimately insisted that she again have intercourse might easily have led him to the conclusion that she was reluctantly consenting to his demands, a

> conclusion for which there was no legitmate basis at the time of the first intercourse. The record fails to show that his conduct was especially threatening on this occasion. * * * his act in having intercourse with the prosecutrix under these circumstances cannot be said to constitute rape. The finding of guilty of Specification 2, Charge I, is accordingly not sustained (Cf CM ETO 9301, Flackman, supra; Mills v U.S., 164 U.S. 644, 41 L. Ed. 584; 44 Am Jur, sec 12, p. 909)".

In CM ETO 10446, Ward and Sharer, the evidence showed that the two accused entered a German home armed with carbines which were, however, slung at the time. After the men entered the house, Ward went into a room where the prosecutrix and other members of the household were congregated and directed her by means of gestures to come outside of the room. She complied and with his gestured directions to accompany him upstairs and into one of the upstairs bedrooms. Sharer also ascended the stairs at this time. The prosecutrix, who was nineteen years of age, unmarried, and a virgin, testified that Ward then indicated that she should sit on the bed, where, after first speaking with Sharer, he proceeded to undress her. Meanwhile Sharer remained outside the room with his weapon. The prosecutrix did not attempt to oppose Ward's action in undressing her because she was in fear and because it "was only the second day after the occupation of the Americans". After undressing the prosecutrix, Ward also undressed and started to engage in intercourse with her. The act hurt her and she began to cry and shook her head in the negative. When he completed the act of intercourse he left the room and called Sharer. Sharer then entered the room, put down his rifle, and also had intercourse with her. Neither accused pointed a gun at the prosecutrix directly or struck her in any way. Primarily on the basis of CM ETO 9301, Flackman, supra, the Board of Review held the record legally insufficient to support the courts' findings that the accused were guilty of rape.

Whether a given act of intercourse was accomplished by force and without the consent of the prosecutrix are, of course, essentially questions of fact for the court (CM ETO 8837, Wilson). In the normal case of the type here under consideration these two elements of the crime of rape are adequately proved. The Board of Review has recognized that in the unsettled conditions which prevail during and at the close of a successful campaign, American soldiers must have been aware that their status as armed members of a conquering force gave added weight to their demands for intercourse and increased the fear and apprehension in which their victims were placed. Under these circumstances it has been held that threats which might be considered relatively minor in another setting took on such proportions as to constitute an act of intercourse accomplished thereby rape (see CM ETO 10700, Smalls; CM ETO 12329, Slawkawski; CM ETO 14875, Swain). It has also been recognized that under the conditions mentioned the resistance demanded of

the prosecutrix both as showing her subjective lack of consent and as manifesting that lack of consent to the accused need not be as vigorous as that demanded under the more settled conditions of peace. Under these circumstances, it is easy to understand why the victim, even though not consenting, may offer little resistanceand, in the usual case of this type, even slight resistance is sufficient to put accused on notice that he is not accomplishing a seduction (Smalls, supra; Slawkawski, supra; CM ETO 15620, Eagans and Copeland).

Notwithstanding the foregoing, the Board of Review is of the opinion that the instant case follows the pattern of the Flackman, Smalls, and Ward and Sharer cases, supra, and the evidence is legally insufficient to support a conviction of rape. While it is probably true that subjectively the prosecutrix did not consent to the intercourse shown, it is concluded that her resistance was not sufficient to manifest that lack of consent to the accused. It is true that at one time she "jerked back" when he touched her on the shoulder, that she made verbal protestations against disrobing and lying down, and that at one time she partially ascended the stairs leading from the basement to call for her neighbor. However, she immediately desisted from this latter activity when directed to do so by the accused and returned to the cellar even though she was part way up the stairs and knew that the doorway at the top of the stairs was open at the time. Despite her verbal protestations, she did in fact comply with comparative docility with accused's directions to disrobe and to lie down on the sofa and it is a fair inference from her testimony that, far from attempting to protest or push him away when he attempted intercourse, she actually aided him in inserting his penis into her vagina. Previously, during conversation with the accused, she had told him she liked him. Aside from the act of intercourse itself accused did not physically mistreat her and she expressly admitted that he did not threaten her at any time. She was a mature woman, old enough to have a child ten years of age, and, even under the circumstances shown, her failure to oppose the carnal act more vigorously justified that accused in assuming that she consented, even though reluctantly, to his demands. This being true, and in view of the authorities cited above, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification.

6. The charge sheet shows that accused is 20 years six months of age and was inducted 8 May 1943. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted above, 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

insufficient to support the findings of guilty of Charge II and its Specification but legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.

8. Confinement in a penitentiary is not authorized for the offense of absence without leave in violation of Article of War 61 (CM ETO 2829, Newton).

(ON LEAVE) Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Leary Jr. Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

6 JUL 1945

CM ETO 13812

UNITED STATES v. Private STANLEY A. HOWE (32799840), Company B, 103rd Engineer Combat Battalion	28TH INFANTRY DIVISION Trial by GCM, convened at Landstuhl, Germany, 2,9 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. With respect to Specification2, Charge II, it was alleged that accused broke and entered the "dwelling of Frau Paula Hack". The evidence showed that the dwelling house was owned by Frau Anna Prester. Frau Hack was an evacuee guest (R39, 42,43). According to the modern rule this variance does not affect the merits of the case and is non-prejudicial (9 Am.Jur. sec.54, p.269). However, there is evidence that Frau Hack was more than a guest, invitee or lodger and that her rooms were in truth a permanent place of abode (R26,30,43). Under such construction of the evidence the allegations of the Specification were proved (2 Wharton's Criminal Law - 12th Ed. sec.1001, p.1295).

_____ Judge Advocate

13812

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

10 SEP 1945

CM ETO 13814

UNITED STATES	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class BENJAMIN M. KARNEY (36198920), Company C, 318th Infantry	)	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Benjamin M. Karney, Company C, 318th Infantry, did, in the vicinity of Biesdorf, Rheinprovinz, Germany, on or about 11 February 1945, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty to-wit: Participation in operations against an enemy of the United States and did remain absent in desertion until he was apprehended by Military Authorities, Nancy, France, on or about 25 March 1945.

He pleaded not guilty and, all 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 an absence without leave from 6 April 1943 to 20 July 1944 in violation of Article of War 61. Three-fourths of the members 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 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 under Article of War 50½.

3. Evidence for the prosecution:

The accused on 10 February 1945 was the assistant squad leader (R7) of a squad in Company C, 318th Infantry, which was engaged in the maneuver of effecting a crossing of the Sauer River (R12) under enemy shell fire near Biesdorf, Germany (R7,10,12,13). During the evening and the following day, the company suffered casualties to the extent of 50 to 60 per cent (R12).

After the crossing was effected a check was taken of the men. The accused was missing. He was last seen with the squad during its first attempt to get down to the river (R8,10,12). He was returned to military control on 25 March 1945 (R14). He was at first entered in the morning report as missing in action but later this was corrected to read from "duty to AWOL" (R10,13).

4. The accused, after his rights as a witness were fully explained to him, elected to testify in his own behalf. He told of his numerous physical and mental ailments during his life and his family troubles, (R16-19). On cross examination, he stated that he had gone through an attack late in January in Luxembourg that had made him nervous and upset. He was made assistant squad leader (R19). In response to questioning by the court, he related that he took part in the attack across the Sauer River. They were heavily shelled. "The shells were coming in so heavy I don't know just what happened". He just could not walk anymore. He was alone and for several days walked through woods and joined at intervals different military outfits until he got to Metz. He tried to get to Luxembourg but was unable to do so. He finally caught a truck ride to Nancy and later turned in to the military police (R20-21). In the opinion of the neuropsychiatrist of the 80th Division, who examined the accused on 2 June 1945, accused is sane. His intelligence was a little above average, but he is a "strange, odd individual * * * high-strung, excitable - very moody - very pessimistic. * * * a chronic worryer * * * depressed * * * suicidal ideas". He was hospitalized twice because of his nervous condition, once in civil life when 17 years of age, and once in the army for two weeks in Camp Shelby when worrying about his wife and home. He is an "odd, moody, unstable individual - a life-long pattern of that type" (R15).

5. The evidence shows that the accused absented himself without leave from his organization at a time when it was actually engaged in combat with the enemy. He was absent 45 days. The court could properly infer from these facts that he intended to avoid the hazardous duty of

participating in operations against the enemy at the time and place and in the manner alleged in the specification. The findings of guilty are therefore legally supported by the evidence.

6. The charge sheet shows the accused to be 30 years and six months of age. Without prior service, he was inducted 16 May 1942.

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

8. 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

[signature] Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 3 15 Sep. 1945

CM ETO 13818

U N I T E D S T A T E S	10TH ARMORED DIVISION
v.	Trial by GCM, convened at Garmisch-Partenkirchen, Germany, 19 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private EUGENE VILLANTI (12028310), Service Company, 20th Armored Infantry Battalion	

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

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

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

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

Specification 1: In that Private Eugene Villanti, Service Company then assigned to Battalion Headquarters, 20th Armored Infantry Battalion did, at Bastogne, Belgium on or about 24 December 1944 desert the service of the United States, and did remain absent in desertion until he surrendered himself at Bastogne, Belgium on or about 1100, 6 January 1945.

Specification 2: In that * * * did, at Bastogne, Belgium on or about 1600 6 January 1945 desert the service of the United States and did remain absent in desertion until he surrended himself at Trier, Germany on or about 10 March 1945.

Specification 3: In that * * * did, at Trier, Germany on or about 10 March 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Bastogne, Belgium on or about 2200 10 April 1945.

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

Specification: In that * * * did, at Trier, Germany on or about 10 March 1945, feloniously take, steal, and carry away a U.S. Automatic Pistol Caliber 45 No. 15023 of the value of about $30.00, property, of the United States furnished and intended for the military service thereof.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence of two previous convictions by courts-martial was read to the court but the evidence thereof is not appended to the record of trial as stated therein. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

a. Charge I and specifications.

Introduced into evidence without objection were duly authenticated extract copies of company morning reports for 12 January and 30 May 1945 (R6-7; Pros. Ex. 1-4). Accused was not present with his company from 24 December 1944 to 10 April 1945 (R7,13) and, so far as was known to the company commander, did not have permission to be absent (R8).

Accused was a member of Service Company on special duty with the wire crew of battalion headquarters (R6,9,12-13). On 24 December 1944 battalion headquarters was at Bastogne and the company was in the vicinity thereof but there were no communications between the two (R8). At the time "there was quite a bit of confusion" in the general status of the war. A witness testified, "The night of the bombing the hospital at Bastogne was hit and everything was torn up the next day. The CP had to be moved that night because it was hit close by". Accused was "about four

buildings away" from this bombing (R11). First Sergeant Arthur C. Hancock, Company C, 20th Armored Infantry Battalion, testified that on 24 December 1944 he was Sergeant Major and the wire crew was under his jurisdiction. When "Sergeant George", the sergeant "in charge of the wire crew" reported accused was not present for duty "we checked the different hospitals to see if he was wounded and we couldn't get a record of him so we picked him up as AWOL" (R9).

Accused's company commander testified that on 24 December 1944 accused was reported as missing "from his place of duty"(R6). The company morning report for 30 May 1945 cancels entry of 4 January 1945 showing "MIA Belgium 24 Dec 44 * * * dropped from rolls" and shows accused from "Dy to AWOL 24 December * * * " (Pros.Es.I). Sergeant Hancock further testified he next saw accused sometime later when accused was walking down the street and this Sergeant /George/ brought him into the CP". Asked if 6 January was the date, the witness replied "Yes, I believe that was the date". While accused told the adjutant he had been in Bastogne during the interim, he was not, according to Sergeant Hancock, present at the organization (R9). The company commander testified that a few days later Sergeant Hancock reported accused's return (R6-7). Morning report for 30 May 1945 cancels entry of 7 January 1945 showing accused "from MIA * * * to dy 6 Jan 45" and shows accused from "AWOL to dy 1100 6 Jan 45" (Pros.Exs.1,2).

According to Sergeant Hancock, when accused returned about 6 January 1945, the adjutant told him not to leave the area unless told to do so by the adjutant or the witness. That afternoon Sergeant George reported accused was absent and was told to look for him. Accused could not be found (R9-10). The company commander testified that some days later Sergeant Hancock reported that accused was absent (R6-7). Morning report for 12 January 1945 shows accused from "dy to AWOL 6 Jan 45 1600" (Pros. Ex.3). Sergeant Hancock next heard of accused when he was reported to have been picked up by Military police. "The first time I seen the man again was when we were on the move. * * * He had been back sometime before that" (R10-11).

First Lieutenant William B. Koon, Military Police platoon, 10th Armored Division, testified that he saw accused on 10 March 1945 at Trier, Germany, when the Provost Marshal asked him to find a place for accused to sleep. He turned accused over to Private First Class Charles Caruso, Military Police Platoon, 10th Armored Division. Later he learned that accused had been turned over to the Provost Marshal by the VI Corps "MP's" (R17-18).

Morning report for 30 May 1945 cancelled entry of 21 April 1945 showing accused from "AWOL to duty 1600 17 Apr 45" and shows, inter alia, accused from "AWOL to absent hands mil auth 10 Mar 45 time unknown" (Pros. Exs.2,4).

Caruso testified that on or about 10 March 1945, Lieutenant Koon asked him to find a place for accused to sleep. He took accused to his quarters and had him sleep in another bed in his room. The next morning accused departed, saying he was going to breakfast. The accused did not return and was not seen by Caruso until 16 April 1945 (R15-16). Lt. Koon further testified he next saw accused 16 April 1945 when he was turned over by military police of another unit as having been apprehended (R18-19). Accused was brought by an officer to Service Company on 24 April 1945 (R13). Morning report for 30 May 1945 cancelled entry of 17 April 1945 showing accused from "AWOL to duty 16 00 17 Apr 45" and shows accused, inter alia, "from absent hands mil auth to AWOL 10 Mar 45 time unknown" and from "AWOL to absent hands mil auth 10 Apr 45 * * *" (Pros. Exs.2,4). Introduced into evidence without objection was a delinquency report of Company A, 713th MP Battalion, dated 11 April 1945, showing that accused was apprehended at Bastogne 10 April 1945 and that he stated he had been "AWOL from his organization at Trier, Germany on or about 4 March 45" (Pros.Ex.5).

b. Charge II and Specification.

On or about 10 March 1945, after accused left Caruso's room to go to breakfast, Caruso discovered his gun, "a .45 automatic" numbered 15023, missing (R15-16). When accused was next seen by Caruso and Koon on 16 April 1945 he had the gun on his person (R16,18-19). The weapon was not issued to Caruso by his supply sergeant. "It was given to me by a Lieutenant in the Ordnance". Asked "Is that gun your property", Caruso replied, "Yes, sir". When then asked, "You say it was issued by an Ordnance officer", Caruso said, "It wasn't issued. The lieutenant told me I could use that instead of my carbine. I broke seven stocks on my carbine. He had this one in excess. He was going to turn it into salvage and I got it instead of the carbine". The lieutenant was an ordnance officer but not of that division (R16-17).

c. Generally.

Accused's first sergeant stated that accused had been with the organization during combat and "acted like a soldier". Since his return he had been on duty and his non-commissioned officers had made no complaints (R13-14).

4. After his rights as a witness were explained to him, accused elected to remain silent (R26-27).

The mess sergeant testified that in combat accused would go into "nysterics" but since the cessation of combat had been "a number one soldier" (R22-23). A cook testified that he had known accused since April and he couldn't ask anybody for a better soldier. During combat accused acted "scared but we all acted scared". He further testified that accused had nightmares (R25-26), which was confirmed by the testimony of a private (R23-24).

5. a. For the purpose of this holding it is not necessary to consider the competency of the morning report for 12 January and 30 May 1945 and the delinquency report of 11 April 1945, for accused's unauthorized absences were established independently thereof by competent oral testimony.

b. Charge I and specifications.

Accused's initial absence began on 24 December 1944 at Bastogne when and where "there was quite a bit of confusion" in the general status of the war. No doubt, accused was charged with notice thereof for "the night of the bombing the hospital at Bastogne was hit" and accused was "about four buildings away" from the bombing. Moreover, while it does not appear of record, on 24 December 1944 von Runstedt's offensive which isolated American units in Bastogne, was in its eighth day and this fact is "of sufficient importance, moment and notoriety that the Board of Review may take judicial notice thereof" (CM ETO 6934 Carlson). Thus, independently of accused's other unauthorized absences, the record would support the finding of guilty of Specification 1, for although the specification alleged "straight" desertion, it was permissible to prove "short" (AW 28) desertion thereunder (CM 245568, III Bull. JAG 142). Though accused stated upon his return on 6 January 1945 that he had remained in Bastogne all the while, the evidence discloses he was not with either the battalion wire crew, which was his place of duty, or with his company.

Within a few hours after his return on 6 January 1945, accused again absented himself without leave, notwithstanding having been told not to leave without the permission of the adjutant or the sergeant-major. While the date of termination of accused's second unauthorized absence does not appear (other than from evidence whose competency it is not necessary to determine), his unauthorized absence was committed when he absented himself (CM NATO 1087, III Bull. JAG 9). It does, however, appear from competent evidence that accused was in the custody of military police on 10 March 1945 and that the next morning, while still in

custody, he again absented himself without leave. And while the date of accused's third unauthorized absence does not appear (other than from evidence whose competency it is not here necessary to determine), it does appear that on 16 April 1945 accused was again in custody of the military police. Accused's three unauthorized absences formed a pattern of conduct from which the court could infer an intent to desert. Substantial evidence supports the findings of guilty of Charge I and its specifications (Cf: CM ETO 7379, Keiser; dist. CM ETO 5234, Stubinski and CM ETO 5593, Jarvis).

c. Charge II and specification.

From the evidence the court was justified in finding that accused did at the time and place alleged, feloniously take, steal and carry away, the pistol alleged (CM 108998, 122216, 122458, Dig. Op. JAG, 1912-40, sec. 451(37), p. 323). The evidence warranted the inference that the pistol was the property of the United States furnished and intended for the military service thereof (MCM 1928, par. 150i, p. 185). There was no proof of the value of the pistol.

> "The standard of value of Government articles of a distinctive character made especially for use in the military service and not having a market value in their manufactured form, such as Army overcoats, is the replacement cost, evidenced by a published price list made a subject of judicial notice by paragraph 125, MCM" (CM 194353, Dig. Op. JAG 1912-40, sec. 452 (14), pp. 338-339).

It cannot be said that a government pistol does not have a market value. To ascribe to the pistol in question its price list or alleged value would be to ignore the evidence that it was to be turned in for salvage. Though judicial notice of Army price lists has been held to preclude the possibility that a usable jeep had a value less than $50.00 (CM ETO 7000, Skinner), it does not preclude the possibility that the pistol in question, usable but ready to salvage, had a value less than $20.00. The pistol was before the court, and the court could infer it had some value (CM 199285, Dig. Op. JAG, 1912-40, sec.451 (42), p. 326). The Board of Review is, therefore, of the opinion the record of trial will support only so much of the finding of guilty of Charge II and Specification as involves a finding that accused did, at the time and place alleged, feloniously take, steal, and carry away the alleged pistol of some value not in excess of $20.00, property of the United States and furnished and intended as alleged.

6. The charge sheet shows that accused is 25 years eight months of age and that he enlisted, without prior service, 11 Jun 1941.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein before noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and specifications, so much of the findings of guilty of Charge II and Specification as involves findings that accused did, at the time and place alleged, feloniously take, steal, and carry away the alleged pistol of some value not in excess of $20.00, property of the United States and furnished and intended as alleged, and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-marital 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, par. 1b(4), 3c).

/S/ Benjamin R. Sleeper Judge Advocate

/S/ Malcolm C. Sherman Judge Advocate

/S/ B. H. Dewey, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 13824

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates WILBERT JOHNSON (38377936) and BENNIE YOUNG (34534450), both of 217th Port Company, 386th Port Battalion, and Private O. D. BAILEY (37403294), 3862nd Quartermaster Truck Company	Trial by GCM, convened at Rouen, Seine-Inferieure, France, 11 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Wilbert Johnson, Private Bennie Young, both of 217th Port Company, 386th Port Battalion (TC), and Private O. D. Bailey, 3862nd Quartermaster Truck Company, TC, acting jointly, and in pursuance of a common intent, did, at or near Elbeuf, Seine Inferieure, France, on or about 10 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Jacquelin Piedleu.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the votes were taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced against Johnson. Evidence was introduced of one previous conviction against Young by summary court for absence without leave for five hours in violation of Article of War 61, and of one previous conviction against Bailey by summary court for speeding in violation of Article of War 96. Three-fourths of the members of the court present at the times 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 term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence established the following facts:

The prosecutrix, Mademoiselle Jacquelin Piedleu, aged 18, her cousin, Pierre Piedleu, aged 17 years six months, and a friend Jean Lefebvre, aged 17, were returning home from a dance about 0200 hours 10 May 1945. Three negro soldiers, the accused, in a truck, accosted them and by a misrepresentation that they were going to take them to the French police, induced them to get into the truck. They were then driven to an isolated spot where Lefebvre and Pierre Piedleu were forced to dismount. The prosecutrix thought there were four negroes in the truck but other testimony including the admissions of the accused was that there were only three. She was physically held on the truck and when Lefebvre attempted to remain with her, he was knocked down and kicked. When she refused to engage in sexual intercourse, one of the negroes made a gesture with his hand across his throat. The truck was then driven into a field. She was forcibly removed therefrom, pushed to the ground, a helmet was put over her face and her pants were removed. She could not get away because they held her by the arms. She was then subjected to four acts of sexual intercourse. Three men had intercourse with her. A "pain" in her throat prevented her from screaming. The prosecutrix was probably a virgin prior to this incident. Medical examination disclosed that her vagina was inflamed and had hemorrhagic clots in it.

4. Each accused elected to make an unsworn statement incorporating by reference their extrajudicial statements. In his extrajudicial statement, Bailey admitted driving the truck, with the other two accused as passengers, picking up the girl and her companions, and driving the truck into the field. He stated, however, that he remained in the truck while the two accused with him took the girl out into the field.

He claimed that he thought they were talking to her about taking her to the French police (R48,49,55;Pros.Exs.A and B).

In his extra-judicial statement, Young admitted his presence at the scene of the alleged offenses and the fact that they had difficulty in persuading the prosecutrix' companions to leave the truck. He claimed that she was a prostitute and that he paid her fifty francs for having sexual intercourse with her (R51,55;Pros.Ex.C).

Johnson similarly admitted his presence and claimed that she was a prostitute. He gave her 50 francs and two cigarettes for engaging in sexual intercourse with her (R53,55;Pros.Ex.D).

5. The record thus discloses substantial evidence that each accused raped the prosecutrix as alleged. Under our decisions the credibility of the witnesses and the weight to be given their testimony were for the court's determination (CM ETO 895, Davis et al; CM ETO 11376, Longie; CM ETO 12180, Everett; CM ETO 14564, Anthony and Arnold). Although the prosecutrix was unable to identify her assailants, this was accomplished by the extra-judicial statements of accused which were properly admitted in evidence (CM ETO 14040, McCreary). Manifestly, the court was not required to believe Bailey's assertion that he remained in the truck, thinking that the two other soldiers were merely talking to the prosecutrix for one-half hour at 2 am in the morning in an isolated field, particularly in view of the prosecutrix' testimony that three men raped her. The record is legally sufficient to support the findings of guilty and the sentences. While three persons cannot be jointly guilty of perpetrating a single joint rape, the joinder here, in view of the evidence showing concerted action, was not prejudicial (CM ETO 10857, Welch and Dollar; CM ETO 10871, Stevenson and Stuart; CM ETO 14596, Bradford et al; CM NATO 643 (1943); CM NATO 1121 (1944); III Bull.JAG,p.61,62).

6. The charge sheet shows that accused Johnson is 22 years 10 months of age and was inducted 4 January 1943 at Camp Beauregard, Louisiana; that accused Young is 23 years three months old and was inducted 6 December 1942 at Camp Blanding, Florida; and that accused Bailey is 24 years nine months of age and was inducted 12 December 1942 at Jefferson Barracks, Missouri. Each accused was inducted to serve for the duration of the war plus six months. None of accused had prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized

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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. F. Swinson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

Branch Office of The Judge Advocate General
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European Theater
APO 887

BOARD OF REVIEW NO. 3 3 AUG 1945

CM ETO 13896

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 45, U. S. Army, 9 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates ROBERT F. NADLER (42103274) and ROBERT E. BEARD (36695828), both of Company K, 179th Infantry	)	

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

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

2. Accused were arraigned separately and tried together, each upon an identical (save for their respective names) Charge and Specification as follows:

CHARGE: Violation of the 58th Article of War.

Specification: In that * * * did, at or near Althorn, France, on or about 15 January 1945, desert the service of the United States and did remain absent in desertion until he returned to military control on or about 25 May 1945.

Each 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 preferred against him. As to Nadler, evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. As to Beard, no evidence of previous convictions was introduced. Three-

fourths of the members present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. As to each, 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 for prosecution:

South of Althorn, France, on or about 15 January 1945 when accused's company was poised to attack, the enemy countered with an artillery and mortar barrage. When the barrage lifted accused had disappeared (R5-8). Duly authenticated extracts of properly signed company morning reports for 17 January and 26 May 1945, introduced without objection, respectively show accused from duty to absent without leave as of 15 January 1945 and from absent without leave to confinement as of 25 May 1945 (R5; Pros.Ex.A,B).

Each accused made a voluntary statement to the investigating officer (R9-10). According to the investigating officer,

> /Nadler/ "said that the company had made a long march and during that time he fell behind and lost his glasses. He reported to the medics and was told it would be about 10 days before he could get new ones. He reported back to the company and the cold weather made his eyes water. This barrage came in and it was too much for him and he took off. He said he knew he did wrong and should have stayed up there" (R9).

In his written statement, Beard stated:

> "On the 15th day of Jan; 1945, I was a member of Co K, 179th Inf. when it moved into position in preparation for making an attack through I Co. Before K Co. jumped off the enemy threw in a terrific mortar and artillery barrage. I don't know why but I lost my head and took off. I guess I was scared. Prior to this time I had been to the medics for trouble with my head and stomach. The medical officer did not help me but sent me back saying I was alright. I still have headaches which last four or five days" (Pros.Ex.C).

4. No evidence was presented for the defense. After his rights as a witness were explained to him, each accused elected to remain silent.

5. Substantial evidence supports the findings. Each accused admitted initial absence without leave to avoid hazardous duty (CM ETO 3062, Osther). Moreover, the absence in each instance was sufficiently prolonged and unexplained to support an inference of intent not to return. (CM ETO 7633, Williams).

6. The charge sheets show that Nadler is 25 years of age and was inducted, without prior service, 31 December 1943 at Newark, New Jersey; and that Beard is 28 years of age and was inducted, without prior service, 30 September 1943 at Chicago, Illinois.

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

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, is authorized (AW 24, Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. E. Lavey Jr. Judge Advocate

Branch Office of The Judge Advocate General
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APO 887

BOARD OF REVIEW NO. 2

7 SEP 1945

CM ETO 13897

U N I T E D S T A T E S	84th INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Prymont, Germany, 4 June, 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private EARNEST L. CUFFEE (33639210), 3455th Quartermaster Truck Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Earnest L. Cuffee, 3455th Quartermaster Truck Company, did, at or near Buckeburg, Germany, on or about 28 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Annemarie Meier.

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 summary court for absence without leave for nine days in violation of Article of War 61. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor 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. Evidence for the Prosecution: The accused, a negro soldier, entered the home of a German civilian in Poggenhagen, Germany, between 10 and 11 o'clock on the evening of 28 April 1945, after requesting a place to sleep for the night. A bed was prepared for him by the civilian's daughter and the accused indicated by motions that he wanted her to sleep with him. She ran out of the house. The accused picked up his rifle and went to the next door house and knocked (R7-13). He was admitted by the mother of Annemarie Meier who lived there with her mother and brother. The family went to a bedroom upstairs with the accused to prepare it for him to sleep. When they were ready to return downstairs, the accused blocked the path of 17-year-old Annemarie and with his pointed rifle indicated that the others should go downstairs (R18,25-27). They departed. The accused closed the door and went over to Annemarie, who had sat upon the bed and started to cry. He pointed his rifle at her with one hand and with the other laid her down on her back on the bed. He then placed the rifle on the bed alongside, got on top of Annemarie and had sexual intercourse with her three different times during the following 45 minutes. She started to resist several times but when she did he struck her severely in the face with his hand three times (R28-30). She had never had intercourse before and it gave her considerable pain (R28,31). The doctor who examined her the following day corroborated the fact that her hymen had been recently ruptured (R22-24). She left the room after the third time and went to a neighbor's house (R31).

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

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The uncontradicted evidence clearly shows that the accused did at the time and place alleged in the Specification engage in sexual intercourse with Annemarie Meier and that he used sufficient force to effect a penetration of her genitals. The only question for discussion concerns the element of consent.

Regardless of how reluctant consent is given, consent negatives rape. If a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent. If a woman's failure to resist is induced by fear of death or great bodily harm, it is not necessary to prove resistance. Thus, in the case under discussion, the court could properly and legally infer that Annemarie did not more strongly resist the accused's advances and his act of penetration by reason of the fear that he engendered in her when he pointed his rifle at her and laid it down alongside of him on the bed. All of the elements of crime being

sustained by competent substantial evidence, the findings of guilty will not be disturbed (CM ETO 10742, Byrd).

6. The charge sheet shows the accused to be 22 years and one month of age. He was inducted into the service on 28 May 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 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,par.1b(4),3b).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

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BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 13898

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Pyrmont, Germany, 5 June 1945.
Private HERMAN L. JAY (34420662), Battery C, 430th Anti-Aircraft Artillery Automatic Weapons Battalion (Mobile)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Herman L. Jay, Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion, Mobile, did, at Afferde, Stadt Kreis of Hameln, Province of Hannover, Germany, on or about 24 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Anneliese Sievers.

CHARGE II: Violation of the 64th Article of War.
Nolle Prosequi
Specification 1: Nolle Prosequi
Specification 2: Nolle Prosequi

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

previous conviction by special court-martial for being drunk and disorderly in uniform, in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution:

During the afternoon of 24 April 1945 the accused, driving a motor vehicle with a Polish soldier as a passenger, stopped in front of the home of Anneliese Sievers, a 17 year old German girl, in Afferde, near Hameln, Germany. She and her mother were in the garden. The soldiers asked for water. The mother procured a glass of water and handed it to them, and then walked away. The Pole asked for another glass of water. Anneliese fetched it. The accused took it and threw the glass against the house and then struck her several times over the head, took out a pistol and directed her in the house (R6-7). The mother witnessed the episode and went for help (R21). Inside the house they met an old woman whom the accused struck on the head twice with the flat side of the pistol in his hand and told the Pole to lock her up (R8). The Pole locked her in the pantry from which she subsequently escaped (R17). With pistol in hand the accused directed Anneliese up the stairs where another old woman was living. The latter unlocked her door and accused ordered her downstairs and then locked the door with Anneliese inside. He then took down her pants and threw her on the bed, removed his belt and helmet, put the pistol inside of his jacket or shirt (R14) and had sexual intercourse with her. She did not resist in any way because she was afraid that he might shoot her. She was previously a virgin (R9). She understood that the word "rape" meant sexual intercourse by force against the will of somebody else. The accused "raped" her (R8,10). She submitted only because of fear. She did not cooperate but remained "perfectly quiet and passive". She "had never done that sort of thing and I didn't know what to do". She could not recall whether she kissed him or not (R14,42). After a while he got up and with pistol again in hand ordered her to remove all her clothing, which she did because of her fear (R8-9,14). The accused did not remove his clothing. He only opened "both pairs of pants" (R9). Two officers responding to a call for assistance knocked on the door which accused opened. They apprehended him (R9). The bed was "messed up" and had blood stains. The girl was "upset"—she had been crying. Accused was drunk (R29). An examination made by a physician about one hour after the above described occurrence disclosed that Anneliese's hymen was torn, "acute trauma to fourchette in form of two mucosal tears presenting fresh blood" and "a few spermatoza" present (R30-31).

4. The accused, after his rights as a witness were explained to him, elected to testify in his own behalf. He related that he and the Polish soldier stopped at the Sievers' house for some water. He followed Anneliese into the house for the water. She asked him for some chocolate which he gave her. He asked her to go to bed with him. She was at first afraid of her mother but after being assured that her mother had gone led him upstairs into a bed room, removed all of her clothes and got into the bed. He removed his belt which carried a holster in which was his pistol. There was no lock on the door so he removed the pistol from the holster and put it in the pocket of his field jacket in case of any interruption. He then got in the bed and had sexual intercourse with the girl who said it was nice and hugged and kissed him (R32-33). He just got through when two American officers came in. He backed into a corner and drew his pistol--he claimed, to put in his field jacket pocket. He was immediately knocked out by two blows on the head. He was drunk at the time (R37).

5. The accused has been found guilty of committing rape upon Anneliese Sievers. Rape is defined as the unlawful carnal knowledge of a woman by force and without her 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 of the prosecution clearly establishes that the accused had "carnal knowledge" of the female named in the specification at the time and place alleged therein without her consent and by force. It was not necessary to show resistance on her part under the circumstances. In lieu thereof it was clearly shown that by a display of brutality and the threat of using a deadly weapon the accused engendered in his victim such fear of death or great bodily harm as to rob her of her power to resist. She elected to be raped rather than be shot and the accused who forced that election upon her cannot complain. The prosecution's evidence therefore legally sustains the findings of guilt. The accused denied that he used force to obtain sexual intercourse with the girl. He claimed that she voluntarily submitted and cooperated with him. His defense raised a factual question which was within the exclusive province of the court to determine. It has determined it against the accused and its decision will not be disturbed by the Board upon review (CM ETO 4194, Scott; CM ETO 10742, Byrd).

6. The charge sheet shows the accused to be 23 years and 11 months of age. He was inducted without prior service, at Camp Shelby, Mississippi, 27 August 1942.

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

8. 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 (AW 42; CIR.229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

Judge Advocate

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APO 887

BOARD OF REVIEW NO. 2

12 JUL 1945

CM ETO 13956

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bamberg, Germany, 14 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ENRICO H. DEPERO (13178052), attached unassigned, 352nd Reinforcement Company, 72nd Reinforcement Battalion	)	

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

1. The record of trial 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 Enrico H. Depero, attached-unassigned, 352d Reinforcement Company, 72d Reinforcement Battalion, did, at or near Amigny Rouy, France, on or about 14 September 1944 desert the service of the United States, and remain absent in desertion until he was apprehended at or near Paris, France on or about 28 April 1945.

He pleaded not guilty to the Specification, but guilty of absence without leave, and to the Charge, not guilty of a violation of Article of War 58 but guilty of a violation of Article of War 61. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of the Specification except

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the words "Amigny Rouy", "apprehended", "Paris", and "28 April", substituting therefor the words respectively "Melun", "did surrender himself", "Etamps" and "17 April", of the excepted words not guilty of the substituted words guilty and guilty of the Charge. No evidence was introduced of previous convictions. 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 pursuant to Article of War 50½.

3. As part of the prosecution's evidence a stipulation was entered into by the prosecution, accused and defense, expressly agreed to by accused in court, that if Captain David L. Dickinson, 352nd Reinforcement Company, 72nd Reinforcement Battalion, were present he would testify that he is the commanding officer of above named company and custodian of its morning reports and that Exhibit A is a true extract copy of that part of the morning report of the company for the dates indicated relating to accused. It shows accused as "fr. Dy. to AWOL 0600 14 Sept.44"; "24 December 1944", accused dropped from the Army rolls (R4). The accused was identified as the soldier accused, and it was stipulated in open court that his organization was located near Melun, France, on or about 14 September 1944, and that he surrendered himself to military authority at Etamps, France, on or about 17 April 1945 (R5).

4. On being advised of his rights as a witness, accused elected to remain silent.

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

Both elements are essential to the offense. Absence without leave is usually proved, prima facie, by entries on the morning report. Here accused has admitted such absence for the period charged by his plea of guilty to such absence, denying only the intent not to return. Intent to remain permanently absent may be properly inferred by the court if the condition of absence without leave is much prolonged and there is no satisfactory explanation of it or that while absent he was in the neighborhood of military posts and did not surrender to the military authorities. The longer the absence, the stronger, in general, is the presumption of the intent to remain permanently absent and unless admitted by accused, such intent is only proveable by presumptions and inferences arising from the circumstances shown to have existed. Accused was absent approximately seven and a half months, the absence was unauthorized and unexplained and terminated at approximately the same time as active hostilities.

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The court could take judicial notice that it occurred in a country where war was being actively waged and which was dotted with military establishments where accused could have surrendered had he so desired. Under the circumstances, his prolonged and unexplained absence raises a strong presumption that when he left or at some time during his absence he entertained the intent not to return to his place of duty and the court was well justified in so finding (CM ETO 1629, O'Donnell; CM ETO 11173, Jenkins).

6. The charge sheet shows accused to be 19 years, six months of age. Without prior service he enlisted on 16 February 1943 at Philadelphia, 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 desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). 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

(ON LEAVE) _____ Judge Advocate

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BOARD OF REVIEW NO. 3

14 JUL 1945

CM ETO 13961

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Hagenau, France, 26 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private PETER J. DeCARLO (32991119), Company B, 22nd Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Peter J. DeCarlo, Company "B", 22nd Infantry, did, in the vicinity of North East Paris, France, on or about 1400, 28 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: offensive action against the enemy, and did remain absent in desertion until apprehended at Gare du Nord, Paris, France on or about 1500 26 January 1945.

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 Specification, except for the words "North East", and of the Charge. 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 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, by morning report entries dated respectively 12 October 1944 and 14 February 1945, that accused was absent without leave from 28 August 1944 to 26 January 1945 (R7; Pros.Ex.A).

Sergeant Ernest Jackson, Company B, 22nd Infantry, the only witness, testified that he and accused were both riflemen and that they were members of the same squad for about 15 days prior to 28 August 1944. The last time he saw accused was about the 14th day of August (R4-5), at a time when the company was "out more or less in the country". Between the middle of August and 17 November, when Jackson left the company, accused did not return to his squad (R5). When Jackson first noticed accused's absence, they were "more or less in a rest area", and Jackson had no information as to where they were going or what the next action would be (R6). Toward the end of August 1944, accused's organization spent about three days in the city of Paris, but accused was not present in his squad or in his company when they entered Paris (R5). After leaving Paris, the company followed the enemy "on towards Germany * * * until we hit the Siegfried line * * * about the 12th day of September", when they proceeded to attack the line itself, and thereafter, in November, encountered enemy machine gun nests in the Hurtgen Forest (R5-6).

4. No evidence was presented by the defense, and accused, after his rights were explained to him, elected to remain silent (R7).

5. The Specification alleges that accused deserted the service "by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: offensive action against the enemy".

> "In order to justify an inference that the absence was designed to avoid hazardous duty, there must be substantial evidence that such duty was known to be impending and that accused was aware of it (CM ETO 455, Nigg; CM ETO 1921, King; CM ETO 5958, Perry and Allen). Moreover,

the intent to avoid hazardous duty must concur in time with the quitting of accused's organization or place of duty (CM ETO 5958, Perry and Allen" (CM ETO 8700, Straub).

In the instant case, the prosecution adduced testimony to show that accused left his company when it was in a rest area somewhere in the country, that thereafter it spent three days in Paris and that at least one member of his squad, who was also the only witness in the case, had no information or knowledge as to where they were going or what their next action would be. There is no evidence whatsoever tending to show that accused had any notice or knowledge of impending hazardous duty at the time he absented himself without leave. It is true the morning report shows his absence to have been initiated on 28 August instead of "about the 14th" of the same month, but the conclusive effect of the prosecution's testimony as a whole is to indicate initial absence on or about the earlier date. Testimony that thereafter accused's organization proceeded to Paris, thence "following" the enemy to the Siegfried Line and later engaged them in the Hurtgen Forest while accused remained absent without leave, is no proof of knowledge or notice to him at the time of his departure, of hazardous duty impending, or that his going absent without leave was with intent to avoid it. Had desertion been charged in general terms, the duration of the unauthorized absence and its termination by apprehension would have been circumstances highly relevant to an issue, which was eliminated by the language of the specification in this case, viz., intent not to return. The record of trial is legally sufficient to support only so much of the conviction as involves absence without leave.

6. The charge sheet shows that accused is 20 years four months of age and that he was inducted at New York City 16 August 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 sufficient to support only so much of the findings of guilty as involves findings that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until apprehended at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

8. 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).

B R Keefer Judge Advocate

Malcolm C. Sherman Judge Advocate

E. L. Levy Jr Judge Advocate

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BOARD OF REVIEW NO. 3

5 SEP 1945

CM ETO 14032

U N I T E D S T A T E S	70TH INFANTRY DIVISION
v.	Trial by GCM, convened at Mudershausen, Germany, 5,7,9,11 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates ROY E. ANDREWS (17111629) and CHARLIE M. HATHCOCK (34446789), both of 271st Ordnance Medium Maintenance Company	

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:

ANDREWS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Roy E. Andrews, 271 Ordnance Medium Maintenance Company, did, at Mudershausen, Germany, on or about 30 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Paula Kranz.

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

Specification: In that * * * did, at Mudershausen, Germany, on or about 30 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Paula Kranz by placing his penis in her mouth.

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(156) HATHCOCK

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charlie M. Hathcock, 271 Ordnance Medium Maintenance Company, did, at Mudershausen, Germany on or about 30 March 1945 forcibly and feloniously against her will, have carnal knowledge of Paula Kranz.

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

Specification: In that * * * did at Mudershausen, Germany, on or about 30 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Paula Kranz by placing his penis in her mouth.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, was found guilty of the charges and specifications against him. No evidence of previous convictions was introduced. 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 term of his natural life. The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 2200 hours on 30 March 1945, Karl Friedrich, his wife and two children, his mother, and his sister, prosecutrix Paula Kranz, aged 34, and her two children, had all retired to bed in their residence in Mudershausen, Germany, when Karl heard "banging on the door" and went down and opened it. Both of the accused and another American soldier "came upon" Karl with their rifles and asked if German soldiers were in the house. They went through and searched all the rooms of the house, keeping a rifle in Karl's back. Then they asked for wine, and when Karl said he had none, Andrews "drove" him into the cellar where Karl gave him two bottles. All three soldiers then went into the kitchen, "stood their rifles in the corner", and "sat down at the table in a friendly fashion and drank the wine" and talked with Karl, his wife, and Paula and her

children for about two hours (R8-10,15-19,36,93,97-102).

Shortly before midnight, the third soldier became drunk and urinated in the hallway, whereupon one accused took him outside and returned without him and laid his weapon on a table. Accused Andrews then "drove" Karl into the cellar with his rifle for another bottle of wine, after which Karl's mother was called into the kitchen to protect the children. Accused both "began to appear so wild and we thought something was going to happen. * * * The large soldier (Andrews) looked wilder everytime the women screamed" (R10-12, 103-104). After about 15 minutes, according to Karl, Andrews

> "said to my sister 'come' and she did not, and again he said 'come' and then grabbed her by the arm and pulled her away from the table. The children hung around the neck of their mother and said 'this is my mother'. The large soldier said 'no' and took his rifle and slapped the children" (R12).

Andrews then, shortly after midnight, took Paula into Karl's bedroom. Soon thereafter she began screaming and continued "every second or so" until 0600 hours the next morning (R12-13). The rest of the family had to go upstairs (R20).

Paula testified that accused Andrews "drove" her from the kitchen "with the rifle to the sleeping room across the hall". He stood in front of her with his rifle and made her undress herself completely, striking her at one time with the rifle. She begged him to stop because she was menstruating and because he had shown her pictures of his wife and children. He then brought Hathcock into the room, talked to him and left the room. Hathcock placed his carbine on a nearby chair. He then came to the bed where she was lying and forced her to put a rubber on his penis, which he then inserted in her vagina. "Because he was so stormy he kept coming out of the vagina", causing her great pain. Then he inserted his penis in her mouth, and afterwards put it in her vagina again. She cried out and "was swooning and incapable of doing anything more to defend myself" (R26-29,105-110).

After Hathcock got up, Andrews came into the room and they talked and smoked cigarettes. Paula fainted and became unconscious, but Andrews shook her and undressed himself, put a rubber on his penis and inserted it into her vagina. He held his hand over her mouth when she tried to cry out and acted as though he was going to stab her with a knife. Then he inserted his penis into her rectum, causing her great pain, so that she could not sit

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for several days thereafter (R29,112-113,117-119). She testified:

> "I was completely exhausted and this pained me very much and I cried. Then he squeezed me by the throat so that I couldn't scream any more. * * * When I didn't do as he wanted me to he had his knife so that I was completely quiet again and then he laid it on the table. I was incapable of doing anything" (R30).

When he threatened to cut her finger off with his knife, she removed her ring and gave it to him. He kept saying, "You are no longer a wife but a woman". When his penis became soft and he could not insert it in her vagina he forced her to take it into her mouth for "two or three minutes" by forcing her head down to it. He had no rubber on and did not have an emission in her mouth. She had never seen or heard of such an act before (R30,114-117).

After Andrews had dressed himself, at about 0430 hours, Hathcock came in again, and after letting her know he had no more rubbers, he attempted without success to insert his penis in her rectum. Then he pulled her up to a sitting position and put his penis into her mouth and kept pulling her head back and forth. She almost vomited several times. Then he attempted to put it into her rectum again. She "kept begging him to have sympathy and leave the house". Andrews came back in the room and returned the ring. Accused went together into the kitchen and talked for some time and then left the house, at about 0600 hours (R30-31,120-122).

Karl testified that shortly after 0600 hours he saw accused leaving the house. Nobody except possibly the children had been asleep. He went downstairs and found Paula lying in bed naked and "practically unconscious", crying loudly. He called his wife and mother and they rubbed Paula with water and vinegar to revive her, thinking she was going to die (R13-14,21).

During her testimony at the trial, Paula cried, shook and showed extreme nervousness (R36,44,45,97,99, 103,104,106,108). The trial was interrupted two times because of her condition (R36,46). She testified that she did not care about the punishment of accused and only wanted protection (R28,46).

It was stipulated that Captain John E. Bohan, Medical Detachment, 10th Ordnance Battalion, if present,

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would testify that at the time he examined prosecutrix, at about 1500 hours on 2 April she was menstruating and was extremely nervous and crying, and complained of pain about her lips and mouth and the back of her neck, although there was no outward sign of injury in such areas. Three contused areas about 1½ inches in diameter were observed on the right leg and one on the right thigh. There was no evidence of recent tears, and the witness could not confirm or deny that she had intercourse on 31 March (R36-37).

4. For the defense, Dr. Alarich Hagena, a German doctor, testified that he examined Paula Kranz about 30 March and found no injury to her vagina. There were scratches around her eyes and face but no noticeable bruises or lacerations on the legs or thighs. She was afflicted with nervous exhaustion (R42-43).

Stipulated testimony of Private Daniel J. Kelly showed that he went with both accused to the German home in search of two members of their company who had broken a restriction, and that they were invited to look through the house. Andrews asked for wine, which was given them, and they sat down and drank and talked with the German family until about 2300 hours, when all three left the house together. Kelly had to go on guard and left both accused going toward their quarters (R46-49).

Stipulations were made as to the testimony of various members of accuseds' company. One guard saw both accused at about 0530 hours on 31 March, at which time they appeared normal except that they had no shirts on and seemed to have been drinking (R50-52). Two other men saw Hathcock in his billet at about 0600 hours on 31 March, before reveille, at which time he appeared as though he had been asleep (R58,59). A section chief saw both accused in bed at about 0600 hours in their billet (R60-61). Another guard woke both accused at about 0700 hours on 31 March for breakfast (R54). Two non-commissioned officers stated that Hathcock was a good worker and one of the "finest" and best men in the organization (R57-58, 59-60). Both the first sergeant and a section chief stated that both accused were very efficient workers, with excellent records, and that neither had ever had company punishment or extra duty while with the company (R60-62).

Each accused, after his rights were explained to him, elected to testify (R63,81). Andrews testified that he is 31 years old, married and has three children, and lives in Iowa. He enlisted 20 August 1942 in the army and was promoted to staff sergeant in January 1944 (R63-64). Hathcock testified that he is 24 years old and unmarried. He was with the "C.C.C." for 27 months prior to joining the army on 12 October 1942, where he

attained the rank of Technician Fourth Grade (R81-82). Both accused testified, corroborating each other generally, that after entering the town during the late afternoon of 30 March they joined most of the company in a drinking party held in their billet. At about 2130 hours they went with Private Kelly through two German homes in search of two other soldiers of their company. In the second house, Andrews asked for wine or cognac, which was freely given them, and they sat down together and drank and talked with the residents of the house, by using two English-German phrase books. They left about 2330 or 2400 hours and went back to their quarters, deliberately avoiding the guards. Neither had intercourse with Paula Kranz, and both were in their billet at all times between 2330 and 0600 hours (R64-81,82-92).

5. The testimony of prosecutrix, which is in part strongly corroborated by that of her brother and by competent medical testimony, clearly shows that each accused had carnal knowledge of her and committed the crime of sodomy per os with her at the time and place alleged in the specifications. Her testimony is sufficient to show that the carnal knowledge was accomplished by each accused without her consent and either by actual force and violence or by putting her in fear of death or serious bodily injury (CM ETO 3933, Ferguson et al; CM ETO 3740, Sanders et al; CM ETO 12472, Syacsure; CM ETO 13476, Givens). There being substantial evidence that the offenses of rape and sodomy were committed, the findings of the court cannot be disturbed (CM ETO 10715, Goynes; CM ETO 10841, Utsey).

6. The charge sheets show that accused Andrews is 31 years eight months of age and had prior service in the Iowa National Guard from 15 August 1931 to 27 January 1933 and from 16 April 1935 to 18 February 1937. He enlisted 20 August 1942 at Des Moines, Iowa. Accused Hathcock is 24 years six months of age and was inducted 12 October 1942 at Albany, Georgia. No prior service is shown as to Hathcock.

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 United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278

and 330, Federal Criminal Code (18 USCA 457,567), and upon conviction of sodomy by Article of War 42 and section 22-107, District of Columbia Code (CM ETO 3717, Farrington, and authorities therein cited). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Dewey Jr Judge Advocate

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with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

CM ETO 14040

18 AUG 1945

UNITED STATES	)	5TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Mulhausen, Germany, 19 May 1945.
	)	
Private JOHN McCREARY (35667107), Battery A, 71st Armored Field Artillery Battalion	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John (NMI) McCreary, Battery A, Seventy First Armored Field Artillery Battalion, did, at Westphalia, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Lena Landwehr.

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 "did, at Westphalia" substituting therefor, respectively, the words, "did, at Erlinghausen, Westphalia," of the excepted words not guilty, of the substituted words guilty and guilty

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

3. On 4 April 1945, the 71st Armored Field Artillery Battalion was located a short distance from an inhabited community in Westphalia, Germany (R7). Around 5:30 o'clock, that afternoon, accused and Private Albert A. Adams, at least one of whom was armed, left the battalion bivouac area and went into the town proper professedly in search of German soldiers (R34,3637). They entered a house where they found an elderly man, two women, and a girl (R37). According to Private Adams, accused and the younger of the two women went into a room together, while he and the remaining occupants stayed in the hall. When accused came out of the room, Adams went in and found the woman lying on the bed, with "half a smile on her face", her dress "up" and her "pants" off. After Private Adams came out of the room accused went in again (R36-38).

About 7 o'clock the same evening First Lieutenant Paul H. McWain, reconnaissance officer of accused's battery, made an inspection of houses in the community looking for German soldiers and firearms. He entered a house whose number he described as "330 Whelan" and there saw accused and an old man. He asked accused whathe was doing and the latter replied, "Just looking for German soldiers". After ordering accused to return to the battery area, Lieutenant McWain noticed Private Adams coming out of an adjoining room. When asked to explain his presence in the house, Private Adams gave the same reply as accused. On searching the adjoining room, Lieutenant McWain saw a woman lying on her back in bed with her dress up between her knees and her hips. There was a bottle of liquor of some sort on a table (R6-9).

Herr August Fette testified that he occupied a house at 330 Eidinghausen Strasse, Eidinghausen, Province of Westphalia, with his wife, his widowed daughter, Frau Lena Landwehr and a little girl. On 4 April 1945, American troops captured Eidinghausen. About 4:30 pm, two American soldiers, of whom he could give only the most meagre description, came to the house in search of German soldiers and firearms. As soon as they saw Frau Landwehr one of the soldiers grasped her by the arm and pulled her into a room while the other stood guard with a rifle over the remaining occupants of the house (R14-20).

Frau Landwehr testified that the soldier threw her on a bed in the room and made her remove her "pants". Following is her testimony as to the succeeding events:

"Q. Describe what took place.

A. He tried to make penetration but he did not succeed because my vagina was too small.

Q. Did he get his penis part way into your body?

A. Only a little way. It didn't go in far.

* * *

Q. Are you certain it went in a little way?

A. Yes. It hurt but I can't swear to it. I do notwant to swear to it. I can't say that while I am under oath (R29).

* * *

Q. Do you thoroughly understand what constitutes the act of intercourse?

A. Yes. After all, I was married.

Q. Then if an act of intercourse were committed on you, would you not know it?

A. Yes, but if you don't mind --

Court member: Let that question go unanswered" (R32).

This soldier remained in the room for about 20 minutes to one-half hour, during which time, according to Fette's testimony, Frau Landwehr could be heard screaming and moaning (R17). On the other hand, she denied screaming for help (R30). After some conversation between the two soldiers they exchanged places, the first soldier taking the rifle and standing guard (R17,29). As to this incident, Frau Landwehr testified as follows:

"Q. Did the second man achieve penetration?

A. Yes a little, but not all the way.

Q. Describe what you call penetration. How far; show me by your finger, did you think that your vagina was penetrated?

A. That I do not know. I can't swear to it. I was so excited that I can't swear to it. Don't force me to swear to it" (R31).

After a short interval the second soldier left the room and the first returned (R17,30). As to his actions this time, she testified:

"Q. Did this first soldier who came in the room; did he achieve penetration the second time he came in?

A. I can't swear to this. It hurt a lot but I can't swear that he penetrated" (R30).

Again, after a brief period, the first soldier left the room and his companion came in (R17). More than once she tried to get up from the bed, particularly when the soldiers changed place, but each time she was thrown back on it (R29,30). The affair was finally interrupted by the appearance of an officer who in searching the house for German soldiers and firearms discovered the two soldiers and Frau Landwehr (R17,33).

On 6 April, Frau Landwehr was examined by Captain Lynn C. Fredrikson, an American medical officer. He testified that at the time of the examination she was hysterical and that it took about five minutes to pacify her sufficiently so that an examination could be made. He found no evidence that she had been subjected to physical violence. A vaginal examination was not made because the prosecutrix had been married and the doctor did not have a microscope (R12-14).

First Lieutenant Peter J. O'Neil of the Military Police Platoon, Headquarters, 5th Armored Division, testified that on 7 April 1945, he interviewed accused at a house numbered 330 where Frau Lena Landwehr lived. After a full explanation of accused's rights under Article of War 24, Lieutenant O'Neil wrote accused's statement and passed it to a clerk (presumably to have it typewritten). The witness re-read the statement and gave it to accused who read it, said that it was his statement, and signed it (R21-23,25). Following is Lieutenant O'Neil's testimony as to accused's statement (R24):

"A. The accused stated to me on the 7th of April that he and another man by the name of Adams had, on the night of 4 April 1945 between the hours of 1800 and 1900, left their Battery area and walked up the street. This was the town of Eidinghausen, and they walked through the back door of one of the farm houses and there were two (2) girls in the farm house, which was a combination farm and house. * * *

A. The accused said that he asked one of the girls in German, 'will you zig-zig', translated, "will you fuck'. One of the girls left immediately.

> He grabbed hold of the girl's arm and took her down to one of the bedrooms and then into the bedroom and he said he motioned to her to take off her pants and she refused. He then lifted up her dress and motioned her to take off her pants again and she unhooked her stockings from the pants and took them off. He opened his own pants and started fucking, trying to rather, and he went on to say that he had a semi-hard on and couldn't do so good. He kept on trying from ten (10) to 25 minutes and finally he left the room. He said he believed the girl was scared, therefore he went to where his friend was standing in the barn and he stayed out with the civilians. The other man who was outside gave him the gun and he didn't see his friend at all for the next fifteen (15) or twenty (20) minutes. Then Lieutenant McWain came in with Private Rudolph Strommer and his Lieutenant asked him what he was doing and he replied, 'just fucking around'. He was told to return to his Battery area and he left immediately. He said then that he spoke to his friend on the evening before the following morning and he said, 'I guess you know we fucked-up last night'. His friend replied, 'I guess we did'".

He further testified that when Frau Lena Landwehr was brought into the room accused stated that she was the woman with whom he had sexual intercourse (R25-27).

There was considerable evidence as to accused's drunkenness on 4 April 1945. Lieutenant McWain testified that

> "it was very evident that he (accused) had been drinking. He talked very much, not knowing who I was or who he was talking to" (R8).

Private Adams testified accused was "really drunk" (R35). Fette thought that both soldiers "might have been sort of drunk" (R18). Frau Landwehr stated that the soldier who first took her in the room was "high and had a bottle of wine with him which he drank" (R33).

4. Evidence for the defense:

Second Lieutenant Stanley H. Hauenschild testified that on 4 April 1945, at about 4:00 or 5:00 pm he observed accused drinking. He took a bottle from accused who at that time was very drunk (R39,40).

At the request of the defense, the court called Corporal Clarence Morrison as its witness. He testified that he has known accused for from two and one-half to three years and that for the past month he has been writing for him and reading his letters to him. Prior to this time, another member of the Battery did the same thing for accused. On occasions he has been asked by accused to read the notice of details on the bulletin board to him. To the best of witness' knowledge, accused could not read although he could sign his name (R42,43).

It was stipulated by and between the prosecution, defense, and accused that there appears on page 2 of accused's service record the following information:

"Educational Qualifications

Years in Grammar School three (3),
High School zero (0)
College or University zero (0)
Graduate work zero (0)
Specialized in zero (0)" (R39).

This stipulation was offered for the express purpose of impeaching Lieutenant O'Neil. The record does not reveal that it was accepted by the court, but we treat it as if it had been.

5. Rape is the unlawful carnal knowledge of a woman without her consent. Any penetration, however slight, of her genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). Every consent involves submission, but it does not follow that mere submission involves consent (52 CJ, sec.26, p.1017), which, however reluctant, negatives rape. But where the woman is insensible through fright or ceases resistance under fear, gaged by her own capacity, of death or other great harm, the consummated act is rape (1 Wharton's Criminal Law (12th Ed., 1932), sec. 701, p.942).

Accused in his pretrial statement admitted that on the date alleged he, with another soldier, entered a German farmhouse in which he found two girls, and asked one of them in German to "zig-zig". One of the girls immediately left but he grabbed her arm, took her into a bedroom, and motioned for her to take off her pants, whereupon she unhooked her stockings from her pants and took them off. He opened his own pants and "started fucking, trying to rather" for he had a "semi-hard on" and "did not do so good". He continued "trying" for from 10 to 25 minutes and finally left the room. The other soldier, who was outside, then gave him "the gun" (R24,25). Accused told

Lieutenant O'Neil that "the woman in question Frau Landwehr, was the woman with whom he had had sexual intercourse with". The officer then asked him

> "if he had reference to fucking and if he wanted it down as fucking or as sexual intercourse and he said to me that sexual intercourse was the nicer word" (R27).

While accused's statement was reduced to writing, this writing was not introduced in evidence and Lieutenant O'Neil was allowed, without objection, to testify as to its contents as accused recited them to him. This was not the "best evidence", but that rule will not be enforced unless the party against whom the oral evidence is offered interposes timely objection thereto and requires that the written document be produced (MCM, 1928, par.116a, p.118; CM ETO 739, Maxwell; CM ETO 5584, Yancy; CM ETO 8690, Barbin and Ponsiek).

Accused's pretrial statement, whether construed as a confession or as an admission made after the commission of the alleged criminal act, is required to be corroborated by some independent evidence under the generally accepted doctrine recognized in CM ETO 8234, Young et al.

The applicable modes of proof in cases before courts-martial are those prescribed in the Manual for Courts-Martial (AW 38; MCM, 1928, par.111, p.109), which provides that a court may not consider the confession of an accused

> "unless there be in the record other evidence, either direct or circumstantial, that the offense has probably been committed"

and that:

> "This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (Underscoring supplied) (MCM, 1928, par.114a, p.115; Cf. CM ETO 10331, Jones).

Applying this rule to the instant case, the Board of Review is of the opinion that there is sufficient evidence in the record to support accused's pretrial statement, which statement, together with such evidence, is sufficient to sustain the findings of guilty of rape as charged.

The question of intoxication and its effect upon the general criminal intent involved in the offense of rape, were issues of fact for

the sole determination of the court (CM ETO 3859, Watson and Wimberly; CM ETO 12662, McDonald).

6. The court in its findings, in effect, added to the Specification the word "Erlinghausen, Westphalia". Erlinghausen is not mentioned in the record. The community where the prosecutrix lived is described as Eidinghausen, which is situated in Westphalia. The variance, however, is not fatal. It does not change the nature or identity of the offense (MCM, 1928, par.79c; p.65; CM ETO 6767, Reimmiller).

7. The charge sheet shows that accused is 20 years eight months of age and was inducted on 20 October 1942 at Cincinnati, Ohio, 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 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). Since accused's sentence is in excess of ten years, the United States Penitentiary Lewisburg, Pennsylvania, and not the Federal Reformatory, Chillicothe, Ohio, is the proper place of confinement (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3(b) and par.3a, as amended by Cir.25, WD, 22 January 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 5

27 SEP 1945

CM ETO 14047

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates ARTHUR B. LANCASTER (14017932), CORNELIUS SANDERS (14008485), and JACK WALKER (14008926), all of 171st Port Company, 392nd Port Battalion, Transportation Corps	Trial by GCM convened at Rouen, France, 5, 25 April 1945. Sentences: As to WALKER, life sentence disapproved; as to LANCASTER and SANDERS, dishonorable discharge (suspended as to SANDERS), total forfeitures, and confinement at hard labor for life as to LANCASTER and for 20 years as to SANDERS. LANCASTER: United States Penitentiary, Lewisburg, Pennsylvania. SANDERS: Loire Disciplinary Training Center, Le Mans, France.

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS 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 jointly upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Jack Walker, Private Cornelius Sanders and Private Arthur B. Lancaster, all members of the 171 Port Company, Transportation Corps, acting jointly and pursuant to a common intent, did, at Rouen, France, on or about 17 January 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Robert A. Moon, a human being, by shooting him with a rifle.

Each pleaded not guilty and, as to Sanders and Walker two-thirds, and as to Lancaster all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. As to Sanders and Walker three-fourths, and as to Lancaster all of the members of the court present at the time the vote was taken concurring, Sanders and Walker were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life, and Lancaster was sentenced to be hanged by the neck until dead. The reviewing authority disapproved the sentence as to Walker. He approved the sentence as to Sanders, but reduced the period of confinement to 20 years, suspended execution of that portion thereof adjudging dishonorable discharge, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. He approved the sentence imposed on Lancaster and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

The order promulgating the result of the trial of accused Walker and Sanders was published in General Court-Martial Orders No. 336, 6 May 1945, Headquarters, Normandy Base Section, Communications Zone, European Theater of Operations.

3. The evidence shows that on the evening of 17 January 1945, Private Robert A. Moon, deceased, and Private Rayle were drinking in the Petit Cafe at Rouen, France (R8,9). Other people were there, including a woman and a baby (R69). At about 2100 hours the three accused and another soldier named Morrow, all of whom had been drinking at various places during the evening, entered the Petit Cafe and ordered drinks (R8, 22,68). A discussion soon arose between Moon and accused Walker about the former's prowess as a fighter. Walker expressed the opinion that a certain soldier could give him a "good scrap" and perhaps whip him (R9). The argument deteriorated rapdily and Moon struck Walker several times and knocked him down (R9,22). Walker got up saying "I don't want to fight * * * Youre too big" (R22). Someone held Moon back and then in response to a suggestion the three accused and Morrow, with Moon and Rayle close behind them, went outside (R12,14). On the way out Rayle pushed and struck Morrow. "It was a fight", Rayle testified, "and I like to

fight. So I thought I would get in it" (R13). The melee continued outside in the dark for a short time (R15,18). The three accused then left and returned to camp, about a block away (R59,70), Morrow disengaged himself and also left the scene (R22), while Moon and Rayle re-entered the Cafe and resumed drinking (R16).

As they reached their barracks either Lancaster or Sanders said, "Let's go back and help Morrow" (R59). Walker and Sanders testified that they went back to find Morrow (R61,66). Lancaster testified that they knew Morrow was "down there getting beat up and more or less went back to get him" (R70). Lancaster admitted saying, "Let's go clean the joint out", or words to that effect (Pros.Ex.E), and testified that someone urged "Let's get our guns and clean the place out" (R70). Lancaster and Sanders each secured a carbine and ammunition and left for the Cafe. Walker, who was much more intoxicated than his companions (R30), followed them unarmed (R70). As Lancaster went out of the squad room, a witness heard him say, "Let's go get him", and when asked whom he was going to get, he told his interrogator to shut up and that "he didn't want any shit from anyone" (R26).

The three accused returned in front of the Cafe about 15 or 20 minutes after they had left it (R9,15). Morrow was not seen outside, and before the shooting began, accused did not enter the Cafe to see what was going on inside (R61,66). Walker remained across the street and said to the other two, "Shoot it up in the air, if you're going to shoot. You're liable to hit the baby or someone inside" (R61). A soldier inside the Cafe heard a banging on the door, opened it and heard a voice outside say, "Let them have it" (R15,19). He immediately slammed the door shut, shouted "Duck", and crouched behind a table. Moon crouched down in front of the bar about five or six feet from the door. A volley of shots immediately followed and bullets came through the door and windows of the Cafe. One of the bullets penetrated Moon's chest and killed him (R9,15;Pros.Ex.A).

Sanders claimed that he shot twice into the air but did not fire directly at the cafe (R65). Lancaster admitted he fired three or four shots into the door of the Cafe at close range (Pros.Ex.A).

Lancaster then entered the Cafe, shot out the light, overturned the bar and a table, and broke some glasses (Pros.Ex.E). Rayle and another soldier meanwhile scurried out through the rear door and ran to the camp for help (R15).

A camp guard, who reached the scene soon after the shooting, saw the three accused approaching a corner near the Cafe and ordered them to halt. Upon hearing one of them working the bolt of a rifle, he fired over their heads. They stopped. Lancaster and Sanders dropped their rifles on the ground, raised their hands, and all three were taken back to camp (R34-36).

A more detailed statement of the evidence introduced by the prosecution and the defense is set forth in paragraphs 5 and 6 of the review of the Staff Judge Advocate, European Theater of Operations, which is attached to the record of trial.

4. There was no legal justification or excuse for the killing. The requisite malice aforethought is inferable from the expressed purpose for which accused, armed with deadly weapons, returned to the cafe. It is also inferable from the deliberate act of firing bullets indiscriminately into premises which they knew were occupied by a number of persons (CM ETO 7815, Gutierez; CM ETO 8691, Heard).

> "Malice aforethought * * * may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused" (MCM, 1928, par. 148a, pp.163-164).

The homicide in this case cannot be mitigated into manslaughter on the ground that the acts of Lancaster and Sanders were done in the heat of sudden passion. No adequate provocation existed for such passion since neither of them was struck by the deceased or Rayle. Furthermore the shooting occurred about 15 or 20 minutes after the fist-fight had been concluded and after accused had walked to and from camp, a total distance of about two blocks. In the circumstances this constituted a sufficient "cooling" period (CM ETO 11059, Tanner). The degree of intoxication of accused Lancaster and Sanders shown by the evidence was insufficient to raise any issue in this case(CM ETO 12855, Minnick). The fact that Sanders may have fired into the air and not into the Cafe is of no legal consequence since he was a participant in a joint venture with Lancaster and acted in concert with him. It is immaterial which of the participants actually fired the fatal bullet (CM ETO 5764, Lilly; CM ETO 6265, Thurman; CM ETO 7518, Bailey). The findings by the court that both Lancaster and Sanders were guilty of murder, were fully sustained by the evidence. Since the sentence as to accused Walker was disapproved by the reviewing authority, the evidence against him need not be considered.

5. The charge sheet shows that accused Lancaster is 24 years and four months of age, and enlisted 24 August 1940 at Fort McPherson, Georgia; Sanders is 22 years and 11 months of age and enlisted 21 December 1940 at Fort Jackson, South Carolina. Neither had prior service.

6. The court was legally constituted and had jurisdiction of the persons and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences, as to accused Sanders as approved, and as to accused Lancaster as commuted.

7. The penalty for murder 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 section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Lancaster is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

14047

1st Ind.

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

1. In the case of Private ARTHUR B. LANCASTER (14017932), 171st Port Company, 392nd Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14047. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14047).

(14047/6)

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

(As to accused Lancaster, sentence as commuted ordered executed. GCMO 516, USFET, 30 Oct 1945).

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

BOARD OF REVIEW NO. 2

25 AUG 1945

CM ETO 14048

U N I T E D S T A T E S	) OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private TERRY W. MASON (35507382), Company F, 1313th Engineer General Service Regiment	) Trial by GCM, convened at Reims, France, 13 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. 2
VAN BENSCHOTEN, HEPBURN and MILLER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Terry W. Mason, Company F, 1313th Engineer General Service Regiment, did, at Mailly le Camp, France, on or about 21 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie Moon, a human being by shooting him with a rifle.

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 conviction was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Oise Intermediate Section, Communications Zone, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in this case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 accused and the deceased Private Willie Moon, were privates in Company F, 1313th Engineer Regiment stationed at Mailly le Camp, France, on 20 March 1945, when Moon, unarmed, approached the accused, took the accused's rifle away from him, struck him in the mouth and knocked him down. Accused got up with nose and mouth bleeding. They were quickly separated by others (R7,9-10).

On the following day, 21 Mardh 1945, in Mailly Le Camp, the two were in a detail to guard prisoners of war. Both carried rifles (R13). The detail had fallen out awaiting the arrival of the prisoners. As deceased was standing talking to another soldier with his rifle slung over his shoulder, the accused walked over to them and said, "Now is the time for me to get you", and fired his rifle at Moon from hip position within a distance of a few feet. Moon dropped his rifle and fell backward to the ground. Accused walked away and was disarmed (R13, 18-19,23,29). Moon had his rifle on his shoulder with muzzle up just before he was shot (R19). Moon was taken to an aid station and then to a hospital where he died (R32,34). Guards on "PW"duty are supposed to load their rifles but not to have any shells in the chamber. They are also supposed to keep their pieces locked (R24).

An autopsy disclosed that death was due to the bullet that entered deceased's body at the lower left side of the ribs and came out through the back (R15-16).

4. Defense:

Prior to the incident under discussion, the accused bore an excellent reputation for good behavior and for the performance of his duties (R42,43).

14048

The accused after his rights as a witness were fully explained to him testified that (R45) on 20 March 1945 while accused was guarding 20 prisoners, Moon came over to him, took his rifle and with the butt end knocked him down without provocation. It made his nose bleed and knocked him out (R46-47). Some months previous to that they had had an argument (R47). He left to wash the blood off his face and upon his return Moon was gone. He saw Moon the following day and went over to talk to him. Moon had his back turned, had a rifle and was talking to another soldier. He swung around with the rifle in his hands ready to fire. It was pointed at the accused who "got scared" and fired. Moon fell to the ground. Accused gave his gun to a sergeant and stated he shot deceased (R48-49). Accused admitted that his instructions were not to put a shell in the chamber of his rifle except in case of an emergency. He had however put the shell in the chamber because of some tough prisoners and had taken the safety off at the time he fired at Moon (R51). He denied that he made the remark, "Now is a good time to get you" but stated "I aimed to have a word with him before I shot him". He claimed that he went over to Moon to tell him what kind of a soldier he was for knocking him (the accused) down. Deceased "was reaching for his gun two or three seconds before he fell" and after accused had shot (R52-53).

5. Discussion:

The evidence establishes, and the accused admits, that at the time and place alleged in the specification he intentionally shot and killed Private Willie Moon with a rifle. His defense was that he shot in self-defense. The court has found him guilty of the murder charged.

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 which is likely to produce, and which does produce, death (Underhill, Criminal Evidence, (4th Ed., 1935) sec.557, p.1090). There was, therefore, substantial competent evidence to support a finding of guilty if the accused is not excused in the killing on the grounds of self-defense. To kill another in self-defense is legally excusable.

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his

> own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par.148a, p.163).

The evidence for the prosecution clearly showed that the accused was the aggressor and advanced upon the deceased with a rifle containing a shell in its chamber contrary to instructions; that he had in mind the beating he had received the day before from the deceased; that he expressed his true intentions when he said, "Now is the time for me to get you"; and that he deliberately fired a bullet through the deceased's body with a deadly weapon at close range while the deceased was turning around and had his own rifle slung over his shoulder. Deceased did not reach for his gun as accused testifies, until after he was shot. Accused "aimed to have a word with (deceased) him before I shot him". Such evidence paints a clear picture of murder and not a killing in self-defense. In direct conflict with this evidence, the accused claimed that as the deceased swung around he had his rifle in his hands and pointed it at him and thinking he was going to fire he shot the deceased in self-defense. This conflict of evidence presented an issue of fact which was within the exclusive province of the court to determine. Inasmuch as the court resolved the issue against the accused and its findings are based on substantial evidence in the record, its decision will not be disturbed by the Board upon review (CM ETO 4194, Scott).

6. The charge sheet shows the accused to be 29 years ten months of age. He was inducted 1 September 1942 and assigned to the 1313th Engineer General Service Regiment on 18 January 1944.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The

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

Judge Advocate

Judge Advocate

Judge Advocate

(182)

1st Ind.

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

1. In the case of Private TERRY W. MASON (35507382), Company F, 1313th 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 14048. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14048).

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

(Sentence as commuted ordered executed. GCMO 389, ETO, 10 Sept 1945).

14048

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

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 14053

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Luneville, France, 23 March 1945. Sentence: To be hanged by the neck until dead.
Private ROBERT WRAY (34461589), 3299th Quartermaster Service Company	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Robert (NMI) Wray, 3299 Quartermaster Service Company, did, at Golbey, France on or about 17 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one, Private Billy B. Betts, a human being by shooting him with a pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by summary court, one for wrongfully introducing into camp about five gallons of cognac and other intoxicating liquor in violation of Article of War 96 and one for absence without leave for two hours 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, Seventh United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution is as follows:

On the evening of 17 December 1944, accused asked another soldier if he would lend him a pistol (R26,28). Thereafter at about 1800 hours he was seen with a weapon in his hands that looked like a "P-38" (R32). He went with several other soldiers from his company to the cafe Moderne in Golbey, France (R14,26), which he entered at about 2000 hours (R6,9,10, 14,26). There was no evidence that he had been drinking (R29). He approached a table at which were Private Billy B. Betts (the deceased), Private First Class Victor Piechnik, both of the 568th Quartermaster Railhead Company and two Puerto Rican soldiers, all of whom had been at the cafe drinking since 1800 hours (R18-19). They had had a few beers and wine, but not enough to become drunk. As Piechnik stood by the table picking up francs to pay for some wine he had ordered, accused requested 100 francs.

"I am sorry", said Piechnik, "I don't know you well enough to give you a hundred francs". Accused reached for his hip, pulled out a ".45" and pointed it at him. Piechnik said, "If you want it you can take it all", started backing away and continued backing on out of the cafe. From outside he heard a shot (R12,17-18).

Meanwhile, several unidentified persons had tried to disarm accused (R15), but he went to the door of the cafe, keeping everyone in the place covered with his weapon (R7,8,15,21). Betts approached him "at the normal rate" (R7,15), otherwise described by witnesses as at "a normal walk" (R22), not in an aggressive manner (R16), "he didn't rush on him" (R15), "he was not running" (R16), and attempted either to disarm accused (R8,9,15-16), or to leave the cafe by going out the door before which accused was then standing (R7,11,13). Accused pushed him back with his left hand and, with the pistol in his right hand fired (R7,10,11,15-16,21-22). Betts held himself up on a table, then fell on his back (R12,15,21,23). He looked dead to one witness (R24), another noted he was still "respiring" (R13). He was brought to the 2nd Convalescent Hospital dispensary at 2030 hours the same night. He was dead on arrival "as a result of what appeared to be a bullet wound entering anterior neck and exit posterior left shoulder" (R5,21-22,47-48; Pros.Ex.A).

4. For the defense, accused's section sergeant testified that accused gave him no trouble, that he carried out orders and that his efficiency as a soldier was good (R43). A corporal in accused's section testified that he performed his duty, was always a good worker and always courteous to the superior officers (R47).

After being advised of his rights (R34), accused testified that after he entered the cafe he went behind a partition where the bar was. A Puerto Rican "pulled out a .45" and he took it away from him. They "started an argument from there". The Puerto Rican ran out the door. As "they" all seemed to want to jump on him, accused went to the door (R35), "told them all to stay back and if they didn't I would shoot" (R38) and then

> "one fellow come from behind the partition. he started to the door and I told them all to stay back so I could get out and I hit him with my fist. I shoved him with my hand and as I shoved him I shot him" (R35,40).

Accused had been drinking, having consumed a bottle of "Schnapps", about the size of a coca cola bottle, and "was feeling good" (R35). He had never before seen the man he shot, had no grudge against him and had no thought other than self-protection (R36). When he entered the cafe he had a "P38" with him which he had borrowed (R38) because some fellows had said they were going to "whip my ass" (R39). He

> "just borrowed the gun. I was aiming to go back up the street and get another bottle of Schnapps. That is why I went in this Cafe up there and there was about 15 men in this Cafe. They started mumbling to each other and I left. I went back to camp" (R40).

5. It was conclusively proved that accused shot a soldier in a cafe at Golbey, France, on the evening of 17 December 1944. The witnesses who saw accused shoot the soldier did not know the latter's name, while the witnesses who did know him did not actually see accused fire the shot. However, the circumstantial evidence was too clear and convincing to admit of doubt that the soldier fatally shot was Private Billy B. Betts and that accused did the shooting, as alleged. The record of trial fails to indicate any legal justification or excuse for the killing. There is no evidence that deceased or anyone else in the cafe were armed at the time of the shooting.

Accused's testimony regarding his actions just before he fatally shot deceased appears to be predicated upon a theory of self-

defense: After he entered the cafe he was threatened by a Puerto Rican who "pulled out a .45". Accused took the weapon away from him and the man ran out the door. It was then that "they" all seemed to want to jump on accused, who went to the door and "told them all to stay back and if they didn't I would shoot" (R38). When deceased thereafter approached him he shot him. He had never seem deceased before and had no thought other than self-protection (R36).

The prosecution's evidence showed that accused was armed with a pistol when he entered the cafe and that it was he who "pulled out a .45" after he had asked Piechnik, then in the company of deceased, for 100 francs. Piechnik backed away and on out of the cafe. Accused went to the door of the cafe, and it was while he stood there making threats to "them all", as he testified, that deceased walked toward him either to disarm him or to pass out the door. Accused testified that he "hit him with my fist" and then "shoved him with my hand and as I shoved him I shot him" (R35,40). It is thus observed that there is no contradiction between accused's testimony and the prosecution's evidence as regards the conduct of accused and deceased immediately before the fatal shot was fired. Accused had never seen deceased before, had no grudge against him, was not threatened by him and had no cause to fear him. No reasonable basis is shown for any belief on the part of accused that the shooting was necessary for his own protection. It thus appears that there was nothing in the prosecution's evidence or in accused's testimony to excuse the killing on the ground of self-defense (MCM, 1928, par.148a, p.163).

Murder is legally defined as follows:

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, sec. 148a, p.162).
>
> "A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequences of his act" (1 Wharton's Criminal Law, 12th Ed., sec.420, p.633).
>
> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * *. The

use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person * * *; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * *, 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" (MCM, 1928, par.148a, pp.163-164) (Underscoring supplied).

"Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.654-655) (Underscoring supplied).

"An intention to kill * * * may be inferred from the acts of the accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS, sec.44, p.905) (Underscoring supplied).

In view of the circumstances shown, the court was justified in finding that accused acted with the requisite malice aforethought to constitute the homicide murder (CM ETO 6159, Lewis; CM ETO 4149, Lewis; CM ETO 4020, Hernandez; CM ETO 1901, Miranda; CM ETO 422, Green; CM ETO 438, Smith). Accordingly, the evidence is legally sufficient to support

the court's findings of guilty and the sentence.

6. The charge sheet shows accused is 23 years of age and was inducted 7 November 1942 at Fort Bragg, North Carolina. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B S Levy Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

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

1. In the case of Private ROBERT WRAY (34461589), 3299th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 14053. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14053).

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

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

(Sentence ordered executed. GCMO 319, ETO, 11 Aug 1945)

CONFIDENTIAL

14053

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

BOARD OF REVIEW NO. 5

22 SEP 1945

CM ETO 14066

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, 25 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CHARLES E. HEISHMAN, Jr. (7026230), Company C, 33rd Armored Engineer Battalion	

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

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

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

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

Specification 1: In that Private Charles E. Heishman, Jr., Company C, 33rd Armored Engineer Battalion, did, at or near Kottenfurst, Germany, on or about 19 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Eva Witing.

Specification 2: In that * * * did, at or near Kottenfurst, Germany, on or about 19 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Helena Jansen.

Specification 3: In that * * * did, at or near Kottenfurst, Germany, on or about 19 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Agnes Jansen.

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

Specification 1: In that * * * did, at or near Kottenfurst, Germany, on or about 19 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Helena Jansen.

Specification 2: In that * * * did, at or near Kottenfurst, Germany, on or about 19 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Agnes Jansen.

Specification 3: In that * * * did, in conjunction with Private First Class Thomas B. Janes, Company C, 33rd Armored Engineer Battalion, at or near Kottenfurst, Germany, on or about 19 March 1945, unlawfully enter the dwelling of Bernhardt Borkes with intent to commit a criminal offense, to wit, larceny, therein.

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 195 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 7th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of Specification 1, Charge II as involved a finding that accused attempted to commit the crime of sodomy as alleged in violation of Article of War 96, and

the finding of guilty of Specification 3, Charge II in conjunction with an unnamed person. He confirmed the sentence, but, owing to special circumstances in the case, 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. The evidence for the prosecution shows that during the evening of 19 March 1945 accused engaged in a drinking party with other members of his organization in their billet in Kottenfurst (R22,23,24). About 11:30 pm that night as he was leaving the billet he said to the guard: "We are going scavenging" (R34,35,45). Around 2:30 am the following morning accused in company with another soldier entered the house of Bernhardt Bourkes, who lived with his daughter and nine evacuees, in Kottenfurst, Germany. The evacuees were Mrs. Jansen and two daughters, Helena and Agnes, who occupied an upstairs bedroom; Mrs. Maria Eva Witing, her four year old child, her brothers Johan and Joseph, and Mr. and Mrs. Nelles, who occupied a downstairs bedroom (R7,8,15,25, 28,29). Although all the windows and doors on the ground floor of the house were locked when Bourkes retired, the soldiers were heard entering the house through a window which was later found to be broken (R28,30). The soldiers were then heard breaking bottles in the provision room of the house and a check next morning disclosed that "wine bottles and syrup" belonging to Bourkes were missing (R27). Next accused and his companion entered the room of Bernhardt Bourkes where accused held a pistol pointed at Bourkes while the other soldier looked through everything. He found a bottle of liquor, and after forcing Bourkes to try it, they both had some (R26).

The soldiers left Bourkes room and shortly thereafter went into the room occupied by Mrs. Jansen and her two daughters. The women cried and begged to be left alone. After making a search of the room, they went downstairs (R8,9,16). Here they entered the bedroom used by the rest of the occupants of the house. While his companion stood by with a rifle, the accused slapped Mr. Nelles on the face and beat Johan with his hands, feet and finally with his pistol. Accused asked Maria Eva Witing to get undressed; and when she refused he forced her to do so by placing his knife against her chest. He then threatened her with his revolver and ordered her into the kitchen where he overpowered her and had sexual intercourse against her will. During the act his revolver lay on the floor within his reach (R30,31,32,33). One shot had been fired that night before the act of intercourse (R33).

Accused returned upstairs to the room occupied by Helena and Agnes Jansen where, with his pistol in his hand, he ordered Helena to go downstairs with him. He then tore her nightgown off and, threatening her with his pistol, forced her to lay on the floor. Despite her efforts to resist by wanting "to get up", pushing his hands away, and holding her legs together, he had sexual intercourse and accomplished penetration. At all times during the act the pistol was laying on the floor next to her head (R9,10,11,12,13). She was then made to go outside with accused where he pushed her head down on his penis and she touched it by sticking her tongue out (R10,13,14). As they were returning to her bedroom he fired a shot in the hall at a door (R10,12).

When accused arrived at the upstairs bedroom he forced Agnes, because of fear of his pistol, to go with him to the kitchen. There he made her undress, and although she pushed him back, he took her arms and held them over her head and had sexual intercourse with her twice (R17,18). He then sat on the sofa, made her kneel before him, and pushed her head against his penis and forced it into her mouth. When he came to an "ejection" she pulled her head back (R19). She at no time consented to any of the acts but was always forced and put in fear that he would shoot (R20).

Accused finally left the house about half past six or seven o'clock in the morning (R20).

4. Accused, after being advised of his rights, elected to make a sworn statement (R36). On the night of 19 March, arriving at the house he found it locked so he took a piece of iron rod, broke a window and entered (R36). In a room he found some bottles of cognac, took a drink and put the other bottles outside the door. He then went upstairs into an old man's room where he had some more drinks, left and started for the attic, but hearing voices in a room across the hall he entered. The three women started "screaming and hollering", so figuring someone might hear and come to investigate, he went downstairs. When nothing happened he continued to roam about the house going into the room on the first floor where he "swung at" a boy but missed him and hit the chandelier. He went out and searched the barn but finding nothing returned to the house where he had some more drinks. About 5 o'clock in the morning he took two bottles of liquor and started back for the area (R37,38). He at no time pulled his weapon out as his intention was only to find something to drink, not to do bodily harm to the people (R38). He had sexual intercourse with no one during the night, and committed none of the acts the witnesses had testified about (R38).

On cross-examination, accused testified that his purpose in going into the house was to get someone else's liquor (R39).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). Maria Eva Witing, Helena Jansen, and Agnes Jansen all identified the accused and testified clearly and certainly to the fact that he had intercourse with them on the night in question. The accused states that he did not have intercourse with anyone that night. Although corroboration of a victim may be required if her testimony is contradictory, uncertain, improbable or impeached, such is not the case here (CM ETO 14587, Teachey). The testimony of the victims shows that they resisted and struggled against him but were overpowered and placed in fear of losing their lives or great bodily harm by his threatening use of a deadly weapon. If believed, their testimony is sufficient to show that the acts of intercourse were accomplished by force and without their consent (CM ETO 10841, Utsey; CM ETO 14382, Janes). There being competent substantial evidence to prove the offense charged the court's finding of guilty of Charge I and its Specifications will not be disturbed (CM ETO 10715, Goynes; CM ETO 10644, Clontz).

"Sodomy consists of sexual connection -- by rectum or by mouth, by a man with a human being" (MCM, 1928, par.149k, p.177). Although accused stated he did not commit such an act, Agnes Jansen testified that his penis was in her mouth and kept there until he came to an "ejection". The court in this testimony had substantial competent evidence on which to base its finding of guilty of Charge II, Specification 2 (CM ETO 2695, White). There is sufficient evidence to support the confirming authority's approval of so much of the finding of guilty of Specification 1 of Charge II as involved a finding of guilty of an attempt to commit sodomy in violation of the 96th Article of War (CM ETO 1638, LaBorde).

Competent evidence for the prosecution shows that accused in company with another soldier unlawfully entered the dwelling of Bernhardt Bourkes during the early morning of 20 March 1945. Accused testified he entered the house through a window which he had broken, and that his purpose in entering was to get something to drink. Further he stated that while there he drank and on departing took with him two bottles of liquor. This evidence is clearly sufficient to support the finding of guilty of Charge II, Specification 3, as approved by the confirming authority (MCM, 1928, par.149e, p.169; CM ETO 14382, Janes).

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6. The charge sheet shows that accused is 26 years and two months of age and enlisted 17 June 1940 at Baltimore, Maryland. 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 as approved by the confirming authority 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

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 22 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CHARLES E.HEISHMAN, JR. (7026230), Company C, 33rd Armored Engineer 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 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 14066. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14066).

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

(Sentence as commuted ordered executed. GCMO 473, USFET, 9 Oct 1945).

14066

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

BOARD OF REVIEW NO. 2

12 JUL 1945

CM ETO 14069

U N I T E D S T A T E S v. Private JACK A. MARZIANO, Jr. (32999661), attached unassigned, Detachment 38, Ground Force Reinforcement Command (177th Reinforcement Company)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Bad Godesberg, Germany, 8 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
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jack A. Marziano, Jr., attached-unassigned, Detachment 38, Ground Force Reinforcement Command, 177th Reinforcement Company, did, at or near Marcilley, France, on or about 9 September 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at or near Glasgow, Scotland, on or about 27 October 1944.

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

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

3. The prosecution's evidence shows that accused was attached-unassigned to the 177th Reinforcement Company of Detachment 38 on 30 August 1944 and that the company was located at Marcilley, France, on or about 9 September 1944 at which time accused was dropped from the company record as being "AWOL". On that day the men of the above company were assigned to another company and, although accused was supposed to be there, he was not present for the transfer. A physical check of the men was made and he was missing. No pass had been issued accused (R6-7). An extract copy of the morning report of Detachment 38, said company, dated 9 September 1944 and listing accused "from duty to AWOL" was admitted in evidence (Pros.Ex.A). Accused never returned "in duty status" (R8) but has been confined in the depot stockade since 16 April 1945. Accused, after due warning of his rights therein, made a statement to the officer investigating the charges against him.(R9) to the effect that he attempted to return to his unit immediately after the date of the absence without leave but was refused a ride on trucks moving up and so went to Paris where he purchased some furlough papers of an enlisted man who wanted to stay in Paris rather than go to the United States for his furlough. Accused's wife was ill and he desired to return to the States to be with her. He got transportation to England and while seeking transportation home, his furlough papers were found not proper and he was apprehended and confined. This statement (Pros. Ex.B) was admitted in evidence (R10). A stipulation expressly consented to in court by accused, to the effect that accused was returned to military control at Glasgow, Scotland on or about 27 October 1944, was admitted in evidence and the court took judicial notice that the absence of accused occurred in a foreign country and in an active theater of operations.

4. Accused, after being fully informed of his rights as a witness was sworn and testified substantially as shown in his statement to the investigating officer (Pros.Ex.B). He admitted that he had no pass when he left his unit (R12), that he went to Paris and bought the furlough papers of another soldier and that he was apprehended under the assumed name of Bowman while planning to get on a boat to go to the United States from Glasgow, Scotland (R13-14).

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

Both elements are essential to the offense. Accused admits and the evidence shows the absence without leave but unless an intent not to return

to his place of duty exists at the inception of, or at some time during the absence, the soldier is not a deserter. 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. Inference of such intent may also be drawn from the circumstance that he was apprehended at a considerable distance from his station; that he attempted to secure passage on a ship; that while absent he was in the neighborhood of military posts and did not surrender to the military authorities or that he was travelling under an assumed name and by virtue of fraudulent representations at a considerable distance and away from his place of duty. Unless admitted by accused, intent can be proved only by the inferences and presumptions which may reasonably be drawn from all the circumstances. Here accused was apprehended many miles from his place of duty, in fact, in another foreign country while seeking transportation to the United States some three thousand miles further from his place of duty. The court could take judicial notice that both the country where accused was properly stationed, as well as that country where he was apprehended, were dotted with military posts where he could have surrendered if he had so desired. Under his admissions and the circumstances shown, the court could have reached no other findings than guilty (CM ETO 1629, O'Donnell; CM ETO 11173, Jenkins; CM ETO 13956, Depero).

6. The charge sheet shows accused to be 31 years, three months of age. Without prior service he was inducted on 17 August 1943 at Camp Upton, New York.

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). 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

14069

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

BOARD OF REVIEW NO. 2

20 JUL 1945

CM ETO 14095

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Mergentheim, Germany, 14 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ULYSSES J. BIJEAUX (34079357), Company E, 12th Infantry.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Ulysses J. Bijeaux, Company "E", 12th Infantry, did, at Appeville, France, on or about 4 July 1944, desert the service of the United States, and did remain absent in desertion until he surrendered himself in Blosville, France, on or about 22 July 1944.

Specification 2: In that * * * did, at LaMancelliere, France, on or about 31 July 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: to engage with the German forces, which forces, the said command was then opposing, and did remain absent in desertion

until he surrendered himself at Blosville, France, on or about 21 January 1945.

Specification 3: In that * * * did, at Bleialf, Germany, on or about 6 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Luxembourg City, Luxembourg, on or about 11 February 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and of Specifications 1 and 3 thereof; and of Specification 2 guilty except the words "desert the service of the United States, by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: to engage with the German Forces, such forces, the said command was then opposing" and "in desertion", substituting therefor respectively the words "without proper leave absent himself from his organization" and "without leave"; of the excepted words not guilty, of the substituted words, guilty, and guilty of the Charge as a violation of Article of War 61 as relates to Specification 2. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 4th Infantry Division, approved only so much of the findings of guilty of Specification 1 of the Charge as involve findings that the accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until he surrendered himself at the time and place alleged, in violation of Article of War 61, approved the sentence and forwarded the record of trial under Article of War 48, with the recommendation that, if confirmed, the sentence be commuted to dishonorable discharge, total forfeiture and confinement for life. The confirming authority, the Theater Commander, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the 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. An authenticated extract copy of the morning report of Company E, 12th Infantry was received in evidence, without objection by the defense, show accused absent without leave on 4 July 1944 (R5,6; Pros.Ex.A). It was stipulated between counsel for the prosecution and the defense, the accused expressly consenting thereto, that accused surrendered himself to military control at Blosville, France, on or about 22 July 1944

(R9). A further entry in the morning report shows accused's status changed from duty to absent without leave on 31 July 1944 (R5,6; Pros.Ex.A). It was also stipulated that accused surrendered himself at Blosville, France on 21 January 1945 (R9).

First Sergeant John E. Cromwell testified that on 6 February 1945, Company E, 12th Infantry, was engaged in attacking the enemy at Bleialf, Germany (R6). On the 5th or 6th, accused was brought to Battalion Headquarters located at Winterscheid, Germany, by members of the military police. He was re-equipped, being issued combat clothing, a rifle, belt and pack, and sent to rejoin his company on the line at Bleialf (R6,7,8). Other replacements were similarly processed at this time and taken to the front lines in jeep and trucks. Accused was next seen to the rear of the front lines near the kitchen, on 11 February 1945 (R7,8). An entry in the company morning report, which was received in evidence without objection by the defense, shows accused's status changed from "Dy to AWOL 0600 6 Feb 45" (R6,7; Pros.Ex.A). It was stipulated, with the consent of accused, that he was apprehended at Luxembourg City, Luxembourg, on or about 11 February 1945 (R9).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R10).

5. Competent uncontradicted evidence establishes that accused absented himself without leave from his organization on 4 July 1944 and again on 31 July 1944. Following these absences, he returned to military control by voluntarily surrendering himself at Blosville, France on 22 July 1944 and 21 January 1945. The entries in the morning reports of his organization constituted prima facie proof of the absences without leave alleged and clearly justified the findings of the court as to Specification 2 and, as approved by the convening authority, as to Specification 1 (MCM, 1928, par.117, pp.120,121; CM 231357, Adams, 18 B.R. 182 (1943); CM ETO 4120, McGregor; CM ETO 4171, McKinnon).

Although no evidence was adduced proving that accused absented himself at "Appeville, France" and "LaMancelliers, France", as alleged, such failure of proof does not affect the validity of the trial inasmuch as the place of the commission of an alleged offense does not have the same importance or significance in military matters as it does in civil courts where the jurisdiction of the court is dependent upon the situs of an offense (Winthrop's Military Law and Precedents, (Reprint, 1920), secs. 105,197,pp.81,138; CM 199270, Andrews, 3 B.R. 346; Dig.Ops.JAG 1912-1940, sec.416, p.270).

Concerning Specification 3 of the Charge, the evidence shows that on 5 or 6 February 1945, accused was brought to the Battalion Headquarters by members of the military police. He was re-equipped with combat clothing and provisions, including rifle, belt and pack, and, together with other stragglers and reinforcements, sent forward to rejoin

his company in the front lines. His organization was at this time engaged in attacking the enemy at Bleialf, Germany. He absented himself from duty on 6 February and was next seen in an area to the rear of the front lines; he was apprehended at Luxembourg City 11 February 1945. His absence was unauthorized. It has been held that, in the absence of a direct attack upon a specification alleging straight desertion, the prosecution may prove an act of desertion under the 28th Article of War which includes absence without leave from an accused's placeof duty with intent to avoid hazardous duty or to shirk important service (CM ETO 5117, DeFrank). It is clear from the facts recited above that accused had full knowledge of the tactical situation and that the nature of his service was hazardous duty. Under such circumstances, the court was fully warranted in finding that at the time he absented himself on this occasion, he did so with the specific intent to avoid the hazards of combat with the enemy (CM ETO 1249, Merchetti; CM ETO 6177, Transeau; CM ETO 7230, Magnanti). Also, a rule of military law provides that in time of war an absence of slight duration, such as "even a part of a day", may fully justify a finding by the court of an intention to desert the military service (Winthrop's Military Law and Precedents, (Reprint 1920), sec. 987, p.638). The accused was therefore properly found guilty of the offense of desertion, as charged (CM ETO 5117, DeFrank, supra; CM ETO 8452, Kaufman).

6. The charge sheet shows that accused is 29 years of age and that he was inducted 10 July 1941 at Livingston, Louisiana. He had no prior service.

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

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

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

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

1. In the case of Private ULYSSES J. BIJEAUX (34079357) Company E, 12th 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 14095. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14095).

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

(Sentence as commuted ordered executed. GCMO 309, ETO, 5 Aug.1945).

14095

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

BOARD OF REVIEW NO. 3

12 SEP 1945

CM ETO 14126

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Luxembourg City, Luxembourg, 23 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private WILLIE BENNETT (34566360), 4176th 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.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie Bennett, 4176th Quartermaster Service Company did, at Wecker, Luxembourg, on or about 6 March, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Leroy White, 4176th Quartermaster Service Company, a human being by stabbing him with a bayonet.

previous conviction by summary court for absence without leave from his place of duty 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 rest of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence showed that on the evening of 6 March 1945, at Wecker, Luxembourg, an altercation arose between accused and deceased during a stud poker game as the result of accused's withdrawal of certain money from the pot after deceased prematurely looked at accused's hole card (R8,12, 16,42,52,59,63). During this altercation, deceased drew a small pocket knife and in a threatening manner ordered accused to return the money to the pot (R20,33,43,44,50,56). Other players managed to halt the argument and succeeded in getting accused to leave the room in which the game had been taking place (R13,33,53). At a time variously estimated at from one to three minutes later, he came running back into the room with a bayonet in his hand (R9,25,35,37,54,55). Deceased, who had been standing near the door by which accused left and through which he reentered, turned and ran toward a doorway at the other end of the room but turned to face the accused when about midway through the room (R9,13, 14,25,36,38). Accused moved straight ahead and deceased fell to the floor with a bayonet in his head (R9,10,11,25, 26,27,55). Accused had either thrown the bayonet or stabbed deceased with a forward thrust with his right hand from shoulder height (R11). Deceased died a short time later from the wound thus received (R28, Pros.Ex.1).

There was testimony that accused had been drinking earlier in the evening and appeared to be somewhat intoxicated during the game and immediately after the homicide occurred (R16,69,71,80,82,92,93). There also was evidence that he was normally of an even temper but drank heavily and was easily affected by liquor (R15,40,58,67,68,79). He testified that he had no recollection of striking the fatal blow (R102-104). However, when questioned immediately after the homicide, he told an officer that deceased "pulled out a knife so I got my bayonet and threw it at him" (R66). Further, he remembered all the incidents leading up to the homicide, including such details as the hand he held when the argument started, remembered going to his billet across the street after he left the poker game, and also remembered returning to the house in which deceased was killed (R102, 103,107).

4. From the facts shown, the court properly could find that accused acted with the requisite malice aforethought to constitute his offense that of murder. Having in mind the fact that deceased ran from accused when the latter entered the room, there can be no question of self-defense in this case, even though deceased had previously threatened accused while armed with a pocket knife; at the time of the homicide, accused was the aggressor. Further, in view of the inadequacy of the provocation and the deliberation of the crime after the quarrel had broken off, the court was warranted in rejecting the apparent theory of the defense that the crime was manslaughter only. Any suggestion that accused was too drunk to entertain the requisite malice aforethought to commit murder is not entitled to serious consideration. The record is legally sufficient to sustain the findings of the court (CM ETO 6682, Frazier).

5. The charge sheet shows that accused is 26 years, 8 months of age and was inducted 15 January 1943 at Fort Benning, Georgia. No prior service is shown.

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

7. 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 Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 14128

UNITED STATES	)	XIX CORPS
	)	
v.	)	Trial by GCM, convened at Bad Nauheim, Germany, 9 June 1945: Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates ROBERT BRANDON (34754777) and WILLIAM B. MITCHNER (33801970), both of 3110th Quartermaster Service Company	)	

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

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

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

BRANDON

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

Specification: In that Private Robert Brandon, 3110 Quartermaster Service Company, did at Borsdorf, Germany, on or about 5 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Terese Herzinger.

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

Specification 1: (Finding of not guilty)

14128

Specification 2: (Finding of not guilty)

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

Specification: In that * * * did, at Geissen, Germany, without proper leave absent himself from his organization at Geissen, Germany, from about 1800, 5 April 1945 to about 1030, 6 April 1945.

MITCHNER

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

Specification: In that Private William B. Mitchner, 3110 Quartermaster Service Company, did at Borsdorf, Germany, on or about 5 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Hilda Seitz.

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

Specification 1: In that * * * did at Borsdorf, Germany, on or about 5 April 1945 commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os and per annum with Frau Hilda Seitz.

Specification 2: In that * * * did at Borsdorf, Germany, on or about 5 April 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Herr Karl Michel, Borsdorf, Germany, a wallet, small change, a gold ring, pocket knife, and acigarette lighter, the property of Herr Karl Michel of the value of about $20.00.

Specification 3: (Finding of not guilty)

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

Specification: In that * * * did, without proper leave absent himself from his organization at Geissen, Germany, from about 1800, 5 April 1945 to about 1030, 6 April 1945.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, accused Brandon

was found not guilty of Charge II and of the two specifications thereunder; accused Mitchner was found not guilty of Specification 3, Charge II, and each accused was found guilty of the remaining charges and specifications preferred against him. No evidence of previous convictions was introduced as to Brandon. Evidence was introduced of one previous conviction by summary court as to Mitchner for absence without leave from his appointed place of duty, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place asthe reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, as to each accused, 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. Evidence for the prosecution shows that on 5 April 1945, Privates Robert Brandon and William B. Mitchner were members of the 3110th Quartermaster Service Company, which organization on this date moved from Airstrip Y-87, near Borsdorf, to a new location near Geissen, Germany (R19;Pros.Ex.C). Both accused failed to make this move with their unit and were accordingly reported absent without leave. There was received in evidence, without objection by the defense, extract copies of the morning report of their organization containing the following entries, as to each accused:

"Fr dy to AWOL 1800 hours 5 April 1945"
"Fr AWOL 1030 hours 6 April 45 to conf 5th Div. Stockade" (R25, Pros.Exs.F,G,H,I).

It was further shown that sometime during the afternoon of the 5th April two colored soldiers entered the house of Frau Terese Herzinger, 17 Nitta Street, Borsdorf, Germany, and asked for liquor (R8,12,19,20). In addition to Frau Terese Herzinger and her two young children, also present in the house at this time were the elderly Frau Herzinger, Herr Karl Michel, the grandfather, and Frau Hilda Seitz, a neighbor, and her young daughter. Accused were told that they had no liquor and were offered eggs, which they refused. Both soldiers were armed with rifles. The shorter one (Mitchner) forced the younger Herzinger, Frau Terese, from the kitchen into the living room, where he pulled her underpants down. She objected to his conduct, saying "Nix-no good" and beggedhim to leave her alone as she was the mother of two children (R8,20). She also insisted that she was not feeling well as she was having her period (R12). He then pushed her back into the kitchen, after which the two soldiers talked together, following which the "taller one," whom she identified as accused Brandon, forced her back into the living room and then led her into a bedroom. He put his rifle aside, pushed her onto the bed, lowered his pants, and engaged in sexual inter-

course with her (R9). She protested by asking him to leave her alone and "not to shoot" and "not to kill" her (R9). She told him to let her alone as she was not feeling well and repeated this "again and again" (R12,13). She struggled during the entire time that she remained with accused, which was about half an hour, but she did not scream because "he kept me so tight I could not yell" (R13). She did not submit willingly to his advances (R13).

After completing the act they returned to the kitchen and the other soldier, who was described as the "shorter one" and identified as accused Mitchner, took Frau Hilda Seitz into the room, drew the blackout curtains, pushed her on the bed, placed his rifle beside the bed, and engaged in sexual intercourse with her (R14,15,17). She testified that he "misused" her by inserting his penis into her "vagina" and also into her "rectum" (R15). These were two separate acts following which she "had to suck it" (R15). Although he hurt her she did not struggle to prevent his advances because she was "afraid of being shot" as he kept his rifle "standing at the night table" (R15). When she tried to leave the room he said "Nix" andjumped from the bed and stopped her. After remaining with him more than an hour, he unlocked the door and returned with her to the kitchen (R15). The children were crying at this time and one of the soldiers "motioned" that he would shoot if anybody made any noise. Upon leaving the house at about 6:00 pm, they forced Herr Michel outside, searched him and took his pocketbook, cigarette lighter, knife, watch, ring, and some German currency, which consisted of two 50 mark notes (R21). As the soldiers departed a shot was discharged but Herr Michel was unable to state who fired the weapon as he was running in an effort to escape (R21,23).

It was stipulated between counsel for the prosecution and defense that if Major C. M. Hartman, Medical Corps, of the 58th General Hospital, were available as a witness, he would testify that on 5 April 1945 he examined both Terese Herzinger and Hilda Seitz and that, as regards the former, he discovered no evidence of trauma of the external genetalia but a profuse smearing of blood on the inside of her thighs and perineum, and that, as regards the latter, the examination revealed evidence of swelling and edema of the anal canal and an indication that her rectum had been subjected to trauma (R18,Pros.Ex.A).

On 7 April an identification parade was held at Leitch, Germany, at which time and place accused Mitchner was identified and "picked out" of the lineup as one of the assailants herein (R17,22). Both were identified in court (R8,14,19,20,22).

4. Accused, after their rights were explained to them, each elected to be sworn as a witness in his own behalf (R25,32).

Brandon testified that on the morning of 5 April 1945, he was on duty unloading and guarding gasoline and that after chow he and Mitchner went into some woods nearby the airport looking for souvenirs. Upon leaving the woods they were stopped by two officers and ordered to pull their pants down for an examination, inasmuch as they had received a report that some women had been raped and that one of them was menstruating. As they had no blood on their clothing they were released. When they returned to the airstrip their company had "pulled out" (R25-27). He and Mitchner made an effort to "catch up" with their outfit but were halted by two guards, who, upon being given a password, stated that the signal was incorrect and suggested that they spend the night there as it was dangerous walking in the vicinity after dark (R26). The following morning they were told by a Lieutenant Colonel to remain there until transportation was available to return them to their organization. Instead of being returned to their company they were taken to the Military Police Headquarters where they were searched. Somewhat later he (Brandon) saw the German women, here concerned, for the first time. This was when one of them picked him out of a lineup of eleven men in an identification parade held at a laundry outfit (R29). He overheard the sergeant tell an officer, who was present at this time, that "she could not say for sure" that he was the right man (R29).

Mitchner's testimony corroborates and is substantially identical with that given by Brandon. He added that on the morning of 6th April 1945 a civilian was brought into the Command Post, who, upon observing him and Brandon, said "That is them," but added that he could not recognize the "one with glasses on" (R34). He was later searched and two 50-mark German notes as well as currency of other countries taken from him. The following day he was picked out in an identification parade by two civilians, a man and a woman, but the man identified another soldier prior to indicating accused (R35,36,40).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, Par.148b,p.165). The extent and character of resistance required in a woman to establish her lack of consent depends upon the circumstances of the case and the relative strength of the parties (1 Wharton's Criminal Law,(12th Ed., 1932) sec.734,p.995). The undisputed evidence herein shows that on the evening in question, and while armed with rifles and during a period of absence without authority from their organization, both accused Brandon and Mitchner entered the house of Frau Terese Herzinger where the taller soldier who was identified as accused Brandon approached Frau Terese and forced her into a bedroom, where he placed his rifle aside, pushed her onto a bed and forcibly engaged in sexual intercourse with her. She protested and struggled and urged him to desist, stating that she was ill and the mother of two children. She denied consenting to his advances or to his act of sexual intercourse. Shortly after the completion of this

act, the shorter soldier, who was identified as accused Mitchner, took Frau Seitz into the living room and, after drawing the curtains and placing his rifle beside a table, pushed her onto the bed and engaged in sexual intercourse with her. He penetrated her person both from the front and rear and forced her to take his penis in her mouth. She was frightened and stated she did this act to prevent him from shooting and killing her. In support of her testimony the officer, who examined Frau Seitz shortly after the occurrences, stated that her rectum showed evidence of a recent bruise and that her anal canal was swollen. Such evidence affords corroboration of the direct testimony of the German woman that accused committed the offenses of sodomy and rape as charged (CM ETO 3964, Lawrence; CM ETO 3858 Davis and Jordon; CM ETO 6224 Kinney and Smith; CM ETO 9611 Prairiechief).

Likewise the finding of the money in the amounts and in the denominations alleged with other items of personal property on the person of accused Mitchner corroborates the testimony of the German witness that Mitchner took his personal property from him. The fact that accused was armed, that he forced the German man to put his arms up in the air and that he fired his rifle and frightened the civilian as he escaped constitutes a sufficient showing of force and violence to sustain the findings of the court that accused committed the crime of robbery as charged. Such findings of the court are supported by substantial evidence (CM ETO 5561, Holden and Spencer; CM ETO 12650 Combs and Shimmel).

6. The charge sheet shows that accused Brandon is 22 years, 11 months of age and was inducted 21 June 1943 at Fort Benning, Georgia; accused Mitchner is 31 years, six months of age and was inducted 13 October 1943 at Philadelphia, Pennsylvania. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that, as to each accused, 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, and for the crime of robbery by Section 284, Federal Criminal Code (18 USCA 457, 567 and 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper as to each accused (Cir 229, WD, 8 June 1944, sec II, pars. 1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

13 JUL 1945

CM ETO 14131

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Schmerldorf, Germany, 17 June 1945.
Private VIRGIL L. LA NORE (36457673), Company K, 12th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Virgil L. LaNore, Company K, 12th Infantry did at Sainteny, Normandy, France on or about 13 July 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 with which his company was engaged, and did remain absent in desertion until he was apprehended at Paris, Seine, France on or about 9 April 1945.

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

Specification: (Finding of not guilty)

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence was introduced of previous convictions. 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 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 pursuant to Article of War 50½.

3. The prosecution's evidence shows accused was identified as a member of Company K, 12th Infantry, which was located on 13 July 1944 in the vicinity of Sainteny, France, in attack and in direct contact with the enemy, receiving both artillery and small arms fire (R4). A check of the men on 13 July showed accused to be missing and he was reported "M.I.A." after the company area had been also checked for him. He was not again seen by his platoon commander. An extract copy of the morning report of Company K, 12th Infantry (Pros.Ex.A), was admitted in evidence without objection (R4-5). It discloses accused as "asgd. and jd. fr. Hq. 92d Repl. Bn." on 11 July 1944; on 22 July 1944, "dy. to MIA and drpd fr. rolls 13 July 44" and under date of 1 May 1945, correction, "dy to MIA and drpd fr. rolls 13 July" should be "dy to AWOL 1200 13 July 44". It was also stipulated by the prosecution, defense and the accused that Company K, 12th Infantry was at Sainteny, Normandy, France, on or about 13 July 1944 and that accused was apprehended at Paris, Seine, France, on or about 9 April 1945, at which time he had in his possession a pass which he knew to be forged. Accused expressly consented in court to the stipulations (R6).

4. On being advised of his rights as a witness, accused elected to remain silent and no evidence was presented by the defense (R7).

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).

Under Article of War 28 "any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter". The undisputed evidence shows that accused was missing from his organization at the time and place and under the circumstances alleged, that is, while his company was engaged in battle. Not only did he leave at that time without authority but he remained in unauthorized absence for nearly nine months and could well have been charged and convicted of desertion on that showing alone. The evidence presented even without the admissions made by accused, both expressly and by implication, clearly shows accused as guilty of a violation of Article of War 58 (CM ETO 5291, Piantedosi; CM ETO 6549, Festa; CM ETO 10578, Parisien).

6. The charge sheet shows accused to be 22 years of age. Without prior service, he was inducted 15 March 1943 at Muskegon, Michigan.

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 (Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 3

20 JUL 1945

CM ETO 14133

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bainberg, Germany, 15 June 1945. Sentence as to each: Dishonorable discharge, total forfeitures, confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates First Class JOSEPH A. CORRIVEAU (11005041) and NUNZIO [illegible]I (33591124), both of Company E, 8th Infantry	)	

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

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

2. Accused were arraigned separately and tried together upon identical (save for their respective names) charges and specifications, as follows:

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

Specification 1: In that * * * did, at or near Washeid, Germany, on or about 29 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: an engagement with the enemy, and did remain absent in desertion until he was apprehended at or near Virton, Belgium, on or about 9 February 1945.

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Specification 2: In that * * * did, at or near Olzheim, Germany, on or about 14 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: an engagement with the enemy, and did remain absent in desertion until he was apprehended at or near Virton, Belgium, on or about 28 February 1945.

Specification 3: In that * * * did, at or near Roding, Germany, on or about 9 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels, Belgium, on or about 13 April 1945.

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

Specification: In that * * * having been duly placed in confinement at Service Company, 8th Infantry, on or about 6 March 1945, did, near Hoffeld, Germany, on or about 9 March 1945, escape from said confinement before he was set at liberty by proper authority.

Each 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 preferred against him. As to Corriveau, evidence was introduced of two previous convictions by special court-martial, one for absence without leave for one day in violation of Article of War 61, and the other for being drunk and disorderly in uniform in a private home in violation of Article of War 96. As to Scuderi, evidence was introduced of one previous conviction by special court-martial for absences without leave of one, one and 14 days respectively in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. As to each, the reviewing authority approved "only so much of the findings of guilty of the Specification, Charge II and Charge II", as involved "findings that the accused, having been duly placed in confinement as alleged, did,

at Roding, Germany, on or about 9 March 1945, escape from said confinement before he was set at liberty by proper authority", approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

Duly authenticated extracts of company morning reports for 5 February, 21 February, 10 March and 12 March, 1945, were introduced into evidence without objection (R7-9; Pros.Ex.1,2).

On 28 January 1945 accused's company relieved a company of the 87th Infantry near Maspelt, Belgium. That afternoon it received enemy fire as it did the morning of the 29th when it launched an attack in the direction of Hermespand (R9). Morning report entries for 5 February 1945 show each accused from duty to AWOL as of 0830, 29 January 1945 (Pros.Ex.1,2). Accused were apprehended in military uniform on or about 9 February 1945 at or near St. Vincent, Belgium (R10).

On 14 February 1945 accused's company was occupying positions at or near Olzheim and was under enemy fire (R9). Morning report entries for 21 February 1945 show each accused from duty to AWOL as of 14 February 1945 (Pros.Ex.1,2). Accused were apprehended in military uniform on or about 28 February 1945 at or near St. Vincent, Belgium (R10).

"About the 12th (sic) of March", Captain John C. Vonkaenel, Service Company, 8th Infantry, turned accused over to the sergeant of the guard with instructions to place them in confinement. The captain did not tell the accused personally that they were to be put in confinement. "They were in the hall just outside of the office and it is possible they heard the instructions I had given the sergeant" (R11-12,17). Morning report entries for 10 March 1945 show each accused from duty to confinement, 8th Infantry Stockade, 6 March 1945, awaiting trial for violation of Article of War 58 (Pros.Ex.1,2). On 9 March 1945 at Roding, accused were among the 20 or 25 prisoners housed on two floors of a building (R13,16). They were on the second floor (R14). A single stairway led therefrom (R16) at the foot of which stood the lone guard. Accused did not pass this guard. However, there were holes in the house through which men might pass and it was dark (R13-14). Accused were found to be missing (R15). Search was made for them without success (R13,15-16). Morning report entries of 12 March 1945 show accused from confinement 8th Infantry Stockade to escape and AWOL 9 March 1945 (Pros.Ex.1,2). Accused were apprehended in military uniform on or about 13 April 1945 at or near Brussels, Belgium (R11).

4. No evidence was presented by defense. After his rights as a witness were explained, each accused elected to remain silent (R18).

5. At the outset three irregularities require comment:

a. The order (par.9, SO 123, 15 June 1945, Headquarters 4th Infantry Division) appointing Captain William I. Bouton, law member for the trials of accused, did not expressly relieve the law member, Major Walter B. Todd, previously appointed (par.1, SO 103, 24 March 1945, Headquarters 4th Infantry Division). The relief of Major Todd as law member was implicit in the appointment of Captain Bouton as such (See R1-3).

b. A member of the court stated he had formed an opinion that accused were guilty. He was excused and withdrew (R3-4). While the member should not have expressed his opinion, the Board of Review is of the opinion that no substantial rights of the accused were affected thereby.

c. The prosecution asked accused if St. Vincent, Belgium, where they were apprehended the first two times, was a suburb of Vinton, Belgium, where they were alleged and found to have been apprehended the first two times (R10). It was improper to have so asked accused, particularly in view of their elections, subsequently expressed, to remain silent (R18). However, no substantial rights were injuriously affected thereby. Their offenses were complete when they absented themselves without leave. The place of their apprehension was immaterial (Cf: CM ETO 2473, Cantwell).

6. a. Specifications 1 and 2, Charge I

The record supports the findings (CM ETO 10218, Gaines, and cases therein cited). As to Specification 1, the variance between the allegations, findings, and actions on the one hand that accused deserted at Washeid, Germany, and the proof on the other hand that accused deserted at Maspelt, Belgium, prejudiced no substantial rights of the accused. The place of desertion is not of the essence of the offense (CM 199270 (1932), Dig. Op. JAG, 1912-40, sec.416(10), p.270).

b. Specification 3, Charge I

Each accused's unauthorized absence of 35 days in an active theater of war, commenced by an escape from confinement while awaiting trial for and following hard upon two unauthorized absences to avoid hazardous duty, and terminated by apprehension, supports the court's inference and findings that at some time accused intended not to return (CM ETO 1629, O'Donnell, and cases therein cited).

c. Charge II and Specification.

Accused were alleged and found to have escaped from confinement 9 March 1945 at Hoffeid, Germany. The escapes were proved to have been made at Roding. The reviewing authority approved only so much of the findings of guilty of Charge II (AW 69) and Specification as involved findings that accused, having been duly placed in confinement as alleged, did, at Roding, Germany, escape from said confinement before set at liberty by proper authority.

Clearly, escapes at Roding, Germany, were not lesser included offenses of escapes at Hoffeid, Germany - assuming the place of escape to have been material. However, the place of escape was not of the essence of the offenses (Compare CM 199270 (1932), Dig. Op. JAG, 1912-40, sec.416(10), p.270, to the effect that the place of desertion was not of the essence of desertion). Thus, the variance between the allegations and findings on the one hand and the proof and actions on the other prejudiced no substantial rights of the accused.

The limited approvals of the findings is not to be construed as disapprovals of the findings of guilty of Charge II. While the reviewing authority in approving only so much of Charge II and Specification as hereinbefore set out, failed to declare affirmatively that the misconduct was in violation of Article of War 69, the approved findings were clearly in violation of Article of War 69 and negate a construction that the reviewing authority did, in fact, disapprove Charge II. Even should the actions be construed as disapproval of the findings of guilty of Charge II, the resulting failure to designate an Article of War would not be material in the instant case. The approved findings were of an offense of which the court had jurisdiction (MCM, 1928, par.28, p.18).

7. The charge sheets show that accused Corriveau is 22 years of age and was inducted, without prior service, 5 February 1942 at Fort H. G. Wright, New York; Scuderi is 21 years of age and was inducted, without prior service, 16 May 1943 at Philadelphia, Pennsylvania.

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

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9. 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 24; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B V Levy Jr Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 14135

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Windsheim, Germany, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 60 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class FRANK P. CERRITO (32009636), Company B, 12th 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 and found legally sufficient to support the sentence.

2. Accused was charged with absence without leave with intent to avoid hazardous duty in violation of Article of War 58. The evidence was not disputed that on 10 February he was "coming back" to duty with Company B, 12th Infantry from a reinforcement depot. When he reached the regimental Service Company, then at Schweiler, Germany, he was attached to it with seven other men in order that they might be tried out as truck drivers. Three were selected from this group. About 7:30 am on 16 February accused was informed that he had not been chosen and that he would return at 9 am that day to his company. At that time his absence was discovered (R5-9,11; Pros.Ex.A). He had no authority to be absent. On 16 February Company B was in contact with the enemy "not more than ten miles" forward from Herscheid, Germany, and receiving mortar, small arms and some artillery fire (R10-11). Accused was apprehended on or about 12 April 1945 in Liege, Belgium (R12). The distance from Schweiler to Herscheid, Germany, was not disclosed.

3. For the defense, Private First Class Willis S. McKennes, Company I, 12th Infantry, testified that he was one of the group to be tried out as truck drivers (R12), that on the morning of 16 February when "they hollered to get our mess kits and go to breakfast", accused was not present and that he did not see him leave (R15,17). It was

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after breakfast that they were informed "we were going back to the line company" (R13,15).

4. After his rights were explained accused elected to remain silent (R18).

5. There was no evidence that accused knew while he was attached to the Service Company from 10 to 16 February where his company was or whether or not it was then engaged in hazardous duty. He was returning to it from a reinforcement depot.

In CM ETO 7532, Ramirez, the Board of Review stated as follows:

> "When a specification alleges desertion with intent to avoid hazardous duty, this intentment must be proved, and the burden is on the prosecution to establish it * * *. This burden is not discharged by a mere showing that accused's organization was in combat during his absence. In order to sustain findings of guilty, it is necessary that substantial evidence reasonably support the conclusion that accused initially absented himself without leave (1) with knowledge of the hazardous duty required of him; and (2) with intent to avoid its performance. Intent may be inferred from the fact that accused's absence without leave effected - or was initiated under circumstances reasonably calculated to effect - avoidance of hazardous duty of which he had knowledge at the time of his departure. In the case under consideration, with reference to Specification 2 * * *, the only evidence having any bearing whatsoever on the tactical situation of accused's company on 8 November is the first sergeant's testimony that 'in the middle of October, we were in a defensive position in the vicinity of N * * * and in the month of November we were in the attack until the first week of December, further that on 8 November 1944 the organization was again at N * * *, France. There is no other evidence of notice to or knowledge on the part of accused of any specific hazardous duty facing him as a member of his company on or about the date of his initial absence [8 November]. To infer such knowledge from the meager, vague and general testimony quoted above, and to use the inference thus arrived at as the basis of a further inference of intent, exceeds even the broad limits

> of judicial discretion accorded courts-martial in determining such necessarily inferential issues of fact. Accused pleaded not guilty of desertion with intent to avoid hazardous duty, and the legal presumption of innocence until proved guilty has not been overcome by any substantial evidence capable of supporting the necessary inference of intent. The evidence therefore sustains only so much of the findings of guilty of Specification 2 as involves the lesser included offense of absence without leave in violation of Article of War 61" (Underscoring supplied).

The foregoing language is particularly applicable to the instant case, and upon the same reasoning, the Board of Review is of the opinion that the court's findings of guilty are sufficient only to support findings of guilty of the lesser included offense of absence without leave from 16 February to on or about 6 April 1945 in violation of Article of War 61. As in CM ETO 7532, Ramirez, supra, the absence is so prolonged that intent to desert could have been inferred from that alone, had ordinary desertion been alleged.

B R Sleeper Judge Advocate

(ON LEAVE) Judge Advocate

B H Levy Jr Judge Advocate

Branch Office of The Judge Advocate General
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18 AUG 1945

BOARD OF REVIEW NO. 4

CM ETO 14138

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Schmerldorf, Germany, 13 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private SIDNEY SPITZER (32979793), Company L, 12th Infantry	)	

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 found legally sufficient to support the sentence.

2. The record contains no evidence that accused was notified that he was to be relieved from duty with the service company, with which he had been for some two weeks trying out as a truck driver, and returned to his line company. Neither is there any evidence that accused was aware of hazardous duty, and the record is devoid of evidence of circumstances surrounding the absence from which an inference might be drawn legitimately that accused entertained the intent requisite for desertion (CM ETO 8300, Paxson). The evidence, however, clearly establishes accused's absence without leave for the period and at the place alleged. The record of trial is, therefore, legally sufficient to support only so much of the findings of Specification of the Charge as involves findings that accused did for the period and at the place alleged absent himself without leave from his organization in violation of the 61st Article of War.

Judge Advocate

Judge Advocate

Judge Advocate

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Branch Office of The Judge Advocate General
with the
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8 AUG 1945

BOARD OF REVIEW NO. 1

CM ETO 14141

U N I T E D S T A T E S	)	5TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Vilshofen, Germany, 23 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class STEPHEN PYCKO (36107508), Cannon Company, 2nd Infantry	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Stephen Pycko, Cannon Company, 2d Infantry, did, at Frankfurt a-Main, Germany, on or about 30 March, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Paul Gallasch, 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. By unanimous vote of the members of the court present at the time the vote was taken, 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

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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 is clear and uncontradicted that at the time and place alleged accused, without justification or excuse, shot a German civilian, Paul Gallasch, in the stomach and immediately thereafter fired three more shots into his victim's then prostrate body, thereby causing his death. The shooting took place in the house of Gallasch and was followed by threats by accused directed against both German civilians and American military personnel and an assault and battery with a pistol upon a German civilian. There was evidence that accused had been drinking heavily of various intoxicants since before the noon meal that day, that he was very drunk, was not in his right mind, did not know what he was doing, was intermittently unable to hear and at one point threw himself violently against a wall. He claimed in an unsworn statement through counsel that he could remember nothing at the time of the shooting and for some time thereafter. There was evidence, however, that shortly after the shooting he was in sufficient control of his faculties to recognize a superior office, to understand what was said to him, and to attempt to avoid and later to break arrest, and that his behavior was "just like any drunk". He also mentioned shooting some Germans. A medical board which examined accused less than two months after the commission of the alleged offense concluded that his past record of drinking was insufficient to indicate any injury due to alcoholism and that he was, at the time both of the alleged offense and of the examination, sane and responsible for his actions.

The court was justified by substantial evidence in determining against accused the issues of whether he killed his victim with malice and whether he was sufficiently under the influence of alcohol to destroy his mental capacity to entertain the general criminal intent necessary to murder. In the opinion of the Board of Review, the findings of guilty of murder were warranted by the evidence (CM ETO 10002, Brewster, and authorities therein cited).

This case is distinguishable from CM ETO 9365, Mendoza, where accused's extreme drunkenness, and a severe blow on the head, which rendered him temporarily unconscious shortly before the crime, and the fact that the victim of his shooting through a closed door was one of his best friends were held to negative the existence of malice and to require a holding that he was guilty of voluntary manslaughter and not murder.

4. The charge sheet shows that accused is 29 years four months of age and was inducted 25 March 1941 at Detroit, Michigan. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

6. The penalty for 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).

D. Franklin Kitty Judge Advocate

Wm. F. Borrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 8 AUG 1945 TO: Commanding General, 5th Infantry Division, APO 5, U. S. Army.

1. In the case of Private First Class STEPHEN PICKO (36107508), Cannon Company, 2nd 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. Although the findings of guilty of murder may not be held as a matter of law to be unsupported by substantial evidence of malice on accused's part, and the court's determination that malice existed may not be disturbed, nevertheless in view of the advanced degree of his drunkenness and the fact that he had recently been engaged in combat lead me to regard his offense as of no more moral gravity than voluntary manslaughter. I therefore recommend that the period of confinement be reduced to ten years or less.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this inforsement, and the record of trial which is delivered herewith. The file number of the record in this office is CM ETO 14141. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14141).

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

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 397, ETO, 10 Sept 1945).

14141

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

BOARD OF REVIEW NO. 2

27 SEP 1945

CM ETO 14165

U N I T E D S T A T E S	) 80TH INFANTRY DIVISION
v.	) Trial by GCM, convened at APO 80, U. S. Army, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ANTHONY J. PACIFICI (33355203), Company K, 317th Infantry	)

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 on the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony J. Pacifici, Company K, 317th Infantry, did, in the vicinity of Bratte, France, on or about 30 September 1944 desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near Ehrl, Bayern State, Germany, on or about 20 April 1945.

Accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his

natural life. The reviewing authority approved the 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 submitted by the prosecution is substantially as follows:

a. The company clerk, a sergeant, after identifying accused as a member of Company K, 317th Infantry, testified that, in accordance with Third U. S. Army directives, when the Division, of which Company K was a part, entered combat the following method of procedure was followed in the preparation of morning reports: The administrative section during combat was set up in the rear echelons with the personnel section and personnel officers. The forward elements in the company compiled in writing the morning report summary which was signed by the company commander and submitted through channels, including battalion, regiment and forward command post, back to the rear echelon where it was delivered to the personnel section and company clerks. The company clerks prepared the white, yellow and green copies of the morning report which were authenticated by the personnel officer. Since entering combat, Captain Frank J. Watson, Personnel Officer, and Mr. Leslie E. Dickson, as Assistant Personnel Officer and as Assistant Adjutant, in the absence of Captain Watson, formally authenticated the morning reports of the company, and that Captain Joe Radek, present personnel officer, authenticated them at the time of trial (R7). The prosecution introduced, without objection at the time, an extract copy of the morning report of 2 October 1944 for accused's organization, as follows:

"2 Oct 1944

1/2 Mile Southeast of Bratte, France.

33355203 Pacifici, Anthony J. (745) Pfc
Dy to MIA - 30 Sep 44

s/ Leslie E. Dickson
t/ LESLIE E. DICKSON
CWO USA Asst Adj

- -

30 Sep 1944

1/2 Mile Southeast of Bratte, France.

RECORD OF EVENTS

1/2 mile southeast of Bratte, France. Defensive positions improved. Much patrolling being done at night. Weather fair and cool.

s/ Leslie E. Dickson
t/ LESLIE E. DICKSON
CWO USA Asst Adj"

(R8,Pros.Ex.A)

Prosecution introduced extract copy of morning report of 22 April 1945 for accused's organization as follows:

"22 April 1945
Burgellen, Germany WO 373596

CORRECTION 2 Oct 44
Pacifici, Anthony J. 33355203 Pfc 745
Dy to MIA 30 Sep 44
SHOULD BE
Pacifici, Anthony J. 33355203 Pfc 745
Dy to AWOL 30 Sep 44 - 0600
Pacifici, Antjony J. 33355203 Pfc 745
AWOL to arrest in qrs 20 Apr 45 - 0600

s/ Joe F. Radek
t/ JOE F. RADEK
Capt Inf Pers Off"

(R9;Pros.Ex.B)

Prior to admission of the foregoing entry of 22 April 1945, defense sought to elicit testimony from the company clerk as to the number of commanders the company had from 30 September 1944 to 20 April 1945 and was prohibited by ruling of the law member (R9). Prosecution also introduced extracts of morning reports showing "Record of Events" as follows:

"Company Morning Report 29 Sep 1944.

Record of Events

1/2 mile southeast of Bratte, France. Defensive positions improved, alternate positions dug in. Weather clear and cool. All casualties occurred in France.

s/ Leslie E. Dickson
t/ LESLIE E. DICKSON
CWO USA asst Adj.

* * *

Company Morning Report 1 October 1944.

Record of Events

1/2 mile southeast of Bratte, France. Defensive positions improved. Patrolling carried on. Weather cloudy and raining.

s/ Leslie E. Dickson
t/ LESLIE E. DICKSON
CWO USA Asst Adj.

* *

(242)

Company Morning Report 2 October 1944.

Record of Events

1/2 mile southeast of Bratte, France. Defensive position improved and moved forward. Patrols contacting adjoining units hourly at night. Weather clear and cool.

s/ Leslie E Dickson
t/ LESLIE E DICKSON
CWO USA Asst Adj.

* * *

Company Morning Report 3 October 1944.

Record of Events

1/2 mile southeast of Bratte, France. Holding same positions, with patrols operating at night. Weather clear and warm.

s/ Leslie E Dickson
t/ LESLIE E DICKSON
CWO USA Asst Adj.

* * *

Company Morning Report 8 October 1944.

Record of Events

1/2 mile southeast of Bratte, France. Departed this area at 0415. Attacked Hill #403 at 0630. Have agained ground slowly. Weather clear and warm.

s/ Leslie E. Dickson
t/ LESLIE E. DICKSON
CWO USA Asst Adj."

* * *

(R8-11;Pros.Exs.C-G).

The defense objected to each and every one of the morning report "Record of Events" as being incompetent, irrelevant and immaterial (R12)

although no specific objection was made to admission of Exhibits C-F at time of admission. Extract copy of Record of Events of morning reports of company were admitted for 24 December 1944 and 26 December 1944, authenticated by Captain Frank J. Watson, Inf., Personnel Officer. These records show company heavily engaged in combat and suffering heavy casualties (R13;Pros.Ex.K.L). The 1st Sergeant testified that for the period of combat 30 September 1944 to 20 April 1945, the company received approximately six to eight hundred reinforcements (R13).

b. A private of accused's company testified that he had been in the company since July 1942 and knew accused; that he (witness) was wounded and evacuated 14 September 1944 but was again present with the company from 8 to 10 October 1944 and did not then see the accused present in the company; that he was again returned to the company about the middle of March 1945, has been present since that time, and saw accused in the company for the first time about 27 April or 28 April. Witness was not a member of accused's platoon, but he was well acquainted with accused with whom he came overseas and would have known it if accused had been present for duty (R14-15).

4. a. At close of prosecution's case, defense asked that morning report of 22 April 1945 (Pros.Ex.B) be stricken from the record. Defense counsel pointed out that he had been prohibited from showing the changes in officers in the company and that he had intended to show that there was no officer present on 22 April 1945 that was present on 30 September 1944; that the entry of 22 April, 2 days after accused's return, was based either on a guess or from statement made by accused upon return; that the former would be hearsay and the latter would require prosecution to show accused had been properly warned of his rights. Counsel concluded that by the admission of this evidence, accused could not exercise his right to remain silent and the right was thus denied. The law member overruled the motion and offered defense an opportunity to obtain evidence to refute any of the morning reports or to indicate same were inaccurate or incorrect (R16).

b. That accused, after being advised of his rights, elected to remain silent (R16).

c. Defense introduced, by stipulated testimony, evidence that in September accused helped evacuate a sergeant of Company K who was wounded to an aid station and went back to the company carrying ammunition to help stop a counter-attack; and that accused was an average fighter (R17).

5. a. Article of War 58 provides that:

> "Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, * * *".

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Article of War 28 provides that:

> "* * * Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter".

The Manual for Courts-Martial, 1928, paragraph 130a, page 143 under the heading "Desertion" contains the following with reference to elements of proof:

> "(a) That the accused absented himself without leave, or remained absent without leave from his place of service, organization, or place of duty, as alleged; (b) that he intended, at the time of absenting himself or at some time during his absence, * * * to avoid hazardous duty, or to shirk important service as alleged (c) * * * (d) * * *".

b. The only evidence in the record, except that found in the various morning report entries submitted, which bears on accused's absence, is the testimony of a private of accused's company to the effect that he did not see accused in the company when he, the witness, was present from 8 October to 10 October 1944, and that when he returned again to the company about the middle of March 1945, he did not see accused until about 27 or 28 April. The only evidence, other than that found in the several morning reports "Record of Events" which bears on the element of hazardous duty is the testimony of the company clerk to the effect that the company received approximately six hundred to eight hundred reinforcements for the period of combat from 30 September 1944 to 20 April 1945.

c. From an analysis of the foregoing testimonial evidence it is clear that the competency of the several morning report entries is vital in determining the legal sufficiency of the record of trial to support the findings and sentence. Considering first the several entries of the morning reports found in "Record of Events" as evidence of the element of hazardous duty alleged, they contain matter descriptive of combat action in which the company was engaged on the dates and places indicated. These historical events were proper material to be entered in the company morning reports (CM ETO 7686, Maggie and Lewandowski). This evidence shows that from 29 September to 3 October 1944 the accused's organization was in defensive positions, and was engaged in improving them. Considerable patrolling was done on the night 30 September the day on which accused is alleged to have absented himself. The remark of 29 September "all casualties occurred in France" together with the other historical data indicates that the company had been in contact with the enemy. Its activities on 30 September authorize the definite inference that hazardous duty, by reason of active combat, was imminent. The court was also justified in inferring from this evidence that

accused possessed knowledge of his company's tactical situation, knew that it was, or was about to be engaged in combat with the enemy, and willfully absented himself to avoid the perils and hazards of the battle which were imminent. Unless otherwise incompetent, this evidence established the element of proof with respect to avoiding hazardous duty (CM ETO 7413, Gogol; CM ETO 11404, Holmes).

d. The entries of the morning reports for 29 September, 30 September, 1 October and the others submitted in Prosecution's Exhibits A through J, except Prosecution Exhibit B were authenticated by an Assistant Adjutant, Chief Warrant Officer Dickson, who was also assistant personnel officer, and who in the absence of Captain Frank J. Watson, personnel officer, was acting personnel officer. Because of the fact that these entries were made prior to 12 December 1944, they were not admissible in evidence on the theory that the officer making them had an official duty to know the facts and record them since an assistant adjutant was not authorized to sign the morning report at that time. Neither did he possess that authority by virtue of the fact that he was acting personnel officer at that time (CM ETO 7686, Maggie and Lewandowski). By Circular 119, European Theater of Operations, 12 December 1944, Section IV, the Commanding General, European Theater of Operations directed that morning reports of units within the theater will be signed either by the commanding officer of the reporting unit, or, in his absence, the officer in command, or by the unit personnel officer. Since the above directive was not effective until 12 December, 1944, the morning reports in question were not signed by an authorized person and could not be admitted in evidence as official documents.

However, the Board of Review is of the opinion that these entries were properly admissible in evidence under the Federal "Shop book rule" statute (Act June 20, 1936, c. 640, Sec. 1; 49 Stat. 1561; 18 USCA 695).

From the testimony of the company clerk, it appears that entries in the morning reports during the period in question were made from morning report summaries signed by the company commander and submitted through channels to the personnel section in the rear echelon from which data company clerks prepared the morning reports. It further appears that it was the practice for Lester D. Dickson, Chief Warrant Officer, Assistant Adjutant, to authenticate the morning reports in the absence of Captain Frank Watson, Personnel Officer. An examination of the pertinent entries reveals that such entries were made at or within a reasonable time after the occurrence of the event therein set forth. The requirements of the Federal "shop book rule" statute appear to have been met in that the "Record of Events" entries were made in the regular course of business and that it was the regular course of business to make such entries at the time of the event. The circumstances here showing viz: the lack of personal knowledge on the part of the extract or maker did not make the entry inadmissible. By statutory declaration such factor simply affects its weight. The conclusion here reached is supported by CM ETO 4691, Knorr; CM ETO 10199, Kaminski. Reference is made to the holding in said cases

for a detailed discussion of the legal problem herein involved, and the principles therein announced are hereby affirmed.

The records of trial in CM ETO 6107, Cottam and Johnson; CM ETO 7686, Maggie and Lewandoski, supra; CM ETO 11693, Parke, and other cases of the same category held legally insufficient by the Board of Review, did not contain specific evidence that the entries in the morning report were made, in the regular course of business. These decisions therefore do not conflict with the conclusion reached herein where there is ample testimony of an adopted and settled procedure for the preparation of morning reports under the supervision of and authenticated by the Personnel Officer, or, in his absence, the Assistant as Acting Personnel Officer.

The comments contained in the opinion of The Judge Advocate General, published in Volume IV, Bulletin of The Judge Advocate General, page 86, have been carefully considered by the Board of Review and in its opinion they are not intended to mean that entries of a morning report if shown to be made in the regular course of business and at the time of the occurrence of the event recorded, are removed from the "shop book rule" but were intended to emphasize the basis for admissibility of morning reports made in the normal way on the theory of being an official writing and therefore not dependent on a showing of the conditions precedent for application of the "shop book rule". While there is language contained therein which taken alone and removed from its context might be construed as excluding the Federal "shop book rule" statute as one of the bases for admission of morning reports in evidence, a fair interpretation of the opinion taken as a whole leads to the conclusion that the Judge Advocate General sought to clarify the status of morning reports as official documents and did not intend to deny the application of the Federal statute where the evidence in a given case supports its use.

> "There is nothing in the Manual for Courts-Martial which leads to the conclusion that a morning report may be introduced in evidence only as an official document" (CM ETO 10199, Kaminski, supra).

e. The entry of the morning report of 22 April 1945 "Dy to AWOL 30 Sep 44 - 0600" correcting the entry of 2 October 1944 "Dy to MIA 30 Sep 44" was authenticated by the personnel officer at a time when personnel officers were authorized and had a duty to know the facts stated in the entry. (Cir. 119, European Theater of Operations, 12 Dec. 1944, Sec. IV).

This entry was manifestly admissible in evidence under the principle announced in CM ETO 14367, Campise. An identical situation then existed. Reference is made to the holding in said case for a discussion of the problem. Nothing can be added to the complete and careful discussion therein contained.

While the corrective entry was made over six months after the alleged departure, the rule applied in CM ETO 7381, Hrabik, is not applicable to the facts in the instant case. The entry of 2 October 1944 indicated clearly by the term "MIA" that accused was not present where he was supposed to be. In the absence of being detained by the enemy forces as a prisoner or having become an unaccounted for casualty, he was actually absent without leave. In the Hrabik case (supra), the entry was a positive entry indicating a valid reason for accused's absence, made at the time of the occurrence of the event, and suggested by further entries of the same positive nature. In the instant case, one common element exists in both the original and the corrective entry namely, that accused was absent. When accused was found not to have become a prisoner or a casualty, his status must necessarily have been that of absent without leave. Although the morning report entry showing accused's return to military control is at variance with the place alleged in the specification, no substantial rights of the accused are prejudiced thereby (CM ETO 15154, Sohn; CM ETO 800, Ungard). The law member's ruling which prohibited the defense from showing the complete change in officer personnel of accused's company was not prejudicial. The situation here prevailing was anticipated in the holding in the Campise case, supra, and what is there said is here adopted. The rejected testimony was also immaterial as will be indicated by a consideration of the present holding and the reasons herein set forth to support the conclusions herein reached.

6. When the operations of the company at the time and place shown by the historical entries on the morning reports are syncronized with accused's unauthorized departure from his organization, there was before the court substantial evidence from which it was fully justified in drawing the conclusion that accused absented himself without leave to avoid the perils and hazards of battle which he knew existed and which he sought to avoid (CM ETO 6637, Pittala; CM ETO 7032, Barker; CM ETO 9365, Mendoza).

7. The charge sheet shows that accused is 23 years old and was inducted without prior service on 29 September 1942 at Wilkes-Barre, Pennsylvania.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

9 AUG 1945

CM ETO 14171

UNITED STATES	)	103RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO
	)	470, U. S. Army, 19 June 1945.
Private JOHN H. PAYNE,	)	Sentence: Dishonorable discharge,
(36763739), Company K,	)	total forfeitures and confinement
411th Infantry	)	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 58th Article of War.

Specification: In that John H. Payne, Company K, Four Hundred Eleventh Infantry, did, at Gundershoffen, France, on or about 18 January 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Steinach, Austria on or about 30 May 1945.

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

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

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

On or about 18 January 1945, while at Gundershoffen, France, the battalion of which Company K, 411th Infantry, was a part received orders that it was to be attached to the 79th Infantry Division to form a task force tooppose a threatened German break-through near Hagenau (R7,10,11). At about 0900 or 0930 hours, the men were oriented, told that "it was reported * * * the Germans were being hopped up, drunk, and that they were pretty hard to handle, kind of kicking the 79th around a bit, and it would be a tough situation," and instructed to be prepared to move out on order (R7,10-14). Accused, a rifleman in the first squad, third platoon, Company K, was present at the orientation (R11,12,14). At about 1000 hours, he was reported missing and a search of the area was made for him without success (R7,10,12). At about 1100 hours, the platoon moved out without him (R10,17,14). He had no permission to be absent (R8,10,14). The unit moved through Hagenau to Sussenheim, where, on the following morning, it engaged the enemy (R12,14). Accused remained absent until 30 May 1945, at which time he voluntarily surrendered himself at the company orderly room, then at Steinach, Austria (R7,8,10,12,15).

A duly authenticated copy of the morning report shows accused from duty to absent without leave on 18 January 1945 and from absent without leave to duty on 30 May 1945 (R8;Pros.Ex.A).

4. After being advised of his rights, accused elected to be sworn as a witness on his own behalf. He testified that while he was in England "they wanted to put me in limited service," apparently because of rheumatism, but indicated that he had refused to accept the classification. He was not present at the orientation held on the morning of 18 January and did not know that his company wasgoing to move. He left his unit "right after chow" on 18 January because he was suffering from rheumatism and could hardly walk. During his absence, he retained his rifle and remained in uniform at all times. He had no intention "of ever deserting the service of the United States Army" (R17,18). On cross-examination and examination by the court, he testified to his awareness of the fact that his unit had been in a defensive position for three weeks prior to 18 January and was in the process of suddenly moving out on that date. He further testified that his division had been "fighting the war" prior to the 18th and

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that he "supposed" it continued to do so after the 18th (R19). He remained in one of two small villages during the period of his absence and "had intentions of going back as soon as I felt better" (R21). Little military personnel had passed through the villages where he stayed and, although he once or twice tried to secure information as to the location of his organization from field artillery and tank destroyer units, he had been unable to do so. With the return of warmer weather, his condition improved and, on or about 30 May, he secured a ride back to his company. He had made no prior efforts to return. At the time of his return, he knew the "war was over" (R18-24).

5. Under the specification as framed, the prosecution was free to prove either "straight" desertion or "AW 58-28" desertion (CM ETO 5117, DeFrank). Under either theory, the record of trial clearly supports the court's findings of guilty.

6. The charge sheet shows that accused is 31 years of age and was inducted on 31 July 1943 at Chicago, Illinois.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B C Lewis Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 1

14 SEP 1945

CM ETO 14174

U N I T E D S T A T E S	10TH ARMORED DIVISION
v.	Trial by GCM, convened at Garmisch-Partenkirchen, Germany, 20, 21 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private WAYNE H. HITCHCOCK (37600207), Company A, 20th Armored Infantry Battalion	

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

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

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

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

Specification 1: In that Private Wayne H. Hitchcock, Company "A", 20th Armored Infantry Battalion, did, at Maria Rains near Nesselwang, Germany, on or about 14 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Gisela Kutsch.

Specification 2: In that * * * did, at Maria Rains near Nesselwang, Germany, on or about 14 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Krimhilde Zilles.

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

Specification 1: In that * * * did, at Maria Rains near Nesselwang, Germany, on or about 14 May 1945, wrongfully place his hands upon the neck of Miss Brunnhilde Zilles.

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Specification 2: In that * * * did, at Maria Rains near Nesselwang, Germany, on or about 14 May 1945, willfully and unlawfully destroy the property of Wilhelm Unsinn, of the value of over $50.00 to wit: radio, piano, clock, cupboard, chandelier, crystalware, tables and rugs.

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

3. During the evening of 14 May 1945, the accused and one Private First Class Mitchell J. Pruitt, having had a few drinks, were riding about the countryside on a bicycle in the vicinity of their organization. Around 10 or 11 o'clock in the evening they demanded admission to the house of one Mr. Unsinn in Maria Rains, Nesselwang, Germany for the professed purpose of searching for German soldiers (R8,9,25,65,66). After being admitted, they went through all rooms of the house which was occupied by Unsinn and his wife, Miss Emma Degenhart, age 25, Mr. and Mrs. Hipp and their 12 year old daughter, Mrs. Anna Zilles and three of her daughters, to wit: Mrs. Gisela Kutsch, age 33, Miss Krimhilde Zilles and Miss Brunnhilde Zilles, twins, age 21, a three year old son of Mrs. Kutsch, Mr. Stoffels, husband of a fourth daughter of Mrs. Zilles, and a Polish servant girl (R9,25,26,35). Accused and his companion, after searching the house, demanded wine and schnapps and were given cider which they did not like. The soldiers then produced a suitcase of wine which they had brought with them (R9,10,25-26). Private Pruitt took some of the wine and went upstairs to the room of the Polish girl (R11) where he remained until 6:30 o'clock the next morning except for occasional visits to other parts of the house (R66-69). Accused then invited the occupants of the house who were downstairs, Mr. and Mrs. Unsinn, Hipp, Emma Degenhart and Stoffels, to drink with him (R10,26). They accepted and later Mrs. Gisela Kutsch came down from her room wearing a coat over her nightgown after Stoffels had gone up to her room and told her "that the American soldiers were very nice boys" and "that she should come downstairs." Mrs. Degenhart became ill and retired to her room (R11). The accused exchanged addresses with Stoffels, who spoke some English, and presented him with a pocket watch (R12). During the

evening Mrs. Kutsch went to her room and returned completely dressed (R11,36). Private Pruitt and the Polish girl came down and joined the party shortly before 1:00 o'clock (R15). Some time later a misunderstanding developed respecting a cigarette lighter of Mr. Stoffels which he thought accused had pocketed (R15). Accused thereafter became "cool" toward Stoffels and suddenly loaded his rifle and fired into the piano (R16). Private Pruitt, who had returned, indicated his displeasure at such conduct, took accused's gun, unloaded it, and then returned upstairs with the Polish girl to her room (R17,27). Mrs. Gisela Kutsch also left for her room at this time (R17). Accused then put the cartridges in his pocket and left the room without his rifle (R17,27). According to Unsinn, he returned a few minutes later, loaded the rifle, fired at the lamp in the hall and then went upstairs with the rifle (R28).

Mrs. Kutsch testified that she returned to her room when the accused fired the shot into the piano, and locked her door. Accused came up shortly thereafter and broke in the door. He extinguished the light which she switched on again, whereupon he tore the "whole cable and everything from the wall" (R37,46). She told him that her mother and child were in the room, but he "put me acrosswise over the bed, pushed me, took off my pants and raped me". She begged him again and again to "leave me alone". She did not cry for help or struggle because "I was so horrified I was like paralyzed" (R37). After he finished he left the room and she later heard "crazy shooting" (R38). After accused had gone upstairs Mr. Stoffels heard "groaning" and went up to investigate. He saw that the door to the room occupied by Mrs. Kutsch, her son and mother, was broken open, "the lock was hanging out". From the doorway he saw the accused lying on top of Mrs. Kutsch who "laid there almost as dead" and that from the movements of accused "he was made to believe some sexual act was taking place" (R17). Stoffels called Unsinn who came to the room of Mrs. Kutsch where he "had to look on how the blond soldier /accused/ worked on Mrs. Kutsch in a sexual intercourse" Mrs. Kutsch was groaning and sobbing. Mrs. Zilles, mother of Mrs. Kutsch, was standing in front of one of the beds in the room crying, and was holding the three year old son of Mrs. Kutsch (R28). Mrs. Zilles begged Stoffels and Unsinn to think of their families and to go away before accused "starts shooting you or killing you" (R17,28). Stoffels then went to the house of a neighbor and did not return until 7 o'clock the next morning. Unsinn retired from the room of Mrs. Kutsch to his room with his wife (R28). Accused, after leaving the room of Mrs. Kutsch, went to the room occupied by the twins, Krimhilde Zilles and Brunnhilde Zilles, this being about 5 o'clock, forced open the door and entered (R55). The twins started to run from the room, but accused caught Brunnhilde and dragged her back into the room, holding her by the neck until she "could hardly get any breath at all". She managed to struggle free and ran to the room of Mr. and Mrs. Hipp where her sister, Krimhilde, had preceded her (R55). Accused then came into the Hipp room and pointed his gun at the chest of

Krimhilde Zilles and told the other occupants of the room that he would kill her and all of them unless she (Krimhilde) remained alone in the room with him (R29,31,33,50,55,58,61). Mr. and Mrs. Hipp and their child, Brunnhilde Zilles, and Mr. and Mrs. Unsinn who had been aroused by the commotion, all left the house at this time and did not return until 6:30 o'clock the next morning (R29,55). Unsinn testified that from the woods where he sought refuge he later observed "how the shots fell in the living room". When he returned the next morning he found damage caused by the shooting to the total extent of 2,352 marks (R29).

Krimhilde Zilles testified that after the others left the room the accused took off her clothes and discovered that she was menstruating. He then left the room and started shooting. She put her clothes on but was afraid to leave the room because he was shooting out in the hall. He then came back into the room and tore the clothes from her body and pushed her on the bed and raped her. He had intercourse with her three or four times and forced her to take his penis in her mouth. Throughout this time she struggled against accused, yelled and tried to keep her legs together. She had pains the next day and went to the doctor (R50-53).

Accused, after leaving Krimhilde Zilles in the Hipp room, returned to the room of Mrs. Kutsch where, according to her testimony, he held his gun before him and forced her to accompany him to the Unsinn bedroom where he tore off her dress, pants and brassiere, pushed her on the bed and had intercourse with her twice. She did not struggle or call for help because "he held me tight" and I was afraid he would shoot me (R38-41).

Private First Class Pruitt testified that from the door of the Hipp room he observed accused having intercourse with Krimhilde Zilles, that "she was lying on top of Hitchcock and they were going through the regular motion of intercourse" (R68,72).

4. Accused, after being fully informed of his rights, was sworn and testified that he and Pruitt entered the house of Unsinn on the night of 14 May 1945. Pruitt went up to the room of the Polish servant girl; accused and the other occupants of the house went to the living room to drink. Stoffels told him during the evening that the Polish girl and Frau Kutsch were "pretty good pricking" (R77,95). While in the living room he kissed Frau Kutsch several times. Later in the evening he understood that he was being accused of having taken a cigarette lighter which made him angry and he prepared to leave after firing a shot into the piano. Pruitt took the gun away and told him not to get angry. Later he found the missing lighter under the table, returned it and apologized for having shot into the piano. Fifteen or twenty minutes later Frau Kutsch mentioned her son and wanted accused to see him and he followed her upstairs to her room. He put out the light because Mrs. Kutsch's mother was in the room. There was the customary preliminary love-

making, engaged in willingly by Mrs. Kutsch, and then he had intercourse with her. She made no effort to resist (R77-78). As he left the room the hall light loomed in front of him and he shot it out. While waiting for Pruitt, he entered the room of the twins and tried to kiss one but "she wouldn't go for it". He later went to the Hipps' room and motioned all the people out except one of the twins. His carbine was on his shoulder and he did not threaten anyone with it, but merely motioned them out with his hand. After the others left he went down, got a bottle of wine and brought it back to the room where he and Krimhilde Zilles each had a couple "of swigs" and they then started "fooling around back and forth".

> "She got hot and so did I. She showed me she had a rag on. It didn't look so good to me so I just sat there and we necked one another and I played around with her. She sort of pulled the pad * * * there was no blood on it so I took it for granted she was through with her period. She unsnapped the pin and took it off. We played around and got hot and we had intercourse then".

She did not resist in any way. Following the first act of intercourse she gave him a "blow job" and then she got on top of him " but couldn't do me any good because I was pretty well worn out" (R79). After he left the room Pruitt went in and he (accused) returned to the room of Frau Kutsch and from the door motioned her to come to the hall. She came willingly and they went to the Unsinn bedroom where he again had intercourse with her (R80,95,116).

Thereafter, he went downstairs to wait for Pruitt and because he didn't like Germans, had "hatred toward them for all they done" (R108), he took his carbine and started shooting up the place (R80). He shot into the piano, the clock on top of the piano, the radio and at other articles in the room (R104). After that Pruitt came down and they returned to their organization (R80).

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

These specifications allege that accused committed rape on Mrs. Kutsch and Miss Krimhilde Zilles. The evidence shows that he had sexual intercourse with Mrs. Kutsch twice. We assume that the prosecution relied on the first act of intercourse (CM ETO 7078, Arthur L. Jones, and authorities therein cited; CM ETO 14564, Anthony and Arnold).

Intercourse with both prosecutrices was not denied by accused but he contended that it was voluntary on their part. This presented an issue of fact for the court whose findings under the law we are powerless to disturb if there is present in the record competent, substantial evidence to support them (CM ETO 895, Davis, et al). Accused's unauthorized entrance into the house at a comparatively late hour, his wanton destruction of property

therein, the admitted circumstances surrounding the acts of intercourse, constitute, in our opinion, such evidence. The record is legally sufficient to support the findings of guilty and specifications 1 and 2 of Charge I (CM ETO 14040, McCreary; CM ETO 14564, Anthony and Arnold; CM ETO 14596, Bradford et al).

b. Specification 1 of Charge II:

This Specification charges a simple assault in violation of Article of War 96. The principles with respect to our function on appellate review set out above in paragraph 5a govern here. The record is legally sufficient to support the findings of guilty of this Specification.

c. Specification 2 of Charge II:

This Specification charges accused with the willful and unlawful destruction of the property of another. Such conduct is violative of Article of War 96 (Cf: II Bull.JAG p.385, CM 235563 (1943)). There is no doubt on this record that accused is guilty as charged. The gravamen of the offense is the willful destruction of property. Assuming, without deciding, that the maximum punishment for such destruction is governed by the value of the property destroyed, we find it unnecessary to discuss that point because the sentence is sustained by the findings of guilty of Specifications 1 and 2 of Charge I.

6. The charge sheet shows that accused is 26 years two months of age and was inducted on 22 July 1944 at Fort Snelling, Minnesota, to serve for the duration of the war plus six months. He had no prior service.

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

8. 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

6 SEP 1945

BOARD OF REVIEW NO. 1

CM ETO 14182

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Hallenberg, Germany, 4, 5 April 1945. Sentences: Lieutenant MALOTT, dismissal and total forfeitures; PAGE, confinement at hard labor for six months (suspended) and forfeiture of $25.00 per month for a like period; ZAPATA, confinement at hard labor for six months (suspended) and forfeiture of $40.00 per month for a like period.
Second Lieutenant JAMES D. MALOTT (O-2005666), First Sergeant GORDON C. PAGE (16015029) and Private First Class REMIGIO ZAPATA (39152067), all of Company C, 899th Tank Destroyer Battalion	)	

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

1. The record of trial in the case of the officer and soldiers above named 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. a. Accused were tried together with their consent. Accused Lieutenant Malott was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.
(Finding of not guilty)

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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RESTRICTED

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

Specification 1: In that 2nd Lt. James D. Malott, Company "C", 899th Tank Destroyer Battalion, did at Lohra, Germany, on or about the 28th of March, 1945 wrongfully fraternize with German civilians in violation of standing orders, Commanding General, Ninth Infantry Division.

Specification 2: In that * * * did, at Lohra, Germany, on or about the 29th of March, 1945, wrongfully fraternize with German civilians in violation of standing orders, Commanding General, Ninth Infantry Division.

He pleaded not guilty to Charge I and its specifications, guilty to Charge II and its specifications, and was found not guilty of Charge I and its specifications and guilty of Charge II 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 and 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, Ninth Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but owing to special circumstances in the case remitted so much thereof as provided for confinement at hard labor for five years, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

b. Accused Page and Zapata were tried upon the following charges and specifications:

PAGE

CHARGE I: Violation of the 92nd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that 1st Sergeant Gordon O. Page, Company "C", 899th Tank Destroyer Battalion, did, at Lohra, Germany, on or about the 29th of March, 1945, wrongfully fraternize with German civilians in violation of standing orders, Commanding General, Ninth Infantry Division.

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(Same as Page, except for appropriate substitution of name of accused in Specifications, Charges I and II).

Each pleaded not guilty to Charge I and Specification and guilty to Charge II and Specification preferred against him, and was found not guilty of Charge I and Specification and guilty of Charge II and its Specification preferred against him. No evidence of previous convictions of either accused was introduced. Page was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. Zapata was sentenced to be confined at hard labor for six months and to forfeit $40.00 of his pay per month for six months. The reviewing authority (1) as to Page, approved only so much of the sentence as provided for confinement at hard labor for six months and a forfeiture of $25.00 of his pay per month for six months, and ordered the sentence as thus modified executed, but suspended that portion thereof relating to confinement; and (2) as to Zapata, approved the sentence and ordered it executed as modified, but suspended so much thereof as related to confinement. The proceedings were published in General Court-Martial Orders Numbers 17 (Page) and 18 (Zapata), Headquarters Ninth Infantry Division, APO 9, 7 May 1945.

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

At about midnight 27 March 1945, Lieutenant Malott and a soldier awakened Herr Jacob Schlienbecker and his daughter Elizabeth at their home at 17 Kirbach Street, Lohra, Kries Marburg, Germany, by knocking at the door and asking for quarters (R16,17,29,40). They were shown available rooms, a fire was built and water heated, and at their invitation Schlienbecker and his daughter drank coffee furnished by the soldiers and all of them talked together. When Schlienbecker suggested they retire, all agreed and the enlisted man left the house (R18-19,29). Shortly thereafter Lieutenant Malott, who remained, made what the daughter characterized as unwelcome advances to her, and by menacing gestures with his pistol induced the father to go upstairs (R30-32). At length he had intercourse with the daughter, allegedly by force, after which he went upstairs and retired (R32-34).

On the evening of 29 March 1945, Lieutenant Malott and Page went to the home of Johannes Rau, immediately across the street from the Schlienbecker house. Rau took them to the cellar and produced one bottle of wine and Lieutenant Malott found two others (R67). Page produced his pistol in an unsuccessful attempt to induce Rau to find more wine, after which all three returned to the kitchen. Here they were joined by Frau Rau and their daughter Elizabeth, and all five sat around a table drinking wine and talking. Page suggested that only the

parents retire, but after some minor unpleasantness Elizabeth and her parents went upstairs (R46). During the scuffling that preceded their ascent Zapata came in, locked the door and pocketed the key (R122). Shortly thereafter Lieutenant Malott and Page went up and forcibly brought the girl back downstairs, and Lieutenant Malott had intercourse with her on the davenport (R47-48). In the period that followed, Page and Zapata each had intercourse with her twice, Lieutenant Malott did once more, and another soldier, not a party or witness in this case, who had come in later, also had intercourse with her (R47-54). Prior to the second act with Page, all of her clothes were removed (by which of them is in dispute) (R53,118). She testified that she did not scratch, strike, pull hair, scream or attempt to leave the room during these acts or the interim periods because she feared that she might be shot (R56), and after each act of intercourse she sat on the edge of the sofa and drank wine (R55).

4. All accused, having been fully advised of their rights, elected to take the stand in their own behalf (R78-79,110,120-121). Their testimony was substantially in accord with that of the prosecution except as to the use of force in accomplishing intercourse (R82,101,113-115,123). Since all accused were found not guilty of Charge I (Violation of Article of War 92) and of its specifications, a detailed review of the testimony on this point is not here included.

5. The actions of Lieutenant Malott in drinking coffee and talking with the Schlienbeckers and of Lieutenant Malott and Page in sitting around drinking wine and talking with the Rau family in what appears to have been a most sociable manner and atmosphere, clearly constituted a relationship of familiarity and intimacy; thus this conduct alone, taken with their plea of guilty makes the findings of guilty as to them proper, and on this question a consideration of the legal effect of the acts of intercourse is unnecessary.

Zapata, however, was present during neither of these periods of conviviality, entering the Rau home after the breach of amicable relationships which preceded the ascent of the Raus to the second floor. His sole association with any German civilian lay in his acts of intercourse with Elizabeth Rau, and had such acts been involuntary on her part, he could not have been found guilty of fraternization (CM ETO 10501, Liner; CM ETO 10967, Harris; but see CM ETO 11918, Bromley, and CM ETO 12869, DeWar). However, in finding Zapata not guilty of a violation of Article of War 92, the court has found that these acts were not accomplished by force and without consent, and voluntary intercourse is certainly "familiarity or intimacy" (CM ETO 10419, Blankenship).

6. The record shows (R2) that charges were served on each accused only one day before the trial. Each consented to trial at the date thereof (R5), which, according to the staff judge advocate, was necessitated by the tactical situation. In the absence of indication that any of the

substantial rights of accused were prejudiced, the irregularity may be regarded as waived (CM ETO 14564, Anthony and Arnold, and cases therein cited; Cf: CM ETO 4564, Woods, and authorities therein cited).

7. The charge sheet shows that Lieutenant Malott is 24 years ten months of age, that he enlisted 20 July 1940 at Detroit, Michigan, and that he received a (battlefield (SJA Review, p.9)) commission 1 March 1945. Page is 32 years nine months of age and enlisted 5 July 1940 at Peoria, Illinois. Zapata is 24 years six months of age and was inducted 17 February 1941 at Los Angeles, California. None of accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentences as approved (Page and Zapata) and as confirmed (Lieutenant Malott).

9. The penalty for violation of Article of War 96 by an officer is such punishment as a court-martial may direct. The maximum penalty for wrongful fraternization with German civilians by an enlisted man is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

Wm. F. Brown Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 6 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant JAMES D. MALOTT (O-2005666), Company C, 899th Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 14182. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14182).

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

(Sentence ordered executed. GCMO 410, USFET, 15 Sept 1945)*

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

BOARD OF REVIEW NO. 2 27 JUL 1945

CM ETO 14183

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, 27 April 1945.
First Lieutenant HENRY PFEFFERKUCH (O-1015250), Company D, 17th Tank Battalion	Sentence: Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant HENRY PFEFFERKUCH, Company "D", 17th Tank Battalion, did, at or near Rosdorf, Germany, on or about 21 April 1945, commit disorders to the prejudice of good order and military discipline, by entering, in an intoxicated condition, a building occupied by himself and enlisted men of his command; by wrongfully taking an intoxicated female

nurse into said building in the presence of enlisted men of his command; and by wrongfully, in the vicinity and presence of enlisted men of his command, in said building, getting into bed with said nurse, lying in bed with her while he was nude and she was partially nude.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority, the Commanding General, 7th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but owing to special circumstances in this case, remitted that portion thereof providing for confinement at hard labor for one year and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's undisputed evidence discloses that accused, an officer of Company D, 17th Tank Battalion, attended a dance (R7) in Rosdorf, Germany (R8) given by the officers of his battalion on the night of 21 April 1945, which was attended also by several nurses from a nearby hospital (R7). He was seen to leave the party about 2300 hours in the company of two nurses, one of whom needed help to walk (R10,12). Accused had drunk his share of liquor at the party (R11). When the second nurse reported that she had left the hall with accused and another nurse, and outside had been told by accused to go back,(R8), two senior officers and a nurse drove to accused's billet in search of her (R11). Accused had been seen to leave the hall for a time about 2200 hours with this same nurse (R12,13). To get to his room it was necessary to go through a room in which two enlisted men were in bed. The rooms were dark but by flashlight accused and the nurse were seen on the bed (R11). Accused was awake (R8). He was entirely nude and she had on no clothes from the waist down except her shoes. Accused told them to turn the flashlight out. The nurse had been drinking too much

and was unconscious (R11). Her clothes were on the floor (R9). One officer carried her out to the vehicle and there with the aid of the nurse helped dress her (R11). Accused was placed under arrest (R7). He was not completely sober but his breath did not smell of liquor (R9,11). The door between the room occupied by the enlisted men and accused was open (R7) or partly so (R9,11) and at least one of the two men was awake (R10). Accused and his platoon were all billeted in this building (R8,12,13). One of the two men through whose room it was necessary to go to reach accused's room testified he was awakened when the accused came in but paid no attention and saw nothing. Later on he heard a girl say in English, "Henry, where are you?" He also heard the two officers come in and pass into accused's room and there was some commotion as one of the officers carried something out (R14). The next morning he noticed some "female underpants" in accused's room (R15).

4. Accused, advised of his rights as a witness, testified that he attended the party in question and spent the entire evening with this one nurse, leaving the hall with her on three occasions. The first time they went outside and sat in an ambulance with the door partially closed. Some enlisted man opened the door, laughed and walked away and he and the nurse returned to the hall. They drank and danced and returned to the ambulance where they had sexual intercourse and again went back inside the hall. He arranged to take her home "and on the way we were going to sneak in a little loving". Each was half drunk (R16). As to what happened from then on till next morning he is vague. He remembers starting down the street with her but from the time of arrival at his billet he remembers nothing. His was the only testimony presented by the defense (R17).

5. Article of War 96 provides that,

> "though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service * * * shall be taken cognizance of by a general or special or summary court-martial * * * and punished at the discretion of such court".

Accused admits he was intoxicated and the other circumstances in evidence are not denied. The conduct of accused clearly falls within the scope of those offenses denounced by the 96th Article of War.

6. The charge sheet shows accused to be 27 years seven months of age. He was commissioned a second lieutenant, Army of the United States, 16 January 1943, after about seven years service as an enlisted man.

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 authorized upon conviction of an offense in violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 27 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant HENRY PFEFFERKUCH (O-1015250), Company D, 17th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14183. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14183).

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

(Sentence ordered executed, GCMO 564, USFET, 9Nov 1945).

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

BOARD OF REVIEW NO. 3

23 AUG 1945

CM ETO 14186

U N I T E D S T A T E S)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	Trial by GCM, convened at Le Havre, France, 28 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private WILLIAM L.COLEMAN (32012432), attached unassigned Detachment 68, Ground Force Reinforcement Command, 15th Reinforcement Depot)	

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 specifications:

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private William L. Coleman, attached unassigned Detachment 68, Ground Force Reinforcement Command, 15th Reinforcement Depot, having received a lawful command from First Lieutenant James A. Stoutenburgh, his superior officer, to give him the carbine, did, at Foret de Montgeon, Le Havre, France, on or about 18 March 1945, willfully disobey the same.

Specification 2: In that * * * did, at Foret de Montgeon, Le Havre, France, on or about 18 March 1945 lift up a weapon, to wit, a carbine

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against First Lieutenant James A. Stoutenburgh, his superior officer, who was then in the execution of his office.

Specification 3: In that * * * did, at Foret de Montgeon, Le Havre, France, on or about 18 March 1945 lift up a weapon, to wit, a carbine against First Lieutenant Norman E. Woodall, his superior officer, who was then in the execution of his office.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. 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, Normandy Base Section, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence 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 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused was charged with

(1) Willful disobedience of a lawful command of First Lieutenant James A. Stoutenburgh, his superior officer, to "give him the carbine;"

(2) lifting up a carbine against Lieutenant Stoutenburgh, who was then in the execution of his office; and

(3) lifting up acarbine against Lieutenant Norman E. Woodall, his superior officer, who was then in the execution of his office;

all in violation of Article of War 64. The uncontradicted evidence shows that, at the time and place alleged, Lieutenant Stoutenburgh, who was accused's commanding officer, while lawfully engaged in undertaking to arrest him, ordered accused to give him the carbine which accused was then holding (R7-8,16). Instead of complying, accused warned Stoutenburgh and Lieutenant Woodall, who was assisting him, not to come any closer, at the same time moving the operating handle

of his carbine to throw a cartridge in the chamber, then fingering the trigger and pointing the weapon in the general direction of both officers (R8,15,18). Woodall left to get his pistol and Stoutenburgh, after a brief struggle, succeeded in disarming the accused (R10). For further details, see the statement of evidence set forth in paragraph 5 of the review by the staff judge advocate of the confirming authority.

The proof required to establish willful disobedience in violation of Article of War 64, consists in showing

> "(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command" (MCM, 1928, par.134b, p.149).

The required proof to establish the offense of assaulting a superior officer in violation of Article of War 64 may be made by showing

> "(a) that the accused * * * lifted up a weapon against him, * * * as alleged; (b) that such officer was accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time" (Ibid, par.134a, p.148).

> "By 'superior officer' is meant not only the commanding officer of the accused, * * * but any other commissioned officer of rank superior to that of the accused" (Ibid, p.147).

> "The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. * * * The raising in a threatening manner of a firearm * * * would be within the description 'lifts up' (Winthop)" (Ibid, pp.147-148).

> "An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage'. (Winthrop)" (Ibid, p.148).

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Applying the rules and standards cited above, it is clear that the evidence sustains the findings of guilty of each offense as alleged.

4. The charge sheet shows that accused is 28 years eight months of age and that, with no prior service, he was inducted at New York City, New York, 13 March 1941.

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

6. The penalty for assaulting or willfully disobeying a superior officer is death or such other punishment as a court-martial may direct (AW 64). Confinement in a penitentiary, by way of commutation of a death sentence, is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Hecker Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Lewis Jr Judge Advocate

1st Ind.

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

1. In the case of Private WILLIAM L. COLEMAN (32012432), attached unassigned Detachment 68, Ground Force Reinforcement Command, 15th 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 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 14186. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14186).

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

(Sentence as commuted ordered executed. GCMO 378, USFET, 2 Sept 1945).

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

BOARD OF REVIEW NO. 5 15 SEP 1945

CM ETO 14206

U N I T E D S T A T E S	)	102ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Erz. Anst, Germany, 26 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class AELRED V. J. PLATTA (6919177), Service Battery, 379th Field Artillery Battalion	)	

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

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

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

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

Specification: In that Pfc Aelred V. J. Platta, Service Battery, 379th Field Artillery Battalion, did, at Terheeg, Germany, on or about 1 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Elizabeth Jansen.

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

Specification: In that * * * being on guard and posted as a sentinel at Terbeeg, Germany on or about 1 March 1945, did, leave his post before he was regularly relieved.

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

Specification: In that * * * did, at Terheeg, Germany, on or about 1 March 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Elizabeth Jansen with intent to commit a felony, viz, rape therein.

He pleaded not guilty and, all of the members of the court present when 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 when the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, The Commanding General, 102nd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, The Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Specification of the Additional Charge as involved a finding that accused did, at the time and place alleged, feloniously enter the dwelling house of Elizabeth Jansen with intent to commit a felony, viz, rape therein, confirmed the sentence, but, owing to special circumstances in this case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 introduced by the prosecution shows that on or about the day and at the place alleged in the specification, accused, a private first class attached to the Service Battery, 379th Field Artillery Battalion, was duly posted as a guard together with another soldier on a "roving post". At that time, 2300 hours, he was normal, neither sick nor drunk (R21-23,37,41-43). His post had definite limits of which he was advised (R38). Almost immediately, walking so fast as to leave behind Technician Fifth Grade Edward J. Whitaker, the soldier with whom he had been posted, accused left his post without permission and went down a road in the direction of a house where Elizabeth Jansen, a 74 year old widow, the prosecutrix, lived with her sister-in-law (R8,9,23,24,40). It was some time before midnight and the prosecutrix had left her house because something was burning in the neighborhood. Two American soldiers came up to her. One of the two "only the one in question", using a gun which he carried, pushed her into the house and into the living room where her brother had just died. The sister-in-law sat down on the bed beside

her dead husband and the soldier touched the corpse's hand "in order to find out if he actually was dead". The little night-light was extinguished by the draft. But the soldier had a light. He told the prosecutrix "clothes down" and he himself took her clothes down with force, pushed her and "raped" her at once. There was a sofa in the room in addition to the bed. In the beginning, this soldier took off some of his clothes, afterwards all of his clothes. He had "sexual intercourse" with the woman. She "resisted", cried and shouted, and when she resisted he struck her on the face and neck. He was there "a good half hour" (R8-11, 13). The prosecutrix did not identify this soldier (R8). While this was going on, the soldier, Whitaker, who had been posted with accused and outstripped by accused when they started to walk their post together, was searching for accused. Following in the general direction taken by accused, he saw a stream of light coming through the window-shutter in this house where the prosecutrix lived. This was about 75 yards beyond the end and limits of the post. Whitaker went to investigate the light and entered the house. The time then was about 2325 hours. He saw a light in a room, the door to which was slightly ajar. Inside the room he saw accused, whom he had known for over a year, and two elderly women, one of whom appeared to be kneeling by the bed and the other reclining on her back on a sofa. The woman on the sofa had her dress drawn up to her back, and her thighs and buttocks were bare and exposed. When Whitaker entered the room and she saw him, she held her hand out in his direction and said, "Comrade, comrade". She was crying. On the sofa with the woman, above her, was a man whom Whitaker recognized as accused. He went over to accused and calling him by name, said: "Platta, come out of this house". Accused reached up and pushed Whitaker away and calling him by his nickname said, in a quiet tone: "Ted, take off". At this time accused was clothed but "somewhat disarranged" (R25-27).

Whitaker left and returned in about 20 minutes with the Sergeant of the Guard. There was no light on at the time of the second visit but they heard suppressed sobbing. There was "a groaning noise". They investigated no further but departed, returning about midnight with First Lieutenant Rose. Whitaker and the sergeant entered the house. Whitaker called: "Platta, come out of this house immediately". Platta answered: "Ted, give me your light", and reached out for Whitaker's light with a bare arm that could be seen to a point half-way between the elbow and shoulder (R27-30,35-40). This was from the room in which Whitaker first saw accused (R36). Whitaker refused to give up his light, after which it sounded as if someone was stumbling around inside. Whitaker and the sergeant then withdrew (R30,40). The sergeant went out on the road and from there, in about five minutes, he and

Lieutenant Rose saw accused coming from the direction of the house, "through the archway that leads into this house" (R40,43).

4. The rights of accused as a witness were fully explained to him. He elected to make an unsworn statement (R66). He told of a quantity of cognac being brought to his battery the afternoon of the day in question and said that during that day he had drunk "close to about a quart and a half of cognac" (R67,69). Despite his resultant condition he went on guard, feeling that if he did not he would get in trouble. He claimed that he did have an argument with the sergeant of the guard to convince him that he "was all right". He stated that he had been on guard approximately 20 minutes when he "noticed a light coming down out of this house in question and that he went down to extinguish it" as we had to be very careful of blackout regulations". He found an elderly lady out in the yard. He tried to explain what he wanted. He could not understand him. So he went into the house through a doorway, a court yard and another door. He found a room with the light, a coal oil lamp, on a table on the far side. To get to the light he had to squeeze between some furniture. However he did blow out the lamp, but dropped his flashlight while trying to depart. While searching for his flashlight, Whitaker (prosecution witness quoted above) came to the door and called him (R66-68). Accused said:

> "I told him to take off and I will be right out, for him to watch the post. I tried to get a flashlight from him so I could find mine and very shortly afterwards Lieutenant Rose called me. He said, 'Platta, come on out'. I went outside and gave him my rifle and he told me that I was under arrest, so I handed over my rifle" (R68).

Asked on direct examination if at any time while in that house he touched either woman, he said,

> "No, sir, I am positive, no, sir, they were both elderly women and I did not touch them, I am positive" (R69).

On cross examination of Elizabeth Jansen, the prosecutrix, it was developed that there was at the time of the incident a fire burning in her yard. She had put water on it, but it was not totally extinguished (R13).

Whitaker testified that just before he went off post at 0001 hours he saw a fire burning in a building on

the same street and side as that in which the prosecutrix lived. However, he did not recall a fire burning at her house (R31). He also said that this house was in sight from one end of his post and that he believed his instructions (as a sentry) did not preclude his investigating anything happening at that house (R34).

The battery commander of accused, recalled as a witness by the defense, said that accused had served under him since the preceding May and that his work had been "satisfactory" and that as far as he knew accused had never been in any trouble (R45). Lieutenant Rose was recalled as a witness for the defense to say that he had found accused "an excellent soldier". On several occasions he went forward with the lieutenant as "forward observer party" and "performed his job perfectly" (R46,47). Corporal Pugh, of accused's battery, observed accused drinking cognac on the afternoon of the day in question. At about 2100 hours, also, accused was drinking. He had been with a party of seven that consumed five or six quarts of cognac between seven and nine o'clock that night. Pugh was not too certain about the time because he was pretty drunk himself. About nine o'clock accused left the party. He was staggering and was drunk. Some shots were fired outside and it developed that accused was shooting at a rabbit. Forty-five minutes later, accused was lying outside the kitchen door and the sergeant of the guard asked him if he was able to go on guard. Accused answered, "Yes" (R49-52). Technician Fifth Grade Kester, of accused's battery, testified generally to the same effect as Pugh regarding the amount of liquor consumed by the party of seven and by accused. He could not tell whether accused was drunk or not (R53-55). Private First Class Hubbard noticed accused was very intoxicated and that he did not fully know what he was doing that night. He had seen accused drink "quite a bit * * * could probably have been a quart" (R56,57).

5. CHARGE I: Specification. On this evidence the court found accused guilty of rape, as charged.

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165).

Although the prosecutrix failed to identify accused as the soldier whom she claimed raped her, accused was proved to have been the soldier who was with her and who committed the offense, if there was an offense. The prosecutrix testified that there was intercourse, that she did not consent and that she resisted. "The force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, ibid). The testimony of the prosecutrix established, therefore, every essential element

of this crime. While the function of the Board of Review is not to weigh the evidence but to determine if there is substantial, competent evidence to sustain the findings of the court, in rape cases the evidence should be scanned most carefully. The line between submission and consent is not always clear. This is particularly true in enemy country where the normal fear of an armed invader has been stimulated by hostile propaganda to such an extent that the woman is paralyzed by fear, unable to resist. On the other hand, in enemy country, a native witness may well be unworthy of belief, and the evidence should be most carefully scrutinized to determine whether the woman has been the victim or whether it is the soldier who has been victimized, entrapped in a scheme to discredit and disgrace and to keep alive the fires of hatred against the conqueror. In the present case, the findings do not rest on the uncorroborated story of the prosecutrix. In addition to the direct evidence of the crime offered by this 75 year old woman, there is circumstantial evidence given by American soldiers which convincingly corroborates her story and points to the guilt of accused. His remaining at the house for so long a period of time, the compromising position in which he was seen, the purpose behind his command, "Ted, take off", and the naked arm reaching out for the flashlight instead of accused himself coming out, all show guilt. The age of the prosecutrix, the circumstance of her brother's body, just deceased, being in the same room, and her crying and groaning, rebut any possible thought of consent or of a seduction. Had accused been victimized, he was the one to have claimed it. The implication, found in defense evidence, that accused was too drunk to know what he was doing was amply offset by the other evidence before the court. There was competent substantial evidence to support the findings of the court of guilty of Charge I and its Specification.

6. CHARGE II: Specification. Accused was also found guilty of leaving his post before he was regularly relieved, in violation of Article of War 86, the offense embodied in Charge II. The evidence shows that accused and another soldier were posted as sentinels at 2300 hours on a roving post. Seventy-five yards beyond one end of this post, the limits of which accused knew, there was this house where the Jansen woman lived. There was a fire burning in the yard, according to her testimony; and there was also a gleam of light coming through the window-shutter, according to Whitaker's testimony. Blackout regulations were being enforced at the time. Accused stated that he noticed a light coming down out of this house. He left his post and went to that house to enforce the blackout regulations, he claimed. However, the evidence shows that

accused did not extinguish the light in the house on his arrival. In fact it was still burning when Whitaker arrived looking for accused, for it was by the light that Whitaker saw the woman on the sofa and accused above her. The fact that accused on arriving at the house did not extinguish the light, and the further fact that he forcibly pushed the woman into the house may well have impeached his declared intention in the eyes of the court, justifying its rejection of his story that he left his post to enforce blackout regulations, there was evidence to sustain the findings of guilty of Charge II and its Specification.

7. CHARGE III: Specification. The findings of guilty under this Charge, as confirmed, involve the offense of housebreaking in violation of Article of War 93, which offense is defined:

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

Accused pushed the prosecutrix into this house with his rifle. Thereafter he raped her in the house. His entry was unlawful and there can be no question that at that time he entertained the intent to commit the crime of rape.

8. The charge sheet shows that accused is 23 years, six months of age, and that he enlisted 8 November 1939, at Wausau, Wisconsin, without prior service.

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

10. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape 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

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Judge Advocate

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1st Ind.

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

1. In the case of Private First Class AELRED V. J. PLATTA (6919177), Service Battery, 379th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted. 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 14206. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14206).

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

(Sentence as commuted ordered executed. GCMO 477, USFET, 10 Oct 1945).

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

BOARD OF REVIEW NO. 5

8 SEP 1945

CM ETO 14209

U N I T E D S T A T E S	)	14TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Taufkirchen, Germany, 5, 6 May 1945.
Technician Fifth Grade ROBERT A. MAY (37460203) Battery B, 398th Anti-aircraft Artillery Automatic Weapons Battalion (SP)	)	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, EVINS and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician Fifth Grade Robert A. May, Battery "B", 398th Antiaircraft Artillery Automatic Weapons Battalion Self-Propelled, APO 403, c/o Postmaster, New York, New York, did, at Bad Neuhaus, Germany, on or about, 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Miss Berta Helmes.

Specification 2: In that * * * did, at Bad Neuhaus, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Rosa Helmes.

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 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, 14th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case, 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. The evidence for the prosecution shows that accused, in a drunken condition, went with two other soldiers to the house of Berta and Rosa Helmes, 25 and 22 years of age respectively, at Bedneustadt, Germany, about 9:00 o'clock on the evening of 9 April 1945 where he demanded "schnapps" and occasionally waved his pistol about. After a short period he was persuaded to leave with his companions (R8,9). In about five minutes he returned, knocked, and was admitted as the occupants believed they had to do so. The girls' parents, other sisters and a Mr. Munz were present and he shouted and made motions with his pistol that they should leave the room whereupon the father collapsed, and accused waved his pistol indicating the father was to be taken away (R9,19,20). Accused grabbed Berta and pushed her into the guest room. He indicated that she was to remove her clothes by pulling on them, which she did except for her panties and brassiere. He then pushed her over on the bed and fell over her like a "wild animal", pulled off her panties and had intercourse with her several times (R10). After about an hour and a half, he was taken from the room by some soldiers who had come into the house, but he returned shortly with Rosa (R12). He pushed her into the room, grabbed at her clothing, indicating that she was to take it off and tore off her ski pants himself. He then caused her to lie down on the same bed with Berta and forced her to guide his penis to her genitals (R21,23,26). He continued having intercourse several times, alternating between Berta and Rosa (R12,21). Both girls cried for help and were afraid that accused would shoot their parents and do harm to them and their sisters (R16,17,23). Eventually two sisters, who had gone for help returned with "three men from the government" and a little later the police, and the accused was taken away (R12,22).

The review of the Theater Staff Judge Advocate contains a fair and adequate summary of the evidence presented to the court by both prosecution and defense in the trial of the case and for further particulars is incorporated in this holding by reference.

4. The accused was duly advised of his rights as a witness and elected to remain silent.

Three soldiers testified for the defense that hearing a disturbance in the house they entered to investigate. They saw accused in one of the rooms having intercourse with a woman who appeared to be struggling "with him" rather than "against" him and was "loving him up" (R35,47). Accused's platoon leader testified that accused had been a member of his platoon since May 1943, that his character and performance of duty had been excellent (R68).

5. To sustain the findings of guilty against the accused, the evidence must prove that he had carnal knowledge of Berta and Rosa Helmes and that the acts were performed by force and without their consent. The identity of the accused was clearly established. Both victims testified that he had intercourse with them, and this is corroborated by the evidence of three soldiers, who knew the accused, and who testified for the defense that they saw him in the act of intercourse with "a woman" at the time and place of the alleged offenses. The only issue is whether the acts occurred by force and without the consent of the girls. The evidence shows that accused constantly used his pistol in a threatening manner towards the girls and their family, putting them all in fear of death or great bodily harm, that he pushed the girls into the bed room and there forced them to undress. There being substantial evidence in the record of force and lack of consent the court's finding of guilty will not be disturbed by the Board of Review (CM ETO 9083, Berger). That accused was drunk at the time of commission of the offenses is no defense (CM ETO 5609, Blizard; CM ETO 8691, Heard).

6. The charge sheet shows that accused is 22 years of age and was inducted 11 March 1943 at Fort Warren, Wyoming. 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 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).

Judge Advocate

Judge Advocate

Judge Advocate

14209

(288)

1st Ind.

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

1. In the case of Technician Fifth Grade ROBERT A. MAY (37460203) Battery B, 398th Anti-aircraft Artillery Automatic Weapons Battalion (SP), 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 14209. For convenience of reference, please place that number in brackets at ~~the end~~ of the order: (CM ETO 14209).

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

(Sentence as commuted ordered executed. GCMO 434, USFET, 22 Sept 1945).

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

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14210

U N I T E D S T A T E S	UNITED KINGDOM BASE, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private First Class FRED L. LOFTON (34748453), 4148th Quartermaster Service Company	Trial by GCM, convened at Thatcham, Berkshire, England, 2 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
VAN BENSCHOTEN, HEPBURN and MILLER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Fred L. Lofton, 4148th Quartermaster Service Company, did, at Earley, Berkshire, England, on or about 17 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Queenie Margaret Frankum, a female under the age of sixteen years.

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 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. Evidence for the prosecution: During the evening of 17 June 1944, about 9 pm when it was still daylight, Queenie M. Frankum, age 13, and Violet and Pamela Mudge, age 12 and 10, respectively, left Three Tuns, Reading, England, and proceeded along Wilderness Road past a camp of colored troops. They crossed over or through a fence to lessen the distance toward their homes and walked through a field where they observed two colored American soldiers, one of whom all three identified as the accused (R7-8,21,24). He was on the ground. He reached up and grabbed Queenie, who was the nearest of the three, and dragged her down. She screamed. He said, "Shut up, or I will choke you" (R7). She continued to scream. He put his hand on her throat and almost strangled her. He "knocked" her down. She could hardly move. He pulled her legs apart and took her knickers down, got on top of her and penetrated her genitals with his penis (R8,13). After about three minutes he got up and the other colored soldier had intercourse with her and then they left (R13). Violet heard the accused say to Queenie when he grabbed her, "If you don't let me do it I will strangle you" (R21). After the accused got on top of Queenie, Violet and Pamela ran away (R22), because the accused told them to go away. Pamela returned and saw the accused on top of Queenie completely covering her body and "jumping up and down" (R25). The other colored man was standing beside them (R29). Queenie smelt liquor on accused's breath. When she asked him his name he told her his name was Jackson (R38). Queenie caught up to the other girls who were trying to summon help. She did not tell of her experience until the next day when she told her mother who discovered blood on her knickers (R14). The girls were taken in an automobile by an English policeman, who was investigating the case, on 18 June 1944, to the colored soldier's camp, where the policeman interviewed the accused because he answered the description given by the girls. The accused admitted that he had been drinking at the Three Tuns pub on the evening of 17 June 1944 and had returned to his billet in the camp across a stream through the rear of the premises (R32, Pros.Ex.I). His shoes showed no sign of mud on them (R32). When the policeman and the accused walked out of a building in which he had been questioning the accused, the three girls immediately identified him as Queenie's assailant (R33).

On 18 March 1945 a baby was born to Queenie with dark skin, hair and eyes. The hair was curly and the skin was "sort of a light coffee color"--"definitely a chocolate color" (R16,36). Queenie testified that she had never had sexual intercourse before or after 17 June 1944 (R16). By stipulation it was shown a medical examination

of Queenie on 19 June 1944 disclosed lacerations of the hymen together with oedema of the hymen and adjacent vaginal walls (R17). The accused is a soldier in the military service (R6).

4. After being advised of his rights as a witness the accused elected to testify in his own behalf. He denied that he saw or raped Queenie as alleged. He had seen her around the camp several times during the previous week and he had given her a cigarette once when she asked for one. On the Thursday preceding the 17th of June he had chased Queenie away from the camp with a switch. On the evening of the 17th he visited the pub and drank some beer and cocktails and then returned to his billet through the woods and in the back way because he did not have a pass. It was then dark. He got in bed and dozed off to sleep right after bed check (R40-42). He claimed that there was no water in the bed of the stream when he crossed it on a log (R43).

5. The accused has been convicted of committing rape upon Queenie Frankum, a 13 year old English girl. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. The offense can be committed on a female of any age (MCM, 1928, par. 148b, p.165). The evidence for the prosecution presents a clear case of rape. The colored soldier in the presence of the three children forcibly grasped one of them--Queenie--and holding her on the ground, in spite of her screams and struggles, ravished her. The only real issue raised was the identity of the offender. The three girls identified the accused. The accused denied that he was the man. He admitted being in the vicinity at the time. Inasmuch as it was within the exclusive province of the court to determine this issue of fact, its decision will not be disturbed by the Board upon review (CM ETO 4194, Scott).

6. The charge sheet shows the accused to be 23 years and three months of age. Without prior service he was inducted on 21 April 1943 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. 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). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (cir.229, WD 8 June 1944, secII, pars. 1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

14210

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

BOARD OF REVIEW NO. 2

20 OCT 1945

CM ETO 14212

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MATHEW C. HEALAN (34041079), 341st Replacement Company, 65th Replacement Battalion, 12th Reinforcement Depot	Trial by GCM, convened at Southamoton, Hampshire, England, 20 April and 1 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. 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 upon the following charges and specifications:

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

Specification: In that Private Mathew C. Healan, 341st Replacement Company, 65th Replacement Battalion, 12th Reinforcement Depot, did, in conjunction with Private Elmer A. Rosheisen, Reinforcement Company X-A-223-H, 11th Replacement Depot, at the British Royal Air Force Station, Chilbolton, Hants, England, on or about 17 March 1945, feloniously take, steal and carry away one blue fibre trunk, value about $40.00, one brown leather suitcase,

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RESTRICTED

value about $28.00, one completely fitted brown leather toilet case, value about $12.60, one gentleman's dressing gown, value about $20.00, one complete set of officer's web equipment consisting of belt, shoulder-straps, holster and ammunition pouch, value about $10.00, one revolver, Smith and Wesson, caliber .38, value about $20.00, one pair of service low cut black shoes, value about $6.00, one pair of civilian low cut black shoes, value about $8.00, one complete officer's service dress uniform consisting of tunic and trousers, value about $50.00, four pair of white drawers, value about $8.00, fourteen blue shirt collars, value about $5.60, five large bath towels, value about $8.00, four black neckties, value about $6.40, one respirator, value about $3.80, two rolls razors with straps, value about $6.40, and sixty razor blades, value about $6.00, all of a total value of approximately $230.00, the property of Squadron Leader John C. Forbes.

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

Specification: In that * * * did, in conjunction with Private Elmer A. Rosheisen, Reinforcement Company X-A-223-H, 11th Replacement Depot, at Westmoor, Dorset, England, on or about 12 March 1945, without proper authority, wrongfully take and use a quarter ton four x four General Purpose vehicle, the property of the United States, of a value of more than $50.00.

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

Specification: In that * * * did without proper leave, absent himself from his organization and station at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, from about 15 February 1945 to about 17 March 1945.

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

Specification: In that * * * having been duly placed in confinement in the 2912th Disciplinary Training Center, on or about 2 January 1945, did, at Shepton Mallet, Somerset, England, on or about 15 February 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * and Private Elmer A. Rosheisen, Reinforcement Company, X-A-223-H, 11th Replacement Depot, acting jointly, and in pursuance of a common intent, did, at Romsey, Hampshire, England, on or about 17 March 1945, shoot Captain Edward Grace, their superior officer, who was then in the execution of his office, in the thigh and abdomen with a pistol.

Accused's motion for a severance was granted. He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of themembers 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. This is a companion case to CM ETO 17272, Rosheisen.

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

Accused, who is in the military service of the United States, was confined in the United Kingdom Guardhouse, at Shepton Mallet, England, on 2 January 1945 (R44,49,50). At 2100 hours on 15 February 1945 he escaped and, although a search was made, he could not be found. He had no authority to absent himself at this time (R45,46). He was returned to this guard house on 18 March 1945 (R46).

On 16 March 1945, Miss Gertrude Audrey Kemp and Miss Mavis Cotton met accused (referred to as "Blondie") and another American soldier (referred to as "Andy") in a public house in Nottingham, England. The soldiers asked them to go for a ride and they agreed to do so. The soldiers had a United States Army jeep (R54) and the four of them entered it and proceeded to another public house in Tollerton where at about 1900 hours, they stopped and had a drink. Accused drove the vehicle at this time (R53,67). From here they proceeded to a house in Bournemouth, where they expected to spend the night but were refused admittance by the lady there. Leaving Bournemouth they stopped in a

woods, where the soldiers left them, saying they were going to a "nigger camp" to get some "petrol". Accused and his soldier companion returned in about three-quarters of an hour bringing with them some blankets and "petrol". Miss Cotton went to sleep in the back of the jeep and when she woke up about 0500 hours the next morning they were somewhere near Salisbury (R54,68). After leaving this vicinity they stopped near an RAF camp and accused and his companion entered the camp, which appeared to be deserted. When they returned, accused carried a big blue suitcase and his companion a small brown one. The luggage was placed in the jeep and the soldiers and girls drove to a place near some rail lines, where the suitcases were opened. The large one contained an RAF uniform, some RAF shirts, a respirator, collars, ties and pajamas. The soldiers burned the large case and then washed and shaved with a razor they found in the small case. In one of the cases accused's soldier companion found a revolver, which he put in his back pocket and "He said if he saw an MP, if he tried to stop him, he would shoot him". Accused told the girls he took the jeep from a "nigger camp" around Bournemouth (R54,55,56,60,69,70,71).

After washing and shaving accused and companion and two girls re-entered the jeep and accused drove them to the Bear and Ragged Staff, a public house in Romsey. They arrived here at about 1120 hours and parked their jeep in front of the public house (R55,56,57,71). After entering the building, they went over to the fireplace to warm themselves and by the time accused and his companion had obtained beer for the party, several American lieutenants and a nurse entered the building (R57,71).

About 1130 hours on 17 March 1945, Captain Edward H. Grace, Commanding Officer of AAF Station 503, drove up to the Bear and Ragged Staff public house in Romsey in his closed-in jeep. He parked his jeep near the back of the building and at that time noticed an open jeep standing in front of the public house. His attention was attracted to this vehicle because it contained a civilian suitcase. When he entered the public house, he observed two American soldiers, with two civilian girls, and a group of his officers in the company of a Red Cross girl. Accused, one of the American soldiers present, soon went outside and drove the open jeep back of the house and parked it next to Captain Grace's jeep (R13,14,15,18). He came back into the bar and then left again with his soldier companion. Shortly thereafter one of them re-entered the public house and took the two civilian girls outside. Captain Grace became suspicious of their actions and went to the back of the building and looked out a window to see what they were doing. They had transferred their luggage to his (Captain Grace) jeep and one of the girls was already in it (R14,15). He called out to them asking them "what they thought they were doing" and then went outside. Both girls were now in the open jeep. Accused stood on the right hand side of it and his companion (referred to as Andy) was on the left hand side of it, to the right of Captain Grace as he approached them (R15,16,34,37,38,78).

The Captain again asked them what they were doing, and, receiving no reply, told them they were under arrest for attempting to steal his jeep. Accused raised the hood of his vehicle, put a rotor arm back in the jeep and Captain Grace reached over and told him to give him the rotor arm. Accused did so and Captain Grace put it in his pocket (R15,17,79). The other soldier then said "Not so fast Captain", or "Get going Captain". Captain Grace noticed he was pointing a revolver at his stomach (R15, 19, 29,31). Captain Grace "made a snatch" for him and he lowered his gun and shot the officer through the right leg, between the knee and the hip (R15, 19,31,38,79). Captain Grace then "rushed" this soldier and pushed the gun away from him. The soldier shot two or three more times, one of the bullets striking the rotor arm in theofficer's pocket and puncturing the skin of his stomach (R15,29,38,39). Captain Grace succeeded in taking the gun away from the soldier and he hit him with the butt end of the weapon, knocking him to the ground (R16,79). Before the first shot was fired the seven other American officers and the Red Cross girl came outside to a point near where Captain Grace was talking to the soldiers (R22,23,24,29,31) and some of them grabbed the soldier when he first was knocked down. He wrenched away from them and "started out" but Captain Grace again hit him with the butt of the gun and he remained there (R16,29). Captain Reps D. Jones, noticing that Captain Grace had been shot, placed him in the latter's jeep and drove him to the hospital (R29). One of the officers present took the revolver, which was a Smith and Wesson 38 with British markings on it, from Captain Grace and emptied it, retaining three spent rounds and one live cartridge (R32,36). During the above incident accused stood alongside his jeep on the left hand side. The fight occurred on the right hand side of the jeep (R33). After accused's companion pulled the gun accused started to run away but two of the officers present brought him back. After Captain Grace was taken to the hospital, he once more attempted to escape but he was again caught and brought back (R19,33,39). He returned calmly and made no further attempt to escape (R36).

Captain Grace was wounded in the right leg by the first shot and one of the other bullets penetrated his stomach about three-quarters of an inch. He was hospitalized from 17 March 1945 until 24 April 1945 and suffered at time of trial from a nerve injury in his leg and numbness of his right foot (R76).

Squadron Leader John C. Forbes, Royal Air Forces, testified that on 17 March 1945 he was stationed at Chilbolton, England. When he returned to his quarters about 1800 hours on that date his blue trunk and brown leather suitcase were missing. He described their contents and valued the items as follows: one blue fiber trunk, £ 10; one brown leather

suitcase, £5; one fitted brown leather toilet case, £5; gentleman's dressing gown, £5; web equipment, £ 3; one revolver, Smith and Wesson, Caliber 38, £5; one pair of low cut service shoes, 30/-; one pair low cut civilian shoes, £2; one complete RAF dress uniform, 13 guineas; four pair of white drawers, 10/6d each; 14 blue shirts, 24/- each; 5 large bath towels, 10/-each; four black neckties, 10/- each; one respirator, 19/8d; two Rolls razors with straps, 27/6d each; and 60 razor blades, 3d each (R41,42).

Captain Thomas L. Corner, Ordnance 14th Port, testified that a quarter-ton 4 x 4 general purpose vehicle is worth $1407 new and considering depreciation, if it were in running condition would have a value in excess of $50.00 (R52).

4. Accused after his rights as a witness were fully explained to him (R80) elected to make the following unsworn statement:

> "On the day the shooting occurred we was at the pub and we want out of the pub and I was the last one out. I started out of the pub, I got halfway out, I says to Andy 'I left my beer half full I will go back in and finish it'. I finished my beer, I walksout and goes and raised the hood on my jeep I was driving. I put a rotor button in and I heard the Captain holler 'What the hell you doing?' Before I could get the rotor button in the jeep he came up to me, he came out and put his foot on the bumper of the jeep and says. 'You are under arrest'. I looks at him, I started to ask him what for. He says 'Give me the rotor button'. I hands him the rotor button, the hood is still up, he goes round the back of the jeep. As he goes to the back I laid the hood down and I heard a shot and ran and after that the MP's came up and got us" (R81).

5. The record contains clear and persuasive evidence that on 17 March 1945 accused stole various items of property belonging to Squadron Leader John C. Forbes as alleged in the Specification of Charge I. Miss Cotton testified that when she woke up about 0500 hours on the date in question they were somewhere near Salisbury and that after that they stopped at an "RAF" camp. Accused returned from the camp carrying a big blue suitcase and his companion a small brown one. Miss Cotton further testified the big case contained an "RAF" uniform, some RAF shirts, a respirator, and ties. Miss Kemp testified accused's companion found a revolver in one of the cases and put it in his back pocket and the weapon with which Captain Grace was shot was identified as a Smith and Wesson 38 with British markings on it. Squadron Leader Forbes testified he was stationed at Chilbolton, England, and that

when he returned to his quarters on 1800 hours on 17 March 1945 his blue trunk and brown leather suitcase were missing. Among the contents of his missing luggage was a Smith and Wesson revolver, an RAF uniform, a respirator and some ties. The court could take judicial notice that Chilbolton is less than five miles from Salisbury, where Miss Cotton placed accused on the morning of 17 March 1945 and that, traveling in a jeep, this distance could be covered in a very short time (MCM,1928, par.125,pp.134,135). Thus, a chain of strong circumstantial evidence was presented from which the court could infer that the missing property of Squadron Leader Forbes was the same property that accused was seen carrying from the RAF camp and later burned and that the gun used to shoot Captain Grace was the one that was missing from the quarters of the British officer.

The only evidence as to the value of these items, however, is the testimony of Squadron Leader Forbes, who was not shown to be an expert on their values. Accordingly, the record of trial is legally sufficient to support only so much of the findings of guilty of larceny as involves a finding of guilty of larceny of property of some substantial value not in excess of $20 (CM 228742, II Bull.JAG 12-13; CM ETO 4058, McConnell; MCM, 1928,par. 149g,p.173).

4. In the Specification of Charge II, accused is charged with the wrongful use of a government vehicle. The evidence clearly showed that for a period of approximately 18 hours he drove another soldier and two civilian girls on a pleasure jaunt between many towns in England in a United States Army jeep. He informed the girls he took the jeep from a "nigger" camp nearby. Under these circumstances the court was warranted in inferring that his taking and subsequent use of the vehicle were unauthorized. The court's findings of guilty is amply supported by substantial evidence of all the essential elements of the offense alleged in this Specification (CM ETO 2966, Fomby).

5. Concerning the specifications of Charge III and IV there is substantial evidence of all the essential elements of the offenses of absence without leave between the dates alleged and escape from confinement at the time and place alleged (MCM,1928,par.132,p.146 and par.139b,p.154; CM ETO 1737 Mosser; CM ETO 2723, Coppone).

6. The Specification of Charge V alleged that accused and another soldier acting jointly and in pursuance of a common intent shot their superior officer, while he was in the execution of his office. Inasmuch as the Board of Review has been unable to discover any precedent wherein an accused has been held criminally responsible under Article of War 64 for the acts of another with whom he was engaged in a joint enterprise, a brief discussion of the legal principles involved appears warranted

Had accused and his companion been jointly charged with assault with intent to commit murder or assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93, the evidence produced at the trial would clearly support a conviction of either offense (CM ETO 2297, Johnson and Loper; CM ETO 3927, Fleming; 22 C.J.S. 87a). To hold that accused cannot be held liable for the acts of his accomplice simply because the offense was charged under the 64th Article of War and thereby given a military aspect would, in the opinion of the Board of Review, lead to an inconsistent conclusion and a distinction between offenses without reasonable basis. The offense as herein charged is a much graver offense than the corresponding civil offense inasmuch as a violation of Article of War 64 is punishable by death. While certain military offenses, such as desertion, cannot be committed by two persons jointly (MCM,1928,par.27,p.18), there is no legal principle which prohibits charging two persons with the joint commission of an offense simply and solely because it is a military offense. On the contrary in CM 249909, Long and Wright, 32 B. R. 223, it was held that two officer pilots "acting jointly and in pursuance of a common intent" were guilty of a violation of Army Air Force directives relative to low flying in violation of Article of War 96 and guilty of suffering through neglect property of the United States to be damaged in violation of Article of War 83. Accordingly, in the opinion of the Board of Review, accused's guilt of the specification laid under the 64th Article of War, although charged as a joint offense may be sustained. Captain Grace was manifestly in the execution of his office in preventing the accused from stealing his jeep, an item of government property and in preventing their escape. That accused's companion shot Captain Grace in order to prevent their apprehension is clearly shown by the evidence and accused, a participant in a joint venture and charged with acting jointly, and in pursuance of a common intent, is chargeable as a principal regardless of the extent of his participation (CM ETO 7518, Bailey et al). The holding in CM ETO 4294, Davis and Potts is clearly distinguishable. In that case the common enterprise, to wit the rape of a French woman had been brought to a halt by the intervention of the woman's husband. Potts left the scene of the joint crime and was enroute to camp when Davis committed the murder of which he was found guilty. In the instant case there is evidence that for at least a day preceding the shooting accused had engaged jointly with his companion, in a series of offenses, including larceny and the wrongful use of a Government vehicle. Jointly they had attempted the theft of Captain Grace's jeep. Foiled in that endeavor there is evidence of a consolidated effort to escape after the officer placed them in arrest. There was therefore substantial evidence to support the court's finding that the shooting of the officer was part and parcel of a joint effort of the two soldiers to escape. All the essential elements of the offense charged in this Specification are established by substantial evidence (MCM,1928,par.134a,p.148).

7. The charge sheet shows that accused is 22 years, four months of age and was inducted 5 April 1941 at Fort Oglethorpe, Georgia. He had no prior service.

8. The records of this office disclose that on 1 April 1945 accused

Private Matthew C. Healan, Jr., 34041079, 343rd Replacement Company, 65th Replacement Battalion pleaded guilty to and was convicted by general court-martial of three violations of Article of War 61, two violations of Article of War 69, five violations of Article of War 93 and single violations of the 84th, 94th, and 96th Articles of War and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority on 30 April 1945 approved the sentence, reduced the period of confinement to 30 years and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. The order promulgating the result of this trial was published in General Court-Martial Orders No. 1082, Headquarters United Kingdom Base, Communications Zone, European Theater of Operations, dated 30 April 1945 and on 14 May 1945 the record of trial therein was examined by the Military Justice Division, Branch Office of The Judge Advocate General with the European Theater of Operations and found legally sufficient to support the sentence.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial except as herein specifically noted. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of larceny of property of some substantial value not in excess of $20, legally sufficient to support the findings of guilty of Charge I and all the remaining charges and specifications and legally sufficient to support the sentence.

10. Conviction of an offense under Article of War 64 is punishable by death or such other punishment as the court-martial may direct (AW 64). Confinement in a penitentiary is authorized upon conviction of the offense of the unauthorized taking and using of a government vehicle (AW 42; 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).

Carle Stephens Judge Advocate

Ronald D Miller Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 14224

U N I T E D S T A T E S	) 28TH INFANTRY DIVISION
	)
v.	) Trial by GCM convened at
	) Kaiserslautern, Germany,
Private First Class GEORGE A. PAGE (37061128), Company H, 274th Infantry, 70th Infantry Division	) 6 June 1945. Sentence: Life imprisonment. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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 Private First Class George A. Page, Company H, 274th Infantry, did at Heiligenmoschel, Germany, on or about 25 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Erma Deutsch.

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. Evidence of two previous convictions by special courts-martial was introduced, one for absence without leave for ten days in violation of Article of War 61, and one for absence without leave for five days and wrongfully taking, and using an automobile without the owner's consent in violation of Articles of War 61 and 96. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to life imprisonment. The reviewing authority approved the sentence, ordered it executed, and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. The Board of Review treats the record of trial as having been forwarded for action pursuant to Article of War 50½.

3. The reviewing authority in his action ordered the sentence executed and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. The proceedings were published in General Court Martial Orders No. 79, Headquarters, 28th Infantry Division, APO 28, U. S. Army, 29 June 1945.

Paragraph 3 of Article of War 50½ provides in part, that:

> "Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence".

Paragraph 7 of the same Article provides:

> "Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President".

The sentence in this case involved confinement in a penitentiary. Under the quoted provisions of Article of War 50½, the reviewing authority was without power to order its execution until the record of trial had been held legally sufficient to support it by the Board of Review with the approval of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater. It follows that the general court-martial order was void (CM ETO 3570, Chestnut; CM ETO 11619, Thompson).

4. About 1 or 2 am, 26 March 1945, accused sought admittance to the home of Herr Georg Deutsch, Heiligenmoschel, Germany. The door, which was locked, was opened by Deutsch. Accused inquired as to the whereabouts of some automobiles which had been parked outside the house. Apparently dissatisfied with Deutsch's reply, accused struck him on the chin and chest with his fist, closed the door which locked automatically, and departed (R13). A few minutes later he returned and Deutsch re-opened the door. When Deutsch had difficulty in understanding accused, the

latter pushed him and hit him on the chin. Deutsch finally gathered that he wanted a light for his cigarette and for a candle he was carrying and provided it for him. Accused heard Deutsch's sister-in-law talking in the kitchen, but when she saw accused she ran into a bedroom occupied by Frau Deutsch. In the excitement accused left a package of cigarettes, a package of coffee, and twenty-five marks on a table. Deutsch tried in vain to return these items to him. The marks were turned over to the burgomaster the next day by Deutsch (R13,14).

When accused saw Deutsch's sister-in-law run into the bedroom, he followed her. She managed to hide and accused turned his attention toward Frau Deutsch who was standing at the foot of the bed. He ordered her to leave the room, at the same time taking her by the arm, and pushed Deutsch against the bed when he tried to stop her (R9,14,16). Over her protests accused made her go into the kitchen and lie down on the table despite the fact that she was beginning her eighth month of pregnancy (R9,10). Deutsch came into the kitchen at this point but accused pushed him out (R9,15). Accused gave Frau Deutsch the candle to hold and proceeded to have sexual intercourse with her. She resisted by pushing him with her free hand and yelling (R9,10,17).

In the meantime the occupants of the house attracted the attention of Sergeant Fred C. Hallett, command post guard, who entered the house and saw the prosecutrix lying on the kitchen table with accused on top of her. The prosecutrix was resisting but not very effectively because of the position she was in (R18,19). When she cried out accused struck her (R10, 19). Unable to make accused understand him, Sergeant Hallett went for assistance. When he returned the prosecutrix was standing in the kitchen holding her stomach and crying. Accused wasfound in the bedroom with his pants unbuttoned (R20,22).

5. There was considerable evidence as to the degree of accused's intoxication. The prosecutrix testified that he was so drunk that she did not believe he knew what he was doing otherwise he "would not have pressed me as hard as he pressed me" (R11). In Deutsch's opinion accused was "apparently very drunk" (R15). Sergeant Hallett testified that accused was not sober and he was staggering a "little bit" as he walked unaided (R20). Accused's company commander, who was summoned by Sergeant Hallett to come to the Deutsch house, stated that accused recognized him and talked to him although not intelligently. Accused was able to walk without assistance although he staggered slightly (R21,22).

6. Accused, after being warned of his rights, elected to be sworn and testify. He stated that before moving into Heiligenmoschel on 25 March he obtained some schnapps. On arriving in that community in the later afternoon he drank the schnapps until he became drunk. He did not eat anything, although sometime during the evening he went into the kitchen and

helped to clean chickens. About 9 o'clock the next morning a Sergeant Scott walked him around and told him that he had to go out with a patrol. He had no recollection of what intervened between the time he was in the kitchen and the time when Sergeant Scott spoke to him. He first learned about the incident at the Deutsch house when the defense counsel told him about it (R23-26).

Private First Class James R. Justice, of accused's company, testified that he saw accused in the kitchen on the night of 25-26 March and that he was drunk. He and accused had been drinking all afternoon and part of the night and during this period they had consumed "quite a few" bottles of schnapps. Accused was a nervous individual and had been removed from the front line for that reason (R26-27).

Private First Class Arthur Sarantopoulos, a cook in accused's company, testified that accused was drunk in the kitchen about midnight 25 March (R27-28).

It was stipulated by and between the prosecution, defense and accused that if accused's platoon leader, First Lieutenant William M. Holsberry, were present in court he would testify that accused was a very nervous individual and that because of nervousness he was relieved from duty as an ammunition bearer and assigned to company headquarters as a driver (R28,29).

7. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.140b, p.165). The uncontradicted evidence shows that accused had carnal knowledge of the prosecutrix without her consent. It likewise shows that he used force to accomplish his purpose. Moreover, when there is in fact no consent the force involved in penetration is sufficient (MCM, supra). The testimony of the prosecutrix and her husband received substantial corroboration from an American soldier, Sergeant Hallett. All elements of the offense were thus established (CM ETO 11376, Longie; CM ETO 11621, Trujillo, et al; CM ETO 12869, DeWar). Any possible question as to accused's mental responsibility by reason of drunkenness was a question of fact for the court which they impliedly resolved against accused, and in view of the evidence - particularly the fact that accused could recognize his company commander - their conclusion will not be disturbed on appellate review (CM ETO 3859, Watson and Wimberly; CM ETO 12662, McDonald; CM ETO 14141, Pyeko).

8. At the outset of the trial the following colloquy occurred:

"Prosecution to accused: Have you had sufficient time and opportunity to prepare your defense?

Accused: Yes sir.

Prosecution to accused: Are there any witness who are not present that you would like to have present?

Defense: Two of the defense witnesses are not available.

President: Are these two witnesses material to the case?

Defense: Their testimony would be corroborated by the witnesses the defense does have.

President: The prosecution will proceed with the trial.

Prosecution to accused: Are you at this time prepared with your defense and ready to proceed with the trial?

Accused: Yes sir" (R7-8).

There was no showing by the defense of any effort to locate the absent witnesses or to procure their attendance, or that their attendance could likely be had by a postponement of the trial. In these circumstances it was proper for the court to proceed with the trial (Chastain et al v. United States (C.C.A. 5th, 1943), 138 F (2nd) 413).

9. Although the sentence did not include dishonorable discharge, it has long been held that the maximum limits of punishment has no application to offenses arising under Article of War 92 and consequently, the provision that a court must impose a dishonorable discharge when it imposes confinement in excess of six months (MCM, 1928, par.104b, p.95) does not affect the validity of the sentence.

10. The charge sheet shows that accused is 26 years five months of age and was inducted 12 February 1941 to serve for the duration plus six months. No prior service is shown.

11. 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.

12. 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).

Wm. J. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald P. Carroll Judge Advocate

Branch Office of The Judge Advocate General
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European Theater of Operations
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BOARD OF REVIEW NO. 2

19 JUL 1945

CM ETO 14239

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Schmerldorf, Germany, 17 June 1945.
Private First Class WILLIAM H. DAVIS (20123554), Company B, 12th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class William H. Davis, Company "B", 12th Infantry, did, at Hurtgen, Germany on or about 23 November 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engaging the German forces in the vicinity of Hurtgen, Germany, and did remain absent in desertion until he was apprehended at Rouen, France on or about 30 April 1945.

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. Evidence was introduced of three previous convictions by special court-martial for absence without leave for two, five and 13 days respectively, in violation of Article of War 61 and for being drunk and disorderly in uniform, in violation of Article of War 96. All 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 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 for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 23 November 1944 accused was a member of Company B, 12th Infantry, which organization was "dug in" in a defensive position in the Hurtgen Forest, Hurtgen, Germany (R4,5). Enemy artillery fire was passing overhead, and although the company was described as "in a rest", replacements were being received and the men were expecting to "shove off" into combat within a short period of time (R4,5).

An extract copy of the morning report of Company B, 12th Infantry, was received in evidence, without objection by the defense, showing accused from "Dy to AWOL 0700 23 Nov 44" (R5; Pros.Ex.A), and was identified by the First Sergeant who recognized the signature of the Company Commander thereon (R5). It was stipulated between counsel for the prosecution and defense, with the accused expressly consenting thereto, that the accused was returned to military control by apprehension at Rouen, France on or about 30 April 1945 (R6).

4. Accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R6).

5. The evidence for the prosecution in support of accused's conviction is not as complete as is desired. However, it was shown that accused absented himself

without authority on 23 November 1944 while his company was "dug in" on the front lines or near thereto in the Hurtgen Forest. Enemy shell fire was passing overhead. Reinforcements were being received in the company and preparations were being made for an attack against the enemy. It is a well-known historical fact of which the court could take judicial notice that the battle of the Hurtgen Forest was one of the most vicious, bloody and hard fought of the campaign of northern Europe (CM ETO 7148, Giombetti). Accused avoided participating in this hazardous fighting. Instead of contributing his part to the campaign, he absented himself from front line duty and sought and found safety in the rear. His absence covered a period of a week more than five months and was terminated by apprehension at a place more than 100 miles behind the front lines. Under such circumstances the court was fully justified in finding that accused absented himself with the specific intent to avoid hazardous duty incident to engaging the German forces in the vicinity of Hurtgen as alleged. The offense of desertion within the meaning of Articles of War 58-28 is established (CM ETO 4743, Gotschall; CM ETO 6093, Ingersall; CM ETO 6177, Transeau; CM ETO 7230, Magnanti; CM ETO 8452, Kaufman).

6. The charge sheet shows that accused is 25 years and three months of age and that he enlisted on 9 November 1939 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 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).

_____ Judge Advocate

_____ Judge Advocate

_____ (ON LEAVE) Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 - 7 AUG 1945

CM ETO 14256

U N I T E D S T A T E S	)	35th INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Neuwied,
	)	Germany, 20 June 1945. Sentence:
Private First Class CLIFFORD BARKLEY (39318274), Battery B, 546th Field Artillery Battalion	)	Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Clifford (NMI) Barkley, Battery B, 546th Field Artillery Battalion, APO 408, US Army, did, at Alsdorf, Kreis Altenkirchen, Regierrungsbezerk Kdlenz, Germany, on or about 2300 hours, 23 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Maria Schob, Alsdorf, Kreis Altenkirchen, Regierrungsbezerk Koblenz, Germany.

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

Specification: (Finding of not guilty).

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 Specification and not guilty of the Additional Charge and its 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. Evidence for the prosecution showed that at the place (where fighting ceased some 25 days before (R12,23)) and at about the time alleged (2300 hours) in the Specification, accused and a soldier named Lanfest gained entrance to a German home by representing themselves to be police, and accused, armed with a rifle, proceeded to search the upper floors of the house (R7-8, 12-13, 17, 19-20).

The alleged victim of the rape, 20 years of age and unmarried, testified she was clad in her nightgown and a coat (R18,19,24) and that accused threatened to shoot her and her mother, with whom she slept on the second floor, and her cousin, if they refused to obtain keys to facilitate accused's search of the house (R20). With his rifle, accused forced the mother and daughter into the corner of their bedroom, where he endeavored to embrace the girl. She resisted him and succeeded in sending her mother for aid. When the girl looked out the window, he fired two shots through it (R21,26,27). She was afraid (R26) and told him to put down his weapon, whereupon he placed it on her bed. She attempted to leave the room, but he held her there. He threw her upon the bed and "tried to get on me" (R21,27). When she fought him off, he struck her in the face with his fist. She continued to struggle with him but did not call for help because no one was there. When he thereafter threw her into the corner she "could do no more" and in order to gain time said in English "We are going to the bed". She then attempted to go to the door when he threw her on the bed a second time, where he raped her. She struggled and held him away with her hand, but he hit her again, in all about three times, and she was helpless. He raised her nightgown, forced her legs apart and engaged in sexual intercourse with her (R22). She could feel his penis in her vagina (R27), where it continued to remain after he fell asleep upon her. She remained quiet and did not disturb him for about two minutes, because she feared he would awaken and molest her further. At this point two American "soldiers" entered the room and called. Accused arose and left the room (R23,28). She also arose and then fell to the floor whereupon the Americans gave her water (R23). She positively identified accused as her assailant (R26) and stated that he appeared to be very drunk and was unsteady on his legs (R23,26).

It was not customary for her to entertain American soldiers in her home (R23), and she never went out with them. She knew that one convicted of rape could be punished by a long jail sentence (R24). She was a compulsory member of a Hitler Youth Organization in school between the ages of six or seven and 14, but after leaving school, although pressure

was exerted upon her, she did not join any women's Nazi organization (R27).

The victim's testimony was corroborated by that of her cousin that accused conducted the search with his rifle, that witness' mother and aunt (the victim's mother) called for help (R8-9), that his mother and brothers and sister were excited and screaming (R15), and that his cousin (the victim) suffered a black eye and a bloody nose and was pale (R11). It was further corroborated by the testimony of a first lieutenant and staff sergeant of the American Army who were summoned to the scene, that they discovered accused, with his trousers down below his buttocks, lying in bed upon or against the girl, whose clothes were up above her waist, with his carbine in the disarranged bedclothes. She pleaded in broken English, "You help me" (R30-32, 35-36, 37-38). These witnesses, as well as another soldier of their unit, testified that her face was beaten and bloody, her clothes torn and the bedclothes bloody, that she was frightened and emotionally upset and that she fainted (R31,36,39). The lieutenant testified that accused was not drunk and his responses to witness' requests for information as to his organization were prompt and seemed to be those of a sober man (R33). The sergeant testified that accused walked normally (R37).

4. After defense counsel explained to accused his rights in open court, he elected to take the stand as a witness in his own behalf (R41). He testified in substance that commencing at 9:00 am on the day in question he and his friend, Lanfest, drank cognac, wine and beer in Alsdorf and continued drinking without breakfast or lunch (R42) until the early part of the afternoon. He did not remember visiting the home in question, firing a rifle there or seeing, attacking or having intercourse with the victim. He did not remember seeing at the time in question the officer or two soldiers who testified. He knew nothing of what happened until he was awakened the next morning and informed he was under arrest.

Accused was the son of a full-blooded Indian mother, a Klamath of the Chippewa tribe, and an Irish father. He had drunk a little prior to this day, but never so much, and never suffered amnesia when drinking before. When he drank he never had a sudden desire for women (R43-44).

It was stipulated that a medical officer would testify as to matters contained in his report relative to accused, which showed that on 2 May 1945 accused was

> "able to understand and differentiate right from wrong concerning the particular acts charged" (R44-45; Def.Ex.1).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge whether emission occurs or not. The force involved in the act

of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). Every consent involves submission, but it does not follow that mere submission involves consent (52 CJ, sec.26, p.1017), which,however reluctant, negatives rape. But where the woman is insensible through fright or ceases resistance under fear, gaged by her own capacity, of death or other great harm, the consummated act is rape (1 Wharton's Criminal Law (12th Ed., 1932), sec.701, p.942).

The prosecutrix' testimony is full, clear and convincing that accused by terrorization and brutality forced her to submit to copulation with him. She testified that she felt his sexual organ in her own. Except as to penetration, her testimony is corroborated. Accused did not deny his connection with the episode but asserted a complete lack of memory of the same resulting from over-indulgence in alcohol. In view of the clear and convincing nature of her testimony, corroboration on the issue of penetration, either in the form of medical evidence or otherwise, was not necessary (CM ETO 4661, Ducote and authorities therein cited; CM ETO 5009, Sledge and Sanders; CM ETO 5869, Williams), and the court was fully justified in concluding that the intercourse was without the victim's consent and against her will and that accused was guilty of rape (CM ETO 11621, Trujillo, et al; CM ETO 12162, Grose; CM ETO 12869, DeWar; and authorities cited in those cases).

The question of accused's intoxication and the effect thereof upon the criminal intent involved in the offense constituted an issue of fact for the sole determination of the court, whose findings of guilty will not be disturbed in view of the substantial evidence that accused was in control of his faculties immediately following the rape (CM ETO 3859, Watson and Wimberly; CM ETO 11608, Hutchinson; CM ETO 12662, McDonald).

6. The charge sheet shows that accused is 32 years eight months of age and that he was inducted 29 September 1942 at Portland, Oregan, to serve for the duration of the war and six months. He had no prior service.

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

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

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BOARD OF REVIEW NO. 1

14 SEP 1945

CM ETO 14284

U N I T E D S T A T E S	FIFTEENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Bad Neuenahr, Germany, 7 June 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 JAMES E. CASEY (33819964) and Private AMOS R. KIRKLAND (35248357), both of 1365th Engineer Dump Truck Company)	

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

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

2. Accused were charged separately and tried together by direction of the appointing authority and with their consent upon the following charges and specifications:

CASEY

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician Fifth Grade James E. Casey, 1365th Engineer Dump Truck Company, did, at Reifstein, Kreis-Neuwied, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Marguerite Zilz.

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Specification 2: In that * * * did, at Reifstein, Kreis-Neuwied, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Katie Zilz.

KIRKLAND

(Same Charge and specifications as Casey except for substitution of name of accused; Kirkland found not guilty of Specification 1).

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the votes were taken concurring, Casey was found guilty of the Charge and both specifications preferred against him, and Kirkland was found not guilty of Specification 1 and guilty of the Charge and Specification 2 thereof preferred against him. No evidence of previous convictions against Casey was introduced. Evidence was introduced of one previous conviction against Kirkland by summary court for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present at the times 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 life". The reviewing authority, as to each accused, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's undisputed evidence shows that at about 2030 hours on the date and at the place alleged, the two accused, who had visited the place on two prior occasions on the same evening, uninvited, entered the house in which the prosecutrices, Marguerite Zilz, 18 and her sister Katie, 15, lived, through the window of a neighbor's room in the same house, and in company with a third colored soldier gained access to the Zilz kitchen by breaking open the door. There two shots were fired and accused threatened numerous inmates of the multi-family house with their carbines. Accused Casey and another soldier took Katie Zilz to a neighbor's bedroom, where they placed her on the floor and removed her pants. Casey thereupon copulated with her while accused Kirkland pointed his gun at her. She feared that if she defended herself he would shoot. When she cried, a hand was held on her mouth. A second soldier, unidentified, also had intercourse with her and thereafter Kirkland lay upon her and attempted unsuccessfully to penetrate her private parts. Meanwhile one of the soldiers, unidentified, after threatening Marguerite Zilz with his gun, took her to a neighbor's

kitchen, placed her on the couch, removed her pants and at least attempted to engage in sexual intercourse with her. Whether or not he was successful in penetrating her person is not clear from the record. It is clear, however, that thereafter Casey copulated with Marguerite for about ten minutes. She did nothing and could not defend herself because he held a gun ready to shoot in case she did not submit.

Katie identified both accused as her assailants and Marguerite identified Casey as hers, both at the trial and at an identification lineup held on the morning following the assaults near the girls' house, about 300 yards from accuseds' billets. Marguerite was unable to identify Kirkland as one of her assailants and neither girl could identify the other negro soldier involved. The record contains competent, substantial evidence of the identity (CM ETO 3837, Bernard W. Smith, and authorities therein cited) of Casey as the rapist of each girl and of Kirkland as his aider and abettor liable as a principal in the rape of Katie Zilz. Kirkland also assaulted her with intent to rape. The girls submitted as a result of terrorization by the armed negro soldiers, whose entry at night was by violence and was shortly followed by shooting and collective and individual intimidation of various members of the household. Notwithstanding the hour, their obvious emotional disturbance and the confusion attendant upon the concerted lustful attack upon them, the prosecutrices' testimony is clear as to the identity of accused and as to the guilt of Casey of carnal knowledge of each by fear and without her consent, and of Kirkland as a principal in actively aiding and abetting Casey in his rape of Katie. In the opinion of the Board of Review, the record supports the findings of guilty (CM ETO 13319, Beets and Manney, and authorities therein cited).

4. The charge sheets show that Casey is 19 years four months of age and was inducted 21 April 1944 at Camp Lee, Virginia; Kirkland is 28 years two months of age and was inducted 24 March 1944 at Fort Benjamin Harrison, Indiana; each was inducted to serve for the duration of the war plus six months under the Selective Service Act, and neither had prior service.

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

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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).

Wm. J. Lemmon Judge Advocate

Edward I. Hennessy Judge Advocate

Donald K. Cook Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3

6 SEP 1945

CM ETO 14298

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Pyrmont, Germany, 30 May 1945.
Private First Class PAUL A. MICHELS (37583300), Company L, 335th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private First Class Paul A. Michels, Company L, 335th Infantry, did, at or near Mont Le Ban, Belgium, on or about 21 January 1945, misbehave himself before the enemy, by failing to advance with his command which had then been ordered forward by First Lieutenant Winther Jorgensen, to engage with the enemy forces, which forces, the said command was then opposing.

CHARGE II: Violation of the 65th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Private (then Private First Class) Paul A. Michels, Company L, 335th Infantry, did, at Schaesburg, Holland, on or about 23 February 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Heerlen, Holland, on or about 18 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 Charge I and its Specification, not guilty of Charge II and its Specification, and guilty of Additional Charge I and its Specification, with the exception of the words "was apprehended", substituting therefor the word "returned". 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 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 may be summarized as follows:

a. Specification of Charge I: On 20 January 1945, accused's company was being concentrated in an area in or near Mont Le Ban, Belgium, preparing to move up to relieve an armored unit which was in contact with the enemy. The company was five miles or less from the enemy and within range of heavy artillery. Early during the evening of 20 January, at the command post, First Lieutenant Winther Jorgensen, the company commander, told accused that the company was "moving out the next morning to go on line to relieve this armored unit and that he expected him to be with the company when it moved out" (R6-8). Accused's squad leader also gave similar instructions to the squad (R11). Accused was present when the company moved out on the morning of 21 January (R11,15,17), and marched for about two miles toward the front lines, after which he fell out and went into a barn about 25 feet from the road. He was not seen again that day, during which the company marched from three to five miles, taking cover from enemy fire at one time, and receiving shellfire as it finally relieved the other unit in a wooded area (R9,12,17-19). Accused still was not present when the company reached its destination. He had no permission to be absent and could not be found (R12,15,18).

The supply sergeant saw accused at the company kitchen in Mont Le Ban during the evening of 22 January and told him that the first sergeant had instructed witness to bring him back to the company.

Accused said he was sick and could not go, whereupon the mess sergeant said he would send accused with one of the cooks to "the medics". The next day, 23 January, upon orders of the company commander, the supply sergeant took accused back to the company (R20-22,24-25).

b. Specification of Additional Charge I: On the night of 22 February 1945, while accused's company was in Schaesburg, Holland, his squad was called together and told that they would leave by truck after midnight and proceed to Suggerath, Germany, for a river crossing. The men were formed into boat groups. Accused was present and knew that a formation was schedules for 0115 hours on the morning of 23 February. He was not present at the formation and the company moved out without him. He had no permission to be absent. He was in a status of arrest in quarters at the time. A search was made for him but he could not be found, although his weapon and blankets were found (R12-14,25-29). Another search was made later that day at Schaesburg by the supply sergeant who returned from Suggerath for a telephone, but accused was not found (R23,26). He was next seen in the company about 26 April 1945 at Schnackenberg, Germany (R14,27). It was stipulated that he returned to military control at Heerlen, Holland, on 18 April 1945 (R29).

Duly authenticated extract copies of the morning report of accused's company show him from arrest in quarters to absent without leave at 0130 hours on 23 February 1945, and from absent without leave to arrest in quarters on 26 April 1945 (R28-29; Pros.Exs.A,B).

4. Defense counsel stated that accused had been advised of his rights and elected to remain silent. No witnesses were called in his behalf (R29).

The court requested and received in evidence a report of psychiatric examination of accused, dated 18 February 1945, which showed that he claimed nervousness on the line since an artillery shell had exploded near him while in combat. Accused was sane, knew right from wrong, and was able to adhere to the right, although he probably had difficulty in adhering to the right because of emotional upset. After examination and observation from 30 January to 4 February 1945, he was returned to duty with a diagnosis of exhaustion (R29-30; Court's Ex.1).

5. a. The evidence is undisputed that on 21 January 1945 accused deliberately left and failed to advance with his company, apparently without justification, while it was within enemy artillery range and marching under orders to relieve a unit in the front lines only one to three miles away. He was returned to the company from the kitchen in a rear area two days later. Such conduct is clearly a violation of

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BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 14338

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Darmstadt, Germany, 28 April 1945.
Private First Class BILLY REED (34741166), 3119th Quartermaster Service Company	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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 Private First Class Billy Reed, 3119 Quartermaster Service Company, did, at Leider, Germany, on or about 6 April 1945, forcibly and feloniously, against her will, have carnal knowledge of ELLA MAERZ.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the 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 prosecutrix, Frau Ella Maerz, was sitting in the kitchen of her home at Leider, Germany, with her mother and a male visitor sometime between 4 and 5 pm on 6 April 1945 when three colored soldiers entered. Two of the soldiers, one of whom was the accused, forced her into an adjoining room and, by threatening her with a gun forced her to remove her pants. The accused then pushed her on the couch and had sexual intercouse with her. She begged him to release her, tried to prevent copulation by drawing back from him, and appealed to the male visitor in the kitchen to assist her. She did not consent to the act of intercourse. The other soldier remained by the door and was in and out of the room. In the meantime, the third soldier remained in the kitchen with a gun and kept the people there at bay (R4-8). The record thus presents the typical pattern of a German rape case and we have repeatedly held that, present substantial evidence in the record as to lack of consent, we are powerless to disturb the court's findings (CM ETO 895, Davis, et al). The court could believe the prosecutrix' testimony that she was forced to engage in sexual intercourse with a colored American soldier (the accused) at gun-point. That and the other details recited above constitute substantial evidence of rape (CM ETO 11376, Longie; CM ETO 11608, Hutchinson; CM ETO 14040, McCreary).

4. The main issue in the case is whether accused was the alleged rapist. The prosecutrix positively identified him as such at the trial, saying, "That's him for sure" (R4). She testified that one-half hour or an hour after this incident she identified accused (R8,9). As to this identification she stated,

> "Q Did you have any hesitation in identifying this man when you saw him with these other people?
> A I'm sure that if he's among three, I can point him out.
>
> Q The first time when you pointed him out, did you have any hesitation?
> A No, they were three different sizes. It was easy to point him out.
>
> Q Did you know this man by name or by anything but his size?
> A Just about. I didn't look at his face very close. I didn't have any other way of identifying him" (R8-9).

The prosecutrix' mother was unable to identify accused, although she was in the kitchen when the three colored soldiers entered (R10-12). On cross-examination the following colloquy occurred:

> "Questions by defense:
>
> Q Isn't it true that the first time you saw this soldier the accused, was in the afternoon when he was standing in your yard with the guards over him?

A That is the first time I saw a colored soldier.

President: I believe the witness did not understand the question. I think you should put the question and have her answer again.

Questions continued by defense:

Q Isn't it true that the first time you saw the accused soldier was in the afternoon when he was standing in your yard with the guards over him?

A Yes.

President: What I'm getting at. I would like to have the witness be more definite. Her daughter has already testified that this is the first time in her life that she had seen a negro person. I believe she's confused. I'd like her to testify whether this was the first time she had seen this negro soldier or whether the first time she had seen this particular negro soldier in the afternoon? Make certain that she understands.

Questions by defense:

Q Isn't it true that the first time you saw the accused, the man here on trial today, is when he was brought into your yard under guard?
A That was the first time I saw him" (R12).

Second Lieutenant Francis J. Daly testified that between 3 and 3:30 pm he was ordered to investigate a disturbance in Leider, Germany, and that he picked up three American soldiers there, one of whom was accused, while they were walking along the street. The three "were slightly inebriated" and one of them in twirling his carbine around his head discharged it. The "pieces" of the other two soldiers had clips in them. They told the witness they were looking for water and asked him where the water point was. None of them had canteens (R13-15, 36-38).

Second Lieutenant David L. Freytag testified that he was designated to investigate a disturbance that occurred at Leider, Germany, on 6 April 1945. About 4:30 pm he took accused and two other soldiers to the Maerz home, arriving there about 5:15 pm. There were several white soldiers with them. The three were slightly under the influence of liquor. One of the three stated that they had entered houses uninvited (R16,17,39,40).

The court took judicial notice of the difference between German time and war time (R15). The president stated that during the recess he had been informed that when the military government occupy a town they post regulations changing the time; that the military government "moved in" at approximately the same time as the offense was alleged to have been

committed. Consequently he ruled, the court can take judicial notice that the civilian population had not gone on "military government time" (R15).

Frau Maerz, recalled, was unable to state whether the Allied Military Government had assumed control of Leider on 6 April 1945. About that date, however, the time was changed and she set her watch back (R19).

Accused's platoon leader, Second Lieutenant William B. Johnson, testified that he placed a guard detail, with Private Lee in charge, over a captured German dump near Leider which contained rations, wines and liquors. The men were given a five gallon can of water and instructed they would have to locate a place to get water (R20).

Private First Class David McArthur testified that he was on guard duty in Leider on 6 April 1945. He, Private Lee, and accused were relieved from guard duty at 3:30 pm and instructed by the acting corporal to get water. They each had canteens and did not take the five-gallon can that was available. Each was armed with a carbine. It took them about 15 minutes to walk to the town from the bivouac area. When they were picked up by the lieutenant they asked him where the water point was. Witness denied having anything to drink and he denied entering any houses in the town. No other American soldiers were seen walking on the street at this time. Later in the day they were taken to the town and identified by some women as the soldiers who had raped them (R23-28).

Private First Class William J. Lee corroborated McArthur's testimony in all important details. He stated that they left the guard detail at 3:15 or 3:30 pm and were picked up 15 minutes later. They encountered no other soldiers while they were in the town and they did not talk with anybody. None of them left any ammunition in the town. The house to which they were taken was on the street on which they were picked up (R29-33).

Accused, after being advised of his rights elected to be sworn and testify. His testimony was substantially in accord with that of Lee and McArthur. However, he did state that their canteens were taken from them by a lieutenant whom he did not know (R34-36).

5. The record thus presents an issue of identity, which the court has resolved adversely to the accused. Here again the question is whether there is substantial, competent evidence to support the findings of the court (CM ETO 895, Davis et al). The prosecutrix identified accused about one hour after the commission of the crime. The testimony as to this identification was competent (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams; CM ETO 8270, Cook; CM ETO 12869, De War). Likewise she identified him in court. While it is true that she stated that she had relied at the pretrial identification chiefly on his size, the identification was nonetheless positive. It is often difficult to formulate in

in precise words the reason for one's recognition. She was evidently explaining why it was so easy to distinguish accused from his companions. Testimony as to identity is not inadmissible merely because it was based upon an impression resulting from facts difficult of precise explanation (CM ETO 3200, Price, and authorities therein cited). Moreover, three armed negroes entered the prosecutrix' house and one of them raped her. All were armed. Accused and two other negroes were apprehended near the scene of the crime and on the same street. The town was "off limits" and no other American soldiers were seen walking on the streets. Their testimony that they had gone to get water was countered by the evidence that they were not wearing canteens. In addition, they admittedly did not bring with them a five-gallon can which was intended for that purpose. Their testimony that they had not been drinking was contradicted by the testimony of an America officer. While it was improper for the court to take judicial notice of the particular date when the German time schedule was changed, they could properly notice judicially the existence of different time zones (MCM, 1928, par.125, p.135) and thus account for the apparent time discrepancy. On this record, then, the findings of the court must remain undisturbed (CM ETO 3200, Price, supra; CM ETO 3837, Bernard W. Smith; CM ETO 12604, Mendez and Rego). The record is legally sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 22 years two months of age and was inducted 17 February 1943 at Fort Benning, Georgia to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for 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).

Wm. T. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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BOARD OF REVIEW NO. 2

16 AUG 1945

CM ETO 14345

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Camp Norfolk, France, 25 June 1945.
Privates JOE A. DI LEO (36743391), and LEO TUCCIARONE (32610071), both of Company L, 23rd Infantry	)	Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused were arraigned separately and with their consent tried together upon the following charges and specifications.

DI LEO

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Joe A. Di Leo, Company L, 23d Infantry, did, at or near Krinkelt, Belgium on or about 18 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Paris, France on or about 25 December 1944.

TUCCIARONE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leo Tucciarone, Company L, 23d Infantry, did, at or near Krinkelt, Belgium, on or about 18 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Paris, France on or about 25 December 1944.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction of each accused by summary court for absence without leave for 8 days as to Di Leo and for 9 days as to Tucciarone, in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, approved the sentence, 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. Evidence for the prosecution shows that on 18 December 1944 both accused were members of Company L, 23rd Infantry Regiment, 2nd Infantry Division, which was located on the outskirts of the town of Krinkelt, Belgium (R9,10,11). Three platoons of this company made an assault against the enemy on this date and the Germans counter-attacked. This was the beginning of the Ardennes break through in the vicinity of Krinkelt and accused's company was subjected to extremely heavy action, including small arms, machine gun and artillery shellfire. The company withdrew into Krinkelt and, as a result of this movement, coupled with the shelling by artillery of all the area, they became disorganized (R9,10). A personnel check was made following their initial withdrawal and both accused were missing. The company subsequently withdrew to Nidrum, Belgium, where a second check was made on 21 December 1944 and at this time accused were still absent. Neither had permission or authority to be absent from the company (R10). Both accused were seen by soldiers of their organization, Company L, 23rd Infantry Regiment, at Camp Elsenborn, Belgium, on the morning of 19 December 1944 and were asked if they were returning to

their company (R13,15,16). Accused denied being members of Company L but made no further statements regarding their identity or that of their organization. They were next seen, by their company commander, sometime in May 1945 at Pilsen, Czechoslovakia (R10). It was stipulated between counsel for the prosecution and defense, with each accused expressly consenting thereto, that they were apprehended in uniform at or near Paris, France, on or about 25 December 1944 (R7,8; Pros. Exs.2 and 3).

4. After their rights as witnesses were explained to them, accused Tucciarone elected to remain silent and accused Di Leo chose to be sworn as a witness in his own behalf (R24,25). He testified that he came overseas in January 1944, after having volunteered for duty as a member of a combat ranger battalion, and that he landed at Omaha Beach, Normandy, France, on D-Day, H-Hour (R25,26). Private Tucciarone landed at "Point DU HOE", and scaled the cliffs there. They were riflemen and fought together at Brest and "all the way through" (R26). Di Leo testified that at Krinkelt, Belgium, when the Jerries opened up, he made a dash across an open field and obtained from his platoon leader permission for the men to withdraw. He went into a cellar and when he came out his squad was gone (R27). He admitted going to Camp Elsenborn and seeing members of his outfit but denied that he was asked by anyone there about returning to his company. He indicated that none of them seemed to know where his company was located (R28). He stated that he was "pissed-off" generally at this time for two reasons: (1) A couple of squads had been left "out there cut off" and forgotten and (2) the company commander and personnel clerk had refused to permit him to turn in some money for sending home. He "figured" that if he could not return an excess amount of funds that he had he might as well spend it and have a good time (R29,30). He did not know that the Ardennes breakthrough had started and asserted that he would not run away from an outfit in battle as he has experienced rough times and knows what it is like in combat (R28,30). He had been recommended for the bronze star, although he had not received the decoration. Tucciarone was awarded the bronze star (R18,29).

Staff Sergeant Martin Sedillos and Private First Class Casimir Chylak, both of accused's company corroborated Di Leo's testimony regarding the withdrawal of troops and the general disorganized condition of the company at the time of the break-through. They both testified that accused were "good fighting men" and "skilled in battle". After having fought with them and observed them in combat they rated them "very highly" and indicated they would like to have them retained in the company regardless of the outcome of the trial (R18,19,20,21).

5. Competent substantial evidence establishes that on 18 December 1944, during an enemy counter-attack both accused absented themselves from their advanced combat positions and withdrew to the rear. It is abundantly clear that neither accused remained in the assembly area where combat units were being reorganized, nor did they make any effort to rejoin their organization. Instead, they denied that they were members of "L" Company to which they belonged and absented themselves without authority from their organization while it was engaged with the enemy. They were apprehended six days later, 25 December 1944, many miles to the rear at Paris, France. Although the period of accused's unauthorized absence was of relatively short duration, length of absence alone is not controlling in determining the question of an accused's intention on a charge of desertion (CM ETO 9843, McClain). In the latter case, as here, the brevity of the absence was not of the accused's making inasmuch as return to military control was terminated by apprehension. Winthrop stated that in time of war, "an absence of slight duration", such as even a part of a day, may under certain circumstances fully justify a finding of an intention to desert the military service. (Winthrop's Military Law and Precedents, (Reprint 1920), sec.987, p.638). The circumstances indicate that accused absented themselves at the outset of one of the most crucial periods of fighting during the war in Europe. It is a well known historical fact of which the court and the Board of Review may take judicial notice that the "Battle of the Bulge" began on 18 December 1944, when the break-through occurred in the Ardennes Forest (MCM, 1928, par.125, pp.134,135; CM ETO 7148, Giombetti; CM ETO 8171, Russo). Accused are not charged with desertion based upon an intention to avoid hazardous duty or to shirk important service but/a specification alleging straight desertion, the prosecution may prove an act of desertion under the 28th Article of War (CM ETO 5117, DeFrank). It is clear from the evidence that accused had knowledge of the existence of a crucial tactical situation at this time. The battle then being fought surely involved hazardous duty. The fact that they denied membership in a combat organization and absented themselves without authority at this time and under the then existing combat conditions, plus the fact that they were apprehended, many miles distant from the front lines, furnishes a substantial basis to support the court's findings that accused intended to desert the military service of the United States (CM ETO 6177, Transeau; CM ETO 6626, Lipscomb; CM ETO 6955, Slonaker; CM ETO 7230, Magnanti; CM ETO 7663, Williams; CM ETO 8452, Kaufman; CM ETO 14095, Bijeaux).

6. The charge sheet shows that accused Di Leo is 20 years, six months of age and was inducted 2 April 1943; accused Tucciarone is 23 years, seven months of age and was inducted 28 October 1942. Neither accused had prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized 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

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BOARD OF REVIEW NO. 1

16 NOV 1945

CM ETO 14349

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Kissengen, German, 20 April 1945, and at Salzburg, Austria, 14 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private HARRY T. McCORMICK (34450258), Company C, 10th Engineer Combat Battalion	

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 specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Harry T. McCormick, Company "C", Tenth Engineer Combat Battalion, did, at Unter Schwappack, Germany, on or about 1530, 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Elfrieda Dennenger.

Specification 2: (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 not guilty of Specification 2 and guilty of Specification 1 and the Charge. Evidence was introduced of one previous conviction by summary court for absence without leave for one and three-fourths hours and for drunkenness in violation of Article of War

61 and 96. 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 returned the record for reconsideration of the sentence because of apprehensions as to its legality in view of the fact that it did not show that all of the members of the court concurred in the findings of guilty. The court thereupon revoked its former sentence and, three-fourths of its members present at the time the vote was taken concurring, sentenced accused 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. Competent and substantial evidence established that accused on 12 April 1945, entered a house in Unter Schwappach, Germany, which was occupied by the prosecutrix, Fraulein Elfrieda Dennenger, and her grandparents. He requested and was given intoxicating liquor. Thereafter, he threatened both of the grandparents with a knife and then dragged her into an adjoining room. Accused cut her pants off with the knife and had sexual intercourse with her within view of her grandparents, during which time he held the knife at her head. An American sergeant who was summoned by the grandfather to lend assistance testified that the prosecutrix was hysterical, "shaking, trembling, and crying". Both the grandparents were emotionally distraught.

4. Accused, after an explanation of his rights, elected both to testify under oath and to make an unsworn statement. In his testimony he admitted that he had sexual intercourse with the prosecutrix but contended that she solicited it. He had a knife in his hands but he was cleaning his fingernails with it "or something like that" (R85). He conceded that the prosecutrix did not cooperate in the act of sexual intercourse (R88). In his opinion the prosecutrix was a "whore". The arrival of the American sergeant caused the occupants of the house to become hysterical (R90).

His unsworn statement added nothing of substance to the above (R104-105).

5. The vital question in this case arises upon a motion by the defense

> "in the nature of a motion for a change of venue on the ground that the accused's rights in a rape prosecution in this jurisdiction will be prejudiced by the appointing authority's statement that rape will be punished by a hanging sentence" (R11).

In support of the motion, the defense offered in evidence a mimeographed document dated April 15, 1945, and entitled

"Headquarters Third Infantry Division
Office of AC of S, G-2 and Public Relations
DAILY NEWS".

The prosecution stated there was no objection to its introduction and it was admitted in evidence (R11; Def.Ex.1). The first paragraph thereof reads as follows:

> "This news bulletin contains information valuable to the enemy and should not be circulated outside military channels. It will be read by front-line units as soon as possible after distribution and then destroyed by burning".

The defense read to the court the following relevant portion of the document:

> "THE THIRD DIVISION STANDARD
> American men, as a whole, respect women. Men of some other nations do not. We are fighting, among other things, for high standards and ideals of living. Recently in other outfits there have been instances of rape being committed. The penalty, when convicted, is hanging by the neck until dead.
>
> I can assure you that anyone of this Division or attached to this Division who commits this crime will be hanged by the neck until he is dead, whether the crime be against a German woman or any other woman.
>
> This Division enjoys too fine a reputation to have it marred by the actions of one or two individuals. Therefore, no matter what the crime, offenders will get the limit.
>
> JOHN W. O'DANIEL
> Major General, U. S. Army
> Commanding" (R11-12;Def.Ex.1)

The prosecution's argument in opposition to the motion and the law member's ruling thereon was as follows:

> "the trial judge advocate wishes to point out that the Commanding General of this Division, who is the appointing authority in this case, well knows that he cannot in any way, as stated in the Manual for Courts-Martial, page 4, 'control the exercise by the court of powers vested in it by law'. We contend that when this bulletin was issued it was not addressed to any member of the court sitting on future dates, but addressed to members of the command as a deterrent to

> their committing crimes of this nature. The Commanding General, we feel, does not wish to influence any court and we feel that he has not influenced any court. Reading further from the Manual for Courts-Martial, on page 67, 'The imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute.' The prosecution feels that this court, sitting here, will not be influenced by the statement made by the Commanding Officer and he did not so intend that statement to be an influencing power and we feel that the motion by the defense should be overruled.
>
> Law Member: The motion of the defense is overruled. The court has taken oath to try and determine the case based on the evidence presented and for that reason the motion is overruled" (R12-13).

It is unnecessary to consider the question whether the defense motion amounted in form or effect to a plea in bar of trial or not, as it raised a question properly determinable without reference to the merits of the case, and which if determined in accused's favor would have put an immediate end to the proceedings. The question before us raised by the defense motion, however denominated, is whether the publication to the command of the last quoted portion of the division newspaper, issued and signed by the commanding general by whose command the court was appointed, and its repetition to the members of the court at the trial, injuriously affected the substantial rights of accused by denying him a fair, impartial trial and thus due process of law (AW 37; cf: CM ETO 4564, Woods, Jr.).

One of the primary duties of each member of a court-martial, as expressed in the statutory oath as such, is to

> "'well and truly try and determine, according to the evidence, the matter now before' him and to 'duly administer justice, without partiality, favor, or affection'"(AW 19).

The latter duty

> "is the obligation, express or implied, of all judges, and secures, or should secure, for the accused, however grave the charges, a perfectly fair trial and full opportunity to make defence" (Winthrop's Military Law and Precedents (Reprint, 1920), p.233 (3)).

The judicial nature of the functions and duties of members of a court-martial are thus expounded in Runkle v. United States, 122 U.S. 543, 558, 30 L.Ed.1167,1171(1887):

> "The whole preceeding from its inception is judicial, The trial, finding, and sentence, are the solemn acts of a court organizad and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law".

(See 1st Ind. by TJAG, to CM 195322, Henderson, 2 BR 211, 221-223 (1931); CM 206971, Esteves, Jr., 8 BR 289, 301-305 (1937)).

It is recognized as consistent with principles of military justice that a commanding officer may with propriety inform members of his command, including his courts-martial, of offenses that are impairing the efficiency and discipline of the command and may suggest to them his opinion of appropriate sentences, the ultimate decision in each specific case being left, however, to the wisdom and judgment of the court (CM 250472, Hoffman, 32 BR 381, 388 (1944)), because "he cannot control the exercise by the court of powers vested in it by law" (MCM, 1928, par. 5a, p.4). In the last cited case, care was taken to distinguish the situation where the commanding officer announces a mandatory policy with respect to minimum punishment to be imposed, as in CM 216707, Hester, 11BR 145, (1941) (discussed infra). In CM 253209, Davis, 34 BR 297 (1944), the members of the court-martial announced in writing that they were deferring to the desires of the Commanding Generals of the Army Air Forces and Third Air Force, respectively, rather than following their own inclinations, in sentencing to dismissal an officer convicted of intentional violation of a flying regulation, rather than forfeiture and restriction, which they recommended. The Board of Review (sitting in Washington), although recognizing the necessity for the practice of military commanders in disseminating among courts-martial information revealing the need for the imposition of stern punishment for certain offenses, made the following pertinent distinction(34 BR at 303-304):

> "It does not follow, however, that military commanders may prescribe minimum sentences and require, by policy pronouncement or otherwise, their imposition for certain offenses. Such action would constitute unlawful usurpation of the court's authority in contravention both of the spirit and of the language of the Articles of War. Congress alone has the power to prescribe minimum penalties. Whatever may have been the practice prior to 1920

when the present Articles of War were enacted, it is now clearly contemplated that our courts-martial should freely exercise certain distinctively judicial functions in a manner which will guarantee independence of judgment in determining the guilt or innocence of an accused and in the imposition of his sentence. That Congress intended to protect our courts-martial in the performance of their judicial duties against the possibility of coercion and undue influence by superior military authority is clearly shown by the Articles themselves. Article of War 40 states that,

> 'No authority shall return a record of trial to any courts-martial for reconsideration of—
> (a) An acquittal; or ***
> (d) The sentence originally imposed, with a view to increasing its severity, ***'.

Article of War 45 provides that the President may prescribe maximum punishments, but significantly fails to authorize the President to establish any minimum punishment whatsoever. Finally, in Article of War 50½, Congress has sought to insure that the administration of justice in our Army will be in accordance with law by providing for a system of automatic appellate review" (Underscoring supplied).

The Board held that because the court surrendered its responsibility to assess punishment according to its own understanding of the law and facts, the accused did not receive the fair trial guaranteed to him by our system of law and disapproved both the findings of guilty and the sentence.

In CM 216707, Hester, 11 BR 145 (1941), cited in the Davis case, supra, the accused officer, charged with violations of Article of War 61, 85 and 95, was convicted and sentenced to be dismissed the service by a court-martial appointed by the Commanding General, 31st Division. During the court's deliberation upon the findings, the following letter was distributed to each member thereof (11 BR at 157-158):

> "HEADQUARTERS THIRTY-FIRST DIVISION
> Office of the Division Commander 11/FWB/ctl
>
> Camp Blanding, Florida,
> February 14, 1941.
>
> SUBJECT: General Courts-Martial Punishments.
>
> TO: All Members General Court-Martial, Camp Blanding, Florida.

1. The severity of the punishment to be adjudged in any particular case is a matter within the legal limits and sound discretion of General Courts-Martial, but it is the desire of the division commander to call the attention of court members to certain general guiding principles which will be taken notice of by them.

2. The division commander in this division is the appointing authority for both general and special courts-martial and as such it is within his province to select the particular kind of court to which each case will be referred for trial. Special courts-martial can neither adjudge confinement or forfeitures in excess of six months nor dishonorable discharge; therefore, when a case is referred for trial to a general court-martial, such reference alone will be considered as an indication that should the accused be found guilty the sentence should adjudge confinement and forfeitures in excess of six months, otherwise the case would have been referred to a special court in the first instance. For a sentence in excess of six months to be legal the court must, in addition thereto, also adjudge dishonorable discharge. (Par. 104a, M.C.M., 1928). Therefore, when a case is referred to a general court, it may be considered as a fixed policy that should the accused be found guilty the court will, in the absence of unusual circumstances, sentence the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a fixed period in excess of six months.

3. Attention is invited to the fact that the division commander as the reviewing authority can reduce, remit or suspend all or any part of a sentence but can not in any instance increase a sentence. Thus, where a sentence is excessive or the accused is entitled to special consideration because of mitigating circumstances, the reviewing authority may take appropriate action; but where an inadequate or inappropriate sentence is adjudged, no remedial action can be taken and the end sought to be obtained in the administration of military justice has been thwarted.

By Command of Major General PERSONS:

(Signed) T. D. Nettles, Jr.,
(Typed) T. D. NETTLES, JR.,
Major, A.G.D.,
Acting Adjutant General."

An officer appointed to investigate the matter in the Hester case found as facts that the letter was not prepared to influence the members of any particular court in any particular case but was a letter of general instruction, for distribution to officers detailed or to be detailed as members of general courts-martial and as regimental court-martial advisers; that the letter had no application to trials of officers, who were excepted from jurisdiction of special courts-martial; it did not instruct the court to dismiss any officer from the service if there was any evidence of his guilt; it did not influence the members of the court in arriving at the particular sentence; and, although its distribution in that case was untimely, it was not applicable to the accused's case and its distribution did not prejudice any of his substantial rights. The Board of Review (sitting in Washington) wrote as follows (11 BR at 160-161):

> "The subject of the letter in question is 'General Courts-Martial Punishments'. It deals solely and exclusively with the type and severity of the punishments to be imposed by a general court operating under the jurisdiction of the Commanding General, 31st Division, Camp Blanding, Florida. It directs 'all members' of general courts-martial at Camp Blanding that, as a matter of 'fixed policy', any accused found guilty by such courts should 'in the absence of unusual circumstances' be sentenced to dishonorable discharge, total forfeitures, and confinement in excess of six months. By no reasonable construction of its text can it be said that this letter introduced into the deliberations of the court the convening authority's personal view of the evidence or of the merits of the case, but neither can it be definitely assumed that this letter introduced into the deliberations of the court prior to its findings, had no bearing or effect on the vote of the members as to the guilt or innocence of the accused.
>
> When considered in connection with the sentence to dismissal this letter takes on a different and more serious aspect. By a strict, and withal reasonable, interpretation of its text the letter may be said to refer only to sentences in the case of enlisted men. The maximum limits of punishment prescribed by the Executive Order in the Court-Martial Manual and cited in the letter itself (par. 104, M.C.M.) apply only to enlisted men and general prisoners not dishonorably discharged. Officers are not dishonorably discharged, they are dismissed, but the analogy in this case is unmistakable. It is particularly significant that this mandatory general policy as to punishment, prescribed by the convening authority and published

February 14, 1941, was laid before each member of the general court in this case by direction of the trial judge advocate, and apparently with the knowledge and consent of the staff judge advocate's office, on May 14, 1941, three months after its publication, and at a time when that court had deliberated without result one hour and twenty minutes the day before. In the opinion of the Board of Review the distribution of this letter to each member of the court just prior to his vote on the findings and sentence so far oversteps the limits of propriety as to constitute coercion. This act tended to overcome the volition and independent judgment of the members of the court, and in the opinion of the Board of Review it vitiates both the findings and the sentence" (Underscoring supplied).

The foregoing case differs, of course, in some respects from the instant case, notably in that the letter from the authority which appointed the court in the Hester case was directed only to members of general courts-martial and was presented to the members during their actual deliberation on the findings. However, it did not in terms or by implication apply to trials of officers or instruct the court to dismiss all convicted officers. The publication in the instant case was directed to all members of the division, but it was brought directly to the court's attention by the defense itself in support of its motion, it applied directly to the crime of rape of German women, for which accused was on trial, and it constituted a virtual mandate, whether intentional or not, to impose the death sentence in the event of conviction. The two cases are similar in that, as recognized by the Washington Board, the letter involved in the Hester case did not introduce into the court's deliberations the convening authority's personal view of the evidence or merits of the case. Yet that Board held that it could not be assumed that it had no bearing or effect on the vote of the members as to the guilt or innocence of the accused and that the findings as well as the sentence were therefore vitiated. The principles of the Hester case, expressed in the following language are, in the opinion of the Board of Review, here controlling (11 BR at 161-162):

"The functions of a court-martial and the convening authority are, and should remain, separate and distinct. It is the function and duty of the court-martial alone to pass upon questions arising during the trial (with certain authorized exceptions not here material), to arrive at findings on the guilt or innocence of the accused based upon the evidence of record, and upon conviction to impose a legal, appropriate and adequate sentence. No higher authority, or for that matter no authority whatever, should be consulted by, or

> should directly or indirectly interfere with or influence the action of the court in its closed sessions. This principle is fundamantal and its violation strikes at the very root of justice and opens the door for undue influence".

Here also there was the same atmosphere of coercion and at least indirect interference with and influence upon the court in its deliberations on the findings as well as the sentence. Whether or not the court was so influenced, it is a fact that the court in this case originally adjudged the death sentence against accused and changed the sentence to life imprisonment (the only other authorized punishment for rape) when the reviewing authority, the same division commander, later returned the record for revision proceedings because it was "desirable to adjudge a punishment other than death". That the sentense now before us, thus changed, is not the death sentence, is immaterial. Neither the argument of the prosecution that the publication was not calculated to influence the members of the court in arriving at a sentenee, nor the statement of the law member that the court had taken an oath to try and determine the case based on the evidence presented, is conclusive. The publication, like the letter in the Hestercase, "so far oversteps the limits of propriety as to constitute coercion"; it at least "tended to overcome the volition and independent judgment of members of the court" as to both the findings and the sentence; it nullified the all-important separateness and independence of the functions of the court and those of the convening authority; and it exposed accused's substantial rights to danger by subjecting them, albeit indirectly, "to the uncontrolled will of one man". We need not with nicety determine at just what point in the members' mental processes or deliberations on findings and sentence, the improper superior influence had or might have had its effect. It is enough to impugn the results of those processes and deliberations that they were exposed to the influence. Every accused has a right to be tried by a court-martial which is completely free from the force and effect of improper considerations. A contrary conclusion would be both unrealistic and dangerous, would open the door to all undue influence if only it were subtle enough, and would jeopardize the very basis of our military jurisprudence. The complete independence and freedom of members of courts-martial from improper external influence, particularly that of the commanding general, in all their deliberations must be beyond suspicion; otherwise it cannot be said that they are in a position to fulfill the sacred obligations of their oath and administer true justice. The publication of the directive in question, and its repetition to the members of the court at theoutset of the trial, therefore vitiate both the findings of guilty and the sentence and the same must be set aside.

6. The charge sheet shows that accused is 23 years of age and was inducted 5 September 1942, at Lumberton, North Carolina, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Error injuriously affecting the substantial rights of accused was committed during the trial. 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.

Edward L. Stevens Jr. Judge Advocate

B. V. Levy Jr. Judge Advocate

Donald K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 2

7 AUG 1945

CM ETO 14357

UNITED STATES	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Munich, Germany, 16 June 1945. Sentence:
Private HENRY E. KELLER, Jr. (32157371), Company E, 157th Infantry	)	Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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: In that Private Henry E. Keller Jr., Company E, 157th Inf., did, on or about 17 January 1945, at or near Reipertsweiller, France, desert the service of the United States and did remain absent in desertion until he was apprehended on or about 16 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 charge and specification. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority

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

3. The prosecution produced the following evidence: On 17 January 1945, accused was a member of Company E, 157th Infantry, located near Reipertswiller, Alsace (R2-5). The regiment was committed to action against the enemy and was "on the line at that time" (R6).

An extract copy of the morning report of Company E, 157th Infantry, received in evidence over objection by the defense counsel, shows the following entries: (R3;Pros.Ex.A)

"23 Jan.1945
32157371, Keller, Henry E. Jr., Pvt.
Duty to AWOL 2359 hrs. 17 Jan. 1945
Signature: Alton M. Moore
Capt. Infantry
Personnel Officer

18 May 1945
32157371, Keller, Henry E., Jr., Pvt.
AWOL to pres conf. Regt'l Stockade, 16 May 1945
Signature: Alton M. Moore
Capt. Infantry
Personnel Officer"

First Lieutenant Harry O. Davis, Assistant Court-Martial Investigating Officer for the 157th Infantry, testified that he interviewed accused on 20 May 1945 and after advising him of his rights under the 24th Article of War, secured a statement, which accused signed, and, which witness summarized as follows:

> "He [accused] was released from confinement around the 17th of January 1945 [and] he returned to company supply and took off from there and went to Lyon, France [where] * * * he stayed around the 36th Division rest camp and ate in a transient troop mess until he was picked up by the MPs around the 1st of May [1945]. * * * He had no frontline service but knew he couldn't take it up there because the noise itself was too much for him" (R4).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R6,7).

5. The admission in evidence of the extract copy of the morning report was objected to by the defense counsel on the basis that such report was not signed by the company commander but signed instead only by the personnel officer.

Unit personnel officers have been authorized to sign morning reports and were so authorized at the time these reports were signed. Paragraph 43a, Army Regulation 345-400, 3 January 1945, as amended, provides as follows:

> "Morning reports will be signed by the commanding officer of the reporting unit, or by the officer designated by the commanding officer."

Circular 119, ETO USA, 12 December 1944, Section IV, provides as follows:

> "Morning reports of units in the Theater will be signed by the commanding officer of the reporting unit, or, in his absence, the officer acting in command (Par.42a, AR 345-400, 1 May 1944), or by the Unit personnel officer (Par.8, AR 345-5, 5 Aug 1944)(AG330, 33X)." (Underscoring supplied).

The authentication of such report by the personnel officer was therefore authorized and its introduction in evidence was proper (CM ETO 6951, Rogers). In addition to the facts recited in the morning report (Pros.Ex.A), the record contains admissions by accused tending to prove his unauthorized absence. Where the condition of absence without leave is much prolonged, in this case 115 days, 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, sec.130a, p.143). This absence also occurred in an active theater of operation. The offense of desertion is thus fully established and legally sustained (CM ETO 1629, O'Donnell; CM ETO 4914, Solomon; CM ETO 7663, Williams; CM ETO 6951, Rogers, supra).

6. The charge sheet shows that accused is 27 years of age and was inducted 20 June 1941 at Trenton, New Jersey. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks,

(354)

Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept.1943,sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 1

CM ETO 14359

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 45, U. S. Army, 4 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DANIEL V. HART, (31353796), Company D, 179th Infantry	)	

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

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1. The record of trial in the case of 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 Daniel V. Hart, Company D, 179th Infantry, did, at or near Engwiller, France, on or about 6 December 1944, desert the service of the United States, by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he returned to military control on or about 25 December 1944.

Specification 2: In that * * * did, at or near Wingen-sur-moder, France, on or about 2 January 1945, desert the service of the United States, and did remain absent in desertion until he returned to military control on or about 9 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 Charge and specifications. Evidence was introduced of two previous convictions by summary courts for absences without leave each for seven days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of Specification 2 as involved a finding that accused did at an unspecified place, on or about 2 January 1945, desert the service of the United States and did remain absent in desertion until he returned to military control on or about 9 May 1945, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent, substantial evidence shows that accused absented himself without leave from his company, as alleged in Specification 1, while it was in an assembly area preparing to move out and take up defensive positions against elements of the German Army. Accused in his extrajudicial confession, which was properly admitted in evidence, admitted that he was motivated by a desire to escape fighting. The evidence supports the findings of guilty of Specification 1 (CM ETO 1685, Dixon; CM ETO 2582, Keyes; CM ETO 13453, Kuykendoll).

As to Specification 2, the evidence similarly shows that accused was absent without leave from 2 January 1945 until 9 May 1945. The accused in his confession admitted that he was absent without leave from 7 January 1945 until 23 April 1945, and that his absence was terminated by apprehension. The court was not, of course, required to believe that part of accused's statement which fixed the duration of his absence. Evidence of an unexplained absence without leave of four months duration in a foreign theater in wartime amply sustains a finding of desertion. (CM ETO 1629, O'Donnell; CM ETO 12045, Friedman and authorities therein cited).

4. Accused, after being advised of his rights, elected to remain silent.

5. The charge sheet shows that accused is 21 (corrected at the trial to 20) years of age and was inducted 28 April 1943 at Fort Devens, Massachusetts. 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 as approved and the sentence.

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

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

14359

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

BOARD OF REVIEW NO. 1

29 SEP 1945

CM ETO 14362

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 16 June 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private GEORGE J. CAMPISE (36732371), Company G, 157th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private George J. Campise, Company G, 157th Inf. did, at or near Rambervillers, France, on or about 25 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended on or about 18 February 1945.

Specification 2: In that * * * did, at or near Saarguimines, France, on or about 14 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended on or about 18 May 1945.

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

3. The prosecution introduced into evidence three properly authenticated extract copies of morning reports, the pertinent parts of which are set out below (Pros.Ex.A,B,C). Each of these was objected to on the ground that "it is not signed by the Company Commander", but the objection was overruled (R4,5):

"EXTRACT COPY OF MORNING REPORT OF—COMPANY "F",
157TH INFANTRY
28 Oct 44
36732371, Campise George J. Pvt.
Duty to MIA 25 Oct 44.
Signature: Alton M. Moore
Captain, Infantry
Personnel Officer" (Pros.Ex.A)

"EXTRACT COPY OF MORNING REPORT OF—Co. "F",
157th Infantry
19 Feb 1945
36 732 371, Campise, George J., Pvt.
Fr MIA 25 Oct 1944 to AWOL 2359 hrs. 25 Oct 1944:
AWOL to Pres Conf Regt'l Stockade 18 Feb 1945.
Signature: Alton M. Moore
Capt. Infantry
Personnel Officer" (Pros.Ex.B)

"EXTRACT COPY OF MORNING REPORT OF—Co. "G",
157th Infantry
21 March 1945
36 732 371, Campise, George J., Pvt.
Duty to AWOL 0600 hrs. 14 March 1945
Signature: Alton M. Moore
Capt. Infantry
Personnel Officer
22 May 1945
36 732 371, Campise, George J., Pvt.
AWOL to Pres Conf, Regt'l Stockade, 1300 hrs.
18 May 1945.
Signature: Alton M. Moore
Capt. Infantry
Personnel Officer" (Pros.Ex.C)

Staff Sergeant Sigmund Brezinski, Company G, 157th Infantry, testified that he was the squad leader of accused's squad and that on 14 March 1945 their organization was in the assembly area near Saarguimines, France. On that day he saw accused about 1530, just before dinner. After dinner the organization was given orders to move to a line of departure. Accused was not present and Sergeant Brezinski searched for him without success. Although the witness was with Company G from 14 March 1945 until 18 May 1945 he did not see accused during that time (R10-12).

First Lieutenant Harry O. Davis testified that he was appointed to investigate the charges for which accused was being tried and that he warned accused of his rights under Article of War 24. Lieutenant Davis stated that,

> "He then told me that on or about the 25th of October 1944 while the regiment was in rest at Rambervillers, France, he heard the outfit was going back up on the line. He knew he could no longer take it, so he left. He went to Dijon and stayed there a few days, and went from Dijon to Marseilles where he met a couple of his buddies. They stayed around with various outfits in Marseilles, and were stopped by the MP's, but at the time he was stopped, he had a pass, a faked pass, and the MP's didn't bother him. Then he was picked up one night in a hotel where he was staying when the MP's raided the hotel. Then in his second statement, concerning his absence in March, from March to May, he said the outfit then was in rest at Vallois, France. Again he heard that the outfit was going up on the lines, and he knew he couldn't take it, so alone he went to Nancy, and stayed around there with various outfits. He met a buddy of his from the 3rd Division. This buddy took him to the XV Corps rest camp in Nancy. He stayed there until the 29th of April, and it was found that he did not have a pass to the rest camp and he was turned over to the MP's" (R9-10).

4. Accused, after being advised of his rights, elected to be sworn and testify. He stated that he joined the 45th Division at Anzio on 5 February 1944 and was assigned to Company L, 3rd Battalion, as a rifleman. He was on the beachhead all during the fighting. When the 45th Division invaded Southern France he was a member of the 157th Infantry which crossed the Moselle River near Epinal. He has never been wounded or hospitalized (R14-16).

5. Specification 1 of the Charge:

The extract copy of the morning report for 28 October 1944 (Pros.

Ex.A) with an entry carrying accused as "Duty to MIA" was improperly admitted in evidence to show accused's absence. Regular course of business was not sufficiently shown. On that date the provisions of par.42, AR 345-400, 1 May 1944, governed the preparation of morning reports in the European Theater of Operations and only the commanding officer of the reporting unit or the "officer acting in command" were authorized to sign them (CM ETO 6951, Rogers). The presumption of regularity, viz, that the report was signed by a properly authorized officer (CM ETO 5234, Stubinski) cannot be applied because the contrary affirmatively appears (CM ETO 7686, Maggie and Lewandowski). It was therefore not admissible as an entry made in the regular course of business or as an official writing.

The extract copy of the morning report for 19 February 1945, so far as it concerns the entry thereon, "AWOL to Pres Conf Regt'l Stockade 18 Feb 1945", was admissible to establish that on 18 February accused was in a status of being absent without leave and that on that day such status terminated. On and after 12 December 1944, unit personnel officers were authorized to sign morning reports in this theater (sec.IV, Cir.119, Hq ETOUSA, 12 Dec 1944) and we have held that extract copies of reports so signed are admissible, at least as to facts occurring after 12 December 1944 (CM ETO 6951, Rogers, supra).

So far as the entry on the morning report for 19 February 1945 pertains to events occurring before 12 December 1944 ("Fr MIA 25 Oct 1944 to AWOL 2359 hrs. 25 Oct 1944") a different question is presented. Before 12 December 1944 the personnel officer, as we have said, was not authorized to sign morning reports. This problem was considered in CM ETO 6951, Rogers, supra, and it was stated there that an extract copy of a morning report signed by a personnel officer was "not competent * * * to prove events occurring prior to the time the duty was placed upon the personnel officer to know the facts stated". An examination of that case reveals, however, that this statement was unnecessary to the decision therein and this dictum is hereby overruled.

Par. 117a, MCM 1928, (p.121) provides that

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e. prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the originals of * * * /a/ morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge".

We start with the premise that entries need not be made contemporaneously with the happening of the event they record.

> "This principle permits the delayed entry in a morning report to be received in evidence as proof of the unauthorized absence of an accused which occurred prior to the date of actual entry".

SPJGN 1945/3492, 29 March 1945, IV Bull. JAG 86; CM ETO 12951, Quintus; CM ETO 9843, McClain). In view of these rulings there is now no longer any doubt that an entry made on 19 February 1945 as to events occurring on 25 October 1944 would be competent evidence of the occurrence of the events so recorded and the lateness of the entry would go only to the weight and credibility to be accorded it (CM ETO 7686, Maggie and Lewandowski), at least in those circumstances where the officer preparing the report had on 25 October 1944 a duty to know and record the matter stated. It is difficult, however, to see the importance of this last clause. It is difficult to see how the evidentiary value of what is entered on 19 February 1945 is either increased or diminished by the entrant's duty, or lack of it, on 25 October 1944. What is received by him and recorded on 19 February is new information pertaining to past events, but this new information is neither the more nor less accurate because the entrant may or may not have had a duty to find it out four months ago. The information he gains and records on 19 February he gains and records because of the position he occupies on that date, namely, as the person whose duty it is to prepare and sign morning reports, and not because of the position he held on 25 October and its accuracy seems to us entirely unrelated to this latter fact.

A contrary conclusion would mean that every time there was a change in the person whose duty it was to prepare and sign morning reports all entries as to the past would be crystallized in their then existing form and the succeeding officer would be powerless to make new entries concerning that period, which would be competent in a court of law. With the confusion attendant upon combat and the resultant necessity for correcting records on the basis of new information constantly being received, we cannot conceive of anything that would hamper the efficient and accurate keeping of personnel records more than a rule providing that only he who made and was competent to make an entry may correct it. Clear and convincing authority would be needed before we would adopt a holding that would lead to such a result and lacking such authority the foregoing seems to us an additional argument of considerable practical force for the conclusions we have reached above.

With respect to the entry of 19 February, Captain Moore, the Personnel Officer, testified that it was entered upon the basis of information received through official channels. This information was contained on what the witness termed "a morning report" (R7).

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It is apparent from this testimony that informal morning reports were submitted from the companies to the Personnel Officer and on the basis of these the official morning report was prepared.

The competency of entries on morning reports prepared in such fashion was the subject of an excellent opinion by Colonel Hubert D. Hoover while he was Assistant Judge Advocate General in charge of the Branch Office with the North African Theater of Operations. He stated,

> "The Manual as quoted provides, among other things, that a 'permanent record compiled from mere notes or memoranda' is competent evidence of the facts and events recorded. Knowledge of the facts and events need not therefore be founded in the immediate visual sense of the recording officer. On the contrary, the test as to whether an entry is competent evidence lies in determining whether the entry is the prescribed, original and permanent record of the fact or event as ascertained or verified by the recording officer from sources recognized by competent military orders or custom as authentic for record purposes. Applying this test, it is apparent that duly authenticated morning report entries prepared from memoranda furnished by the company commander under competent orders for the purpose of enabling another to prepare and authenticate the record, such as morning reports prepared and authenticated in accordance with instructions from the Commanding General, North African Theater of Operations, as noted above, are admissible to prove the facts and events so recorded.
>
> "To be true, the Manual excepts from the rule of competency those records, including morning reports, which are 'obviously not based on personal knowledge.' This clause has been interpreted to render inadmissible entries on morning reports relating to events which the reporting officer was not officially obliged to know, which were ascertained from unauthorized secondary sources, or which occurred at such great distance from the reporting officer that personal ascertainment or verification of the facts from sources recognized as authentic by military orders or custom would be impossible (Dig.Op.JAG,1912-1940, Sec 395 (18); Bull. JAG, Aug 1942, Sec 395 (22a); Bull. JAG, Sep 1942, Sec 395 (18); NATO 603, Suci). Though the language of some of the interpretations is broad, this office finds nothing in them inconsistent with giving probative effect to morning reports of the type here under consideration. The exclusionary rule is not construed by this office to prohibit the use of entries compiled from memoranda where the entries constitute the first prescribed permanent record of the

> facts or events and where competent military orders or custom contemplates the use of the memoranda, although the use of the memoranda may admit elements of hearsay in that the memoranda are prepared by persons other than those who make the permanent record. Military custom supports this view. It is well known that in the preparation and authentication of morning reports by company commanders it is not unusual for them to utilize data and memoranda furnished by other military personnel of the company for the purpose of determining the facts and events recorded"(1st Indorsement, dated 17 February 1944, to Letter, Division Judge Advocate, First Armored Division, dated 4 February 1944).

Wigmore (Code of Evidence (1942) sec.1606, p.305) states that,

> "A return or report * * * is admissible, subject to the ensuing details on these conditions: * * * (2) Whenever the duties of an officer require him to obtain information other than by personal observation * * * his return or report is admissible only when he had express authority, by legislative enactment or by executive command, to make it upon such information". (Emphasis in original.)

To be sure, Cir. 119 Hq. ETOUSA supra did not in haec verba grant personnel officers authority to prepare morning reports other than on the basis of what they themselves had actually observed. Nevertheless, the authors of that directive were familiar with the organization of divisions. They were aware that it would be physically impossible under combat conditions for a personnel officer to make daily visits to every company and check on the status of each individual in them. With an average of more than 3000 men in each regiment a personnel officer must necessarily rely on information submitted to him by others. We think the very designation of the personnel officer as the person authorized to prepare and sign morning reports was in itself a grant of authority to prepare and sign them on the basis of information submitted through customary military channels and that reports so authenticated fall within the rules quoted from Wigmore, supra.

We conclude, then, that the entry made on 19 February 1945, relative to accused ("Fr MIA 25 Oct 1944 to AWOL 2359 hrs. 25 Oct 1944") is competent evidence of his absence without leave on that date. The further entry on 19 February established as we have said, the termination of this absence on 18 February. With the corpus delicti thus admitted (CM ETO 14040, McCreary), it appears, then, that accused absented himself without leave on 25 October 1944 to avoid combat duty and remained absent without leave for almost four months until he was apprehended on 18 February.

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This evidence amply sustains the court's finding that accused was guilty of desertion (CM ETO 1577, LeVan; CM ETO 1629, O'Donnell; CM ETO 2433, Meyer; CM ETO 4490, Brothers).

6. Specification 2 of the Charge presents no such troublesome question as to the admissibility of the extract copies of the morning reports as Specification 1. They were clearly competent (Cir.119,Hq ETOUSA, supra). Although the absence charged here was shorter than that charged under Specification 1, yet accused's confession, which was properly admitted (CM ETO 14040, McCreary,supra) brings this case within the authorities cited above. The finding of guilty of desertion under this Specification was entirely warranted.

7. The charge sheet shows that accused is 22 years of age and was inducted 10 February 1943 at Chicago, Illinois. 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 desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec. VI, as amended).

Wm. J. Burrow Judge Advocate

Edward C. Allen, Jr. Judge Advocate

(DISSENTING IN PART) Judge Advocate

I concur as to Specification 2 but not as to Specification 1, for the reason that, in my opinion, if the entry of 28 October 1944 was unauthorized, the entry of 19 February 1945 (relative to"AWOL" as of 28 October) was inadmissible as not in compliance with the Federal statute (concerning entries made in the regular course of business) recognized and applied in CM ETO 4691, Knorr and CM ETO 10199, Kaminski; and inadmissible as an "official writing" because obviously not based on personal knowledge.

David R. Carroll Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 8 SEP 1945

CM ETO 14380

U N I T E D S T A T E S	106TH INFANTRY DIVISION
v.	Trial by GCM convened at Bingen, Kreis Bingen, Province of Hessen, Germany, 16 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class ROBERT L. HALL (38229217), Company E, 3rd Infantry	

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private First Class Robert L. Hall, Company "E" 3d Infantry, did, at Bingen, Kreis Bingen, Province of Hessen, Germany, on or about 6 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Herr Fritz Schoppe, a human being, by shooting him with a rifle.

Specification 2: In that * * * did, at Bingen, Kreis Bingen, Province of Hessen, Germany, on or about 6 June 1945, with malice afore-

thought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Herr Philip Schaeffer, a human being, by shooting him with a rifle.

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

On 6 June 1945 accused and Private Rufus V. Fain, who had been drinking cognac and wine in their company area, walked to Bingen, Germany, each carrying an M-1 rifle. They entered a house, where they and an old man, a German civilian named Fritz Schoppe, aged 79, drank some wine. Schoppe drank enough to be "tipsy". Fain testified that the old man was talking about being an ex-soldier; that when they asked for his papers, he would not show them and "you could tell by the tone of his voice he was getting all stirred up" (R8). His wife came into the room, motioned for the soldiers to leave, and Fain left the house (R8). A shot was fired within the house, and Schoppe and accused came out into the courtyard (R21). Schoppe's cheek was bleeding from a wound not caused by a bullet (R21,39; Pros.Ex.B). Shortly thereafter accused was seen firing his rifle at Schoppe, who advanced towards him or "just stood there" (R8,21). Schoppe fell down (R25), the right side of his face and parts of his brain being shot off (R15,38), resulting in death (R38,39; Pros.Ex.B).

Shortly afterward accused was seen talking to another German civilian, Philip Schaeffer, aged 50, in a courtyard. Accused called "halt" and held his rifle in the direction of Schaeffer, who, when he raised his hands, was shot by accused (R30,32,34,36). Schaeffer received a bullet wound in his neck from which he quickly died (R37).

After an explanation of his rights under Article of War 24, accused made a pretrial statement that the first civilian had been "cussing" him and Fain, which led to the shooting; that he thought that this civilian had been a prisoner of war; that he accosted the second civilian and asked him to raise his hands; that this civilian apparently also began swearing at him and "as the civilian was moving, motioning his hands and moving to one side, he shot him" (R46).

It was stipulated that a board of officers, appointed to determine the sanity of accused, found that on 6 June 1945, he was able to distinguish right from wrong and to adhere to the right (R5-6; Pros.Ex.A). In its recommendation, the board stated that in his own mind accused believed that his actions were right and were in accordance with the instructions he had received, namely, not to take any "stuff" from Germans (Pros. Ex.A).

4. After an explanation of his rights, accused elected to be sworn as a witness and testified substantially as follows:

He and Fain asked Schoppe for his papers, Schoppe "got louder and it seemed it wasn't any of our business whether he had been discharged or anything else" (R56). Schoppe tried to take accused's rifle away from him, and in the scuffle a round was fired inside the house. Accused ran outside and the old man ran after him. Again accused asked Schoppe for his papers, but he would not show anything

> "so I was gonna turn and leave and he went in his pockets like he was gonna get a knife or gun or something and shoot or cut me while I was walking away, so I figured the best thing for me to do was to stop him" (R57).

Accused then walked out on the street where he met the second German.

> "He was coming toward me pretty fast. I halted him twice. He kept coming, so I fired at him" (R57).

At his company "the lieutenant" had told him once or twice

> "to not have anything to do with Germans and not take 'anything' off them, and he said when you do have to shoot one of them, to shoot to kill".

Accused's understanding of this was that

> "he meant not to take any cussing, not to let them shove you around, if you was on guard for them to do what you instructed them to do (R57).

Several witnesses for the defense testified that accused was a good soldier and had an excellent reputation (R49-55).

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 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 reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

A reckless disregard of human life was clearly manifested by accused's conduct in the present case. The proof of the homicides as alleged is substantial and undisputed. They occurred long after hostilities had ceased. Every element of the crime of murder was proven under each of the specifications (CM ETO 9810, Teamer Johnson; CM ETO 11231, Mitchell; CM ETO 12850, Philpot). The question whether accused was acting in self-defense was for the determination of the court (CM ETO 3180, Porter; CM ETO 4640, Gibbs; CM ETO 9410, Loran; CM ETO 11178, Ortiz; CM ETO 12377, Graham), and very substantial evidence supports its determination in this case. The firing of several shots indicated malice and not self-defense. The fact, if it were a fact as accused claimed, that "the lieutenant" told them not to have anything to do with Germans and "not to take 'anything' off them" but to shoot to kill if they had to shoot one of them, did not constitute a defense to the charge of murder under the circumstances proven in the record (Cf: CM ETO 13369, McMillon et al). It need not be decided whether it would be a defense that accused believed his actions were right, as the court was not obliged, in view of the evidence, to accept as a fact this conclusion of the board of officers (Cf: CM ETO 8474, Andoscia). The testimony of the German witnesses at the trial was supported by that of American witnesses. The court, with the witnesses before it, was in a position to judge of their credibility and the value of their evidence and its findings of guilty may not be disturbed (CM ETO 8837, Wilson; CM ETO 11621, Trujillo et al).

The investigating officer testified orally concerning the contents of accused's pretrial statements which was apparently in written form (R44-47). The failure of the defense to object to such oral proof constituted a waiver of the objection (CM ETO 8690, Barbin and Ponsiek, and authorities cited therein).

6. The evidence was in conflict on the question of the drunkenness of accused, some witnesses testifying that he was drunk, others saying he was not (R10,29,33,36,39,43,45,54). Substantial evidence in the record supports the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite intent and to support the court's findings that accused was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 11269, Gordon; CM ETO 11958, Falcon; CM ETO 12850, Philpot).

7. The charge sheet shows that accused is 28 years six months of age and was inducted 28 September 1942 at Abilene, Texas, to serve for the duration of the war plus six months. He had no prior service.

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

Wm. F. Burrows Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Cornell Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3 2 AUG 1945

CM ETO 14382

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, 25 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private First Class THOMAS B. JANES (31214112), Company C, 33rd Armored Engineer 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 soldier named above has been examined by the Board of Review.

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

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

Specification: In that Private First Class Thomas B. Janes, Company C, 33rd Armored Engineer Battalion, did, at or near Kottenfurst, Germany, on or about 19 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Eva Witing.

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

Specification: In that * * * did, in conjunction with Private Charles E. Heishman, Jr., Company C, 33rd Engineer Battalion, at or near Kottenfurst, Germany, on or about 19 March 1945, unlawfully enter the dwelling of Bernhardt Borkes with intent to commit a criminal offense to wit, larceny, therein.

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 and forwarded the record of trial for action under Article of War 48, but recommended that, if the sentence be confirmed, it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The confirming authority, the Commanding General, European Theater of Operations, 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 execution of the sentence pursuant to Article of War 50½.

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

a. Specification of Charge II. During the day and evening of 19 March 1945, accused engaged in drinking wine with his squad in their billets in the town of Kottenfurst. He was last seen in the billets at about 0100 or 0130 hours on 20 March (R8-9,13). Private Charles E. Heishman, Jr., a member of accused's company, testified that on the night of 19-20 March he and accused left the company area in Kottenfurst alone and walked for about fifteen minutes to a nearby farmhouse. Heishman's intention was "to get drink" at the house, which they entered through a window near the kitchen door. They found 4½

bottles in "a little room on the left hand side" and then proceeded to the top of some stairs. Heishman went into "the old man's room" and did not see accused any more until they reached the company area (R6-8). Their entrance through the window was heard by Maria Eva Whiting, who had been sleeping on the ground floor of the house (R18-19).

Heishman was identified by Bernhardt Bourkes, a householder in the postal area of Kottenfurst, as the "tall one" of two American soldiers who "banged on the door" of his room on the night of 19 March after he had gone to bed. When the witness opened the door Heishman threatened him with a revolver and the two soldiers then proceeded to take liquor from behind the wash table in his room, making him drink from the bottle first. "The little one did all the searching". The next morning his "golden" watch was missing from the wash table on which it was laying that night. A watch shown him by the prosecution was identified as the missing watch (R14-17, Pros.Ex.A).

At approximately 0530 hours on 20 March, a guard of accused's company saw him "back of the house". Accused was alone, appeared normal, and had nothing with him that the guard remembered (R13-14).

Private Joseph B. Browning, another member of accused's company, saw accused in the billets between 0500 and 0700 hours on the morning of 20 March. Accused wanted Browning to get up and get his buddy, who was "drunk and raising hell", but the witness refused to do so. Upon waking later, Browning observed some wine sitting "more or less" at the head of his bed, and accused was lying by the side of his bed. Browning also found a "gold, closed face watch" in his bed roll, which resembled Prosecution's Exhibit A. He had not seen the watch before and did not know how it got in his bed roll. He later gave it to a major who was conducting an investigation (R8-12,25).

b. Specification of Charge I. During the night of 19 March, Maria Eva Witing had been sleeping on the ground floor of the home of Bernhardt Bourkes, in the same room with her four-year-old child, her two brothers and Mr. and Mrs. Nelles, when a tall soldier, identified by her as Heishman, and a small soldier who resembled accused, knocked on her room door. Mr. Nelles opened it but he "had to go back to bed immediately". Heishman

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forced her to undress with his pistol and she went with him into the kitchen, where he "overpowered" her and had intercourse with her without her consent. The "small one" came into the kitchen while she was struggling with Heishman, who was still on top of her. She was "heavily afraid" of both soldiers. After talking with Heishman, who then left the room, the small soldier sat down on the sofa and wanted her to kneel in front of him. She "didn't want to at first". He asked her to have sexual intercourse with him by talking about "baby or bobby", which was all she understood. He was armed with a weapon "longer than a pistol" with which he "always threatened" her "when I didn't want what he wanted". He grabbed her and threw her to the "ground". She was still nude. Holding his gun with one hand, he "tore" her legs apart with the other. She tried to keep her legs closed, but could not so do because it was hard lying on the "ground" and he had his legs between hers. She struggled and resisted, but he had sexual intercourse with her against her will, penetrating her vagina with his penis. His weapon was always lying next to him and she was afraid he might shoot her with it. He pointed it at her twice and threatened her continuously. "I wanted to throw him from me but he still did overpower me, and afterwards I did get rid of him, but he three me on the sofa and there he overpowered me again". However, she "was struggling continuously so he couldn't do it exactly the second time", and this time his penis did not penetrate her vagina. She got up and wanted to leave, and Heishman, who had returned to the kitchen with Bourke's fourteen-year-old daughter, spit on her. Then they asked her to leave. About fifteen minutes later, at 0330 hours or after, she jumped out a window with her child, her brothers and Mr. and Mrs. Nelles, and ran into the field (R18-24).

The prosecutrix' testimony was corroborated in part by Maria Borkes, who testified in rebuttal that when one of the soldiers took her downstairs into the kitchen, "Maria Witing was laying nude on the sofa". However, the witness "saw no contact. The two stood". Maria Witing had to get up and go outside shortly after (R36-37).

Prosecutrix' brother, Johan Jansen, aged 16, who slept in the same room with her, testified that Heishman, whom he identified, carried a pistol and the "short one" carried a rifle when they entered the room. The small soldier went to some packages and suit cases in

the corner of the room and took all the things out and scattered them around the room, while Heishman "felt over Mr. Nelles' bed and asked him for the work papers". The small one made Jansen accept a cigarette, then pushed his rifle into Jansen's ribs and took the cigarette away. The small soldier also struck Jansen with his hand, threatened with his rifle, and "loaded and unloaded his gun continuously. Later on he was nervous then he shot with his rifle into the floor". Both Heishman and the small soldier then took turns getting in bed with his sister, but he could not see what was going on. The small soldier threatened her with his gun, and she was nude when she afterwards went into the kitchen with the soldiers, who kept coming back and using a flashlight to see if Jansen and the others were still there (R26-31).

4. After his rights as a witness were explained to him, accused elected to testify under oath (R32). He had told the investigating officer he was not at the Bourke house because he had not been identified, and was afraid to admit being there. He had "probably a couple of quarts of champagne and wine and cognac" to drink before going to the house with Heishman to get more drink at about 0030 or 0100 hours. They rapped on the front door and the old man opened it. Accused had never seen any member of the household before. He had an M-1 rifle but kept it slung over his shoulder and did not threaten anyone with it, although it went off accidentally one time. He "imagined" the people in the house were frightened but they did not scream or cry. He was in the house about three hours "drinking and looking around in cupboards". At one time he got "woozy and went outside and sat on the steps. While in the house he took a watch, which fell out of his pocket and was found the next morning. He "guessed" it was the one showed him at the trial. He sat on the bed with Maria Witing but did not get in bed with her. Then, he testified,

> "I walked out of the room and into the kitchen, which was across the hall and when I went in there, I didn't know she was there. There was a bottle in there and I was drinking from it. This girl was laying on a bench, quite wide, and she was just laying there naked, her legs were up like that, so I figured it was a lay. She didn't struggle. I didn't strike her. I got into the saddle and that was all there was to it" (R32).

She did not scream or offer any resistance. The act required about 20 minutes. After the intercourse he went in the back room and had some "snaps" and then had a smoke and went back to the billets about 0515 hours. Before the war he worked for General Electric and with Maintenance of Way for the New York Central (R32-36).

5. Competent evidence for the prosecution shows that accused and Private Charles E. Heishman, Jr. unlawfully entered the dwelling of Bernhardt Bourkes through a window during the early morning of 20 March 1945, as alleged in the Specification of Charge II. Accused testified that he intended to get something to drink in the house, and he admits drinking and taking a watch while in the house. The evidence is clearly sufficient to support the findings of guilty of Charge II and its Specification (MCM, 1928, par.149e, p.169; CM ETO 3679, Roehrborn).

Carnal knowledge of Maria Eva Whiting by accused was established by her testimony and was admitted by accused. Her testimony also shows that she vigorously resisted accused's advances and that she was placed in fear of losing her life or suffering great bodily harm by his threatening use of a deadly weapon. Accused's testimony indicates that she consented to the act. If believed, her testimony is clearly sufficient to show that the intercourse was accomplished by accused through force and without her consent under such circumstances as to constitute rape (CM ETO 3933, Ferguson, et al; CM ETO 10841, Utsey). There being substantial evidence to prove the offense charged the court's findings of guilty of Charge I and its Specification can not be disturbed (CM ETO 10715, Goynes; CM ETO 10644, Clontz).

6. The staff judge advocate states in his review that accused was tried by the same court which had just tried Private Heishman for similar offenses committed at the same place and at substantially the same time. The record of trial affirmatively shows that the defense declined to make any challenge either for cause or peremptorily, and that accused stated that he had no objection to any of the members present (R3). The fact that the members of the court may have tried an alleged co-wrongdoer for the same offense does not of itself render them ineligible (Dig.Op.JAG, 1912-40, sec.375(2), p.185;

Winthrop's Military Law and Precedents (Reprint, 1920), p.227). The burden rested on accused to make and maintain a challenge to any member of the court who may have been objectionable to him (CM ETO 6234, Young).

7. The charge sheet shows that accused is 29 years and seven months of age, and was inducted 20 November 1942 at Fort Devons (sic), Massachusetts. No prior service is shown.

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

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

O R S Keegan Judge Advocate

Malcolm C. Sherman Judge Advocate

E. L. Lewis Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 2 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private First Class THOMAS B. JAMES (31214112), Company C, 33rd Armored Engineer 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 14382. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 14382).

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

(Sentence as commuted ordered executed. GCMO 318, ETO, 10 Aug 1945)

RESTRICTED

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

BOARD OF REVIEW NO. 1

16 AUG 1945

CM ETO 14408

U N I T E D S T A T E S v. Privates QUINTER GRIFFIN (34633236) and JOHN D. HANEY (34633232), both of 4008th Quartermaster Truck Company, and Privates WILLIE L. CALVIN (38485971) and CLAUDE HAILEY (36390929), both of 3544th Quartermaster Truck Company, all formerly of 3393rd Quartermaster Truck Company	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Liege, Belgium, 4 June 1945. Sentence as to each adcused (disapproved, and rehearing ordered as to HANEY and HAILEY): Dishonorable discharge, total forfeitures and confinement at hard labor, GRIFFIN for 15 years, CALVIN for 10 years. Places of confinement: GRIFFIN, United States Penitentiary, Lewisburg, Pennsylvania; CALVIN, Federal Reformatory, Chillicothe, Ohio.

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

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

2. Although Charge II as to accused Griffin and Calvin is laid under the 84th Article of War, the specifications allege facts constituting crimes under the ninth paragraph of the 94th Article of War, viz., the sale by the accused wrongfully and knowingly of property of the United States, furnished for the military service thereof.

The 84th Article of War is of narrow application. Primarily it is intended to cover cases of the wrongful sale or disposition of military property of the United States issued for the use of military personnel (MCM, 1928, par.144, p.158; Winthrop's Military Law and Precedents (Reprint 1920) p.561). The primary element of the offense is that the property involved had been issued for use in the service. The automobile tires, tubes and wheels in the instant case may or may not have been "issued" within the meaning of the 84th Article of War. The

evidence leaves this point in doubt. However, there is no difficulty in concluding from the evidence that they were property of the United States furnished for the military service (CM ETO 11497, Boyd; CM ETO 11936, Tharpe et al; CM ETO 11072, Copperman). The fact that the specifications were laid under the wrong Article of War is immaterial and the guilt of accused of violation of the 94th Article of War may be sustained (CM ETO 10282, Vandiver and Coelho; CM ETO 6268, Maddox).

The importance of this distinction lies in the fact that wrongful sale of Government property under the ninth paragraph of the 94th Article of War of a value in excess of $50.00 authorizes penitentiary confinement (CM ETO 9288, Mills). The wrongful sale of Government issued property under the 84th Article of War of any value is a military offense only, for which penitentiary confinement is not authorized (CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski; CM ETO 10282, Vandiver and Coelho, supra).

3. The record of trial is legally sufficient as to accused Griffin and Calvin to support the findings of guilty of Specification 1, Charge I and Charge I and so much of the findings of guilty of Specifications 1 and 2 of Charge II as involves finding of guilty of a violation of the 94th Article of War, and legally sufficient to support the sentences.

4. Confinement in a penitentiary is authorized upon conviction of larceny and wrongful sale of property of the United States furnished and intended for the military service thereof of a value exceeding $50.00 by Article of War 42 and section 35 (amended) (as to larceny) and section 36 (as to wrongful sale), Federal Criminal Code (18 USCA 82,87) (See CM ETO 1764, Jones and Mundy). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Griffin, and of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Calvin, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b (4) and 3b, and par.3a as amended by Cir.25, WD, 22 Jan.1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 29 SEP 1945

CM ETO 14433

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Possneck, Germany, 18 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Third Grade ANIBAL J. LAMAS (32826697), 135th Ordnance Medium Maintenance Company	

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS 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 92d Article of War.

Specification: In that Technician Third Grade Anibal J. Lamas, One Hundred and Thirty-Fifth Ordnance Medium Maintenance Company, did, in the vicinity of Huckeswagen, Germany, on or about 19 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Louis A. Wolak, a human

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being, by shooting him with a rifle.

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

3. Clear, substantial evidence for the prosecution established the following:

On 19 April 1945, a group of Polish, French and Ukrainian refugees were living in a barn and a farm house (R8), comprising a displaced personnel billet (R20), in the vicinity of Huckeswagen, Germany (R25). At 2230 hours, when it was dark, accused, a member of a company stationed nearby (R11,25), was seen chasing a girl into the barn. Private Marion W. Pethtal, a member of the same company, heard the girl yell, went into the barn, and said "let her alone - she is a nice girl." At this time the girl was "kind of on her legs and Sgt. Lamas was bending over her, sort of slapping the girl" (R9). Private Louis A. Wolak, also a member of the Company (R7), came into the barn, grabbed accused by the arm, and pulled him away. Accused broke away and hit the girl twice again. Pethtal and Wolak each grabbed an arm and pulled him away again (R9). Just as they were coming out of the barn, accused again broke away from Wolak and hit him on the body. Wolak then struck accused a "good solid blow" in the eye (R9,12,13). Pethtal then shone a flashlight on the girl and saw that her hair was mussed up - she was not crying, "but you could see she was hurt" (R9). Wolak was talking to the girl in Polish when Pethtal left the barn (R10).

Soon afterward Technician Fourth Grade Edward J. Vaitulonis saw accused coming from the

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direction of the farmhouse "looking for someone". Vaitulonis walked up to him, and they stood talking about six feet from the door of the barn. Accused said "I will find that Polock" and explained that it was not a refugee he was referring to but "a Polock from the company". He stated that the person he was looking for had struck him on the face, and that he would fight him with his fists or weapons. The sergeant tried to quiet accused, who seemed to be a bit excited (R25), and told him the displaced personnel had had enough trouble of their own while working for the Nazis. Accused then "seemed to quieten down and everything seemed better" (R26). A soldier standing near by heard Vaitulonis say, "You had better let it go until morning" and accused reply, "well, all right" (R21).

About ten minutes after the incident inside the barn, Wolak came to the door of the barn. Accused struck a match. When the match went out, accused pointed his M-1 rifle inside the doorway and started firing. Three or more shots were fired. Two soldiers grabbed his rifle away from him (R10, 11,14,21,22). One of these heard accused say, "He is not going to hit me, and get away with it" (R21).

Immediately after the shooting, someone asked accused why he did it. Accused said that "he was a 'Polock'" and walked away (R10). Later a soldier on the way back to the company area saw a figure crouched in the field and asked who it was. The figure answered "Lamas" and asked what had happened. The soldier told him "You shot a man". Accused replied with something which the witness did not "catch", then said "I will have a black eye in the morning" (R21).

The body of Wolak was found inside the barn near the door, his head "all bloody" (R10,27). He died soon after the shooting (R27) as a result of wounds from bullets. The secondary causative agents were shock, hemorrhage, and "Brain substance destructed". Three bullet wounds were found in his body (R28; Pros. Ex.2).

The evidence showed that accused had been drinking prior to the shooting (R16). He drank whiskey out of a bottle when he first went to the barn and house (R18) and was giggling and laughing (R19).

Just before the shooting he was "talking pretty regularly" and was coherent (R24). He appeared angry to Vaitulonis, who "attributed it to drinking", though he did not smell liquor on accused's breath (R26).

4. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness (R29) and testified that at 1930 hours he had had several drinks from a bottle with another soldier. They opened another bottle at the barn. Later he saw a girl who had been very sociable the day before. He followed her into the barn and was holding and kissing her when Wolak came over and said "Let my girl alone". He and Wolak argued back and forth. Accused testified:

> "They were both talking in Polish and she sort of cast me aside like she wanted to go with him. I started walking away and said 'You Polocks are all the same' and then Wolak hit me in the eye and the jaw. After that I don't remember what took place - between the alcohol and the lick, I don't remember anything" (R30)

The next thing he remembered was waking up the next morning. (R30).

An officer, testifying as a witness for the defense, said that at about 2350 hours he went to accused's bunk to place him under arrest and found him snoring. He shook him and called his name but elicited no response (R28,29).

Another defense witness testified that after the shooting he saw accused squatting on the ground in a field. Accused asked what had happened and the witness replied accused "had shot a guy". Witness did not know "if he was under the influence of liquor or excitement, but he did not act normal". Accused also said "something about us not saying anything about it or words to that effect" (R32). He was coherent. When told he had "shot a guy", accused

> "acted more or less nervous but I couldn't say whether it was from drink or what" (R33).

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 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 reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

In addition to the implications of malice arising out of accused's use of the deadly weapon with fatal result, there is ample evidence in the record to show express malice. Shortly before the shooting he declared that he was looking for "the Polock" and that he would fight him with his fists or weapons. After the shooting he said, "He is not going to hit me and get away with it", and, when asked why he did it, he replied that "he was a 'Polock'". His lighting the match when Wolak appeared in the doorway and shooting immediately afterwards were indicative of a deliberateness of purpose, showing malice specifically addressed toward the deceased.

There was substantial evidence in the record to support the court's implied finding that sufficient "cooling time" had elapsed from the time of the conflict with Wolak inside the barn until the shooting. It was testified that about ten minutes elapsed. Accused meanwhile had left the barn and engaged in conversation with Sergeant Vaitulonis, who had endeavoured to dissuade him from making further trouble, and he seemed to quiet down (Cf CM ETO 4640, Gibbs; CM ETO 6682, Frazier; CM ETO 11958, Falcon).

While the evidence showed that accused had been drinking prior to the shooting, it also showed that he was able to talk coherently and engage in conversation concerning his desire to fight with Wolak. He recognized Wolak as a member of his company and lighted a match in the darkness before shooting his rifle at the soldier he had said he was looking for. Substantial evidence in the record supports the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite malice (CM ETO 1901, Miranda: CM ETO 11958, Falcon: CM ETO 14380, Hall; CM ETO 16581, Atencio).

It was the function and duty of the court and the reviewing authority to weigh the evidence and to determine whether drunkeness, or passion under adequate provocation, not cooled by the passage of time, or a combination of the two, reduced the crime from murder to manslaughter. Since sufficient, substantial evidence

supports the court's findings, the Board of Review is without power to disturb such determination upon appellate review (Stevenson v. United States, 162 U.S. 313, 40 L. Ed. 980, 16 S.Ct. 839 (1896); CM ETO 6682 Frazier; CM ETO 11958, Falcon; CM ETO 12320, Norris).

6. The charge sheet shows that accused is 32 years one month of age and was inducted 8 March 1943. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the courtmartial 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).

Wm. T. Sumner Judge Advocate

Edward L. Stevens Jr. Judge Advocate

David K. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 29 SEP 1945 TO: Commanding General, Headquarters, 30th Infantry Division, APO 30, U. S. Army.

1. In the case of Technician Third Grade ANIBAL J. LAMAS (32826697), 135th Ordnance Medium Maintenance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 14433. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 14433).

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

(Sentence ordered executed. GCMO 634, USFET, 21 Oct 1945).

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

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14436

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters
	)	36th Infantry Division, APO 36, U. S.
Private DURWOOD B. BIGGERS	)	Army, 22 June 1945. Sentence: Dis-
(20806693), Company L,	)	honorable discharge, total forfeitures
142nd Infantry	)	and confinement at hard labor for life.
	)	Eastern Branch, United States Disci-
	)	plinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 DURWOOD B. BIGGERS, Company "L", 142d Infantry, APO #36, U. S. Army did, at St. Vith, France on or about 7 September 1944 desert the service of the United States and did remain absent in desertion until on or about 10 April 1945

He pleaded not guilty and, all the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced on one previous conviction by special court-martial for absences without leave of 2, 4 and 13

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days respectively, 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 pursuant to Article of War 50½.

3. The prosecution's evidence is in substance as follows: An assistant truck driver and mail orderly of Company L, testified that on 7 September 1944 they were on a road block in Southern France and that accused was a bazooka man in company headquarters. Accused was present for duty the first part of September but thereafter was not in the company up to 23 September when the mail orderly went to the hospital nor was he present with the company on 23 November when the orderly returned from the hospital nor at any time thereafter (R7-8). The orderly received mail for accused and after holding it for the time authorized, marked it "moved, no address" and forwarded it out (R10). The cook of accused's company, a member of the company since 25 November 1940, testified that he did not see accused when serving meals after sometime in September 1944 (R11-12).

Without objection, an extract copy of the morning report of Company L, 142nd Infantry for 19 September 1944 was admitted in evidence; it shows accused "Duty to AWOL 1700 hrs. 7 Sept 44" (R12; Pros.Ex.1). On 7 and 19 September 1944, the 36th Infantry Division, was under the Mediterranean Theater of Operations. By letter, Headquarters NATOUSA file AG 330.33/100-S, dated 29 July 1943, Subject, "Adoption of New Morning Reports", the Theater Commander of NATOUSA authorized personnel officers to prepare and authenticate morning reports. This directive was in force until 26 September 1944. The morning report in this case was prepared in accordance with the cited authority and the court could take judicial notice of it.

A stipulation by prosecution, defense and accused to the effect that accused was under military control on 10 April 1945 (Pros.Ex.2) was also admitted in evidence (R13).

4. For the defense, a member of the service platoon of which accused was a member in 1941 states that at that time accused performed his duties satisfactorily (R13-14) and a soldier who knew him for about a year "in Bowie, through the Louisiana maneuvers and while we were at Camp Blanding" stated that at that time accused did his work well (R14-15).

Accused informed of his rights as a witness made an unsworn statement to the effect that he had spent four and a half years in the Army as machine gunner with the 36th Division. He made the Salerno landing with the company and the Italian campaign, losing 13 days only in hospital. He also made the invasion of Southern France. On 7 September 1944 he had been drinking (R15-16).

5. "Desertion is absence without leave accompanied by the intent not to return" (MCM, 1928, par.130a,p.142). Both elements are essential to the offense. The morning report shows the unauthorized absence of accused beginning on 7 September 1944 and the testimony of the mail orderly and cook of the company indicate his continuous absence thereafter until 10 April 1945 when accused admits by implication in his stipulation that he returned to military control. Intent to remain permanently absent may properly be inferred by the court from the very prolonged absence, more than seven months, in an active theater of war where were located many military posts at which he could have surrendered. His absence was not explained. Intent unless confessed must be proved by circumstances and inferences and here the court was well justified in its findings that accused intended to remain permanently absent (CM ETO 10185, Polander; CM ETO 13956, Depero).

6. The charge sheet shows accused to be 24 years of age. He enlisted without prior service at Wichita Falls, Texas, 23 November 1940.

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).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

6 SEP 1945

CM ETO 14448

UNITED STATES	)	99TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Kitzingen, Germany, 6 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private HARRY L. LUCKEY (33641119), Company K, 394th Infantry	)	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Harry L. Luckey, Company "K", 394th Infantry Regiment, did, at Schwabach, Germany, on or about 29 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Frau Ida Clos, #1 Norde Ringstrabe, Schwabach, Germany.

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. No evidence of previous convictions was introduced. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharge 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. Evidence for the Prosecution. About 9:30 of the evening of 29 April 1945, at Schwabach, Germany, the accused, a colored soldier of Company K, 394th Infantry and a white soldier of Company K, 395th Infantry, after drinking wine at several places and in search of cognac, knocked on the door of and entered a house situated at and known as #1 Norde Ringstrabe (R18). They were led by an old man into an adjoining room where six women were seated and a baby was lying on a couch. Frau Ida Clos, 22 years of age, the prosecutrix, testified that the accused searched a chest of drawers, displayed interest in a baby's cradle in the room, was taken into one of the two bedrooms and shown the baby, returned to the drawing room and pointed his rifle around the room with finger on the trigger and showed the occupants that it was loaded. The white soldier put the safety on. The accused asked two of the young girls some questions. Thinking that he wanted to know how old they were they told him "ten". He then turned to Frau Clos and asked her the same question. She did not answer. All of the women started to scream when he apparently started for one of the young girls.

He then went for Frau Clos who threw herself on her 18 month old baby. Accused pulled her away from the child and, when she resisted, slapped her. She resisted and screamed. He pointed the gun at her and directed her to one of the sleeping rooms. There he put his rifle against the door, locked it, turned out the light, threw her on the bed and in spite of her resistance he penetrated her private parts with his. The white soldier came to the door and knocked. Accused got up and opened the door and was angry. She also stood up and motioned that she wanted to leave the room. The accused shut the door and again threw her on the bed and got on top of her but before he had effected another penetration, the white soldier again knocked. Accused arose and opened the door and after some talking between the two, sat down on a bathtub. Almost immediately thereafter the military police arrived having been summoned by one of the other women and placed the two soldiers under arrest (R6-9,10).

Frau Clos was corroborated as to what occurred in the kitchen by two of the other women (R26-34,35-37). The white soldier related how they entered the house and when they asked for cognac the women started to yell. Then they asked each one separately for cognac and the girls answered "ten". Accused pointed his loaded gun at Frau Clos and asked her for cognac. Frau Clos answered by immediately getting up and walked through the kitchen into one of the bedrooms. The accused followed her. She was crying as she left (R26). The bedroom door remained open and when the white soldier went to the bedroom to get the accused to leave, about 5 minutes later, he saw him on top of Frau Clos apparently having intercourse. Accused got angry at him and told him to go. Thinking the old man was the woman's father he tried to get him to call his daughter out of the room. He could not make the old man understand. So he returned to the bedroom and said to the accused, "let's go". Accused arose from the bed and sat in a chair. The woman started to cry and went into the kitchen. The police arrived then (R18-20,24). The two soldiers were "pretty drunk" (R19). He denied that accused slapped the woman or used any force on her (R22). Neither one of the soldiers could understand or

speak German (R25).

4. Evidence for the Defense. By stipulation it was shown that a medical examination of Frau Clos, made about four hours after the alleged offense, revealed no evidence of violence nor of male spermatozoa. Frau Clos had in the meantime taken a vaginal douche (Pros.Ex.A).

The accused after his rights as a witness were explained to him elected to testify in his own behalf. In substance he stated that he and the white soldier after drinking wine, but entirely sober, went into the house described in search of cognac. He carried his rifle in his hands because he was 6 foot 1 inch in height and could not go through the doorways with the rifle slung on his shoulder. He asked the girls and women in the room for cognac. One answered "ten" and held her hands up with fingers extended. The one who proved to be Frau Clos got up and led him into the bedroom by motion with her hand. She sat on the bed and asked for chocolate. He gave her some. She turned the light out and partially closed the door and then got in the bed. Thinking this was for the chocolate he got in the bed with her, unfastened his trousers and took out his penis. She took it in her hand and guided it into her private parts and they had intercourse for a very short time when the other soldier came and said something. He then left but soon returned to the door. The accused arose, sat on a chair, and buttoned his trousers. The woman walked out. When he came out of the room the military police were there and took them away (R39). When she led him into the bedroom he thought she was going for some cognac (R40). He was in that room only for about 3 minutes (R41). He denied that he threatened anyone with the gun or touched any of them (R42).

5. Discussion. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of a woman's genitals is sufficient. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165).

In the light of the foregoing the evidence showed and the accused admitted that he had sexual intercourse with the female named in the Specification at the time and place alleged therein. The only issue raised was the presence or absence of consent.

The burden of proving lack of consent is upon the prosecution. Ordinarily this is shown by evidence of resistance.

> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, Ibid).

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Such proof, however, is not necessary if it is proved that the woman was robbed to her power to resist through fear of death or great bodily harm engendered by the accused (1 Wharton's Criminal Law, (12th Ed. 1932) sec.701, pp.942,944; CM ETO 10742, Byrd).

In the case under discussion the evidence for the prosecution clearly showed that the accused put Frau Clos in fear of her life by pointing his loaded rifle at her and in that manner overcame her resistance and without her consent had sexual relations with her. The evidence for the prosecution presented a clear case of rape. The accused denied the lack of consent and contended that she invited him to have relations with her in exchange for some chocolate. An issue of fact was thereby raised which the court has resolved against the accused. Inasmuch as it is within the exclusive province of the court to determine the issue of fact, it will not be disturbed by the Board upon review (CM ETO 4194, Scott; CM ETO 10742, Byrd).

6. The charge sheet shows the accused to be 21 years and 10 months of age. He was inducted at Richmond, Virginia, on 17 June 1943.

7. The court was legally constituted and had jurisdiction of the accused 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 and the sentence and to warrant confirmation of the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Penitentiary confinement 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 (AW 42; cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

(TEMPORARY DUTY) Judge Advocate.

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 6 SEP 1945 TO: Commanding General, 99th Infantry Division, APO 449, U. S. Army.

1. In the case of Private HARRY L. LUCKEY, (33641119), Company K, 394th 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, 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 14448. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14448).

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

(Sentence ordered executed. GCMO 640, USFET, 26 Dec 1945).

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

BOARD OF REVIEW NO. 3 13 SEP 1945

CM ETO 14455

U N I T E D S T A T E S	THIRD ARMORED DIVISION
v.	Trial by GCM, convened at APO 253, U. S. Army, 21 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CLARENCE L. NICE (33828150), Company I, 33rd Armored 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: Violation of the 61st Article of War.

Specification: In that Private Clarence L. Nice, attached Unassigned Detachment 38, Ground Force Reinforcement Command, did, without proper leave, absent himself from his station at Ensival Belgium from about 9 March 1945 to about 23 April 1945.

ADDITIONAL CHARGE: Violation of the 75th Article of War.

Specification: In that Private Clarence L. Nice, Company I, 33d Armored Regiment, did, at Baclain, Belgium, on or about 16 January 1945, misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Captain (then 1st Lieutenant) Thomas A. Cooper, 33d Armored Regiment, to engage with the German Army, which forces the said command was then opposing.

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He pleaded not guilty to and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave of 14 days. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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. Evidence for prosecution:

a. Additional Charge and Specification:

About 16 January 1945, accused's company was "in the battle of the Bulge" and was "contemplating moving in to Cherain". It "had been fighting to there and * * * stopped to regroup". The German army was on its left flank. About 1900 hours that night Captain Thomas A. Cooper, the company commander, "got the company together in one room" and "told them about the situation for the next day". After he "had briefed the company" and as he started to leave accused and another spoke to him and "stated they were going to refuse to go forward on the attack". When warned of court-martial proceedings, accused replied, "There are no bullets in the jail" (R7). A company officer heard accused tell Captain Cooper that "he couldn't go forward because he said it was suicide". When Captain Cooper "gave him a direct order to go * * * [accused] said he refused to go" (R8).

Sometime after the briefing and on the night before the company pulled out, accused shook hands with the driver of the tank of which he was assistant driver, wished him good luck and said "he wasn't going along". Although the tank driver did not know whether he went forward, accused did not move forward on the tank of which he was assistant driver (R11). Apparently the company moved forward on the night of the 16th for a company officer testified that on that night they "moved [without engaging the enemy] into the town of Cherain" which was occupied by American forces (R10). However, according to Captain Cooper they went forward the next morning -- "The next morning I went forward in a tank and I don't know whether the [accused] went forward or not" (R7). Captain Cooper saw accused about a week later in a hospital where accused "had gone back to be treated for frost bite" (R8).

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b. Charge and Specification:

Introduced into evidence without objection were duly authenticated extracts of the morning reports (maker not shown) of 178th Reinforcement Company, 38th Reinforcement Battalion, 3d Reinforcement Depot, for 10 March 1945 and 8 May 1945, and of the morning report, signed by the adjutant, of Detachment 38, "GFRC", for 22 May 1945 (R6, Pros.Exs.A,B,C).

The company morning report for 10 March 1945 shows accused from duty to absence without leave as of 9 March 1945 (Pros.Ex.A); that for 8 May 1945, accused's return to military control and confinement at the 19th Replacement Depot on 3 May 1945 (Pros.Ex.B). The Detachment morning report for 22 May 1945 corrects a morning report entry for 8 May 1945 to show accused's return to military control and confinement at the 19th Replacement Depot on 23 April 1945 rather than 3 May 1945 (Pros.Ex.C). The trial judge advocate announced it was stipulated between the prosecution, defense, and accused that if a named officer were present he would testify that "accused turned himself in on 23 April 1945 * * * at * * * Brussels (R6).

4. No evidence was introduced by the defense. After his rights as a witness were explained to him accused elected to remain silent (R12).

5. a. Additional Charge and Specification:

The evidence shows that accused, at a time the enemy was on the company's left flank, refused to advance with his company on an attack. Moreover, accused did not go forward in the tank of which he was assistant driver. While the enemy was not engaged in advancing

> "That an attack was not in fact made is not material (CM ETO 2469, Tibi). The gravamen of his offense was his refusal * * * (CM NATO 1614, Langer). The evidence supports the findings of guilty in violation of Article of War 75 (CM ETO 4820, Skovan; CM ETO 5359, Young)" (CM ETO 4630, Shera).

b. Charge and Specification:

Accused's initial absence without leave was shown by the morning report for 10 March 1945. His offense was complete when he absented himself without leave (Cf: CM NATO 1087, III Bull. JAG 9; CM ETO 13096, Balcerzak). It, therefore, is unnecessary to consider the effect of defense's un-

shown concurrence (see CM ETO 739, Maxwell; CM ETO 5765, Mack; CM ETO 6810, Shambaugh) and the law member's unshown admittance of the stipulation offered by prosecution to show accused's return to military control. And, for the same reason, it is unnecessary to determine the competency of the morning reports for 8 and 22 May 1945 (see CM 161011, 161013, Dig. Ops. JAG 1912-40, sec.395 (18), pp.213-214).

6. The reviewing authority designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. Confinement in a penitentiary is not authorized for either offense of which accused is convicted. The designation was improper (AW 42; CM 238707, II Bull. JAG 308; CM NATO 811, II Bull. JAG 425; CM ETO 3885, O'Brien). The proper place of confinement of this accused is the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sept.1943, sec.VI as amended).

7. The charge sheet shows that accused is 20 years of age and was inducted, without prior service, 26 June 1943, at Allentown, Pennsylvania.

8. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 42).

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life at a place other than a penitentiary, Federal correctional institution or reformatory.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Avery Jr Judge Advocate

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BY AUTHORITY OF TJAG
BY CARL E WILLIAMSON, LT. COL.,
JAGC, Ass't Exec ON 20 MAY 54

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