E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 6342

CM ETO 7988

VOLS. 17-18

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 18 B.R. (ETO)

CM ETO 7202 - CM ETO 7988

REGRADED UNCLASSIFIED
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BY CARL E. WILLIAMSON, LT. COL.
JAGC, ASST EXEC ON 20 MAY 54

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

Holdings and Opinions

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

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 18 B.R. (ETO)

including

CM ETO 7202 - CM ETO 7988

(1945)

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

BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 7202

U N I T E D S T A T E S	10TH ARMORED DIVISION
v.	Trial by GCM, convened at Metz, France, 23,24 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Federal Penitentiary, Atlanta, Georgia.
Staff Sergeant LAUREN H. HEWITT (32939736) and Technician Fifth Grade MARSHALL D. NASH (35146030), both of Battery A, 796th Antiaircraft Artillery Automatic Weapons Battalion (SP)	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 were charged separately and tried together with their consent upon the following charges and specifications:

HEWITT

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Staff Sergeant Lauren H Hewitt, Battery A, 796th Antiaircraft Artillery Automatic Weapons Battalion (SP), did, in conjunction with Technician 5th Grade Marshall D Nash, Battery A, 796th Antiaircraft Artillery Automatic Weapons Battalion (SP), at Glatigny, France, on or about 13 January 1945, unlawfully enter the dwelling of Joseph Hoog, with intent to commit a criminal offense, therein, to wit: rape.

Specification 2: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, unlawfully enter the dwelling of Joseph Hoog, with intent to commit a criminal offense, therein, to wit: sodomy.

Specification 3: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, with intent to commit a felony, to wit rape, commit an assault upon Anna Hoog, by willfully and feloniously striking her with his fists, and throwing the said Anna Hoog upon the ground.

Specification 4: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, by force and violence, and by putting her in fear, feloniously take, steal and carry away from the presence of Anna Hoog, the property of Joseph Hoog, value about $743.05.

Specification 5: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, with intent to commit a felony, to wit, sodomy, commit an assault upon Anna Hoog, by willfully and feloniously dragging the said Anna Hoog into a barn and holding her on the ground for the purpose of committing sodomy.

NASH

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

Specification 1: In that Technician Fifth Grade Marshall D Nash, Battery A, 796 Antiaircraft Artillery Automatic Weapons Battalion (SP), did, in conjunction with Staff Sergeant Lauren H Hewitt, Battery A, 796 Antiaircraft Artillery Automatic Weapons Battalion (SP), at Glatigny, France, on or about 13 January 1945, unlawfully enter the dwelling of Joseph Hoog, with intent to commit a criminal offense, therein, to wit, rape.

Specification 2: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, unlawfully enter the dwelling of Joseph Hoog, with intent to commit a criminal offense, therein, to wit sodomy.

Specification 3: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, with intent to commit a felony, to wit rape, commit an assault upon Anna Hoog, by willfully and feloniously striking her with his fists, and throwing the said Anna Hoog upon the ground.

Specification 4: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Anna Hoog, the property of Joseph Hoog, value about $743.05.

Specification 5: In that * * * did * * * at Glatigny, France, on or about 13 January 1945, with intent to commit a felony, to wit, sodomy, commit an assault upon Anna Hoog, by willfully and feloniously throwing the said Anna Hoog upon the ground, dragging her into a barn, and striking her upon the face, hands and chest for the purpose of committing sodomy.

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

Specification 1: (Finding of not guilty)

Specification 2: In that * * * did, at Glatigny, Ffance, on or about 13 January 1945, wrongfully strike Joseph Hoog on the head with his fists.

Each accused pleaded not guilty to all charges and specification preferred against him. Accused Hewitt was found guilty of the Charge and specifications preferred against him. Accused Nash was found not guilty of Specification 1, Charge II and guilty of all other charges and specifications preferred against him. No evidence of previous convictions was introduced against either accused. 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 20 years. The reviewing authority, as to each accused, approved the sentence, designated the Federal Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. It is unnecessary for the purpose of this holding to recite the facts of this atrocious case. Prosecution's evi-

dence sustains in a most substantial manner the findings of guilty as to each accused.

4. Each accused, after receiving an explanation of his rights, elected to be sworn as a witness. Their testimony and the defense evidence had for their object the exculpating of accused of the offenses charged on the ground of their intoxication. Captain Ernest L. Munday Jr., 1st Lieutenant John R. Walbridge and 1st Sergeant Walton S. Winder, all of accused's unit testified as to the good reputation of Hewitt and Nash.

5. The issue whether accused were sufficiently intoxicated to prevent their entertaining the specific intents requisite to constitute the offenses alleged was one of fact for the determination of the court. As there is competent, substantial evidence that each accused was capable of entertaining at the time of the commission of the offenses the required specific intent, the court's findings will not be disturbed by the Board of Review upon appellate review (CM ETO 2007, Harris, and authorities therein cited).

6. The court convened at Metz, France. The trial judge advocate announced his intention of calling Mrs. Anna Hoog, age 66, the victim, as its first witness and stated that Mrs. Hoog's physical condition made it impossible for her to be present in court. He requested it "to move" to Mrs. Hoog's home at Glatigny, France, to receive her testimony. The president of the court inquired of defense counsel if he had any objection. He replied in the negative. Thereafter, the personnel of the court, prosecution, defense, accused, and reporter re-assembled at Mrs. Hoog's home. The trial judge advocate then addressed the court as follows:

> "If it please the court, I would like the court to view the premises of Mrs. Anna Hoog. There are certain features of the premises which the prosecution would like to direct the court's attention. And if during the trial the features that have no bearing on the case, will be stricken from the record" (R11).

The president of the court asked defense counsel if he had any objection to the court "viewing the premises". He replied in the negative. Thereupon the trial judge advocate called the court's attention to various objects, features and conditions at the situs of the crime (R12).

Pursuant to the special orders appointing the court, the president thereof could fix the time and place for the court to assemble. In view of the reason advanced by the trial judge advocate, it was not an abuse of discretion for the president to reconvene the court at Mrs. Hoog's bedside. Her home, however, was

also the scene of the crimes, and the court, though it did not convene there for that purpose, was asked to "view the premises" and thereafter to receive Mrs. Hoog's testimony. The Board of Review has heretofore disapproved the practice of receiving testimony at a "view of the premises" (CM ETO 3162, Hughes, and cases therein cited). However, in the instant case, the court properly re-assembled to take testimony at Mrs. Hoog's home in deference to her infirmities and undoubtedly also motivated by a desire to ascertain all the facts of the case. In so doing it could not escape viewing and observing the situs of the crimes. Defense counsel consented to the practice followed, and it clearly appears from the record of trial that none of the substantial rights of accused were injured thereby. The Board of review concludes that it was not error for the court to receive Mrs. Hoog's testimony under the circumstances related nor to "view the premises" as an incident of its presence in the victim's home.

7. The record of trial contains competent and substantical evidence to establish the guilt of each accused of all the offenses of which they were found guilty. It is unnecessary to decide whether specification 1 and 2 or 3 and 5 of Charge I as against each accused are multiplicitous, since the penalty imposed is within the authorized maximum for the most serious offense alleged, i.e. assault with intent to commit rape (MCM, 1928, par.80, p.67; par.104c, p.99; Cf: CM ETO 78, Watts).

8. The charge sheets shows that accused Hewitt is 27 years 11 months of age. He was inducted 29 May 1943 at Delhi, New York. Accused Nash is 24 years and 11 months of age. He was inducted 7 June 1943 at Indianapolis, Indiana. Each was inducted to serve for the duration of the war plus six months and neither had prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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.

10. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The same article of war authorizes penitentiary confinement upon conviction of two or more acts or omissions, any of which is

punishable by confinement in a penitentiary. The designation of the Federal Penitentiary, Altanta, Georgia, however, should be changed to the United States Penitentiary, Lewisburg, Pennsylvania (Cir.229, WD, 8 Jun. 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 16 MAY 1945

CM ETO 7209

U N I T E D S T A T E S	) NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private L. C. Williams (36389184), 3275th Quartermaster Service Company	) Trial by GCM, convened at Granville, Manche, France, 1 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private L. C. Williams, 3275th Quartermaster Service Company did, at or near Annebecq, Manche, France, on or about 15 August 1944 forcibly and feloniously against her will, have carnal knowledge of one Germaine Brochet, a female human being.

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

Specification 1: In that * * * did, at or near

(8)

Annenecq, Manche, France, at about 2300 hours, on or about 14 August 1944, unlawfully enter the dwelling house of one Leon Brochet, with intent to commit a criminal offense therein, to-wit: Assault.

Specification 2: In that * * * did, at or about 0100 hours on or about 15 August 1944, at or near Annebecq, Manche, France, unlawfully enter the dwelling house of one Leon Brochet, with intent to commit a criminal offense therein, to-wit assault.

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

Specification 1: In that * * * did, at about 2300 hours on or about 14 August 1944 commit an assault upon Leon Brochet by wrongfully pointing at him and threatening and menacing him with a dangerous weapon, to wit a gun.

Specification 2: (Disapproved by reviewing authority)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, disapproved the finding of guilty of Specification 2, Charge III, 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 accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The facts proved by the prosecution are in substance as follows:

At about 2100 hours on the night of 14 August 1944, two negro soldiers came to the home of Monsieur and Madame Brochet in Annebecq, France. Other Americans were there, and the two colored men left (R6). At about 2200 hours, after the Brochet family had gone to bed, accused and another negro soldier struck the door with their rifle butts and broke it open (R6,7,8,10,12,14). They went upstairs, menaced Brochet and his wife with their guns and knives, and attempted to "take" their two daughters age 17 and 15, but Brochet "tore them" away. The girls escaped (R6,8,9, 12,13). The group moved downstairs, and the two negroes took Madame Brochet outside the house and threw her on the ground (R6,13). While his companion guarded Brochet with a rifle accused lay on top of Madame Brochet, held her about the arms, and raped her by putting his private organ into her (R6,7,13,14). She did her best to prevent it but was unable to do so or to escape (R7). She was very frightened (R8). After being in the house about 20 minutes, the two soldiers left (R7).

The same two soldiers returned at about 0100 hours, 15 August and made an entry into the house without permission, which the Brochets were powerless to prevent (R8,10). For two hours they held Madame Brochet on her bed, and she could not get away (R10). They left about 0300 hours, 15 August (R7,10,20).

There was no moonlight on this night, and no light in the house. There was only a little light from the stars (R8,9,16). The soldiers however, lit matches or lighters to see their way about the house, and Monsieur and Madame Brochet saw them clearly (R9,14,15). Brochet identified accused at the trial, but in a previous trial of another case he had pointed out the assistant defense counsel as the accused (R14,16,17). Madame Brochet testified she saw accused at 2200 hours on Monday evening, 14 August, and again in the early hours of Tuesday morning (R9,20,21). When interrogated by the court she testified that the following Wednesday afternoon, when military police detained accused, his companion and another colored soldier at a house about 400 or 500 meters from the Brochet home, she recognized accused and his companion (R9,20-22). She said she recognized accused at first sight (R22). The Saturday thereafter, she recognized the two in a line of 25 or 30 colored soldiers (R22). She positively identified accused at the trial as the one who raped her, saying she recognized him "because he worried me such a long time" (R7,11,22).

(10)

4. Accused, after his rights were fully explained to him, elected to make an unsworn statement. He said that he had been in the service for 23 months and was inducted from Illinois. On the evening of 14 August, he and a soldier named Palmer went to a farm house where they bought some cognac. They were invited to sit down, did so, and remained 15 or 20 minutes. They returned to camp, where he refused Palmer's invitation to go to a U.S.O. show and went to his tent. He read his mail and a newspaper and did not leave the tent until 0600 the next morning. After supper on 16 August, he, Palmer and another soldier returned to the same house where they had bought the cognac, but the people were not at home. They went to another house about 400 or 500 yards away, where they stayed a few minutes drinking cider until arrested. He said that shortly thereafter a lady was brought to the place and identified Palmer, but that it was about an hour later before she pointed to him (accused).

No other evidence was introduced in accused's behalf.

5. The court recalled Madame Brochet, after the defense rested and interrogated her further with respect to identification (R20-22). This testimony has been noted above.

6. There is an evidentiary question in this case as to the admissibility of Madame Brochet's testimony that she "recognized" accused on two occasions soon after the offense. He was then in custody. Following the liberal and majority rule advocated by Wigmore, this Board of Review has held evidence of extrajudicial identification of persons in custody properly admissible, even though the testimony thereof was given by a person other than the identifying party (CM ETO 3837, Bernard W. Smith). Since that decision, the Board of Review, sitting in Washington, held in a manslaughter case, that where the only evidence of the accused's identity was that of third persons to the effect that the victim identified accused by word and gesture at the stockade as his assailant, such evidence was legally insufficient to support a conviction (CM 270871, IV Bull. JAG 4). The stated ground for that decision was that such statements were hearsay, and the cited authority was McCarthy v. United States (C.C.A. 6th 1928), 25 F (2nd) 298. The latter case involved a hearsay accusation but not necessarily identification (Cf. U.S. v. Fox (C.C.A. 2nd 1938) 97F(2nd) 913). The Washington decision should not be construed as an authority to prohibit testimony by the witness testifying in court that he had previously identified the accused in confinement or arrest, for hearsay

is not then involved (Cf. U.S. v. Fox (C.C.A. 2nd 1938), 97 F(2nd) 913). The most recent holding on these points was by the Board of Review sitting in the European Theater of Operations. It was held in a rape case that testimony of third parties as to the victim's and her mother's identification of the accused, by statements and gestures at a police line parade, was not prejudicial error where both such identifying parties positively identified the accused at the trial (CM ETO 6554, Hill).

In the instant case, Madame Brochet did not say that she pointed out the accused or made any statements to him. She testified only that she "recognized" him, obviously when his features were fresh in her memory. The small minority, which hold to the extremely narrow rule that an identifying witness at a trial may not give testimony as to his statements and acts at an extrajudicial identification; admit testimony of prior recognition (State v. Buschman, ____ Mo. ____, 29 S.W. (2nd) 688, 70 A.L.R. 904 (1930), citing State v. Egbert, 125 Iowa 443, 101 N.W. 191; Annotation 70 A.L.R. 910). Her evidence of prior recognition was therefore properly admitted in evidence.

7. a. Specification, Charge I: The evidence is not strong, but is legally sufficient. This accused is identified by the victim as having thrown her on the ground, with the assistance of his companion, and then having penetrated her person against her utmost resistance. Her husband corroborates the testimony as to violent conduct. Circumstances are inconsistent with her consent. All elements of the crime of rape are shown (CM ETO 8451, Skipper and authorities therein cited). The credibility of the witnesses as to the accuracy of the identification was an issue of fact for the court (CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith and authorities therein cited).

b. Specifications 1 and 2, Charge II: It was proved that at about 2200 hours on 14 August 1944 the accused and another broke in through the door, and shortly thereafter the rape was committed. At about 0100 hours on 15 August they entered the house without permission and committed an assault upon Madame Brochet. Housebreaking is the unlawful entry into another's building with an intent to commit a criminal offense therein (MCM, 1928, par.149e, p.169). Entry, in the first instance by force, and in the second without permission after the previous demonstration of force, was unlawful. Proof that criminal offenses were

committed shortly after each entry is proof that the entries were with intent to commit such offenses (CM ETO 3679, Roehrborn; CM ETO 4071, Marks et al). The accused having participated in the unlawful acts was properly convicted as a principal.

c. Specification 1, Charge III: The testimony shows Brochet was menaced by the knives and guns of the two offenders, and guarded with a rifle while accused raped his wife nearby. The proof is sufficient to sustain the charge (CM ETO 3475, Blackwell et al).

8. The charge sheet shows the accused is 24 years one month of age and was inducted 7 January 1943 at Fort Custer, Michigan, to serve for the duration of the war plus six months. He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 16 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private L. C. WILLIAMS (36389184), 3275th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7209. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7209).

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

(Sentence as commuted ordered executed. GCMO 194, ETO, 7 June 1945.)

(12 copies)

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

BOARD OF REVIEW NO. 2 13 APR 1945

CM ETO 7230

U N I T E D S T A T E S	2ND INFANTRY DIVISION
v.	Trial by GCM, convened at Dison, Belgium, 3 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private LOUIS P. MAGNANTI, (31383831), Company E, 38th Infantry	

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

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

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

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

Specification: In that Private Louis P. Magnanti, Company E, 38th Infantry, did at Berg, Belgium, on or about 5 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit: Combat with the enemy and did remain absent in desertion until he surrendered himself at Verviers, Belgium, on or about 6 January 1945.

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

Specification: In that * * * having received a lawful command from 1st Lt. Maxwell Snydal, his superior officer to go with 1st Lt. Robert H. Warden to his company, did at Verviers, Belgium, on or about 9 January 1945, willfully disobey the same.

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

3. The evidence for the prosecution shows that, on 2 January 1945, accused was a member of Company E, 38th Infantry, which was "dug in" in a defensive position about three or four hundred yards from the enemy lines, near Berg, Belgium (R8,14,17,24). Accused's platoon was on "Hill 577",out in front of the battalion and was under enemy artillery and mortar fire (R14,24). On this date accused reported to his supply sergeant and stated that he had been released from the hospital. He was instructed to go to the service company to get his equipment, preparatory to rejoining his company. The following day, 3 January, he was found"hiding" in the basement of the command post theater, without having obtained his equipment. He was again ordered to get his equipment; and the next day, 4 January, "the same thing happened again" (R9,10). On 5 January First Lieutenant Edward J. Hall, his platoon leader, assigned accused to the 2nd squad, turned him over to the squad leader with instructions for him to be taken to his position and told him to "dig in" (R13). The instructions were complied with and accused, together with two other soldiers, began to dig a hole for a place to sleep "out in front of the line a little bit" (R16). Accused left presumably to get some poles to put over the top of the foxhole. He did not return. His absence was reported to the platoon sergeant who made a thorough search throughout the area, but was unable to find him. His absence was unauthorized (R13,16,18,21,24). An extract copy of the morning report of Company E, 38th Infantry, was introduced in evidence, without objection by the defense, showing accused's absence without leave from 1515 hours, 5 January 1945 (R23,24; Pros.Ex.2). It was stipulated between counsel for the prosecution and the defense that accused voluntarily surrendered himself to military control at Verviers, Belgium, on 6 January 1945 (R7, Pros.Ex.1).

On or about 8 January,accused was examined by Captain Luther W.

Chesney, Medical Corps, who found nothing mentally or physically wrong with him (R32,33). Lieutenant Snydal then told accused that he would have to go back to his company, but he replied that he "couldn't take it anymore" and that he "wouldn't go back " (R25,33). Lieutenant Snydal then made arrangements with First Lieutenant Robert H. Warden to take accused back, and on the afternoon of the same day, ordered accused to get his equipment and be ready to return to his company with Lieutenant Warden. He replied that he would not go back to the front and stated:

> "Lieutenant, you can lock me up. I'm not going back and I'm not going to get my stuff. * * * I want to go to jail" (R26).

Following this, Colonel Samuel H. Ladensohn, the Divisional Inspector General, talked with accused and asked him if he knew that he could be shot for refusing to obey the order to return to his company which was before the enemy. Accused answered that he "would take his chances" (R26). Later he was again ordered by Lieutenant Snydal to get his equipment and to go with Lieutenant Warden, but he persisted in his refusal, stating "I haven't changed my mind. I won't go", whereupon he was placed in confinement (R25-28).

There was received in evidence, without objection by the defense, a voluntary written statement made by accused to the investigating officer which reads, in part, as follows:

> "I make this statement of my own free will, and accord./after being fully informed of his rights under the 24th Article of War/ * * * I came back and I just cant take it anymore. * * * I refused to go back on order of Lt. Snydal, * * * I realized that he was an officer and /that I/ could be Court-Martialed for refusing to go. I positively refused his order but only because I cant stand combat, I just cant take it anymore. It wasn't because I wanted to willfully refuse to go to my Company".(R31; Pros.Ex.3).

It was stipulated between counsel for the prosecution and defense, the accused expressly consenting thereto, that on 28 January 1945 accused was examined by the division neuropsychiatrist and found to be mentally responsible for his acts and capable of distinguishing between right

and wrong and of adhering to the right at the time of the commission of the alleged offenses (R34,36;Pros.Ex.4).

4. The accused, after his rights as a witness were fully explained to him, made an unsworn statement in writing which was read to thecourt by defense counsel in pertinent part is as follows:

> "After I had arrived in France, I was under fire of the enemy and received a serious gun shot wound. Ever since I received that wound I have been in mortal terror of any engagement with the enemy. * * * I supressed these feelings as best I could until the day in December when the Germans broke through * * * and I saw from my position shells falling all round me and the screaming shells passing over head. * * * I did leave my position and fell in with other stragglers * * * Again on January 5th I was assigned to a defensive position in * * * /the/ front line * * * and was told to dig myself in.* * * I knew that the enemy was in front of me and * * * I felt that I could not stay there. I don't remember * * * what impelled me to flee but I know I was in mortal terror * * * I dropped all my equipment and fled * * * I remained /there (Rear Echelon)/ for about two days trying to collect my wits * * * I knew I had done wrong. * * */but/ I could not force myself to return to the front lines and face those shells again" (R38; Def.Ex.1).

No witness testified on behalf of accused and, after introduction of the above statement, the defense rested.

5. Competent, uncontradicted evidence establishes the fact that accused absented himself without proper leave from his organization on 5 January 1945 and that he remained in unauthorized absence until he surrendered himself to military control at Verviers, Belgium on 6 January 1945. At the time of his initial absence, Company E was entrenched

in a defensive position in the front line and being subjected to enemy artillery and mortar fire. He left the company to avoid the dangers and hazards incident to combat. This fact is fully admitted by accused, who stated that he was in "mortal terror" and that he "fled" from his front line position with only the thought of getting away from enemy shellfire. His act of cowardice in running away from his company under the circumstances fully justified the court in finding the accused guilty of absence without leave with intent to avoid hazardous duty, constituting desertion as such offense is defined and denounced by Articles of War 28-58 (CM ETO 6177, Transeau; CM ETO 7153, Seitz).

Concerning Charge II, the evidence clearly establishes that on 9 January 1945 accused was given a direct order by Lieutenant Snydal, his superior officer, to return to his company in the front lines and that he willfully disobeyed this command. Accused was given several opportunities to obey yet he repeatedly refused, stating on several occasions that he could not stand combat and could not take it anymore. His refusal was deliberate and willful and continuous. This fact is admitted by accused in his unsworn statement. Under such circumstances the court was fully justified in finding the accused guilty of the offense as charged (CM ETO 3080, Holliday; CM ETO 4622, Tripi and authorities cited therein).

6. The charge sheet shows that accused is 21 years and three months of age and was inducted on 20 May 1943 at Providence, Rhode Island. 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 either of the offenses of desertion and willful disobedience of a lawful order of a commissioned officer in time of war is death or such other punishment as a court-martial may direct (AW 58; AW 64). 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).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

7 MAR 1945

CM ETO 7245

U N I T E D S T A T E S)	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.)	
Lieutenant Colonel ROBERT M. BARNUM (O-425283), 152nd Replacement Company, 127th Replacement Battalion (AAF))	Trial by GCM, convened at AAF Station 590, APO 635, U.S. Army (England), 18 December 1944. Sentence: Dismissal and total forfeitures.

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

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

2. The accused was tried upon the following charges and specifications:

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

Specification: In that Lieutenant Colonel Robert M. Barnum, Air Corps, 152nd Replacement Company, 127th Replacement Battalion (AAF) APO 635, U. S. Army, did, at Bristol, Gloucestershire, England, wrongfully, unlawfully, knowingly, and dishonorably, fail to properly safeguard secret, confidential and restricted documents and other papers containing vital military information by leaving said classified documents and papers in an unlocked and unsecured piece of hand luggage at the Grand Hotel, Bristol, Gloucestershire, England, from on or about 8 May 1944 to on or about 27 July 1944.

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

Specification 1: In that * * * did, at Bristol, Gloucestershire, England, wrongfully, unlawfully, knowingly and dishonorably, fail to properly safeguard secret, confidential and restricted documents and other papers containing vital military information by leaving said classified documents and papers in an unlocked and unsecured piece of hand luggage at the Grand Hotel, Bristol, Gloucestershire, England, from on or about 8 May 1944 to on or about 27 July 1944.

Specification 2: In that * * * being indebted to the Grand Hotel Co., Bristol Ltd, Bristol, England, in the sum of thirty-two pounds, ten shillings, one pence (£ 32.10.1) ($131.14) which amount became due and payable during the period from about 21 March 1944 to about 8 May 1944, did at Bristol, Gloucestershire, England, from about 21 March 1944 to about 8 August 1944, dishonorably fail and neglect to pay said debt.

Specification 3: In that * * * being indebted to the May Fair Hotel, Berkeley Square, London, England in the sum of one hundred sixty-two pounds, thirteen shillings, ten pence (£162.13.10) ($654.12), which amount became due and payable during the period from about 30 May 1944 to about 8 August 1944, did, at London, Middlesex, England, from about 30 May 1944 to about 8 August 1944, dishonorably fail and neglect to pay said debt.

He pleaded not guilty, and was found not guilty of Charge I and its Specification and guilty of Charge II and the specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, 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 deemed wholly inadequate punishment for an officer guilty of such grave offenses, stated that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

a. Charge II, Specification 2. Accused became a guest at the Grand Hotel, Bristol, Gloucestershire, England, on 21 March 1944 and was charged "twelve and six for the room and breakfast" (R14-15,16, 17,18). On 16 May he departed without notice, and did not pay his account then owing of approximately 32 pounds. He left a Val-Pak bag at the hotel. The manager of the hotel, Angus H. V. Ward, opened this bag to determine whether "it was valuable enough to recover the cost of the bill" (R20-21). It was not locked, and he noted therein papers, clothing, numerous "odds and ends, toilet articles and so on" (R22). He made a rough estimate of the value and turned it over to "your own Military Police in Bristol" (R21). He obtained accused's address, and on 26 May sent him a letter requesting payment of his account (R24; Pros.Ex.6). Receiving no reply, he sent him another letter to the same effect on 14 June (R24; Pros.Ex.7). Accused replied by telegram, dated 19 June, which stated he was "mailing duplicate check at once covers full payment evident you did not receive first letter" (R24; Pros.Ex.8). On 26 June the manager again wrote accused, stating that the check had not been received (R24-25; Pros.Ex.9). On 10 July accused replied by telegram, stating "letter containing check returned by Army postoffice for insufficient postage remailing same this morning sincerely apologize" (R25; Pros.Ex.10). The manager never received any check or any letters from accused, but did receive full payment by money order on 10 August (R19,26).

Lieutenant Colonel Eugene H. Cocanougher, Inspector General's Department, Headquarters European Theater of Operations, interviewed accused on 6 August regarding certain confidential, restricted, and secret documents found in accused's Val-Pak bag at the Grand Hotel, and "there was also attached certain correspondence from the Grand Hotel, Bristol, relative to non payment of his debts" (R29). He advised accused of his rights under Article of War 24. Regarding his bill at the Grand Hotel, accused's "answer was to the effect that he had mailed them a check and that one check had been returned because of lack of postage". Colonel Cocanougher asked about the check stub and his reply was that he thought he had it in his quarters. Later he said he had been unable to locate it (R32). Colonel Cocanougher identified a statement, signed by accused, as the one given him by accused and which was received in evidence, special defense counsel stating "no objection" (R35; Pros.Ex.49). In this statement accused explained that his delay in paying his account at the Grand Hotel until 9 August resulted because a properly stamped and posted letter containing his check had not been received by the hotel, after the letter had been once returned for lack of postage. Prior to his sending this letter, his shortage of cash was due to his "sending home a number of antique articles I had purchased here in England", "the unfortunate experience of losing my wallet" shortly before he left for detached service at Bristol, and the fact that

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> "I had sent surplus cash home to my wife to the extent of $300.00 approximately two months prior to my D/S duty of Bristol" (R35; Pros.Ex.49).

b. Charge II, Specification 3. Accused registered as a guest of the May Fair Hotel, Berkeley Street, London, England, on 3 January 1944 and was billeted in a double room with another officer. A month later he moved to a single room and on 20 May he changed to a small suite (R6-7), from which date he assumed personal responsibility for payment of the bill in the amount of "two pounds five" daily, less one-third thereof. On 22 or 23 June, as the "amount was going up and payments were not being made", the hotel's Assistant General Manager, Charles P. Churchman, asked accused for payment. He replied that he was waiting for his monthly check and requested that he be given until the end of the month to make payment. Churchman spoke to him a few days after the end of the month and this time accused said he had been promoted and there might be a little delay in consequence. On 29 July Churchman telephoned accused's office. He was not available but his secretary said he would call Churchman later. Churchman telephoned "after twelve" as he had not heard from accused. Accused said he would see Churchman the same afternoon or the following morning (R8). Meanwhile, on 12 July the hotel's Managing Director, F. M. Swindells, wrote accused requesting payment of his account not later than 13 July (R12; Pros.Ex.2). The hotel's Assistant General Manager, Edwin C. Schmid, informed accused on two separate occasions a few days after 12 July

> "that unless he made a further substantial payment on his hotel account we would have no alternative but to report him to the American Billeting Authorities".

Accused assured him on each occasion that "he would make an effort to settle as soon as his pay was due". However, he made no settlement and on 20 July went away "without informing the management of his absence". On 31 July Schmid telephoned accused at his office. Accused said "he was at the moment attending a conference and would ring up later". He failed to do so. On 1 August accused telephoned to Schmid, said he would

> "see me either in the afternoon or the following morning and asked that we please not ring his office as he was in conference all day long".

Schmid then contacted "Capt. Wentzel, the Billeting Officer, and explained our anxiety about Col. Barnum's account". When accused telephoned on 2 August, he was informed by Schmid that the matter had been reported to the Provost Marshal. Accused

> "called in on 7 August, 1944, to make a payment on account of £63, and on the 8th of August, 1944, he paid the balance of £99, 13s, 10d in full settlement" (R14; Pros.Ex.4).

In his written statement above mentioned, accused explained his billet at the May Fair was not government furnished and his reimbursement "does not come thru until the 12th or 15th of the following month". He "cabled home for money from my wife, however she was in the hospital at the time" and

> "This entire situation was caused by problems brought about in the previous paragraph (shortage of ready cash in England)" (R35; Pros.Ex.49).

c. Charge II, Specification 1. By stipulation signed by accused, the trial judge advocate, and the defense counsel, 34 documents were received in evidence, the court granting permission for the substitution of photostatic copies in making up the record of trial (R26,30; Pros.Ex.12; Pros.Exs.13 through 48 inclusive). These papers were taken from accused's Val-Pak at the Grand Hotel (R30,32).

Colonel Cocanougher testified that, at the time of his conversation with accused in early August, he showed to accused Pros.Ex.31, which accused stated was in his own handwriting. It contained references to the names of certain towns that were in the path of the American forces following the landings in France on 6 June 1944, such as "St. Lo opens D + 29", Rennes opens D + 36", and "Le Mans opens D + 70". Accused stated to Colonel Cocanougher that undoubtedly this was information he gained from conferences (R30-31). Pros.Ex.30 concerned plans for D-day and was marked "SECRET". Accused explained to Colonel Cocanougher that this document was

> "plans - as these plans progressed - the plans which were on that sheet - were superseded and were not - they showed only plans" (R31).

The colonel asked accused, "'Did you keep your Val-Pak locked?'", and his answer was:

> "'My Val-Pak was locked. I have two padlocks on my Val-Pak at all times. I do this to safeguard the "Restricted" papers that I have in same. At no time did I feel I was retaining papers in my possession which, to the best of my knowledge, had not been down-graded'" (R33).

Colonel Cocanougher testified that at the time he had the documents in his possession there was no indication that they had been "down-graded", although accused "stated he had authority to down-grade documents" (R34). Accused's voluntary statement, admitted in evidence, in his handwriting and signed by him, above referred to, contained the following regarding these documents:

> "I wish to relate now the circumstances surrounding my luggage (flight bag) held in storage at Grand Hotel, Bristol. I talked on the phone several times from London to one of my former non-com's, a Staff Sgt. Frederick Marks, now with Advance Section, Com. Zone. Sgt. Marks personally saw to it that my luggage was removed from my room and held in storage at the Hotel to be called for. My plan was that either Sgt. Marks could bring my bag to London when coming on official business to London offices, or that I could personally call for same. I was not worried about my bag as I felt it was in safe keeping. It did not contain essential things that I needed. I brought back to London some essential items in my brief case. The bulk of my belongings remained in London while on D/S at Bristol.
>
> * * *
>
> No officer is more Security minded than I am. I have served as AC of S G-2 with the 12th Port TC, in addition to my other duties as Port Air Officer. Prior to that I was Military Intelligence and Security Officer at the Indianapolis Storage Depot (Air Corps). At Advance Section, Com Zone I was brought in to set up a security plan for handling all their classified papers in the G-3 Section. I was a Top Secret Bigot officer. I set up a system that envoked commendation from the G-2 Section at Advance Com Zone. The chief clerk in the G-2 Section there is one of my former Sgts that has been schooled in all his Security background under my direction. So it can be seen that I would not do anything knowingly that I felt in my own mind and acting with my best judgment, that would violate Security. I have given talks on Security many times plus setting up security systems for many adjacent commands. My interest in this subject was such that I assisted, unasked the Commanding Officer of the Goxhill Air Base (U.S) in his many security problems. (Col. McGee), when I was stationed at Hull.

As a matter of record my flight bag was provided with small locks. In my opinion, these locks were tampered with to get into my bag or that the locks were defective. To the best of my knowledge my bag was locked when I sent it to storage. This bag afforded the safest place I had to keep papers in.

In my bag were found papers that I maintain are downgraded to a RESTRICTED class only. This power was vested in me while serving with the 12th Port TC by the Commanding Officer. I understand that he has given a statement to that effect to the investigating officer. It was also our practice in the G-3 Section at Advance Section, Com Zone to downgrade documents, as we were so very very crowded for every inch of space in our field safes. This power was vested in me by the AC of S G-3, Advance Section, Com Zone, acting in my capacity as Security Officer. All the papers found in my luggage were in this category of downgraded documents. I admit I erred in not crossing out the classification SECRET or confidential and marking same RESTRICTED. It might be contested I did not have the authority to downgrade some papers from other echelons of command, however on old documents with out of date data, and with field safe space at a premium, I acted in my best judgment as the AC of S G-2, or as Security Officer. I admit that some papers (notes etc) could be burned or destroyed. For example extracts, pencil notes from conferences - that in themselves had little meaning. I planned to cull down many of those odd papers when the opportunity was such that I could properly dispose of same.

My record in the past in the Army will show that I have been very very careful about handling classified papers. Papers that are downgraded to a RESTRICTED class, we naturally take reasonable care, but not extreme care. I am very sincere and conscientious in handling classified papers" (R35; Pros.Ex.49).

Colonel Bert C. Ross, Transportation Corps, Assistant Police Transportation Officer, United Kingdom Base, testified that accused served under his command, the 12th Port Embarkation, from about March or April 1943 until about the middle of January 1944 (R36), as Air Officer and

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also Port Intelligence and Security Officer. Colonel Ross was "quite sure" accused had authority to classify official documents and his "impression" was that accused also had authority to "down-grade" secret documents. Colonel Ross examined Pros.Ex.14, a letter having to do with business of the 12th Port at the time he commanded it. He testified it was properly classified as "secret". Regarding Pros.Ex.17, General Orders Number 3 of Headquarters 12th Port of Embarkation TC CBS SOS ETOUSA, dated 9 March 1944, regarding "Reorganization of Unit", marked "S E C R E T", he testified,

> "as to whether or not it should be secret or confidential - I would not quarrel with its being classified as 'secret' although my own marking of 'confidential' would have been sufficient for it" (R37).

The witness was shown Pros.Exs.34,46,41,15, and 42 and was asked "in your opinion, should these documents have been down-graded from 'confidential' to 'restricted'?" (R37). He indicated that as to each exhibit his answer was, "I see no reason for down-grading that document" (R38).

Staff Sergeant Frederick A. Marks, Headquarters Advance Section, Communications Zone, testified that he was on duty in the same section as accused, that he went to the Grand Hotel in Bristol and carried some of accused's luggage down the steps of the hotel and put it onto a government vehicle (R38-39). Asked if accused gave him "any instructions regarding the baggage", he answered "No" after the law member overruled the defense objection to the question and warned the court not to consider the question "for impeachment purposes" (R40-41).

Motion of defense for a finding of not guilty of Charge I and Specification was denied by the court (R43).

4. The defense presented evidence as follows:

a. The testimony of Lieutenant Colonel George Danker, Military Intelligence, Headquarters Communications Zone (R43-44,45), of Lieutenant Colonel Harold L. Fuller, Headquarters US Group (R45-46), of Colonel William Lanagan, Air Corps, Communications Zone, Air Section (R48), and of Colonel Ross, recalled as a defense witness (R49-50), showed that these officers had had occasion to observe accused in the performance of his past duties and indicated that accused performed his duties in an excellent manner and was an efficient and able officer. The testimony of Colonel Frank L. Elder, General Staff Group (R47) and of Brigadier General Julius H. Houghton, Director of Supply, Air Service Command, United States Strategic Air Forces in Europe (R77; Def.Ex.C), received in evidence by stipulation between accused, the defense, and the prosecution, was to the same effect. Both Colonel Ross and General Houghton would be glad to have accused assigned to their commands (R49-50,77; Def.Ex.C).

b. Accused elected to be sworn and testified with respect to his education and his successful progress in civil life from the time he received his master's degree in Business Administration at Yale - class of 1929 - until he became "Assistant to the President of the American Machine and Foundry Company" at a salary of $830 per month. He entered active duty with the Army at a salary of $316 a month (R50-55). He described his similarly successful progress in the Army until he was assigned to the Advance Section, Communications Zone, Air Section, located in Bristol, England. He was placed in the G-3 section with the duty, among others, "to set up a security plan for their top secret papers that were at that time in more or less a chaotic state" (R57). He identified his 66-1 card, which was received in evidence, permission being granted by the court for the substitution of a copy after the trial (R60; Def.Ex.A). This document shows all the Army assignments of accused since 17 August 1929 described in his testimony, in which, as regards the "manner of performance" of his duties, "E" appears five times and "Sup" five times.

In regard to Specification 1, Charge II, accused declared that he did not realize that he had left in his bag the papers later discovered therein (R60) and realized

> "that I made a mistake and, furthermore, I am prepared to accept punishment in this Court - whatever they feel is just under the circumstances" (R61).

A copy of the orders under which accused proceeded from Bristol to the Western Base Section about 15 May 1944 was received in evidence (R62-63; Def.Ex.B).

Relevant to Specifications 2 and 3, Charge II, accused was questioned at length by the court regarding his payments on his indebtedness to the May Fair Hotel (R63) and the Grand Hotel (R67) to which he sent a check on "approximately June 19th". He did not know what happened to the check. He never received it back. He closed his account in the Chase National Bank in London in June 1944 (R68) after sending the check to the Grand Hotel (R69).

Accused's attention was then called by the prosecution to Ward's letter dated 26 May 1944 regarding the account owing the Grand Hotel (R70; Pros.Ex.6), accused's telegram to Ward of 10 July 1944 (R70; Pros.Ex.10), stating

> "LETTER CONTAINING CHECK RETURNED BY ARMY POSTOFFICE FOR INSUFFICIENT POSTAGE REMAILING SAME THIS MORNING SINCERELY APOLOGISE = R M BARNUM",

and his telegram to Ward dated 19 June (R71; Pros.Ex.8), stating

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"YOUR LETTER JUST RECEIVED MAILING DUPLICATE CHECK
AT ONCE COVERS FULL PAYMENT EVIDENT YOU DID NOT
RECEIVE FIRST LETTER AM SENDING FOR BAGGAGE
REGRET INCONVENIENCE CAUSED YOU = ROBERT M BARNUM".

He testified he sent these telegrams (R71) and that when he stated in the 19 June telegram "mailing duplicate check" he "should have said duplicate mailing". There was just one check which was mailed twice (R71-72). To further lengthy questioning by the court to the effect that "your telegram would indicate that there were two mailings in addition to the original mailing" he maintained "it was the same check remailed twice" (R72-74).

5. In rebuttal for the prosecution, Warrant Officer Junion Grade Miles S. Weston, G-2 Section, Headquarters Advance Section, Communications Zone, testified that he was accused's "sergeant while he was Security Officer of the G-3 section, Headquarters, Advance Section Communications Zone" from 1 April until the middle of May 1944. Accused was then Security Control Officer, having control of all the classified documents which might enter the section. Witness' duties were to carry out "his instructions as Security Officer" and he had occasion to observe the manner in which accused performed his work during that period (R78). The witness considered that

"Through inattention and preoccupation with his own interests and amusements, I feel that he did not perform his duties properly" (R79).

This was evidenced by his continual absence from the section, although witness did not know whether this concerned military activities or social activities (R79).

6. Attached to the record of trial is a brief addressed to the reviewing authority submitted by the four defense counsel. No provision is made, in military procedure, for the oral argument and time to submit a "more formal Brief" requested therein. The record shows that oral argument was made at the trial by the defense after all the evidence had been presented, in accordance with the procedure set forth in the Manual for Courts-Martial, 1928 (par.77, pp.61-62). No substantial right of accused was injuriously affected by failure of the reviewing authority to comply with these requests. The contention set forth in the brief that the findings of the court are inconsistent in that Specification 1 of Charge II, of which accused was found guilty, is identical in language with the Specification of Charge I, of which he was found not guilty, is without merit (McRae v. Henkes, 273 Fed. 108, cert. den., 258 U.S. 624; CM 230222 (1943), II Bull.JAG, p.96; CM ETO 5389, Pomerantz).

7. a. With respect to Specification 1, Charge II, the court's findings of guilty were supported by competent and substantial evidence that accused failed "to properly safeguard secret, confidential and restricted

documents" at the time and place and in the manner alleged (CM ETO 4808, Jackson; CM ETO 1953, Lewis).

b. As regards Specifications 2 and 3, Charge II, the court's findings of guilty were also supported by competent and substantial evidence that accused dishonorably failed and neglected to pay his debts as alleged. Accused's own testimony emphasized that presented by the prosecution and demonstrated his disingenuous attempts to postpone an accounting with his creditor in each instance. Such an attitude toward his creditors and his private indebtedness "reflects discredit upon the service to which he belongs" (MCM, 1928, par.152b, p.188) and is a violation of Article of War 96 (CM ETO 3024, Dunn; CM ETO 5459, Kuse and authorities therein cited).

8. The charge sheet shows that accused is 39 years two months of age and was commissioned a captain at New York, New York, on 16 September 1941. He had no prior service.

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

10. A sentence of dismissal and total forfeitures is authorized upon conviction of violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Lieutenant Colonel ROBERT M. BARNUM (O-425283), 152nd Replacement Company, 127th Replacement Battalion (AAF), 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 7245. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7245).

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

(Sentence ordered executed. GCMO 71, ETO, 17 Mar 1945.)

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

BOARD OF REVIEW NO. 2 13 APR 1945

CM ETO 7246

U N I T E D S T A T E S	))	6TH ARMORED DIVISION
v.	)	Trial by GCM, convened at Hellimer, Moselle, France, 3 December 1944.
Major ROBERT W. WALKER (0-370289), 231st Armored Field Artillery 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 of Operations.

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that MAJOR ROBERT W. WALKER, 231st Armored Field Artillery Battalion, was, near ATTON, MEURTHE-ET-MOSELLE, FRANCE, on or about 8 November 1944, found drunk while on duty as Battalion Executive Officer.

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

Specification: In that * * * did, near CLEMERCY, MEURTHE-ET-MOSELLE, FRANCE, on or about 8 November 1944, with intent to deceive his Commanding Officer, LIEUTENANT COLONEL THOMAS M CRAWFORD, officially state to

the said LIEUTENANT COLONEL THOMAS M CRAWFORD that he, MAJOR ROBERT W WALKER, had not been drinking intoxicating liquor during the day, which statement was known by the said MAJOR ROBERT W WALKER to be untrue in that he had been drinking intoxicating liquor previously that day.

Specification 2: In that * * * did, near ATTON, MEURTHE-ET-MOSELLE, FRANCE, on or about 8 November 1944, in the Headuqarters Battery position area, during the progress of an attack, wrongfully drink intoxicating liquor in the presence of an enlisted man.

CHARGE III: Violation of the 75th Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty)

CHARGE IV: Violation of the 61st Article of War.
(Finding of guilty disapproved by reviewing authority)
Specification: (Finding of guilty disapproved by reviewing authority)

He pleaded guilty to Charge II and its Specifications and not guilty to the remaining charges and specifications. He was found not guilty of Charge III and its Specification and guilty of the other charges and specifications. Evidence was introduced of one previous conviction by general court-martial for drinking intoxicating liquor in presence of enlisted men while on duty and for being drunk in quarters, in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 6th Armored Division, disapproved the findings of guilty of Charge IV and its Specification, 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 findings of guilty of Specification 2 of Charge II as involves findings of guilty of the said specification in violation of Article of War 96, confirmed the sentence, but declared it wholly inadequate punishment stating that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence, introduced by the prosecution shows that on 8 November 1944 accused, a major in the 231st Armored Field Artillery Battalion, was executive officer of that organization and was officially on duty in that capacity (R7-9). On that and the preceding day, this battalion was beforethe enemy in the vicinity of Atton, approximately a half mile distant, and near "Clemercy" (Clemery), Meurthe-et-Moselle, France (R7,40) it was expected "that there would be an attack soon" (R7). On the morning of 8 November, between 0500 and 0600 hours, the

battalion "fired a preparation at the enemy of approximately 900 rounds" (R10). At 0800 hours, accused who had been absent overnight on a mission, appeared at an officers' meeting and was then told by Lieutenant Colonel Thomas M. Crawford, his battalion commander, that the battalion was "going forward" and that he wanted accused to "coordinate the displacement of the battalion forward" as soon as word was received by accused from the artillery group commander authorizing displacement (R7). Colonel Crawford testified that this authorization came through at about 1500 hours that day. He had gone ahead to the new area and the displacement did not start, after authorization, within a period deemed by him sufficient for that purpose. Furthermore, he overheard accused talking or attempting to communicate with the batteries by radio. Accused seemed to be talking "as if he were drunk". Thereupon, this witness returned to the battalion area where he found accused "talking over the radio and having a great deal of difficulty in his speach". The colonel said: "at that time I thought he was drunk" (R7,8). After the batteries had been displaced and the move to the new area completed, involving a distance of approximately 4000 yards, Colonel Crawford had accused report to him (R7,28). The colonel related the conversation that ensued:

> "I told him [accused] I thought he had been drinking and asked him if he had. He told me that he had not been drinking. I told him that in fairness to himself and also to me I would have the doctor examine him to determine whether he had been drinking" (R8).

Asked whether accused was drunk when the foregoing conversation occurred, Colonel Crawford replied: "I think he was drunk" (R28). The battalion surgeon, Captain Vincent S. Palmisano, Medical Corps, thereupon gave accused clinical tests for "the determination of alcoholism" (R8,53,54). This officer had graduated from a medical college in Philadelphia, after a year internship was called into the service. He had had two years in the Army. He testified as to his examination of accused and as to his resulting opinion. Besides noting accused's breath, which "reeked of alcohol", his examination of accused consisted of "a series of coordination tests" (R8,54-55). Upon their completion he told Colonel Crawford, in the presence of accused, that the latter "had been drinking" (R8), "was definitely under the influence of alcohol". He described the tests he gave. They were the usual sort: touching nose with finger from extended arm position, sliding heel of one foot down opposite shin bone while in prone position, and others. There was a definite lag or difficulty in the performance of each, occasioned according to the captain by "the influence of alcohol", with one exception: the Romberg test, where the subject stands up with both legs together and eyes closed. The captain said the accused performed this test to his satisfaction. The result of that particular test was "negative" (R54-56). Asked his opinion as to whether accused was then drunk or sober, Captain Palmisano said:

"Not having a clinical laboratory report to back up my decision, I made the report that he was definitely under the influence of alcohol" (R55).

He also testified that "the physical faculties" of accused were "sensibly impaired" (R56).

First Lieutenant William C. Seibel, of accused's battalion, saw accused on the day in question and at some time, after 0900 hours, observed that he was not walking like he normally walked; that his talk was garbled, he "couldn't just exactly speak the words as clearly as he normally would have done"; that "it seemed like his tongue was, * * * thick"; and that in his opinion accused "had been drinking or was intoxicated" (R40,41). Technician Fifth Grade Kenneth M. Swartz, Privates Ben S. Adair, Walter F. Harrison, and Technician Fourth Gade Clayton J. Bohnert, all members of the same battalion as that to which accused belonged, had occasion to observe him on 8 November. Swartz testified that when accused was operating the radio "his procedure wasn't as good as it usually was". He talked to accused and saw nothing wrong with his condition; his speech was normal. He did see accused take "one drink" from a gin bottle (R46,47). Adair also saw accused take "one drink" just before noon. He "assumed" it was gin because it was "white looking". However, he did not "notice the container ". Accused's condition was normal and he did not appear to be under the influence of liquor. Harrison said that he saw accused take "just one drink" at about eleven o'clock. He thought it was "scotch". To his "knowledge", accused was not under the influence of liquor that day. Bohnert testified that he saw accused 8 November. He "wouldn't swear" accused was under the influence of liquor. His condition was not normal. His eyes were red and he didn't speak as clearly as usual (R46-53).

4. For the defense, it was adduced on cross-examination of prosecution's witnesses: That when Captain Palmisano completed his examination of accused, he reported to Colonel Crawford that accused "wasn't absolutely drunk, he was still maintaining his senses" (R29, 57); that this medical officer had made a prior statement, as to the condition of accused at the time in question, in which he said that at no time did accused "get boisterous"; and also that in the officer's opinion, the condition of accused was not such as he normally associated with that of a "civilian drunk" who is interpreted as one manifesting a "don't give a damn attitude" (R56,57). Major Worth L. Kindred, Field Artillery, 183rd Field Artillery Group, testified for the prosecution that he had issued the order for the displacement of battalions within the group that day, including that of accused, and that he had ordered the displacement of accused's battalion around four o'clock after accused "had called at two previous times during that day for permission" (R31). He said he had no difficulty "about transmitting" to accused. He also said that he noticed no difference in accused's voice that day (R32).

Asked on cross-examination, whether the battalion had "moved out promptly to its new location", Major Kindred answered: "I have reason to believe that it did" (R33). Accused issued the orders for and probably supervised the displacement of his battalion (R23,24).

Accused, after his rights as a witness were fully explained to him, testified on his own behalf. He said, in part, that on the day in question the whole displacement was completed and he made a check of all battalions and installations before anyone said anything to him about drinking; that he heard the medical officer tell Colonel Crawford: "I had been drinking but he didn't consider me drunk"; that in his own opinion he didn't think he was drunk; and that he did not think that the drinks he had had in any way impaired him from carrying out any or all of his official duties (R69,75,76). On cross-examination, accused answered "Yes" to the question as to whether he drank in the battalion area on 8 November 1944, and said that he took four drinks (R78,79).

5. It is unnecessary to summarize all the evidence. There can be no doubt that the condition of accused at the time and place alleged in the Specification of Charge I came within the definition of "drunk" as defined by the Manual for Courts-Martial for the purpose of Article of War 85. The testimony of the medical officer was not too satisfactory in view of the earlier report which admittedly he made. He told Colonel Crawford that accused "wasn't absolutely drunk, he was still maintaining his senses". While this diagnosis, unexplained, is almost meaningless, it was supplemented by his testimony that "the physical faculties" of accused "were sensibly impaired". The results of the coordination tests were not too convincing. The Romberg Test, the most difficult of performance by one under the influence of liquor, was concluded successfully. The others were characterized by lag in performance rather than by failure. Unfortunately, it did not seem to occur to anyone as appropriate to question the medical officer as to the effect that battle conditions or questioning by a superior officer might have on a particular person or personality with resepct to his powers of coordination. In addition to the medical officer's testimony, Colonel Crawford testified that in his opinion accused was drunk at the time. One of the enlisted men swore that accused's condition was not normal, that his eyes were red and that he did not speak as clearly as usual. Lieutenant Seibel testified that in his opinion accused had been drinking or was intoxicated, that his walk was not normal, his talk was garbled, and that his tongue seemed thick. In other words, he found that accused's faculties were impaired. That this impairment of accused's faculties was occasioned by intoxicating liquor was clearly proved. The medical officer smelt liquor on accused's breath; Colonel Crawford's characterization of accused as "drunk" carried that implication; and accused's own testimony was conclusive. While accused may well not have been proven drunk within the meaning of that term as accepted and applied in the police courts of civil life, it was established that his mental and physical faculties were impaired. In the offense under consideration, drunk on duty in violation of Article of War 85, "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties

is drunkenness within the meaning of the Article"(MCM, 1928, par.145, p.160).

The offense of making a false official statement, as alleged in Specification 1, Charge II, was proved. Accused was asked by his commanding officer if he had been drinking. Under the conditions, those of combat, the question and the answer were official. The answer was false. The summary of evidence contained in the preceding paragraph adequately supports this conslusion . Accused pleaded guilty to this charge. Accused's conduct in this respect was properly charged as a violation of Article of War 95 (CM 153703, (1922) Dig.Op. JAG, 1912-1940, sec.453(18), p.345).

Specification 2, Charge II alleges that accused drank in the presence of an enlisted man. The evidence shows that on the date and at the place alleged accused drank intoxicating liquor in the presence of three enlisted men, Swartz, Adair and Harrison. These men all testified that they saw accused take a drink. Their testimony was not competent to prove the beverage was liquor. That latter fact was established by other competent evidence. This conduct, while improperly charged and found as an offense under Article of War 95, was a clear violation of Article of War 96. It was prejudicial to good order and military discipline, occurring as it did and was properly approved by the confirming authority tothe extent that it constituted a violation of Article of War 96.

6. The charge sheet shows that accused is 35 years of age. He had seven and one half years of enlisted service in the Missouri National Guard, was commissioned second lieutenant in the National Guard 5 June 1938, and was inducted into the Federal Service 25 November 1940.

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

8. A sentence of dismissal is mandatory on conviction of violation of Article of War 95 and in time of war of Article of War 85.

(ON LEAVE) Judge Advocate

John Townsend Judge Advocate

Anthony Julian Judge Advocate

1st Ind.

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

1. In the case of Major ROBERT W. WALKER (O-370289), 231st Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7246. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7246).

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

(Sentence ordered executed. GCMO 122, ETO, 20 April 1945.)

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

BOARD OF REVIEW NO. 1 10 MAR 1945

CM ETO 7248

U N I T E D S T A T E S)	IX TACTICAL AIR COMMAND
)	
v.)	Trial by GCM, convened at Headquarters,
)	IX Tactical Air Command, APO 595, U.S.
First Lieutenant JOHN B.)	Army, 4 December 1944. Sentence: Dis-
STREET (O-1584967), 1180th)	missal, total forfeitures and confine-
Quartermaster Company (SG),)	ment at hard labor for three years.
327th Service Group, Quarter-)	Eastern Branch, United States Disciplinary
master Corps)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant John B. Street, 1180th Quartermaster Company, Service Group, 327th Service Group, did, at Site A-71, on or about 15 September 1944, feloniously take, steal, and carry away forty (40) cartons of cigarettes, four hundred (400) sticks of chewing gum, four hundred (400) candy bars, sixteen (16) packages smoking tobacco, six (6) plugs chewing tobacco, fourteen (14) tubes shaving cream, twenty-eight (28) bars soap, six (6) tooth brushes, two (2) razors, twenty (20) cans

tooth powder, sixty (60) razor blades and four hundred (400) boxes of matches of the aggregate value of approximately $35.00, the property of the United States furnished and intended for the military service thereof.

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 three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Specification as involved a finding that accused did at the time and place alleged feloniously take, steal, and carry away 40 cartons of cigarettes, 400 sticks of chewing gum, 400 candy bars, 16 packages of smoking tobacco, four plugs of chewing tobacco, 14 tubes of shaving cream, 28 bars of soap, four tooth brushes, two razors, 60 razor blades and 400 boxes of matches of the aggregate value of approximately $35.00, the property of the United States furnished and intended for the military service thereof, approved the finding of guilty of the Charge and 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. Before pleading to the general issue accused entered a plea in bar of trial based upon a claim of former jeopardy. He had previously been charged with a violation of Article of War 93, the Specification of which alleged that he

"did, at Site A-71, on or about 15 September 1944, feloniously take, steal and carry away two (2) cartons of combat post exchange rations containing forty (40) cartons of cigarettes, four hundred (400) bars of candy, sixteen (16) packages smoking tobacco, twelve (12) packages razor blades, twelve (12) tubes of shaving cream, two (2) razors, six (6) tooth brushes, six (6) plugs of chewing tobacco and sixteen (16) cans of tooth powder, of a value of thirty seven dollars and thirty-two cents ($37.32), property of the Army Exchange Service".

At the trial of that case before a general court-martial, accused was arraigned and pleaded not guilty. After introducing some of

its evidence, the prosecution discovered that it could not prove that the goods alleged to have been stolen were owned by the Army Exchange Service, and thereupon, by direction of the appointing authority and against the objection of accused, entered a nolle prosequi (R5,6).

Accused's plea in bar of trial was properly overruled. The offense alleged in the present case is not the same as the one alleged at the previous trial. The property of the Army Exchange Service is not the property of the United States (CM ETO 1538, Rhodes; I Bull. JAG, pp.198-199,351). Where accused is charged with larceny of the property of one person, proof that the property was owned by another would constitute a fatal variance (Dig.Op. JAG, 1912-1940, sec.451 (45) pp.328-329; CM 201485, Darr (1934), 5 BR 119,140; Walker v. Territory of New Mexico, 227 Fed.851; Thompson v. United States, 256 Fed.616). Another fact required to be alleged and proved in the present case which was not alleged or required to be alleged and proved in the previous case is that the property in question was furnished or intended for the military service of the United States (AW 94; MCM, 1928, par.149g, p.173, par.150i, p.185). The two offenses, therefore, were not the same and the claim of former jeopardy was without basis (Burton v. United States 202 U.S. 344, 50 L.Ed. 1057, 1070-1071; Morgan v. Devine 237 U.S. 632,641, 59 L.Ed.1153,1156; Gavieres v. United States 220 U.S.338, 55 L.Ed. 489; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia).

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

Accused was commanding officer of the 1180th Quartermaster Company which on 15 September 1944 was stationed at Strip A-71 near St. Quentin, France (R8). The company had received from a Class I Subsistence Depot a quantity of rations contained in boxes, hereinafter described, for distribution to the various units served by the company (R9,10,37). The rations were the property of the United States and were ultimately to be issued free of charge to members of these units when facilities were not available to sell them the items included in the rations from sales commissaries, exchanges or commercial sources (R10; Pros.Exs.1,3). The rations were packed in wooden boxes called "Ration Accessory Packs 'RAC' (Composite)" and "Ration Accessory Convenience Packets, Combination Packs". Two of these boxes contained all the items ennumerated in the action of the confirming authority, paragraph 2, supra. Each full box had a value of $17.50 (R9,19,20; Pros. Exs.1,2,4).

On 15 September accused, using a government truck and

assisted by its driver who was a private acting under his direction, surrepititously took two unopened ration boxes above described out of a group of eight which were stacked on the side of the field at Strip A-71 and loaded them in the truck (R9,10,12-15, 18,26,27-29,31,36,43,46). They then proceeded directly to Paris, where at the direction of accused, the truck was stopped at two cafes. In each instance accused went into the cafe, conferred with a civilian and subsequently delivered to him cartons of cigarettes and other items taken out of the ration boxes. As the truck was driven away after each delivery, accused counted the money he had received from the transaction and gave the driver, in all, a total of 5000 francs as his share, saying to him, "You are a 20% man today" (R43-44,45,47,52). About a week later after the driver had been questioned relative to these events in the course of an investigation, accused sought the driver and said "They are trying to screw me up * * * Don't change your statement * * * Remember you are in this much as I am" (R45-46,49-50,53). Except for two cartons of chocolate bars which he kept for himself, accused discarded the items that had not been sold (R45,61).

5. After his rights were explained to him, accused elected to remain silent (R62). The substance of the evidence presented by the defense was that after landing in France free rations of cigarettes, candy and other items were issued to members of accused's company. Those who did not use their rations placed them in a pool managed by the acting supply sergeant. A day was set aside each week when the men could go to him and draw what they needed. A rumor that some of the men were selling cigarettes to German prisoners of war caused an order to be issued by accused that a record be kept of the number of cigarettes issued from the pool to men in the organization. A defense witness testified that the driver of the truck, who was a witness for the prosecution, had the reputation in the company of being "more or less of a 'bull thrower'" (R58,60,61).

6. The evidence fully warranted findings (a) that accused took the property as alleged in the Specification except the items excluded by the action of the confirming authority; (b) that he carried such property away; (c) that the property belonged to the United States and was furnished and intended for the military service thereof; (d) that the property was of the value of about $35.00; and (e) that he took and carried away the goods involved, with intent to steal, that is, with a fraudulent intent to deprive the United States of its property in the goods. The findings of guilty of a violation of Article of War 94 are sustained by competent, substantial evidence (MCM, 1928, pars.149g, 150i, pp.173,185).

7. The charge sheet shows that accused is 34 years nine months of age and that his commissioned service began 11 December

1942. The following prior service is shown:

"10-18-28 to 10-10-31, 17th F.A.,12-19-31 to 1-30-40, 13th C.A.C. 1-30-40 to 11-1-41 83rd C.A.C.(AM), 11-1-41 to 8-19-42 16th Air Base Group".

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 as modified by the confirming authority, and the sentence.

9. An officer convicted of a violation of Article of War 94 is punishable by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties (AW 94). The Table of Maximum Punishments does not apply to officers (MCM, 1928, par.104a, p.95). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant JOHN B. STREET (O-1584967), 1180th Quartermaster Company (SG), 327th Service Group, Quartermaster Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the finding of guilty, as modified, 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 7248. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7248).

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

(Sentence ordered executed. GCMO 72, ETO, 17 Mar 1945.)

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

BOARD OF REVIEW NO. 2

6 APR 1945

CM ETO 7251

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Esch, Luxembourg, 17 January 1945.
Private First Class JAMES J. JACKSON (32970482), 3936th Quartermaster Gasoline Supply Company	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

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 James J. Jackson, 3936th Quartermaster Gasoline Supply Company did, at Forme de Morrieaux, Tucqueqniex, France, on or about 27 November 1944 forcibly and feloniously, against her will, have carnal knowledge of Madame Louis Francois.

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. Evidence was introduced of one previous conviction by summary court-martial for appearing wrongfully in improper 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, stating that it was inadequate, 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 presented by the prosecution was substantially as follows:

Cecile Francois, 42 years of age, referred to in the Specification as Madame Louis Francois, lived with her husband, Louis, in a farmhouse at Ferme de Morrieaux about one kilometer from Tucqueqnieux, France, and approximately the same distance from the nearest inhabited place. Their two hired farm hands, Antoine and Roland, lived with them (R5,6,18). On 24 November 1944 accused went to the farmhouse and asked for cognac. Madame Francois gave him some. He was polite and well-behaved on that occasion. On the morning of 27 November he again called at the farmhouse and was permitted to enter by Cecile. He was armed with a carbine. Her husband was away but the two farm hands were working about the place. Accused asked for cognac and was given a small drink. He warmed himself at the kitchen stove. He inquired if her husband was away and Cecile told him he was. She continued doing her housework and spoke to him a little. Pointing to the ceiling, he asked who was making the noise overhead and she said there was a dog in the attic. Suddenly he went towards the storeroom adjoining the kitchen, opened the door and looked inside. He then went into the bedroom to a dressing table in a corner and made some motion with his hands about his face. She thought he wanted to wash his face and indicated to him that the place was in the kitchen. He returned to the kitchen and stood again near the stove. She then went into the bedroom to look for a filter used for filtering milk. He followed her into the bedroom, approached close to her and gave her two packages of cigarettes and a package of matches. He kept pointing at the dressing table in the corner. There were pears on that table and thinking that he wanted some she went over and got two of them. As she was coming back with the pears and was passing near the bed, he seized her and quickly placed his hand over her mouth (R7,8). She struggled to free herself and shouted for help. In the course of the struggle they moved out of the bedroom, across the kitchen and into the hallway. A table was pushed over. Cecile weighed about 198 pounds. Her outcries brought Antoine, who was working in the adjoining stable, to her assistance. He found her and accused fighting in the hallway. She was crying. When accused saw Antoine he took his carbine and leveled it at him. Antoine, afraid of being killed, ran away. Cecile seized the gun and continued to resist, crying all the while for help (R9,24,25,27). Roland, 17 years of age, also heard Cecile's outcries and went to the house. He opened the door and saw her and accused struggling in the hallway. She called on Roland to help her but the boy was afraid of the colored soldier who seemed to him to be "a little crazy". Accused loaded his rifle. Believing he could do nothing alone the boy closed the door and went to seek help. When Cecile saw accused load the rifle and Roland disappear, her own fear increased and, in her own words, "realizing I was alone and being at the end of my strength, I gave in". Accused pulled her into a small storeroom and laid her on a box. He lifted her dress, tore off her underclothing and penetrated her. She

testified that, "He raped me there". She did not consent. "It was a question of life or death". He then seized her by the arm and dragged her to the bedroom. There he laid her on the bed, pulled up her dress again, separated her legs, lay on top of her and again performed the act of coition. She testified, "I never consented. If I hadn't accepted he would have killed me". Accused left the house taking the rifle with him. When her husband returned in the evening Cecile informed him that she had been raped. Because she was ashamed, she told no one else. She was taken to an army hospital for examination (R10,11,12,31,32,33). Bruises and lacerations were noted on various parts of her body. She received these injuries in her struggle with accused (R12,38; Pros.Ex2). After leaving the farmhouse, young Roland notified First Lieutenant Victor J. Porto in the nearby town of Tucquegnieux. The officer accompanied him to the outskirts of the town where he saw a group of excited civilians pointing toward the woods (R32,35). A man was seen walking along the edge of the woods about 600 yards from Ferme Morrieaux. Lieutenant Porto went towards him and called to him. It was accused. In reply to questions accused told the officer that he was on his way back to his company, that he had been at a farmhouse to buy a bottle of cognac but that a boy had stolen his money. When the officer suggested that they go back and that he would try to get the money for him, accused said "No, I would rather forget all about it. I have to get back to the company". When the officer asked him for his name, organization and identification tags and papers, accused gave him a fictitious name, the wrong organization and stated he had forgotten his identification tags and had no papers. In fact accused had his identification tags in his pocket. The officer noticed two fresh bloodstains on accused's field jacket. He asked accused several times to go with him but the latter refused. The officer thereupon disarmed him and took him to the Francois' farmhouse where he was identified by Cecile as her assailant (R36,37,38,40). Roland identified him as the colored soldier he had seen struggling with Cecile.

In a pre-trial statement which was properly received in evidence (R43-46; Pros.Ex.1), accused made the following admissions: He visited the Francois farmhouse on two occasions, the second time on the morning of 27 November. On this latter visit he asked for the owner and was told he was away. Accused was armed with a carbine. In the course of his stay he asked Cecile for sexual intercourse and she refused. He "hugged" her three times, the second time "real tight", and she "kinda screamed", and the third time she "hollered". She "hollered" again when she fell against the wall as he wrested his carbine from her and Antoine's hands. Antoine then "left a running". He again "hugged" her and asked for intercourse. This time she consented and cooperated in the consummation of the sexual act. "After I had drank the cognac my intentions were to try to get intercourse with this woman".

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 (R48,49).

5. The evidence fully warranted the court in finding that accused had carnal knowledge of the woman named in the Specification by force and

without her consent at the time and place alleged. There was proof of two penetrations in close succession. The victim took such measures to frustrate the execution of accused's design as she was able to take and as were called for by the circumstances. The evidence shows that she ceased resisting only after her strength was exhausted by her struggle to repel accused and as a result of her belief that further resistance would endanger her life at the hands of accused who was armed with a deadly weapon. She was made aware of his readiness to use the weapon when he aimed it at Antoine who had answered her calls for help, and frightened him away. The findings of guilty were sustained by competent, substantial evidence (MCM, 1928, par.148b, p.165; CM ETO 3933, Ferguson and Rorie; CM ETO 5584, Yancy).

6. The charge sheet shows that accused is 24 years and two months of age and was inducted 16 June 1944 at Brooklyn, New York. 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, 467). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1 5 MAR 1945

CM ETO 7252

U N I T E D S T A T E S	XXI CORPS
v.	Trial by GCM, convened at Chard, Somersetshire, England, 16 December 1944. Sentence as to each accused: To be hanged by the neck until dead.
Corporal ROBERT L. PEARSON (38326741) and Private CUBIA JONES (34563790), both of Company A, 1698th Engineer Combat Battalion	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Cubia Jones and Corporal Robert L. Pearson, both of Company A, 1698th Engineer Combat Battalion, acting jointly and in pursuance of a common intent did, at Chard, Somerset, England, on or about 3 December 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Joyce M. Broom.

Each accused pleaded not guilty and, all of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification. No evidence of previous convictions of accused Pearson was introduced. Evidence was introduced of two previous convictions of accused Jones, one by summary court and one by special court-martial, each for absence without leave of unstated duration in violation of Article of War 61. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, XXI Corps, approved the sentence as to each accused and provided "Pursuant to Article of War 48 the order directing execution of the sentences is withheld". The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. As the reviewing authority had no power to order execution of the sentences herein (AW 48), that part of his action purporting to withhold the order directing execution thereof pursuant to Article of War 48 is without effect. As the record of trial was actually forwarded to the confirming authority as required by that article, however, the irregularity is immaterial and will be disregarded.

4. Evidence for the prosecution was substantially as follows:

On 3 December 1944 accused were members of Company A, 1698th Engineer Combat Battalion, stationed at Camp Chard, Somersetshire, England (R7,35). About 8 pm that evening, which was dark, Mrs. Joyce M. Broom, married and in her ninth month of pregnancy (R9,10,32), left her home at 12 Bonfire Close, Chard, Somerset, to go to a cinema (R9; Pros. Ex.1). Suddenly she became aware that she was being followed and turned around and saw two figures. They blocked her path and said "'Hello'" and she replied "'Hello, I don't know you and you don't know me'" (R11,12,19). When she attempted to bypass them they grasped her wrists and she struggled and attempted, as best she could but unsuccessfully, to free herself, informed her assailants of her married status and pregnancy and asked them to leave her alone. She then observed that they were colored soldiers, one of whom was slightly taller than the other (R11,12,20). Because she could not see their faces plainly, however, she was unable at the trial to identify accused as the soldiers (R12,27). The men placed their hands on her face and mouth to prevent her from shouting or breathing and in the ensuing struggle all three fell to the ground (R12,20). While While she was struggling on her back on the ground one soldier said "'Keep it up. She will be alright in a minute'" (R21). She testified "It was terrible. I cannot remember what was happening" (R13), but she was conscious of where she was (R21).

Still struggling with her and preventing her outcry by holding her face and mouth, they dragged her along the road to a gate leading into Bonfire Orchard. One of the soldiers said "'Lift up'" and the next she remembered was when she was on the ground in the field (R13,21; Pros.Exs.1-5). As soon as she was able to do so (R22), she shouted "'Don't do it'" and begged the soldiers to leaver her alone and let her go (R23, 25). They said that they loved her (R23), and took her along the field by the hedge (R14) where she was forced to the ground. The taller soldier thereupon engaged in sexual intercourse with her while the other held her on her back (R15-16, 23,25). The taller arose and held an open knife, which she identified as Pros.Ex.7, over her face, while the other engaged in sexual intercourse with her (R15-16,24,26). She was frightened (R27) and at no time consented to either act of intercourse. She resisted as much as possible (R18).

After the second act was completed, the taller soldier started to hand the knife to the other, when Mrs. Broom gained possession of it (R16,23-24,26). The soldiers warned her "'Don't say anything about this to anyone or we will shoot or kill you'" (R28) and told her they were going to leave and she must remain there until they were gone. Thereupon they departed and she left for home shortly thereafter (R17, 27). They did not act as if they had been drinking (R27).

The first person Mrs. Broom saw was Frederick Bandy, a friend and neighbor, to whom she complained of the assaults (R18,27,29). Bandy reported the crimes to Police Sergeant Arthur E. Doughty of the Somerset Constabulary stationed at Chard (R30,32-33), who went with Dr. Albert E. Glanvill, of Jocelyn House, Chard, to the Broom house about 9 pm. Bandy, Doughty and Dr. Glanville testified she was crying, pale and in a very distressed condition, her lip was bruised, her nose appeared to be slightly swollen and her mackintosh, which she identified as Pros. Ex.6, was mudstained (R14,29-31,32-34). Dr. Glanvill testified she was suffering from shock and her clothing indicated the presence of semen. In his opinion, based upon the irritated appearance of and dampness on the vulva and the recent semen on the pubic hairs, she had recent intercourse (R31-32).

During a search for stained clothing in the quarters of members of accuseds' battalion on the night in question, accused Pearson displayed his trousers, the knees of which were wet and muddy (R35-36). On the following day (4 December) a pair of trousers, bearing stains on both knees and spots of mud on the right leg below the knee, were identified by accused Jones as his (R43).

About 12:30 pm on 4 December 1944 James E. O'Connor, 32nd Military Police Criminal Investigation Section, interviewed both accused (R37) at the office of the Camp Chard dispensary (R44), and in the presence of First Lieutenant Albert C. Riggs, adjutant of accuseds' battalion (R44-45), after warning them of their rights, took voluntary sworn state-

ments from each accused(R37-38,44,45,46).

Pearson's statement (R41-42; Pros. Ex.9) was to the effect that he and Jones went to town on the night in question and met a woman whom he asked "did she care for any company and she said that we do not know her ". He caught her (R41) by the arm and asked if she cared to walk back "a piece". She said if they did not kill or hurt her she would, as she had some children at home. Jones caught her other arm and the three approached a gate, over which they helped her. They moved out of sight of the gate and the woman said not to kill and her she would direct them to "some more ladies", but they told her she would do. She lay down and pulled up her dress and Jones engaged in intercourse with her, while Pearson stood near them. Then Pearson had intercourse with her, during which she hugged and kissed him. Jones left to search for his glove and returned with her shoe which he gave to her. Pearson arose and the woman said "'Let's go'". She told the two soldiers to go over the fence first and she would come by herself. They left in that order. Pearson did not carry a knife nor did he see Jones with one. Mudstains on Pearson's trousers were caused when he was kneeling beside the woman in the field. She did not scream or object to their actions (R42).

Jones' statement (R39-41); Pros.Ex.8) was substantially similar to Pearson's with the following additions: The woman said she would make a date with one but not both of them. Jones failed to have an emission during his intercourse with her and the woman told Pearson "to come on that I hadn't did nothing". When Pearson finished with her he asked Jones if he "wanted any more " and Jones replied "'Yes'", but the woman said "'No, I am feeling bad. I cannot do it any more'". She agreed to meet Jones at a pub the next night. He identified a pearl handled knife shown to him as the one he had with him (R40) that night and which he missed just before he returned to camp. There were stains like blood on trousers which he identified as worn by him that night (R41).

O'Connor testified he believed Pros.Ex.7 (which the victim identified as the knife held over her face during the second rape (R16)) was the knife to which Jones referred in his statement (R43).

5. After a full explanation of their rights (R46-47), each accused elected to remain silent (R47,48). No evidence was introduced by the defense.

6. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of the woman's genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165).

The highly credible, uncontroverted and well corroborated testimony of the victim established the commission by two colored American soldiers, at the time and place alleged, of bestial rapes upon her person. Each assailant forced himself upon her and had sexual intercourse with her without her consent and despite her emphatic protestations and vigorous resistance. The victim's testimony as to penetration is clearly corroborated by that of Dr. Glanvill. The use of force and lack of consent are corroborated by testimony as to her distressed condition, bruised lip, swollen nose and irritated vulva and her complaint to Bandy immediately following the attack.

The identity of each accused as a participant in the dual attack upon the pregnant woman is established by the admissions contained in their voluntary pre-trial statements, by the muddy condition of their trousers immediately following the attack and by the identification of the knife used to intimidate the victim as that of Jones. The issue of fact created by the statement of each accused that the woman consented to the acts was for the exclusive determination of the court which, in view of the convincing evidence of nonconsent, reached the only reasonable conclusion in its findings of guilty (CM ETO 4194, Scott). The record is devoid of evidence of mitigating circumstances. The Board of Review is emphatically of the opinion that the evidence fully supports the findings of guilty as to each accused (CM ETO 3375, Tarpley and authorities there cited; CM ETO 3253, Bowman and Glover).

7. a. During the direct examination of Bandy, defense counsel objected to testimony of any conversation between the witness and the victim following the attack "on the grounds of remoteness and hear-say". The law member's overrulling of the objection (R29) was clearly proper in view of the well established rule that testimony as to complaint of such an assault is admissible (CM ETO 3253, Bowman and Glover, and authorities therein cited).

b. After the law member admitted the pre-trial statements of accused in evidence, defense counsel requested that any reference in each statement to the accused other than the maker of the statement be deleted. The law member overruled the request and the statements were read to the court without deletions (R39). Thereafter the law member instructed the other members of the court that "the statement Jones made concerning Pearson shall not be considered against Pearson and the statement Pearson made or any reference he made concerning Jones shall not be considered against Jones" (R43-44). In view of the precautionary instructions, the ease of following the same in the case of the two statements in question, and the nature of the admissions of each accused, their admission in evidence and the reading thereof to the court without the requested deletions was free from error (CM ETO 1052, Geddies et al., p.15, and authorities there cited).

8. The charge sheets show the following with respect to accused: Pearson is 21 years seven months of age and was inducted 30 December 1942. Jones is 24 years seven months of age and was inducted 29 Dece[illegible] 2252

ber 1942. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of Corporal ROBERT L. PEARSON (38326741) and Private CUBIA JONES (34563790), both of Company A, 1698th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published 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 7252. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7252).

3. Should the sentences as imposed by the court be carried into execution, it is requested that a complete copy of the proceedings be furnished this office in order that its files may be complete.

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

(Sentence ordered executed. GCMO 67, ETO, 11 Mar 1945.)

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

BOARD OF REVIEW NO. 2 **4 APR 1945**

CM ETO 7253

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Soumagne, Belgium, 23 November 1944. Sentence: To be hanged by the neck until dead.
Private BENJAMIN F. HOPPER (32720571), 3170th 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 soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Benjamin F. Hopper, Thirty-One Hundred Seventieth Quartermaster Service Company, did, at Welkenraedt, Belgium, on or about 28 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Randolph Jackson, Jr., a human being, by shooting him with a carbine.

He pleaded not guilty and all members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for appearing in a city placed off limits to United States troops, 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 hanged by the neck

until dead. The reviewing authority, the Commanding General of the First United States Army, approved the sentence but recommended that it be commuted 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, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Accused and Randolph Jackson Jr., the deceased, were both privates in the 3170th Quartermaster Service Company (R12) stationed on 27 October 1944 at the railroad station at Herbesthal (R7), Welkenraedt, Belgium (R17). At some time between midnight and 12:30 A.M. of 28 October, deceased and Private James W. Rogers of the same company, both of whom had been drinking beer at a cafe, started back for camp together when the place closed for the night. On their way they passed another cafe where they heard voices inside, and on going in found accused with another soldier from their outfit and a Mexican, sitting at a table drinking. Rogers and the Mexican proceeded to sing some Spanish songs, leaving accused, deceased and the third soldier talking at the table, and the proprietor endeavoring all during this time to get them to leave so he could close.

The soldiers finally started to gather their equipment to leave, at which time accused and deceased were "hollering about something". No attention was paid to them, it being assumed by the others to be a playful argument when accused said in substance that if he had his gun he would shoot deceased. Deceased then said,

> "Oh, you wouldn't do that. I will give you my gun and even put one in the chamber;"

which he did and handed the gun to accused (R8). Still nobody paid any attention as everyone was talking, but the next instant accused, from a distance of six or eight feet, raised and aimed the gun at deceased and fired. Deceased fell. Rogers testified,

> "everybody froze and I still thought he had just shot to scare him and they were playing * * * and Hopper kept shooting the carbine and walking towards Jackson * * * he walked right up over him and fired the carbine until there was no more ammunition, I don't guess".

Some eight to twelve shots were fired, then accused threwthe carbine down on top of deceased, turned and went out. Rogers went to the door and called to accused, "Hopper, don't go away and leave the boy. Help me take him to a hospital", and accused answered, "You didn't see nothing" and ran away (R9). It was not known what the argument was about and it had seemed friendly. While accused had been drinking, he walked normally and talked intelligently (R11). Accused's character and reputation in

his company was good. He was not known as a trouble maker (R13). Deceased was dead when a medical officer arrived (R14) and the autopsy showed multiple gun shot wounds of the head, chest, abdomen, left arm and both thighs. The injury to the heart alone was sufficient to cause death (R16).

4. Accused remained silent and presented no evidence.

5. Murder is the unlawful killing of a human being with malice aforethought and to prove the offense it must be shown that the act was so done (MCM, 1928, par.148a, pp. 162-164). The uncontroverted evidence shows that accused shot and killed deceased as alleged. The only question requiring consideration is whether there was "malice aforethought".

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the 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" (Ibid.p.163).

Malice aforethought may exist when the act is unpremeditated and it is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner, providing in all cases there are no circumstances serving to mitigate, excuse or justify the act.

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

The evidence shows that both accused and deceased had been drinking and an argument arose between them. The record does not disclose the cause of the argument which did not reach a point where it drew the attention of their companions sitting at the same table until accused was heard to remark that if he had his gun he would shoot deceased and the reply of deceased that accused wouldn't do that. His offering to accused his loaded rifle, indicates how lightly deceased

regarded the argument. However, accused accepted the rifle and immediately started shooting at deceased from a distance beginning at six or eight feet. He continued to fire at the prone body of deceased until his gun was empty when he tossed it upon the body of deceased. This act together with his refusal when asked to help get his victim to a hospital, and his reply as he left the cafe that "You didn't see nothing", all evidence the deliberate intent and actual malice with which the shooting was accomplished and his utter disregard of the value of human life. The record contains no evidence of provocation on the part of deceased nor the slightest element of excuse or justification on the part of accused. The undisputed facts show such a vicious, brutal and intentional killing as to "carry within itself proof of malice aforethought and thereby irrefragably stamp the offense as murder" (CM ETO 3585, Pygate; CM ETO 3932, Kluxdal). The findings of guilty were fully supported by substantial, competent evidence of the most convincing kind (CM ETO 3180, Porter; CM ETO 1161, Waters).

While accused had been drinking, there was no evidence of intoxication at the time of the shooting. He walked without difficulty, his speech was coherent and his actions positive. The issue of intoxication was not seriously raised as a defense and in any event the question of whether accused was sufficiently intoxicated so that he could not have had the necessary intent to constitute murder, was one of fact for determination by the court. In the absence of substantial competent evidence that he was so intoxicated, the findings of the court were fully justified (CM ETO 2007, Harris Jr; CM ETO 1065, Stratton; CM ETO 1901, Miranda).

6. The charge sheet shows that accused is 24 years and two months of age. He was inducted 16 January 1943 at New York, New York and had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private BENJAMIN F. HOPPER (32720571), 3170th 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 7253. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7253).

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

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

1 Incl.
Record of Trial.

(Sentence ordered executed. GCMO 107, ETO, 7 April 1945.)

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

BOARD OF REVIEW NO. 3 29 MAR 1945

CM ETO 7269

UNITED STATES	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Chaudfontaine, Belgium, 7 December 1944.
Second Lieutenant HENRY A. VAN HOUTEN (O-1596531), 560th Quartermaster Railhead Company	)	Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Second Lieutenant Henry A. Van Houten, Five Hundred Sixtieth Quartermaster Railhead Company, did, without proper leave, absent himself from his command at Davron, Seine et Oise, France, from about 1 September 1944 to about 3 September 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his command at Weiswampach, Luxembourg, from about 2000 hours 1 October 1944 to about 0630 hours 2 October 1944.

CHARGE II: Violation of the 84th Article of War.

Specification: In that * * * did, at Malmedy, Belgium, on or about 30 September 1944, wrongfully dispose of two (2) carbines of the value of Ninety-Six ($96.00) Dollars, issued for use of the Military Service of the United States, by giving them to Belgium civilians.

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

Specification 1: In that * * * did, at Spa, Belgium, on or about 1 October 1944, wrongfully and without authority transport two Belgium civilian women in a United States Army vehicle.

Specification 2: In that * * * did, at Spavelot, Belgium, on or about 1 October 1944, wrongfully and unlawfully fraternize with Belgium civilians by visiting and spending the night in a Belgian residence in violation of Letter Orders, Headquarters First United States Army, dated 15 September 1944.

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 allcharges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority, the Commanding General, First United States Army, approved the sentence, but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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. A summary of the evidence for the prosecution is as follows:

a. Charge I, Specification 1: On 1 September 1944 accused's company, the 560th Quartermaster Railhead Company, was at Chateau de Chavin, Davron, a village about 15 miles west of Paris, France. A child in the village was ill with pneumonia. Accused was allowed by Captain Louis M. Dessaint, his company commander, to

take the child and its parents in a jeep with driver to a hospital in or near St. Germaine, France (R7-8,13). Late in the afternoon at a road junction Captain Dessaint in another vehicle met accused and his driver, then en route in their jeep to visit Paris. He told accused not to go to Paris. Accused said "he was going to pick up the child's parents and he would go right back" (R8-9,14). However, accused did drive to Paris, parked the vehicle and with his driver entered a cafe. They remained 15 minutes and when they came out the jeep was gone (R14,15). Accused returned to his company the morning of 3 September. He had no authority to be absent during this period (R9).

b. Charge II Specification: On 30 September 1944 at about 1500 hours, accused with Private Lenard J. Sraga and Technician Fifth Grade Frank M. Tomasko, both of accused's company, left the company area then at Weiswampach, Luxembourg (R7) by jeep to attend a meeting at First Army Headquarters. After the meeting and while they were returning to their company area, accused directed Tomasko, who was driving, to stop at a cafe. Tomasko complied and accused entered the cafe where he remained unitl it closed at 2000 hours. He returned to the jeep with a Belgian soldier whose acquaintance he had made in the cafe. The Belgian entered the jeep and directed the way to another cafe. Accused presented the Belgian with a carbine, which the latter "did not want to take", but accused "told him to take it". On reaching the cafe in question, accused and the Belgian entered while the two enlisted men waited outside. After "quite a while" accused came out and on request obtained Sraga's carbine telling him "not to worry that he would bring it back". When accused next emerged from the cafe he was "kind of drunk" and "wobbly". He went back in again and Sraga also entered the cafe where he saw the two carbines "laying against the wall by the Belgian soldiers". Sraga tried to get back his weapon and "had it in my hand once", but accused took it away and gave it to a Belgian soldier, saying it was his, "he gave it to him". The cafe closed about midnight or 0100 hours and each of two Belgian soldiers had a carbine. Sraga again retrieved his gun but once more accused took it from him and returned it to the Belgian. Accused, Sraga and Tomasko then returned to their company where they arrived about 0400 hours (R16-17,18-19).

It was stipulated between accused, the prosecution and the defense that the value of the two carbines referred to in the specification was about $96.00 and that they were issued for use in the military service of the United States (R25).

c. Charge III, Specifications 1 and 2: On 1 October 1944, while proceeding from his company area at Weiswampach, Luxembourg, by jeep to First Army Headquarters with two enlisted men of his company, accused stopped on the way at a cafe where he met two young women who desired to attend a "picture show at Spa". Accused therefore "took them into Spa and left them out and we went on to

the APO. On the way back we picked them up and took them back home" (R20-21,22-23). An extract of a letter, of which accused had notice, from Headquarters European Theater of Operations, United States Army, dated 24 January 1944, prohibiting the transportation of civilians in military vehicles was received in evidence without objection (R10; Pros.Ex. "No.1").

After taking these women to their homes, accused and the two enlisted men "were going back to camp", but on the way passed another cafe and accused "wanted to go in and get another beer". The driver backed up the jeep and accused went in. After a while he called in the driver and inside "they met three other enlisted men from some combat engineer outfit". They decided then that "they wanted to find some women" and, after obtaining advice in this regard from the proprietor, were accompanied by the "three engineers" to a place that was a little way outside of Spavelot. It was a residence, but "had a bar and had living quarters in it too". They arrived there at 2200 hours and "a girl came downstairs and she said 'Come right upstairs'". At this "residence" there were about five Belgian civilians. At 0200 hours accused told his driver he might as well take the "engineers" back to camp "and pick me up on your way home and I will be ready to go". The two enlisted men took the engineers to camp and returned but were then unable to gain entrance to the building or to arouse anyone. They therefore slept in the vehicle until shortly after 0600 hours when accused came out and they all returned to their company area (R21-22,23,24).

A directive from Headquarters First United States Army dated 15 September 1944, subject "Relations of Troops with Civil Populace", which prohibits fraternization with the civilian populace, was received in evidence without objection (R10; Pros.Ex. "No.2").

d. Charge I, Specification 2: Accused had no authority to be absent from his organization on 1 October 1944 as indicated by his activities above described which followed his attendance of the meeting at First Army Headquarters on that date and continued until about 0630 hours the next day (R9).

4. The following evidence was presented for the defense:

a. His rights having been explained (R25), accused testified that when he met his company commander on 1 September 1944, he did not interpret their conversation "as a direct order not to go to Paris". He went to Paris and while he and his driver were away from their jeep for a short time, it was stolen (R26). He reported the loss to the Provost Marshal's office of the Seine Base Section and spent the following day in that office waiting to see if the vehicle would be recovered. He obtained a ride back to his company area on 3 September (R27).

With reference to his giving away two carbines, as alleged, accused did not "actually remember giving any weapons away" but he "had been drinking quite a bit and I can't dispute the fact that I did or didn't" (R27-28).

Accused admitted transporting two civilian girls and that they were taken to their home (R28-29).

The "Belgian residence" referred to in Specification 2, Charge III was not a residence, but it was rather "a combination hotel. It had a cafe in connection with it. They had rooms there for hire just as any small inn or hotel would have". While the enlisted men were taking "the three engineers" to their organization the morning of 2 October, accused was waiting for them and "fell asleep in the place" (R29).

b. Character witnesses testified for accused, his company commander testifying that he performed his duties in an excellent manner, was very energetic and ambitious (R11-12). Major Julien R. Price, Quartermaster Corps, Headquarters 47th Quartermaster Group, testified that accused had been a member of his command since 2 October 1944, performed all his assigned duties in an excellent manner and "morally he has been an excellent officer of high character" (R31-32). Colonel Nelson J. Moore, Quartermaster Corps, also of Headquarters, 47th Quartermaster Group, corroborated the testimony of Major Price as to accused's capabilities and conduct (R32-33).

5. The absences of accused as alleged in Specifications 1 and 2 of Charge I were clearly established by the prosecution's witnesses and by the testimony of accused.

There was substantial convincing evidence to support the court's findings that accused wrongfully disposed of two carbines as alleged (CM ETO 5389, Pomerantz; CM ETO 4293, Howard; CM 207652, Fay and Morris, 8 B.R. 365, 1937; MCM, 1928, sec.144a, p.158).

Under Specification 1 of Charge III, the court's findings that accused transported Belgian civilians as alleged was shown by the prosecution's evidence and also by accused's testimony (CM ETO 2966, Fomby). His fraternizing with Belgian civilians, as alleged in Specification 2 of Charge III, was similarly fully established (CM ETO 6293, Mistretta).

6. The charge sheet shows that accused is 31 years of age and was inducted at Baltimore, Maryland, 17 March 1941. He was commissioned second lieutenant, 17 September 1943 at the Quartermaster School, Camp Lee, Virginia. 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 approved, modified and confirmed.

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8. The penalty for absence without leave, wrongful dispostion of arms issued for use in the military service, wrongfully and without authority transporting Belgian civilians in a United States Army vehicle or wrongfully and unlawfully fraternizing with Belgian civilians by a person subject to military law is, in each instance, such punishment as a court-martial may direct (AW 61,84 and 96). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Benjamin R Sleeper Judge Advocate

SICK IN HOSPITAL Judge Advocate

B. N. Newey Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant HENRY A. VAN HOUTEN (O-1596531), 560th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, modified and confirmed. 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 7269. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7269).

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

(Sentence ordered executed, GCMO 95, ETO, 4 April 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 7270

3 MAR 1945

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Mdsheim, France, 2 December 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant CLAUDE D. McDONALD, Jr. (O-537592), Company E, 30th Infantry	)	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that 2nd Lieutenant CLAUDE D. McDONALD JR., Company "E", 30th Infantry, having received a lawful command from Lieutenant Colonel Frederick R. Armstrong, his superior officer, to return to his Company in combat, did at or near St. Die, France, on or about 29 October 1944, willfully disobey the same.

He pleaded guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty

of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, but reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action 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 for the prosecution was as follows:

About 20 October 1944, accused joined the 30th Infantry and was assigned to Company E under the command of Captain Ralph R. Carpenter. On 29 October the company was about two kilometers from Le Haute Jacques near Saint Die, France, with the regiment's second battalion under the command of Lieutenant Colonel Frederick R. Armstrong (R7-8,12). At 1745 hours 29 October accused informed Captain Carpenter "he didn't want to command a platoon, he'd like to be relieved". Captain Carpenter

> "talked with him and explained to him that even though an infantry officer felt he couldn't do a job he still had to make an effort, no matter how difficult the circumstances were he had to do a job. The conversation lasted about 15 minutes" (R9).

Thereafter accused talked for about half an hour in front of the company command post (R9) with Colonel Armstrong who was making a final check of the positions in anticipation of a counter-attack which "the Germans usually throw at us about that time". Accused stated that

> "it would be impossible for him to continue as platoon leader. He said he couldn't take it and couldn't stand combat, he couldn't order his men to fight" (R12).

Colonel Armstrong talked to accused about the seriousness of his action,

> "what it meant, what a tight spot we were in and I told him that he had no choice, he had a job to do and he would continue to do it. After describing the situation to him, the position he was in, he still refused to go back to his men" (R12).

Colonel Armstrong then called Captain Carpenter and said "Captain Carpenter, I want you to be a witness to the giving of a direct order" (R9). Colonel Armstrong then turned to accused and said,

> "in not so many words, but asked him if he understood what a direct order, what disobedience of a direct order meant, not only to himself but to his family, and Lt McDonald said yes" (R9-10).

He then gave accused "a direct order to go back to his company and lead his men" (R12). Accused said, "I refuse" and did not go back to his platoon, then 175 to 200 yards away, nor did he make any movement to comply with the order (R10,12). He was not defiant or argumentative and remained in the area until Captain Carpenter placed him under arrest about half an hour later and "sent him back to battalion" (R11,13).

4. After his rights were explained (R14) accused testified in substance as follows:

He enlisted and reported in July 1943 at Fort Leavenworth, Kansas. He later went to Fort Riley, Kansas, then attended Officer Candidate School and graduated 7 December 1943. From there he went to Camp Roberts, California and

> "After being there about a week I was sent out to an IRTC and I spent a month there, and then I reported to the 80th Battalion at Camp Roberts and I stayed there until June 1st, at which time I was sent to the 70th Division. I stayed with the 70th Division until August 9th and then I received my POE orders, and received a leave. After my leave I went to Fort Meade and from there I was sent to Camp Shanks and came overseas. I landed here on September 18th and stayed one week in a depot and then we were

shipped to the 15th Depot, where we stayed two weeks and was shipped to the 2nd Replacement Depot, and then was sent to the 3rd Division" (R15-16).

He joined the 3rd Division "around 18 or 19 October" while it "was in a defensive position". He described the tactical situation of his company on 28 and 29 October, the small arms and machine gun fire to which his platoon was subjected and the repulse of his men from a hill by enemy fire (R16-17). On 29 October as Captain Carpenter said to go on up the hill further, he started to go up and

"the machine gun cut loose again. My men laid down in the road and then they ran behind a tank and there they stayed. Part of the men ran behind the tank and part ran behind the company CP. I didn't find them till much later in the day. The tanks fired and knocked out two of the machine guns. The men were lying in back of the tank and mortar shells began to drop in on us and at that time all of my platoon took off. I was left there and Lt Parsons' Battle Patrol took off and we were the only two men standing there. He got his men back and got them in their holes and they stayed there. I got eight of my men back as well as I could and then Capt Carpenter told me to push on up the hill and I started up the hill but I couldn't get the men to go. Machine gun fire was heavy from the top of the hill. I stood up and motioned for the men to come up and I got them up a few yards but couldn't get them any farther. The platoon sergeant told me, 'Lt, these men are worn out. You can't get them up the hill.' Capt Carpenter then told me to get the men up the hill and contact 'F' Company, which was up the way. I started again, and I got them up about 15 or 20 yards more and had them dig in and patrols were sent out. I received word to go farther in the woods. At this time machine gun fire had died down, there was a little small arms fire. We went about 100 yards up the woods so I came down and asked Capt Carpenter what we should do and he said, 'Come back down and form along the road where you were this morning.' He told me to form on to Lt

> Parsons. I got my men back down so Lt Parsons took me around and showed me the best holes to put my men in and I put my men in those holes. This was about 5 o'clock and then I went back to Capt Carpenter" (R17-18).

At 1700 hours the enemy had been successfully repulsed. Some of his men had come back and they "dug in and everything was quiet". He had

> "one man killed, two injured and out of the machine gun section, out of 12 men who went up there, 7 got killed. Eight in all were killed in the first 20 minutes".

Accused knew that those men had been good men and

> "honestly felt that the reason they didn't do what they were supposed to do was because of my leadership. I felt that I wasn't qualified to lead a platoon. I went to Capt Carpenter and told him, 'Sir, I can't lead a platoon. The men are better off without me', and I asked to be relieved, and that was the only reason because I had fallen down as a platoon leader. I wasn't able to get my men up the hill, and not one of my men fired a shot, they all ran. I still think it was my fault that they didn't fire. I feel it was all my fault".

He therefore told Colonel Armstrong that

> "I couldn't feel right, that I couldn't lead these men. He told me what I was doing. He said that he could send me back to the Medics. I said there was nothing wrong with me and he said, 'the only thing I can do is to give you a direct order to go back up,' and he gave me a direct order and I refused" (R19).

Accused never was afraid and told the colonel he was"willing to go back as a buck private" (R10) if he could go back in without the responsibility of those men on his hands and "I am ready to go back now as an officer or enlisted men" (R19-20). He would like to return as an officer or enlisted man for reasons as follows:

> "I have had a lot of time to think it over and I know that I know my job and I do know how to lead men, and I know my greatest fault at that time was failure to be an inspiration to the men. I saw how Lt Parsons did when his men ran, he got them back and in that I fell down, but I know that I know my job and I can lead those men. I'll tell you the biggest reason. I don't know how you men believe in the Bible and in Christ, but I have been a great believer in it for many years. My mother has been a Pentecost for 14 years. I never did believe in it till I came over here and it is since then that I have followed that religion of my mother and I have given my heart to God and I know now that if I'm given another chance that God will help me and I know I can be the inspiration to my men and lead them because I know God will help me" (R20).

About 16 November he went to see Lieutenant Colonel John A. Heintges, executive officer, 30th Infantry (R22,28), who said to him, after talking with "Capt Dwan", the regimental adjutant (R21).

> "You can go back. I'm sending you to another company as a replacement officer. They won't know anything about what happened".

He then went to Company A as a replacement officer and

> "stayed there for about a day and just before we were going to attack the Meurthe River I got a call to come out, that the General didn't approve my going back" (R20).

He was then a platoon leader. They were to cross the Meurthe River under cover of darkness. He had been "briefed", had"briefed" his platoon and was waiting for the order to move out. It was "about 5 o'clock" when the first sergeant said, "I think we're going to lose you" and told him he had to go back. He

"reported back to Capt Dwan. Lt. Hunt asked me if I was coming back and I told him I'd let him know later on. When I got back Capt Dwan told me my going back had been disapproved so I called the First Sergeant and said I wouldn't be back" (R21).

The day before th trial he went to "Capt Dwan" again and

"wanted to try to see the General to see if he wouldn't let me go back, and I went to the Division C.P. Rear in Strasbourg and I saw the G-1 and asked him if I could see the General because I felt if the General heard my story about being a Christian and living by the Bible he'd let me go back, but he wouldn't see me" (R21).

Cross-examined, accused testified that he did not do any fighting while with Company A. The following questions and answers are pertinent:

"Q: You testified as to your reason you now think you could perform as an officer. When did you first make up your mind that you wanted to obey this order?

A: As far as obeying that order, I couldn't do it. When I was placed in arrest I had a lot of time to think and I'll say that I spent a great many hours in prayer.

Q: When did you make up your mind?

A: About the 14th.

Q: On the 3rd day of November you were examined by the Division psychiatrist were you not?

A: Yes, sir.

Q: On that day you told the psychiatrist that you were not willing to go back?

A: I told him that as an officer I was not willing to go back" (R22).

Accused was assistant commandant at Wentworth Military Academy in 1943, when his duties were

> "to handle the disciplinary action of the cadets in school. When they had too many demerits. I saw that they worked them off. If they were given other punishment I saw that the punishment they were given was carried out" (R24).

Second Lieutenant Gilbert B. Hunt, Company A, 30th Infantry, testified in corroboration of accused's testimony that accused was assigned to Company A and briefed for an attack across the Meurthe River. Asked if he would be willing to have accused return as an officer in his company, he replied "I certainly would" (R26-27).

Lieutenant Colonel John A. Heintges, executive officer, 30th Infantry, testified that the day before his regiment crossed the Meurthe River he talked at his quarters with accused who said he realized his mistake and that he would like to return to duty as an officer in our regiment. He told accused "his case had advanced pretty far" but that he was sure the regimental commander would be willing to give him another chance. While accused waited, Colonel Heintges went and talked with the regimental commander who said "Yes". The colonel returned and reassigned accused to Company A. He then "called" the staff judge advocate and "told him what happened". The latter said "he'd have to get in touch with the General". About three or four hours later the staff judge advocate "called me and told me that the General had disapproved reassignment of Lt McDonald". Both Colonel Heintges and the regimental commander were willing to have accused reassigned to their regiment (R28-29). The day following accused's alleged offense Colonel Heintges talked with accused "in great lengths" at which time accused did not desire to go back to duty, but did not say he was afraid to fight.

5. Accused's guilt as charged was shown beyond any doubt whatever by his plea of guilty and by the evidence including his own testimony (CM ETO 3080, Holliday and cases therein cited; CM ETO 4184, Heil; CM ETO 5318, Bender). He admitted his guilt and that he made a mistake. His defense consisted solely of a plea for clemency and a chance to return to the front "as an officer or enlisted man" (R20).

6. The charge sheet shows that accused is 24 years of age, attended the Infantry School, Fort Benning, Georgia, from 10 August 1943 to 7 December 1943 and indicates he was commissioned a second lieutenant on 7 December 1943. No prior service is shown.

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

8. The penalty for willfully disobeying the lawful command of his superior officer by a person subject to military law in time of war is death or such other punishment as the court-martial may direct (AW 64; MCM, 1928, par.104c, p.98). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep.1943, sec.VI, as amended).

B. Franklin Pike Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant CLAUDE D. McDONALD, JR. (O-537592), Company E, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved and confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 7270. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7270).

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

((Sentence ordered executed. GCMO 78, ETO, 19 Mar 1945.)

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

BOARD OF REVIEW NO. 2

3 APR 1945

CM ETO 7308

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Walferdang, Luxembourg, 10 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MICHAEL LOYA (33184024), Company I, 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael Loya, Company I, 12th Infantry, did, at Germeter, Germany, on or about 12 November 1944, desert the service of the United States by absenting himself without 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 surrendered himself near Germeter, Germany, on or about 22 November 1944.

Accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "Germeter", substituting therefor the words "Hurtgen", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. Evidence was introduced of one previous conviction by special court-martial for absence without leave

for 48 days, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 presented by the prosecution was substantially as follows:

Accused was a member of a bazooka team in the weapons platoon of Company I, 12th Infantry (R4,5). On 7 November 1944 the company began an engagement against the enemy which continued until 22 November. Accused absented himself from the company without authority on 12 November when it was under intensive mortar fire in the Hurtgen Forest near Hurtgen, Germany. The company had already suffered about 30 casualties. From 12 to 22 November it remained in the line attacking the enemy continually and receiving artillery and mortar fire. The terrain was rugged and the men had to pass constantly through enemy mine fields (R5,6,9,10). Battle and other casualties, and men going to the rear on their own initiative for various reasons, decreased the strength of the company to such an extent that it was necessary to obtain reinforcements twice daily for a period of several days, and even then there were not enough men to hold the objectives wrested from the enemy (R10). While the company was thus engaged in battle, accused was seen by his first sergeant on 18 November in a rear area occupied by an artillery unit about five or six miles behind the company (R6,7,9). He informed the sergeant that he had gone there to get warm and "dried out" (R6,8). He also stated that he wanted to return to the company (R7). The following morning the sergeant took him to the battalion motor pool, obtained a ride for him to the battalion command post, and instructed him that when he reached there he was to proceed to the company which was a short distance forward and report to the company commander. Accused did not return to the company nor did he report as directed (R6,8). On 22 November the company's strength was so depleted that it was ordered back from its front-line position in Hurtgen Forest into battalion reserve for reinforcements and reorganization (R10). Accused rejoined the company on 22 November as it passed by the battalion command post on its way back to the assembly area. The battalion command post was about 1,000 to 2,000 yards behind the company's front-line position. He told the company commander that he had to stay around the battalion command post because the aid station was there and he was waiting to see the medical officer. He appeared to be in good physical condition when seen by the company commander on 22 November as he did when seen by the first sergeant in the rear area three days before (R7,9).

4. 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 evidence for the prosecution established that accused absented himself from his company without leave at a time when he and

the rest of his company were engaged in combat with the enemy. From the circumstances surrounding the commencement of his unauthorized absence, the court was warranted in finding that he quit his organization with intent to avoid hazardous duty as alleged. That accused by his absence did in fact avoid continued participation in the action at a time when his company was suffering heavy casualties and was in great need of men, adds to the gravity of his offense. The Board of Review is of the opinion that the findings of guilty of the Charge and Specification are supported by competent and substantial evidence (CM ETO 1432, Good; CM ETO 1664, Wilson; CM ETO 4165, Fecica; CM ETO 4743, Gotschall).

6. The charge sheet shows that accused is 31 years of age and was inducted 25 April 1942 at Conemaugh, Pennsylvania. He had no prior service.

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

Sick in Quarters Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 1

31 MAY 1945

CM ETO 7312

U N I T E D S T A T E S	87TH INFANTRY DIVISION
v.	Trial by GCM, convened "Somewhere in Luxembourg", 26 January 1945.
Private First Class CALVIN D. ANDREW (39926875), Company A, 346th Infantry	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Seine Disciplinary Training Center, Paris, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Calvin D. Andrew, Company "A", 346th Infantry, did near Achen, France on or about 12 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazard-

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ous duty, to wit; to go with his company into combat, Company "A", 346th Infantry, and did remain absent in desertion until he was apprehended at Metz, France on or about 14 December 1944.

He pleaded guilty to the Specification, 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 go with his company into combat" and "in desertion", substituting therefore, respectively, the words, "absent himself without proper leave from" and"without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty to the Charge, but guilty of a violation of the 61st Article of War. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the 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 thirty years. The reviewing authority approved the sentence, and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Seine Disciplinary Training Center,Paris, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 1, Headquarters 87th Infantry Division, APO 448, U. S. Army, 1 February 1945.

3. Accused's company, which had been in reserve with the 1st Battalion, 346th Infantry, while the 2nd and 3rd Battalions were in battle, attacked the enemy shortly after 0800, 12 December 1944. It was the company's first action. At some undisclosed time, the men had been informed that they were to attack. The morning report introduced in evidence contains the following entry: "Fr dy to AWOL 0800 as of 12 Dec 44". Accused was discovered to be absent when the attack began. He surrendered in Metz, Germany, 14 December.

4. The morning report entry makes a prima facie showing that the accused was present for duty at a time immediately prior to the attack. Presence with first battle so imminent, after having been in regimental reserve, could hardly have been without knowledge that battle was impending. There was substantial evidence in the record from which the court could reasonably infer that his absence without leave was with the intent to avoid hazardous duty (CM ETO 7339, Conklin; CM ETO 6637, Pittala, and authorities therein cited; CM ETO 11503, Trostle).

5. The charge sheet shows that accused is 19 years two months of age and was inducted 14 March 1944 at Fort Douglas, Utah (to serve for the duration of the war plus six months). He had no prior service.

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

7. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Seine Disciplinary Training Center, Paris, France, should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq. European Theater of Operations, AG 252, Op TPM, 19 Dec 1944, par.3).

_____ Judge Advocate

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_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

26 MAY 1945

CM ETO 7315

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters IX Air Force Service Command, APO 149, 25 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class CLARENCE WILLIAMS (34056477), 2047th Quartermaster Truck Company (Aviation), 1513th Quartermaster Battalion, Mobile (Aviation).	

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

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

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 Clarence (nmi) Williams, 2047th Quartermaster Truck Company (Aviation), 1513th Quartermaster Battalion Mobile, Aviation, did at the Citadel, Langres, France, on or about 2200 hours, 11 November 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Jasper (nmi) Little, a human being, by shooting him with a Carbine, calibre .30.

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

Specification: In that * * * did at the Citadel, Langres, France, on or about 2200 hours, 11 November 1944, with intent to do murder, commit an assault upon Private First Class Raymond W. Craft Sr., by shooting him in the back with a dangerous weapon, to wit, a Carbine, calibre .30.

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 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. a. The accused took his carbine from his room and approached four men standing around a fire in an Army motor pool at night. He called his name to the guard and said he was coming into the area. When he was observed with a gun at his shoulder, two of the men took cover behind a truck. They heard several shots within a few seconds, and immediately discovered their two companions prone by the fire. Little died from a gunshot wound, and Craft was critically wounded by four shots. Both were unarmed. Accused admitted twice within ten minutes of the shooting "I just killed two men" (R30,61). His defense was that he had been ridiculed, cursed and threatened by Craft at a cafe in town earlier that evening. He testified that he approached the fire, carrying the gun for "protection" against Craft and another, recognized Craft, got "nervous", and did not remember anything further. The case is cold-blooded murder, and the evidence is legally sufficient to support the findings and sentence (CM ETO 4640, Gibbs; CM ETO 4497, De Keyser; CM ETO 1901, Miranda; CM ETO 739, Maxwell). If the accused intended to shoot Craft only, and shot and killed Little, he was still guilty of murder of the latter (CM 221640, Loper, 13 B.R. 195; Carpio v. United States (New Mexico) 199 Pac. 1012, 18 ALR 914).

b. In this case the accused intended either to kill Craft or seriously injure him. Craft suffered serious gun-shot wounds. Accused's guilt of an assault upon Craft with intent to murder him was proved beyond all doubt (CM ETO 78, Watts; CM ETO 4269, Lovelace; CM ETO 5137, Baldwin).

4. The charge sheet shows that accused is 23 years five months of age and was inducted 22 August 1941 at Camp Blanding, Florida, to serve for one year. (His service period is governed by theService Extension Act of 1941). He had no prior service.

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

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

B. Franklin Rites Judge Advocate

Wm. T. Brennan 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. 1

CM ETO 7339

9 APR 1945

U N I T E D S T A T E S	)	29TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 29, U. S. Army, 29 January 1945. Sentence: Dishonorable discharge, (suspended), total forfeitures and confinement at hard labor for 30 years. Loire Disciplinary Training Center, Le Mans, France.
Private JAMES CONKLIN (37094083), Company K, 115th 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 in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient in part to support the findings and sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

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

Specification: In that Private JAMES CONKLIN, Company "K", 115th Infantry, did, without proper leave, absent himself from his post and duties at or near Paris, France, from about 29 September 1944, to about 10 November 1944.

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

Specification: In that * * * did, at or near

Siersdorf, Germany, on or about 21 November 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty and to shirk important service, to wit: action against the enemy, and did remain absent in desertion until he surrendered himself at or near Liege, Belgium, on or about 1 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. Evidence was introduced of two previous convictions: one by summary court for being drunk and disorderly in camp in violation of the 96th Article of War and one by special court-martial for absence without leave for 18 days in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders No. 30, Headquarters 29th Infantry Division, APO 29, U. S. Army, 9 February 1945.

3. Prosecution's evidence was as follows:

a. Specification, Charge I:

On 29 September 1944 accused absented himself without leave from his organization, Company K, 115th Infantry, near Paris, while it was en route by train from Brest, France, to Holland (R5-6,11; Pros.Exs.1,2). He remained absent (R6) until he surrendered to military police at Liege, Belgium, on 10 November 1944. He was returned to his organization on 18 November 1944 (R7,11; Pros.Exs.1,2).

b. Specification, Charge II:

Sergeant Marion W. Massey, Headquarters Company, 115th Infantry (R7), testified that he was provost sergeant in charge of the Lagoon Prisoner of War Enclosure which on 18 November 1944, and until 21 November, was at Baesweiler, Germany. In the enclosure were kept not only prisoners of war but also enlisted men and other regimental prisoners. On 18 November, pursuant to the direction of the regimental S-1, witness took accused from the S-1 section to the prisoner of war enclosure. On 21

November the enclosure was moved to Siersdorf, Germany (R8) where a number of German prisoners were received (R9). (It was stipulated that on that date all units of the 115th Infantry were either engaged in combat with the enemy or in reserve subject to being so engaged (R12)). As the enemy, which was about three or four miles away, was shelling the area and witness was unable to guard both the German and American prisoners, he placed the latter, including accused, in an unlocked cellar without a guard (R9). Asked whether he gave accused and the others any instructions when he placed them in the cellar, witness stated that they all wanted to go into the cellar because of the shelling (R10). Witness' instructions were to hold accused in confinement until he was called for and he did not give accused permission to leave. He last saw accused, who was not armed, on the morning of 21 November 1944 when the latter went out to urinate and then returned to the cellar. A search was made for him, but witness did not see him again until he was returned on 6 January 1945 (R9-10). It was stipulated that accused surrendered himself to the military police at Liege, Belgium, 1 January 1945 (R10-11). It was also stipulated that accused voluntarily signed a statement upon the investigation of his absence (R11). The statement, verified 6 January 1945 and received in evidence without objection by the defense, was in pertinent part as follows (R12; Pros.Ex.3):

> "On or about 21 Nov 44 I was located at the 115th Regimental PW Enclosure at Siersdorf, Germany. I was in confinement, awaiting court-martial trial. The enemy was throwing in some artillery around the PW, and it got too hot for me, so I became scared and left the PW without the guards seeing me. I made my way back through different towns in Germany and Holland until I reached Maastricht, where I remained for about a week, staying with civilians. Then I went to Brussels, where I stayed for about two weeks. Then I went on to Liege and turned myself in to the 524th M.Ps. there, on 1 Jan 45. Then I was returned through M.P. channels to the S-1 section of the 115th Infantry, arriving today. * * * I am scared, and I don't want to go back to my company, regardless of any court-martial that might be brought against me".

4. After an explanation of his rights, accused elected to take the stand as a witness in his own behalf (R13). His testimony was, in pertinent summary, as follows:

a. Specification, Charge I:

Accused received permission from a Lieutenant Jones, when on the train, to leave it for the purpose of obtaining water. The officer informed him the train would remain for about two hours but did not give him permission to be away that long. He left the train "just outside of Paris". He believed he could catch the train again because it made so

many stops (R16-17). He did everything possible to rejoin his organization, but the military police could not assist him (R14). He was averse to surrendering to the military police and preferred to return alone and on his own because he feared that being returned by them to his organization would create the wrong impression (R16).

b. Specification, Charge II:

Until he was pinned down by artillery and mortar fire for two days and nights in a tank trap at Brest, accused was never adversely affected by artillery fire. He was a squad leader at that time (R15). On 21 November 1944 he was in confinement at the regimental prisoner of war enclosure at Siersdorf, awaiting trial by court-martial, what type he did not know. He remained there only about a day and a half and left (R14) because the artillery shelling was "just too much for me and I had to leave". Its regular effect upon him was to make him wish "to get away from it the best way I know how". His plan was to go to the rear and endeavor to obtain a job there where he "could be of some value instead of coming back to the 29th Division" (R15).

> "If I got back farther to the rear I thought that I could be of more good, and if I came back here I would get a court-martial and might spend the rest of my life in prison" (R17-18).

At Maastricht he unsuccessfully asked an engineer unit for a job and attempted to surrender to the military police. He went to Brussels with similar results. His idea was to get a job from a unit which would secure his transfer from the 29th Division, but he was unsuccessful (R17). He did not know what would happen to him but knew he would receive some kind of punishment. After trying to surrender to four or five different military police detachments without success, he "finally knew it was almost impossible" and surrendered to the military police at Liege (as he had previously done on 10 November) (R17-18).

He was confused when his statement concerning this absence was taken and did not intend the statement to read as it did about not wanting to return to the company. He knew there would be a court-martial (R16).

5. a. Specification, Charge I:

The evidence establishes accused's absence without leave as alleged.

b. Specification, Charge II:

The evidence shows that on 21 November 1944 accused and his unit were before the enemy and that he "escaped" from his confinement in an unlocked cellar without guard, pending trial for his recently terminated absence without leave (Specification, Charge I, supra), went to the rear without authority for the admitted purpose of avoiding enemy artillery fire which was being received when he left, and remained absent until he surrendered at Liege,

Belgium on 1 January 1945. He is charged with desertion "by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty and to shirk important service, to wit: action against the enemy". It may be assumed that had the proof shown the same circumstances except that just prior to his departure accused was present for duty with his unit, rather than in so-called confinement, his guilt of the Specification would have been established (CM ETO 6810, Shambaugh, and cases therein cited). The sole question for determination is whether a contrary conclusion is required because of the fact that accused was in "confinement" awaiting court-martial trial at the time of his departure.

The record shows that accused without authority left his place of duty in an unlocked cellar, which was unattended except generally by a guard whose primary duty was to guard German prisoners of war. All units of accused's regiment were either engaged in the hazardous duty of combat with the enemy or in reserve subject to being committed at the will of superior authority. The enemy was about three or four miles distant and shelled the area. Because of the shelling the American prisoners, including accused, desired to go into the cellar. According to accused's own pre-trial statement and testimony, the reason he left his place of duty and went to the rear was that the shelling was too much for him to bear, and he became frightened. As was usual in his case, he wanted "to get away from it the best way I know how".

There was no mandatory requirement that accused be restrained pending trial and the restraint imposed was required to be only the minimum necessary under the circumstances (MCM, 1928, par.19,p.13). His status of temporary restraint pending trial for his prior absence was wholly different from that of a garrison or general prisoner in confinement directed by a court-martial sentence, in that it was not punishment in any sense but merely a matter of administrative convenience unrelated to his guilt of any offense, which was not then established. He was presumed innocent until proved guilty and accordingly could not be punished as a convicted soldier (Winthrop's Military Law and Precedents (Reprint,1920), p.124).

Although one incident of his status was that he might not bear arms (AR 600-355, 17 July 1942, par.7c), nevertheless, he was available for the performance of routine duties (CM 127903 (1918), Dig.Op.JAG, 1912-1940, sec. 427(2), p.290), which under the circumstances shown, might well be hazardous. Moreover, his restraint might at any time be directly terminated (MCM, 1928, par.19,p.13; CM 187795 (1929), Dig.Op.JAG, 1912-1940, sec.427(1), pp.289-290), or constructively terminated by an order to perform military duty or duties, hazardous or otherwise, inconsistent with his restraint (CM 256909, Robinson (III Bull JAG 380, 36 BR 379,384 (1944), and authorities therein cited). The termination of his restraint was a matter resting in the judgment of his commanding officer (CM 187795, supra). Should the necessity arise, as it well might, that officer could immediately order accused into active duty of a hazardous nature directly or indirectly related to action against the enemy. It was accused's duty to remain in the cellar which was a hazardous place at the time. When he left he escaped existing hazards and perils of battle. The imminence of hazardous duty for accused, who was immediately available for its performance at the time he left his place of duty without authority, as a practical matter was no less than it would have been for soldiers granted permission to sleep or rest in the cellar, or to stay there temporarily for any other purpose for an indefinite period. For

soldiers in and near the front line of battle where manpower is always a vital and prime necessity, hazardous duty is ever present or imminent, regardless of the fact that they may be temporarily relieved from active participation in combat for a wide variety of reasons. It is reasonable to infer that accused knew this and that this knowledge, at least in part, motivated his departure. His duty was to remain in the cellar pending his trial and pending the assignment to him of any duty his commanding officer might see fit at any time to impose upon him. It may be concluded, therefore, that hazardous duty and important service involved in action against the enemy were, to accused's knowledge, reasonably imminent for him, that his absence was "calculated to enable him to avoid" and shirk such duty and service (MCM, 1921, par. 409, p.344), and that he absented himself from his place of duty with intent to avoid and shirk them, as alleged. The findings of guilty of Charge II and its Specification are fully supported by the record (CM ETO 6810, Shambaugh, and authorities there cited; CM ETO 5437, Rosenberg).

6. The charge sheet shows that accused is 25 years of age and was inducted 23 October 1941 at Fort Snelling, Minnesota. 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 designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr. Hq. European Theater of Operations, AG 252 Op. TPM, 19 Dec. 1944, par.3).

B. Franklin Riter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens Judge Advocate

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

BOARD OF REVIEW NO. 1

2 JUN 1945

CM ETO 7373

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fifth Grade JAMES L. JOHNSON (35727203), 3907th Quartermaster Truck Company	Trial by GCM, convened at Caen, Calvados, France, 12, 13 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 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 Technician Fifth Grade James L. Johnson, 3907 Quartermaster Truck Company, did, at or near La Jalousie, France, on or about 22 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Marie Louise Lebrunet.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such

place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Prosecution's evidence, confirmed by accused's extra-judicial voluntary statement, proved beyond all reasonable doubt that accused, a colored American soldier, on 22 September 1944 at or near La Jalousie, France, engaged in an act of sexual intercourse with a young French woman, Mademoiselle Marie Louise Lebrunet. The accused, acting in conjunction with Corporal James L. Brizendine (34712210)(colored) also of 3907th Quartermaster Truck Company, waylaid Mademoiselle Lebrunet, her sister, Mademoiselle Marcelle Lebrunet and two women companions upon a public road while they were traveling on bicycles from Bretteville in the direction of La Jalousie. The Lebrunet sisters were threatened with a rifle in the hands of Brizendine and forcibly placed in a Government motor vehicle which was under the control of the two negroes and held prisoners under force of arms. They were driven by accused to an obscure place in an adjoining woods where the truck was halted. The young women were forced to dismount from the vehicle. Brizendine took Mademoiselle Marcelle a distance from the truck. Accused forced Mademoiselle Marie Louise to lie on the ground in front of the truck, where the sexual act occurred. The evidence abundantly established the completed act of copulation and the fact that the girl not only did not consent to same but also resisted the violation of her person to the utmost of her ability. All of the elements of the crime of rape were fully established (CM ETO 3837, Bernard W. Smith; CM ETO 3933, Ferguson et al; CM ETO 4444, Hudson et al; CM ETO 4608, Murray et al). The crime was deliberately planned and was brutal and bestial in its execution. It well merited the extreme penalty of death.

4. The charge sheet shows that accused is 20 years, 11 months of age. He was inducted 12 March 1943 to serve for the duration of the war plus six months. He had no prior service.

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

6. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania,

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 7378

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U.S. Army, 3 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life; Fisher: United States Penitentiary, Lewisburg, Pennsylvania; Wilhelm: Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates DELBERT C. FISHER (35295164) and DANIEL F. WILHELM (42028696), both of Company C, 121st Infantry	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 were charged separately and tried together with their consent upon the following charges and specifications:

FISHER

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Delbert C. Fisher, Company "C", One Hundred and Twenty First Infantry, did, at or near Hurtgen, Germany, on or about 21 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Arlon, Belgium, on or about 1400 hours. 10 January 1945.

(105)

WILHELM

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Daniel F. Wilhelm, Company "C", One Hundred and Twenty First Infantry, did, at or near Hurtgen, Germany, on or about 21 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Arlon, Belgium, on or about 1400 hours, 10 January 1945.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced as to accused Fisher. Evidence was introduced as to accused Wilhelm of one previous conviction by summary court for absence without leave for two days in violation of Article of War 61. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Fisher and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Wilhelm, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence proved the following facts:

On 20 November 1944 Company C, 121st Infantry, was in a reserve area and under orders to move into an attack upon the enemy in the Hurtgen Forest, Germany. It was under heavy artillery fire (R6,7). Both accused on said date were members of the third platoon of the company (R11).

First Lieutenant Durward M. Kelton was executive officer of the company on 20 November 1944. He saw accused Fisher on a road in the assembly area just prior to the time the company moved out of it to the line of attack. Fisher had "passed out" and was apparently sick. He was placed in a motor vehicle and was taken to the First Battalion aid station (R5,6,8,11). Lieutenant Kelton did not see Fisher again until about a week before the trial when he was brought back to the company (R6). First Sergeant Samuel C. Hjort saw Fisher on 19 November but the latter was absent from the company from 21 November to 1 December (Hjort left the company on 1 December) (R9,10).

Later, on 20 November, on the road between the assembly area and the company's attack position in the Hurtgen Forest, Lieutenant Kelton saw accused Wilhelm. He had fallen and hurt his arm. The officer left Wilhelm with an aid man and directed the latter to take Wilhelm to the First Battalion aid station. The aid station was at that time being moved forward and consequently Wilhelm would of necessity have gone forward to reach the station instead of to the rear (R7,8,11). An aid man, Private Thomas R. Atkinson, placed him in a motor vehicle and took him to the station. Upon arrival, Atkinson and Wilhelm waited until the station was "set up" for operation and then Atkinson directed Wilhelm to see Captain Greenslit, the assistant surgeon. The medical officer informed Wilhelm that he would see him the next morning. Later in the day Atkinson saw Wilhelm at the station and after that time did not see him (R13,14). Hjort did not see Wilhelm with the company between 21 November and 1 December (R10).

Neither Lieutenant Kelton nor Sergeant Hjort gave either accused permission to be absent from the company on 20 November or at any time subsequent thereto (R6,8,10). The two accused were apprehended by the military police at the home of a civilian at 44 Schoppach Street, Arlon, Belgium, at about 1800 hours on 10 January 1945. They admitted to Corporal Rodney King, 821st Military Police Company, that they were absent without leave from their company (R16). When taken to the police station they gave their correct names to the desk sergeant. The American front lines on 10 January 1945 were in the vicinity of Bastogne, Belgium, about 26 miles from Arlon (R17).

Staff Sergeant Edward Jankowski, Company C, 121st Infantry, was a member of the third platoon of the company. He saw both accused "in the woods" about 21 November. He next saw them at the field train about a week before trial. He was present with the company from 21 November to 26 November and during that time did not see either accused with it (R14,15).

4. Evidence for the defense summarizes as follows:

Lieutenant Kelton, as a witness for the prosecution, testified on cross-examination that Fisher

> "always complained of his nervous stomach and back. He seemed to me as always sick and at one time he was a combat fatigue case. He was on a list with a few other men destined for limited service but for some reason they were never transferred out" (R9).

Fisher, to the knowledge of the officer, had never failed to obey an order and had always performed his duties although he complained of his stomach. Wilhelm also always obeyed orders and performed his duties (R9).

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Private James Workman, Company C, 121st Infantry, also a prosecution witness, stated on cross-examination that he had seen Fisher while sick and had seen him vomit (R12).

Sergeant Jankowski, as witness for the prosecution, stated on cross-examination that he had known both accused since they joined the company and that he would be willing to accept them in his squad.

Sergeant Rudolph Fabian, Company C, 121st Infantry, a defense witness, testified that he had known accused Fisher "since Luxembourg". "I know we were there for 45 days, we were in a defending position" (R17). He was on guard with Fisher many times. Fisher had a nervous stomach and "threw up" frequently in the presence of witness (R19).

Sergeant Hjort, as a defense witness, testified that "about the middle of September" accused Fisher, with certain other soldiers, was then recommended by the company commander for transfer to limited service because he suffered from combat fatigue and other ailments. No action was taken on the recommendation. During the time the company was in Luxembourg, Fisher was at the rest camp at Clervaux for two or three weeks (R18,19).

Each accused, after his rights were explained to him, elected to remain silent.

5. The evidence is clear and positive that on 20 November 1944 accuseds' company moved from a reserve area into front-line combat. In the course of the movement accused Fisher fell ill and accused Wilhelm was hurt. Both of them were escorted to the battalion aid station, which was then moved forward in the course of the advance. The presence of the two soldiers at the aid station is definitely proved, and there is no question of their right to be there. However, the evidence next discovers them at the home of a civilian in Arlon, Belgium, where they were apprehended by the military police on 10 January 1945 - approximately 51 days after they were last seen at the aid station. They were not with the company during this intervening period and no permission or authorization had been given them to be absent.

From the facts above summarized, the court was fully justified in concluding that both accused possessed, at the time they were at the battalion aid station, accurate and positive knowledge of their company's tactical movement and of the certainty that combat with the enemy was imminent. With this knowledge each of them deliberately left the aid station and went to a neighboring town out of the battlefield area for the purpose of avoiding the hazards and perils of armed conflict with the enemy. The foregoing conclusion is the only possible one under the facts and circumstances proved. The guilt of each accused of the offense charged was proved beyond reasonable doubt (CM ETO 6623, Milner and authorities therein cited).

Assuming that proof of physical disablement of an accused to the extent he is unable to perform his duties is a defense to the instant charge, the court by its finding resolved this issue against each accused. Such finding is supported by substantial evidence of their ability to perform their duties and is therefore binding on appellate review (CM ETO 4702, Petruso and authorities therein cited; CM ETO 6468, Pancake).

6. The charge sheets show the following with respect to the service of accused: Fisher is 32 years old. He was inducted 6 November 1943 at Columbus, Ohio. Wilhelm is 24 years old. He was inducted 8 October 1943 at Rochester, New York. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused 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 of accused Fisher (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b (4) and 3b), and of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Wilhelm (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended) is authorized.

_____ 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 7 MAY 1945

CM ETO 7379

U N I T E D S T A T E S	104TH INFANTRY DIVISION
v.	Trial by GCM, convened at Brand, Germany, 8 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private SAM W. KEISER (37398183), Battery C, 386th Field Artillery Battalion	

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

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

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

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

Specification 1: In that Private Sam W. Keiser, Battery C, Three Hundred and Eighty-sixth Field Artillery Battalion did, at La Calamine, Belgium on or about 11 December 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 2 January 1945.

Specification 2: In that * * * did, while en route from Paris, France to his organization at Langerwehe, Germany, on or about 3 January

1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels, Belgium on or about 9 January 1945.

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

Specification: In that * * * having received a lawful order from First Lieutenant Sidney Fain, Corps Military Police, to return to his organization, the said First Lieutenant Sidney Fain being in execution of his office, did, at Brussels, Belgium, on or about 2 January 1945, fail to obey the same.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring in each finding, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 32 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that accused was a private, Battery C, 386th Field Artillery Battalion (R6). Between 15 November and 11 December, inclusive, 1944, he was on detached duty, one of ten guards for the baggage of his organization, at La Calamine, Belgium, On the last named date, the sergeant in command assembled this detail, accused being present, and told them to pack up as they were leaving at approximately 1500 hours that afternoon to join their "units". At 1500 hours accused was absent from the area without permission,and was not present when this detachment actually left at 1800 hours. The sergeant looked for him "at the area" and could not find him (R7-9,11). Accused did not rejoin his battery on 11 December and was absent therefrom without permission until 19 January 1945 (R9, 11-12). On 9 January 1945, accused and another soldier were arrested in Brussels, Belgium, by two military policemen. Accused was wearing a "mixed uniform". In the possession of either accused or his companion was found a written order, dated 2 January, purporting to be signed by First Lieutenant Sidney Fain, Corps of Military Police. It

was written on the letterhead of the Provost Marshal, Seine Section, Communications Zone, European Theater of Operations, was addressed to accused and three others, and directed each of them to "return to your organization and report to the Commanding Officer thereat without delay". On the back appeared four signatures, one being a name similar to that of accused. The signature purported to acknowledge both the receipt and an understanding of the written order (R11-13; Pros.Ex.A).

On 23 January 1945, accused was interviewed by First Lieutenant James B. Atkinson, 386th Field Artillery Battalion, appointed "to investigate the charge against accused". At that time accused volunarily stated that "he wished to make a statement and make a clean breast of the whole thing". Accordingly, he made and signed a written statement (R13-15; Pros.Ex.B). Among other things, accused said in this statement that about 9 December 1944, while on duty at La Calamine, Belgium, guarding duffle bags and equipment, he with the other members of the guard, had been told to get their belongings together preparatory to leaving in about an hour. Encouraged by others in the group, he went "AWOL with them". They went to Brussels. Accused continued:

> "After about five days in Brussels, we went to Paris, where on 2 January 1945 Military Police picked us up and shortly released us after giving us written orders to proceed to our organizations without delay and report immediately to our commanding officers. The orders were signed by an M.P. officer. Instead of following orders we returned to Brussels, and after eight or nine days, Pfc Rolla and I were picked up by the Military Police" (R14,15; Pros.Ex.B).

At a subsequent interview with the investigating officer, on 30 January 1945, accused admitted to the latter that the order, a copy of which is now attached to Prosecution's Exhibit A was the order, "The Pass" which was given to him "by the MP's"in Paris on 2 January 1945, and that the signature of "Sam W. Keiser", on the back thereof, was his (accused's) signature. This statement was reduced to writing and was also signed by accused (R15-17; Pros.Ex.C).

From 11 December 1944 to 19 January 1945, accused's organization was "in actual combat with the enemy", its mission being one of direct support to an infantry regiment. Accused's duties were those of a cannoneer on a cannon working with the ammmition and the "firing of the piece" (R17). On or about 2 January, accused's organization was at Langerwehe, Germany (R9).

4. Advised of his rights as a witness, accused elected to remain silent. He called no witnesses. On cross-examination of the first sergeant who had been in command of the baggage guard at La Calamine, the defense showed that it had not been customary for members of that guard to secure permission from the sergeant or from "Lieutenant Jackson" before leaving the baggage area (R8,18).

5. From the foregoing evidence, it is clear that accused absented himself from his place of duty on 11 December 1944, and remained absent from military control until he was apprehended at Paris, France on 2 January. The custom of leaving the baggage area without the necessity of securing permission certainly was revoked when the guard was alerted to pack and leave the area. This absence was at all times unauthorized. The second absence and departure from constructive military control, involving disobedience of a written order to rejoin his command was also unauthorized. The first absence was for 22 days and the second lasted one week. Ordinarily absence for such brief periods, if satisfactorily explained will not support charges of desertion (CM 189658 (1930), Dig.Op.JAG, 1912-1940, sec.416 (9), p.269; CM 213817, Fairchild, 10 B.R.287 (1940)). However, there are additional circumstances in the present case which justified the court in finding that each absence was the result of an intent to desert. Accused did not testify or offer anything to rebut the natural inference growing out of these circumstances. His first absence was terminated by arrest. His return to military control was involuntary and his absence might well have lasted indefinitely, save for his arrest. This latter conclusion is almost inescapable in view of his second offense of absence without leave which was committed immediately, at the first opportunity, after his arrest. This second absence throws a most unfavorable light on the intent, which motivated his first absence. Particularly is this true in view of the fact that his second absence occurred when he was under direct order to rejoin his command. The court was justified in believing with respect to the second absence that it too was characterized by the same intent as that which inspired the first. The two absences were too closely connected in point of time and pattern of conduct to permit of any other conclusion. The evidence shows further that during these absences accused separated himself from his command by a substantial distance. On all these circumstances, the court was justified in finding that accused's first absence (Specification 1, Charge I), was desertion as charged and also that the same intent, an intent to desert, accompanied the second unauthorized absence, (Specification 2, Charge I)(CM ETO 2723, Copprue;CM ETO 1629, O'Donnell). In the Copprue case (supra), the absence was for 23 days. The initial absence was accompanied by an escape from confinement. It was terminated by arrest at which time accused committed a felonious assault in resisting arrest. When arrested, accused, an enlisted man, was wrongfully wearing the uniform of a commissioned officer. In the present case, there were no unauthorized absences, so closely related in time as to constitute in reality one absence, of 28 days. Each

absence was terminated by arrest. The second initial absence was accompanied by an offense which under the circumstances was of the same gravamen as escape from confinement. In the case of O'Donnell (supra), desertion was found, and the finding sustained, on an absence of 37 days. There the accused voluntarily surrendered and took the stand to explain his absence. As noted, in the instant case, there were two arrests before accused absence was finally terminated and accused failed to offer any explanation for his absence.

Accused's second absence, voluntary in nature, necessarily involved a failure to obey the order given him by Lieutenant Fain, as alleged in the Specification, Charge II. Lieutenant Fain was then in the execution of his office. The evidence clearly shows this. Accused was an absentee and it was Lieutenant Fain's duty as the officer at Military Police Headquarters to see that accused, brought before him as an absentee, was returned to his organization. Proof that the order was actually given accused is found: in the written order itself, the best evidence of the order, in the signature of accused appended thereto as acknowledgement of receipt, and in accused's admission. Each allegation of this Specification was sustained. Disobedience of such an order is at least a violation of Article of War 96, the article under which this offense was charged, as prejudicial to good order and military discipline (MCM, 1928, par.152a, p. 187).

6. Accused is 29 years 5 months of age. He was inducted 17 November 1942 at Jefferson Barracks, Missouri. 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

Judge Advocate

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

BOARD OF REVIEW NO. 3

9 APR 1945

CM ETO 7381

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, 30 January 1945.
Private STEPHEN J. HRABIK (32776713), Company B, 179th Infantry	)	Sentence (suspended): Dishonorable discharge, total forfeitures and confinement at hard labor for life.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Stephen J. Hrabik, Company B, 179th Infantry, did, at or near Pozzilli, Italy, on or about 9 November 1943, desert the service of the United States and did remain absent in desertion until his return to military control at Naples, Italy, on or about 24 October 1944.

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

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reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, but due to the soldier's creditable performance in combat since the commission of the offense, suspended execution thereof. The proceedings were published in General Court-Martial Orders Number 27, Headquarters 45th Infantry Division, APO 45, U.S. Army, 10 February 1945.

3. The evidence for the prosecution is as follows:

Authenticated extract copies of the morning reports of Company B, 179th Infantry, and of Disciplinary Training Stockade, PBS, APO 782, United States Army (R3; Pros. Exs.A,B), were admitted into evidence without objection by the defense (R3), and are quoted as follows:

> COMPANY B 179th INFANTRY
> "17 August 1944 - 32776713 Hrabik, Stephen J. Pvt M/R entry of Nov 17/43 as reads: 'duty to sk hosp 120th Clr Sta Nov 9/43 LD' is amended to read 'duty to AWOL 0600 Nov 9/43' & M/R entry of Jan 5/44 as reads: 'sk 120th Clr Sta to evac & dr fr rolls hosp unkn s' is amended to read: 'AWOL to dr fr rolls.
>
> 17 November 1944 - 32776713 Hrabik, Stephen J. Pvt Dr fr rolls AWOL to * * * * * confined at PBS Stockade 1600 24 Oct 44.
>
> 19 November 1944 - 32776713 Hrabik, Stephen J. Pvt Conf PBS Stockade to Conf Regtl Stockade".
>
> DISCIPLINARY TRAINING STOCKADE, PBS
>
> "24 October 1944
> 32776713 HRABIK
> fr ar to conf
>
> 4 November 1944
> 32776713 HRABIK
> fr conf to ar".

The only additional evidence for the prosecution consists of the testimony of Technician Fifth Grade Albert Shapiro, Service Company, 179th Infantry, a clerk in the S-1 Section of the forward command post of the regiment. He stated that he was with the regiment on 9 November 1943. At that time, it was in the Venafro sector in Italy and during the first two weeks of November, Company B was engaged in combat operations against the enemy near the town of Pozzilli. Enemy opposition was encountered, Pozzilli being known by the men as "Purple Heart Town" (R4-5).

4. Accused, being warned by the law member of his rights, elected to take the stand and testify under oath in his own behalf (R14,15). He stated that he had been back with his company since 14 December 1944, serving alternately as an ammunition bearer and machine gunner. He

admitted that "I made a mistake and I have realized it more than ever", and expressed the desire to return to his company and "not only do my job, but the job of two or three other men". His company was in need of men and he was positive that he would be a good soldier, saying "When I first met the enemy I was scared I admit but now whatever he does doesn't phase me in any way" (R14-16).

Accused's company commander, platoon sergeant, section sergeant and squad leader also testified in his behalf. All stated that he had been back in the company approximately two months, during which period he had displayed unusual devotion to duty and had on several occasions volunteered for hazardous tasks. His behavior under fire was exemplary and his work was characterized by exceptional willingness and cooperation. Each of the witnesses expressed the desire to have him back in his particular unit (R6-13).

5. It is apparent that the legal sufficiency of the record of trial to support a finding of guilty of either desertion or the lesser included offense of absence without leave depends entirely upon the competency of the morning report entries for accused's company. It was obviously assumed by all concerned with the trial that the proof of unauthorized absence necessary to sustain findings of guilty of desertion or absence without leave was supplied by these entries, with the result that the record is devoid of any other evidence tending to prove absence. The morning report of the Disciplinary Training Stockade is of no value in this respect since it contains no reference to any such absence on the part of accused but relates only to changes of status as between arrest and confinement. Nor is there anything in the testimony of the witnesses that could be accepted as adequate proof that accused was so absent. All but one testified only as to his conduct since return to the company. Their testimony was based on an assumption of unauthorized absence on his part during the period alleged, but nowhere does it affirmatively appear that such absence actually existed. Statements by witnesses for the defense to the effect that accused had been back with his organization for about two months (R6, 11,13) and that he seemed to be willing to do his utmost to make up for the "wrong" he previously committed (R9,12) fall short of proof that he had been absent without leave for the specified period or for any period. Nor do accused's admissions that he "made a mistake" and "realizes it more than ever" and that when he first met the enemy, he was scared, constitute an admission of guilt of the offense charged or of absence without leave.

Consideration must therefore be given to the question whether the Company B morning report entries constitute competent proof of the absence without leave. As a matter of law, such entries are admissible as exceptions to the hearsay rule either as official statements in writing made by an officer who had the duty to know and to record the matter stated (MCM, 1928, par 117a, pp. 120-121), or as records made in the regular course of business within the meaning of the Act of June 20, 1936, Chapter 640, section I, 49 Statute 1561, 28 United States Code Annotated, section 695 (CM ETO 4691, Knorr). The Board of Review, accordingly, must determine whether the three entries here relied on conform to the legal requirements applicable under either of those two bases of admissibility.

The entry relating to accused's departure is objectionable both as an official writing and as a record made in the regular course of business. It was made on 17 August 1944, more than nine months after the alleged departure, and purports to correct two previous entries one of which itself was made eight days after the event it described. The corrected entries described accused's status as "duty to sk hosp" and "sk 120th Clr Sta to evac & dr fr rolls hosp unkn s". It is apparent, therefore, that the entry of 17 August 1944 does not purport to be a correction of error resulting from mere inadvertence or oversight, but rather represents an ex post facto change in accused's status which must have been made as the result of information reaching the entrant subsequently to the time of the original entries. The source of this new information is a matter of pure speculation since the correcting item was made exactly three months before accused's alleged return to military control. Whatever such source may have been, however, it appears certain that the information recorded on 17 August 1944 could not have been within the personal knowledge of the entrant and hence the entry is not competent evidence of the facts therein stated within the rule relative to official writings (CM 254182, Roessel, 35 B.R. 179, 1944).

Nor is the entry acceptable as a record made in the regular course of business. The Federal Statute above cited specifically provides that such a record shall be admissible only if it appears "that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter". A morning report entry made more than nine months after the transaction with which it purports to deal and offered without any showing or explanation of the reasons for the delay or the sources of the information on which it is based, can scarcely qualify as having been made at the time of such transaction or "within a reasonable time thereafter". The Federal Statute is a liberalized version of the early shop book rule, the basis for which lay in the probability of trustworthiness of business records because they were routine reflections of the day to day operations of the business. In the enactment of the statute, it was not intended that this basis be abandoned (Palmer v. Hoffman, 318 US 109, 87 L.Ed. 645). Therefore, since it has always been one of the essential requisites to the admissibility of business entries as evidence that they appear to have been made at or near the time of the transaction to which they relate (20 Am.Jur., sec.1063, pp. 910-911), it is apparent that such requisite persists under the statute and that the entry of 17 August 1944 in this case is not admissible.

There remains for consideration the probative effect, if any, of the entries of 17 November and 19 November 1944 relating respectively to the change in status of accused from "dr fr rolls AWOL to * * * * * confined at PBS Stockade 1600 24 Oct 44" and from "Conf PBS Stockade to Conf Regtl Stockade". The latter, in itself, obviously is without effect as far as proving absence is concerned. The former is objectionable as an official writing since the matters described were clearly not within the personal knowledge of the entrant (See CM 254182, Roessel, supra). Likewise its admissibility as a regular business entry is dubious for the reasons discussed in connection with the entry of 17 August 1944. In any event, however, an entry showing return to military control, in the absence of other competent evidence, could not alone sustain a conviction of desertion or absence without leave (CM 227831, Gregory, 15 BR 375, 1942; CM 229567, 7,381

CONFIDENTIAL

Bangs, 17 BR 197, 1943).

6. The charge sheet shows that accused is 25 years of age and that he was inducted at Newark, New Jersey on 20 March 1943. He had no prior service.

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

Benjamin R. Sleeper, Judge Advocate

Malcolm C. Hocum, Judge Advocate

B. L. Levy Jr, Judge Advocate

(120)

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private STEPHEN J. HRABIK (32776713), Company B, 179th Infantry.

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

3. At this trial, accused took the stand as a sworn witness and was apparently willing to tell all he knew. He was asked no question by the trial judge advocate and the three questions asked by the president did not relate to the offense charged. Proper cross-examination would undoubtedly have resulted in proof of the absence.

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

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

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

(Findings and sentence vacated, GCMO 125, ETO, 22 April 1945.)

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

BOARD OF REVIEW NO. 3

13 APR 1945

CM ETO 7391

U N I T E D S T A T E S	XV CORPS
v.	Trial by GCM, convened at Sarrebourg, France, 5 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WENDELL E. YOUNG (33649206), Company A, 157th Engineer Combat 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 specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: Finding of Not Guilty.

Specification 2: In that Private Wendell E. Young, Company A, 157th Engineer Combat Battalion, did, at or near Carlsbrunn, Germany, on or about 14 January 1945, misbehave himself before the enemy by failing to advance with his command, which had then been ordered forward by Captain Herbert A. Benton, Jr., 157th Engineer Combat Battalion, to man a defensive position before German troops, which forces the said command was then opposing, and by stating to Captain Herbert A. Benton, Jr., "I will not go with the platoon" and "I will not carry a rifle" or words to that effect, upon being ordered by the said Captain Benton to join his platoon.

He pleaded not guilty and three-fourths of the members present at the time the vote was taken concurring, was found not guilty of Specification 1, but guilty of Specification 2 and of the Charge. Evidence was introduced of one previous conviction by summary court-martial for failing to obey an order not to fire a service rifle unnecessarily in the rear army area, in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution relative to Specification 2 is substantially as follows:

Accused was a member of Company A, 157th Engineer Combat Battalion (R23). On 14 January 1945, the company commander received orders to man a defensive line with Troop C, 121st Cavalry, some two and a half miles from the company command post. The line ran in a generally north-south direction to the west of Forbach and Saarbrucken. It was approximately a mile from the enemy position, but there were enemy patrols out, some of which came right into the positions the company was ordered to occupy. These positions consisted of trenches in part, but were mostly foxholes or outposts manned by four men (R23,24). The company was to be on the line by approximately 1800 hours (R23).

The company commander directed his platoon leaders to form all available men into one body and to move out so as to join the Cavalry troop at 1800 hours (R24). Accused was one of the men selected for the detail and was instructed to get his equipment and to board a truck which was to take the men from the command post to the line. He complied with this order, put his bed roll on the truck and took a place "on the end of the truck in the back". This was at about 1900 hours. The sergeant in charge checked his men just before taking off and accused at that time was still in the truck. The sergeant rode in the cab and when the truck arrived at the positions, he checked his men again. Neither accused nor his equipment were aboard. The sergeant testified on cross-examination that the other men in the truck told him upon arrival that accused jumped off with his equipment before the truck started (R26-28).

Accused was next seen about half an hour later in the company command post. The company commander asked him what the trouble was. He said that "he wasn't going up there and he wasn't going to carry a rifle". The captain read Article of War 75 to him and explained the danger of the mission and the protection he would have in being with the men with whom he had worked. He told accused "I am going to give you fifteen minutes and at 2000 hours * * * I want you back here with your equipment and I will take you up there". In a few minutes, accused repeated that he was not going (R24-26). The first sergeant who was present at the interview testified

that accused also said he was not going to fight and did not believe in fighting or killing anyone (R28). When accused refused the second time to join his group, the company commander placed him under arrest (R24,28). The first sergeant pleaded with him, telling him of the seriousness of the situation and that the rest of the men were up there, but he said he wasn't going anywhere regardless of what happened (R28-29). Accused apparently did not have his rifle, but there were plenty of rifles available and "he said he wouldn't get any" (R30).

The defensive positions were actually occupied by the men of the company beginning at about 0430 hours, 15 January 1945. All were in the line by 0730 hours. The company remained there for four days. They had patrols almost every evening and at one outpost, a staff sergeant was shot in the arm, one of the men was killed and a German was also killed. Accused at no time went up to the positions (R24,25).

4. After explanation of his rights as a witness, accused elected to remain silent with respect to the specification of which he was convicted, and no evidence was introduced in his behalf as to such specification (R34-35).

5. At the outset, it is noted that the specification alleges misbehavior before the enemy on the part of accused "by failing to advance with his command * * * to man a defensive position before German troops, which forces the said command was then opposing, and by stating to Captain Herbert A. Benton, Jr., 'I will not go with the platoon' and 'I will not carry a rifle' or words to that effect * * *". The question is raised whether two separate offenses are intended to be stated (i.e., failure to advance and refusal to advance, the statements of accused being tantamount to the latter (See CM ETO 6177, Transeau)) or whether the specification merely undertakes to describe two phases of the same transaction. Since both accused's departure from the truck and his subsequent avowal of intent not to join his platoon occurred within half an hour of each other and related to a failure to advance with his command in connection with the same movement or detail, it would seem the better view to regard the specification as designed to set forth a single transaction (See CM ETO 1109, Armstrong; CM ETO 4074, Olsen). Adopting this hypothesis, the specification as framed is unobjectionable, the latter part thereof being at worst an unnecessary pleading of evidence. Even assuming, however, that the pleading was multifarious in that it alleged two different acts capable of being construed as separate offenses, it nevertheless satisfactorily alleged a violation of Article of War 75 consisting of a failure to advance. Accused, therefore, was fully acquainted with the offense charged against him and was in no way hindered in the preparation of his defense. Hence the possible defect of multifariousness, in the absence of objection by defense, is not fatal (See CM 195772, Wipprecht, 2 B.R. 273, p.293 (1931); CM 218876, Wyrick, et al., 12 B.R. 157 (1942)).

6. The proof shows that accused was selected as a member of a group which was under orders to advance to man defensive positions some two or two and one-half miles from his company's command post. The defensive positions were apparently about one mile from the main enemy line, but were located in an area which fell within the zone of activity of enemy patrols

and in which hostilities actually occurred during the time the positions were manned by personnel of accused's company. Pursuant to his instructions, accused boarded the truck along with the other men selected for the detail and then without permission left the vehicle. When found in the command post half an hour later, he was specifically ordered to get his equipment and prepare to go forward, but despite explanation by both the company commander and the first sergeant of the serious nature of his conduct, he refused to comply. Under the circumstances, it is apparent that accused was "before the enemy" when he engaged in the conduct complained of (CM 128019 (1919), Dig.Op. JAG, 1912-40, sec.433(2),p.304). Nor is there any doubt that he knew of the hazardous character of the mission and that his failure to advance was designed to avoid it. He was guilty of both a physical failure to advance consisting of his removal of himself from the truck at or after its departure for the positions and a refusal to advance upon being ordered to do so when found in the company command post shortly afterwards. Taken either separately or together, these acts constitute a violation of Article of War 75 and the record of trial is accordingly sufficient to sustain the court's finding of guilty (CM ETO 4630, Shera; CM NATO 1614, Langer).

7. The record of trial contains hearsay evidence as to the exact time accused left the truck (R27). This, however, is not prejudicial to the substantial rights of accused since the fact that he left the truck is established by other evidence both competent and compelling and since the exact moment of such departure is immaterial.

8. The charge sheet shows that accused is 20 years of age and was inducted 27 April 1943 at Roanoke, Virginia. He had no prior service.

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

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

Benjamin R. Sleeper, Judge Advocate

Malcolm C. Sherman, Judge Advocate

B. L. Dewey Jr., Judge Advocate

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

BOARD OF REVIEW NO. 2

CM ETO 7397

7 MAY 1945

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 29, U. S. Army 20 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSEPH De CARLO, JR. (35007842), Medical Detachment, 115th Infantry	

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

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

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

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

Specification: In that Private JOSEPH De CARLO, JR., Medical Detachment, 115th Infantry did, at Fort Tregantle, Cornwall, England, on or about 2 May 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 and shirk important service, to wit: participation in the oversea invasion of the enemy occupied European continent, and did remain

absent in desertion until he surrendered himself at London, England, on or about 21 August 1944.

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

Specification: In that Private JOSEPH De CARLO, JR., then a member of Replacement Detachment X-111-A, 19th Replacement Depot, did, without proper leave, absent himself from his place of duty at or near Omaha Beach, Normandy, France, from about 10 September 1944, to about 30 October 1944.

He pleaded not guilty to the Specification of Charge I and to Charge I, guilty to Charge II and its Specification and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all the charges and specifications. 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. a. Charge I and Specification: The evidence presented by the prosecution established that accused was a member of the Medical Detachment, 115th Infantry, stationed at Fort Tregantle, Cornwall, England (R6). On 1 May 1944 parts of a secret letter dated 21 April 1944, on the subject of desertion, issued by Headquarters V Corps, was read at a company formation at which accused was present (Pros.Ex.5). The substance of the parts read was as follows:

The penalty for desertion in time of war is death or such other punishment as a court-martial may direct. Any person who quits his organization or place of duty with intent to avoid hazardous duty or shirk important service is deemed a deserter. Confinement in a United States penitentiary is authorized for desertion in time of war. Any

person dishonorably discharged for desertion in time of war forfeits his United States citizenship. Notice was given that the organization was under orders to participate in the oversea invasion of the enemy occupied European continent, that it was alerted for that operation, that the operation was imminent and would be both hazardous duty and important service within the meaning of Article of War 28, that "any absence without leave by any of you from now on will be deemed desertion to avoid this duty and will subject you to being tried by general court-martial as a deserter" and

> "that proof of your unauthorized absence together with morning report proof of the foregoing information being given you, in connection with further proof of the fact that your organization is now under orders and alerted for participation in the imminent oversea invasion operation against the enemy, will authorize a court-martial to infer that your unauthorized absence was with intent to avoid such duty and therefore to find you guilty of such desertion" (Pros.Ex.5).

While the organization was thus alerted, accused absented himself without leave on 2 May and continued so absent until he surrendered to military authorities at London, England, 21 August (Pros.Ex.1; R10). On 6 June accused's organization landed on the beaches of Normandy, France, for the invasion of the continent (R10). The prosecution introduced in evidence an extrajudicial statement of accused (R10; Pros.Ex.6) in which he admitted his absence without leave from 3 May until about the middle of August. The statement also contained the following explanation for his absence:

> "About 2 May 1944 Capt. JESSE WILKINS, 3rd Bn Surgeon, 115th Infantry, talked to me at some length and then told me that he was going to have me sent to a hospital for treatment as a psychoneurotic. At this time I was a member of the Medical Detachment, 115th Infantry, attached to Co K, 115th Infantry as an Aid Man. I had

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previously had trouble with my legs and my duties at Company K were to drive a jeep, and did not include all the normal duties of a company aid man. From certain information I concluded that Capt. Wilkin's decision was prompted by a request from the then commander of company K, Capt. LOUIS J. HILLE.

On the following day, 3 May 1944, not wishing to spend a lengthy period of time in a mental hospital, I went AWOL. I had no knowledge or suspicion that my outfit was soon to take part in the invasion.

From that date until around the middle of August I spent most of my time in Birmingham and Oxford. I had plenty of money. Sometime in August I went to London and turned myself in to the M.Ps., at APO 887".

b. It does not appear from the record of trial that any explanation was made to accused of his right to remain silent, to testify as a witness, or to make an unsworn statement, or that he understood his rights in the premises. Immediately after the prosecution had presented its case, the defense rested without introducing any evidence (R10).

c. The evidence would clearly have supported a finding that accused absented himself without authority from his organization and place of duty with intent not to return thereto (MCM, 1928, par.130a, pp.143-144). If the specification had charged desertion generally without alleging any specific intent whatever, the prosecution would have been free to prove that accused absented himself without leave with intent at the time he absented himself, or at some time during his absence, to remain away permanently or that he quitted his organization or place of duty with intent at the time he absented himself to avoid hazardous duty or to shirk important service (CM ETO 5117, DeFrank). Where, however, the specification, as in the instant case, alleges a certain specific intent, the existence of that intent must be proved (CM ETO 5958, Perry and Allen, and cases therein cited).

The prosecution failed to prove that accused at the time he absented himself without leave entertained

the intent to avoid hazardous duty or to shirk important service. Proof that he absented himself without leave on 2 May after he received notice from the reading of the letter dated 21 April that his organization was under orders to participate at some indefinite future time in the invasion of the continent, was alerted for that operation, and that the operation would constitute hazardous duty and important service, does not, without more, furnish the necessary probative basis from which may be inferred the ultimate fact of intent to avoid such duty or service (CM ETO 2432, Durie; CM ETO 2481, Newton; CM ETO, 2396, Pennington; see CM 266441 III Bull JAG 511). In his extrajudicial statement, accused admitted that he absented himself without leave but stated that he did so to avoid being sent to a mental hospital for treatment and gave a factual basis for believing he was about to be sent to such hospital. This was introduced by the prosecution and was neither inherently improbable nor refuted by the other facts in evidence. The prosecution, therefore, failed to prove one of the essential elements of the offense charged, namely the specific intent to avoid hazardous duty or to shirk important service (CM ETO 2481, Newton; CM ETO 5958, Perry and Allen). The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, absent himself without leave until he surrendered himself on 21 August 1944 at the place alleged, in violation of Article of War 61.

4. The findings of guilty of Charge II and its Specification are supported by accused's plea of guilty (R5).

5. No explanation was made to accused of the meaning and effect of his plea of guilty to Charge II and its Specification, nor was any explanation made to him of his right to remain silent, to testify as a witness, or to make an unsworn statement. Although it does not appear that any substantial right of accused was injuriously affected in this case by the failure to give him the pertinent explanations it is the better practice to explain an accused's rights as a witness in all cases and the meaning and effect of a plea of guilty in every case where such plea is entered (see MCM, 1928, par.70, p.54; par.75a, p.59).

6. The charge sheet shows that accused is 26 years of age and was inducted 4 February 1941 at Cleveland, 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 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 findings of guilty of Charge I and its Specification as involves findings that accused did at the time and place alleged, absent himself without leave from his organization and place of duty until he surrendered himself on 21 August 1944 at the place alleged in violation of Article of War 61, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence.

8. Penitentiary confinement is not authorized for the offense of absence without leave (AW 42; CM ETO 2432, Durie). Confinement should be in a place other than a penitentiary, Federal correctional institution or reformatory.

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
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APO 887

BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 7413

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, 9 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.
Private ANTHONY T. GOGOL (32063954), Company C, 317th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony T. Gogol, Company C, 317th Infantry, did, in the vicinity of Feulen, Luxemburg, on or about 24 December 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 Heiderscheid, Luxemburg, on or about 11 January 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by

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special court-martial for four days absence without leave in violation of Article of War 61. All 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, did not designate the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence without contradiction proved the following facts:

On 24 December 1944 accused was a rifleman in the first platoon of Company C, 317th Infantry (R6,8). During the December 1944 German offensive his company had been actively and continuously engaged "trying to push the enemy back out of the Bulge". On 24 December the company was located about 2½ miles from Feulen, Luxembourg (R6). It was attacked by the Germans in the early morning. It engaged them near an old chateau in the proximity of Niederfeulen and was "trying to push the enemy back" (R7,8). Accused was shown absent without leave from his company on the morning of said date at 0600 hours on the company morning report (R7,8; Pros.Exs.A,B,C). Technical Sergeant James A. Woods, leader of accused's platoon, searched for him and could not find him in the platoon area. Woods was present with the company from 24 December to 11 January, and did not see accused (R7). The company morning report showed accused was present for duty on 11 January 1945, but there is no evidence whether he was apprehended or voluntarily returned to duty (Pros.Ex.C).

4. After explanation of his rights to him, accused elected to remain silent (R9).

5. This is a typical "battle line" desertion case and of a pattern familiar to the Board of Review. The evidence is definite and positive that on the morning of 24 December 1944 accused's organization was in active combat with the enemy. The Board of Review may take judicial notice of the fact that at this time the American military forces were resisting to the utmost the advance of the Germans into Luxembourg and that it was one of the most critical periods in the German offensive of December 1944 (CM ETO 7148, Giombetti, and authorities therein cited). At this moment accused left his company and place of duty without authority and was absent for 18 days. There is evidence that accused was actually present with his company on the early morning of 24 December. The court was therefore justified in inferring from this evidence that he possessed knowledge of his company's tactical position and knew that it was engaged or about to be engaged in sharp combat with the enemy. In the absence of an explanation from him the court was authorized to conclude that he deliberately and willfully

absented himself to avoid the hazards and perils of the immediate operations against the enemy invading forces. The record is legally sufficient to support the findings of guilty (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto; CM ETO 4783, Duff; CM ETO 5293, Killen; CM ETO 6623, Milner).

6. The charge sheet shows that accused is 26 years four months of age. He was inducted 25 March 1941 at Harrison, New Jersey, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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BOARD OF REVIEW NO. 2

18 MAY 1945

CM ETO 7439

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, 6 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, CONLEY for life, WHITAKER for 35 years. (Place of confinement not designated).
Privates THEODORE B. CONLEY (39041123) and CHARLES T. WHITAKER (35827645), both of Company B, 319th Infantry	)	

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

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

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

CONLEY

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Theodore B. Conley, Company B, 319th Infantry, did, in the vicinity of St. Avold, France, on or about 27 November 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 Dahl, Luxembourg, on or about 13 January 1945.

WHITAKER

(Identical Charge and Specification as above set forth except for the appropriate substitution of name and serial number of accused).

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Specification preferred against him except the words "until he surrendered himself at or near Dahl, Luxembourg, on or about 13 January 1945", substituting therefor the words, "until he returned to military control at or near Lucy, France, on or about 17 December 1944" of the excepted words, not guilty, and of the substituted words guilty and guilty of the Charge. Evidence was introduced of three previous convictions against accused Conley, one by special court-martial for absence without leave for three days in violation of Article of War 61, and two by summary court, one for breaking parole, absence without leave for 11 days in violation of Articles of War 96 and 61 respectively and one for wrongfully appearing in the city of Nancy, France without a pass and for failing to carry a firearm, in violation of Article of War 96. No evidence of previous convictions was introduced against accused Whitaker. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced (to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, accused Conley for the term of his natural life and accused Whitaker for 35 years. The reviewing authority approved the sentences, but did not designate any place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

Both accused were privates in Company B, 319th Infantry. During the period from about 15 November 1944, to about 10 December, 1944, the company had moved across Northern France from Loisy to Suisse and had seen action

at Eischville and nearby towns (R8,9). The first sergeant of Company B testified that during this action and maneuvering

> "we moved into this town, I forget the name of it; and we ran into some Heinies, and Conley and Whitaker were there at that time. And the company commander came and said get them out right away to move out to relieve the 3d battalion, and Conley and Whitaker couldn't be found at that time, that was the last I saw of them. After we relieved the 3d battalion, the next morning we jumped off to go into St. Avold.
> * * *
>
> Conley was a runner, 2d platoon, assigned to Company Headquarters and Whitaker was assigned also to Company Headquarters as a runner" (R9).

The morning report for Company B under date of 5 January 1945, admitted in evidence, shows that the status of both the accused changed from duty to AWOL on 27 November 1944 (R10; Pros.Ex.A) and the morning report dated 16 January 1945 shows each accused to arrest in company area as of 13 January 1945 (R10; Pros.Ex.B).

After the disappearance of the accused from the company, the first sergeant did not see them again until 13 January 1945 when the company was at Heiderscheid, Luxembourg (R10). However, the accused came under military control on 17 December when they were found hiding in the attic of a house in Lucy, France. At that time they were both dressed in army uniform. Each had a loaded carbine but they did not resist arrest (R11-14).

4. Upon their rights as witnesses being explained to them, each accused elected to remain silent and no evidence was introduced for the defense (R14-15).

5. The tactical situation on 27 November had very obviously grown serious with increasing hazards. On that date, the accused disappeared and remained well out of combat until they were discovered following a search in the attic

of a civilian house some distance to the rear. The imminence of further combat and its accompanying hazards must have been known at company headquarters and to accused for they were company runners (CM ETO 1432, Good).

6. The charge sheets show that accused Conley is 22 years of age and was inducted 1 March 1943, at San Francisco, California and that accused Whitaker is 19 years and seven months of age and was inducted 28 March 1944, at Fort Benjamin Harrison, Indiana. Neither had prior service.

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

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 United States Penitentiary, Lewisburg, Pennsylvania, or of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

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BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 7474

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WALTER R. LOFTON (32219517), 3983rd Quartermaster Truck Company	Trial by GCM, convened at Seine Section, Paris, France, 28 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1.
RITER, SHERMAN 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. Notwithstanding accused's plea of guilty to Specification 3, Charge I, alleging absence without leave from 5 November to 18 November 1944, the evidence only supports a finding of absence without leave from 5 November to 8 November 1944. The evidence clearly indicates that the period of unauthorized absence was temporarily interrupted 8 November 1944 when accused came under military control at the military police sub-station at 8 Rue Scribe, Paris, France (R14,15).

3. The court was legally constituted and had jurisdiction of the person and offenses. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 3, Charge I, as involves

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findings that accused did absent himself without leave from the Straggler's Stockade, 19th Replacement Depot, from 5 November to 8 November 1944, legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I and of Charge I, Charge II and Specification and Charge III and Specification, and legally sufficient to support the sentence.

4. 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. Franklin Peters Judge Advocate

Marcus C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

23 FEB 1945

CM ETO 7489

UNITED STATES	4TH ARMORED DIVISION
v.	Trial by GCM, convened at Morfontaine, France, 26 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private LONNIE V. RIGSBY (34166270), Headquarters 25th Cavalry Reconnaissance Squadron (Mechanized)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lonnie V. Rigsby, Headquarters 25th Cavalry Reconnaissance Squadron, Mecz., did, at Epiais, France, on or about 26 August 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control on or about 4 January 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. All the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for

absence without leave for eight days in violation of Article of War 61. All the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence established the following facts without contradiction:

On 26 August 1944 accused was a member of the Headquarters and Service Troop, 25th Cavalry Reconnaissance Squadron (Mechanized). The troop was stationed one mile south of Epiais, France, and the squadron was committed to action (R4). Accused on that date had been on a trip to obtain gasoline. He returned to the bivouac at about 1800 hours and at 2000 hours he was reported missing. The first sergeant of his troop made a search of the camp area and he could not be found. He had no permission to be absent from either his camp or his organization. He left all of his equipment and property at the camp and had with him only the clothes he wore. He remained absent from military control until he was returned thereto on 4 January 1945 (R5-7).

4. Accused elected to remain silent (R7).

5. Accused was absent without authority from military control for a period of 131 days. He offered no explanation for his absence. Evidence of a soldier's prolonged absence from his organization in a foreign country in time of active hostilities without any explanation for his conduct is a substantial basis of facts from which the court is authorized to infer that he intended to desert the military service (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell; CM ETO 6435, Noe and authorities therein cited; CM ETO 6857, Dougan).

6. The charge sheet shows that accused is 21 years of age. He was inducted 23 January 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and 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 Jun 1944, sec.II, pars.1b(4), 3b).

E. Smith Yates Judge Advocate

Malcolm C. Sherman 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. 1

3 MAR 1945

CM ETO 7500

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 16 January 1945.
Private First Class EUGENE K. METCALF (31403441) and Private WILLIAM J. WLOCZEWSKI (33625079), both of Company A, 121st Infantry	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.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 were charged separately and with their consent were tried together upon the following charges and specifications:

METCALF

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

Specification: In that Private 1cl Eugene K. Metcalf, Company "A", One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 1030, 22 December 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he surrendered himself at Hurtgen, Germany, on or about0900 hours, 23 December 1944.

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

Specification: In that * * * having received a lawful command from Captain James H. Godfrey, his superior officer, to return to your organization immediately, did at or near Kleinhau, Germany, on or about 24 December 1944 willfully disobey the same.

WLOCZEWSKI

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

Specification: In that Private William J. Wloczewski, Company "A", One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 1030, 22 December 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he surrendered himself at Hurtgen, Germany, on or about 0900 hours, 23 December 1944.

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

Specification: In that * * * having received a lawful command from Captain James H. Godfrey, his superior officer, to return to your organization immediately, did at or near Kleinhau, Germany, on or about 24 December 1944 willfully disobey the same.

Each accused pleaded not guilty and, all the members of the court present at the time the votes were taken concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced against either accused. All the members of the court present at the time the votes were taken concurring, each was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentences, recommended that the sentence as to accused Wloczewski be commuted to confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused, but, owing to special circumstances in the case, commuted each to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern

Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

3. The facts shown by prosecution's evidence are as follows:

On 22 December 1944 both accused were members of the second platoon of Company A, 121st Infantry (R6,9;12). The front line of the company on that date was located in a wooded area east of the Hurtgen Forest (Germany) at a point one mile west of the Roer River, one mile southwest of Manbach and six miles southwest of Duren, Germany (R7; map of Germany, Lendensdorf, 1/25000, coordinates 069361). The German forces were located about 300 yards north of the company's front lines. On 21 December the company commander, Captain Dan L. Henry, received orders which directed his company on 22 December to move forward, clear the woods to its front and establish contact with Company C, 121st Infantry, which was to assist in the attack. Company A was under enemy fire and there was an exchange of small-arms fire until the attack commenced on the morning of 22 December. The second platoon was the company unit designated to move forward and clear the woods. Captain Henry on the night of 21 December gave implementing orders to his platoon leaders, and they at 0600 hours 22 December gave the soldiers directions as to the movement (R6,7,11). The attack was made as ordered. At midnight, 22-23 December, the company, after it was replaced by a platoon from Company F, 121st Infantry, moved to a new area (R8).

Staff Sergeant Robert L. Dever, Jr., was the guide of accused's platoon. At 1030 hours 22 December he went to the foxhole occupied by both accused, informed them that the platoon was "moving out", and directed them to secure and "get their equipment on". The accused complied with this order. The platoon moved forward to point "A", which had previously been designated by the platoon sergeant as the point where two squads of the platoon would separate and enter upon their respective missions. The third squad remained in reserve. When the two squads reached point "A", Dever became the leader of one squad and the platoon sergeant led the other squad. The platoon successfully completed the attack (R9,11,12).

The accused proceeded with the platoon for a distance of about 200 yards from the line of departure but were not with the platoon when it reached point "A" (R9,13,14). It required seven or eight minutes for the platoon to move from its foxholes to point "A" (R12). They were not with the platoon when it reached its objective (R9,10,13). Neither the company commander (R7) nor Dever (R10) gave either of the accused permission or authority to be absent or to leave the advance movement.

On 23 December 1944 Captain James S. Hinkle, 121st Infantry, was "straggler officer" of the regiment. At 2100 hours on that date

he saw the two accused at the "straggler point" where they had voluntarily appeared. He directed that they remain at the point while he sent to the 1st Battalion command post to arrange for their return to the company. On 24 December, pursuant to Captain Hinkle's direction, a supply sergeant returned the two men to the 1st Battalion command post located near Kleinhau, Germany (R16,17). They were brought before Captain James H. Godfrey, battalion adjutant, who interviewed them. They asserted they suffered from fatigue but admitted they had not sought medical aid. They also stated that the Articles of War had been explained to them. Captain Godfrey thereupon gave Wloczewski a direct verbal order as follows: "Wloczewski, I order you to return to your company at once". He also ordered Metcalf as follows: "Metcalf, I order you to return to your organization". Each accused replied that he would not return to the company. They were then placed in arrest and under guard were turned over to the regiment (R15,16).

4. Each accused, after his rights were explained to him, elected to remain silent (R18).

5. a. Charges I and Specifications. The uncontradicted evidence shows that each accused without authority deliberately left his platoon as it advanced to attack the enemy on the morning of 22 December 1944. The court was justified in concluding that each of them was cognizant of the nature of the operations and of the perils and hazards involved. At the critical moment they left their comrades in arms to carry on the attack and sought and found safety. The inference that they absented themselves with the intention of avoiding the imminent hazardous duty is not only reasonable but is the only possible conclusion. This is a typical "battle line" desertion case of the same pattern as CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 7086, Dell Amura; and the principles therein announced govern this case. The record is legally sufficient to sustain the findings of guilty of each accused.

b. Charges II and Specifications. Each accused willfully and knowingly defied Captain Godfrey's authority and deliberately refused to comply with his lawful order to return to his company. The offense was proved beyond all doubt (CM ETO 3988, O'Berry and authorities therein cited; CM ETO 5318, Bender).

6. The charge sheets show the following with respect to the service of accused: Metcalf is 27 years old. He was inducted 8 January 1944 at AFIS, New York City. Wloczewski is 19 years old. He was inducted in May 1943 at Allentown, 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 the record is legally sufficient as to each accused to support the findings of guilty and the sentence, as confirmed and commuted.

8. The penalty for both desertion in time of war (AW 58) and willful disobedience of the lawful command of a superior officer (AW 64) is death or such other punishment as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(150)

1st Ind.

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

1. In the case of Private First Class EUGENE K. METCALF (31403441) and Private WILLIAM J. WLOCZEWSKI (33625079), both of Company A, 121st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7500. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7500).

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

(As to accused Wloczewski, sentence as commuted ordereed executed. GCMO 69, ETO, 17 Mar 1945.)
(As to accused Metcalf, sentence as commuted ordered executed.) GCMO 70, ETO, 17 Mar 1945.)

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

BOARD OF REVIEW NO. 1

5 MAY 1945

CM ETO 7506

U N I T E D S T A T E S	) IX AIR FORCE SERVICE COMMAND
	)
v.	) Trial by GCM, convened at 1st
	) Advanced Air Depot Area, IX Air
Private JESSIE L. HARDIN	) Force Service Command, U. S. Army,
(37381490), 1992nd Quarter-	) Reims, France, 19 January 1945.
master Truck Company (Aviation),	) Sentence: Dishonorable discharge,
1577th Quartermaster Battalion,	) total forfeitures and confinement
Mobile (Aviation)	) at hard labor for 45 years. 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 I: Violation of the 84th Article of War.

Specification: In that Private Jessie L. Hardin, 1992nd QM Trk Co, Avn, 1577th QM Bn, Mbl, Avn, did, at Dampierre, France, on or about 20 November 1944, unlawfully sell to Gautron Henry, (a French civilian), eleven (11), five-gallon, jerricans containing fifty five (55) gallons of 80 octane gasoline, of a total value of more than fifty dollars ($50.00), issued for use in the military service of the United States.

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

Specification: In that * * * did, at Dampierre, France, on or about 20 November 1944, unlawfully sell to Gautron Henry, a French civilian, 55 gallons of 80 octane gasoline, issued and intended for United States government use at a time when 80 octane gasoline was vital for the military effort, such conduct being at that time in the nature of impeding the military war effort.

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 45 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The offense charged under the 84th Article of War (Charge I and Specification), although covering the same 80 octane gasoline as is the subject of the offense charged under the 96th Article of War (Charge II and Specification) is separate and distinct from the latter offense (CM ETO 4570, Hawkins; CM ETO 5155, Carroll, et al; and authorities cited in those cases).

4. With respect to Charge I and its Specification the evidence conclusively established the unlawful sale of the jerricans and gasoline as alleged in the Specification. The items were "other property issued for use in the military service" (AW 84). Article of War 84 applies to any property issued for use in the military service (MCM, 1921, par.434, p.394; MCM, 1928, par.144, p.158; CM NATO 252, Dickerson et al). The evidence is legally sufficient to sustain the findings of guilty of said Charge and Specification.

5. The allegations of the Specification of Charge II that accused:

"did * * * unlawfully sell to * * * a French civilian, 55 gallons of 80 octane gasoline, issued and intended for United States Government use at a time when 80 octane gasoline was vital for the military effort, such conduct being at that time in the nature of impeding the military war effort"

stated an offense under the 96th Article of War in the nature of diversion by accused of articles and supplies intended for, adapted to or suitable foruse by the armed forces of the United States in connection with actual combat (CM ETO 8234, Young, et al; CM ETO 8236, Fleming, et al; CM ETO 8599, Hart, et al). The proof of the sale of the gasoline by accused is complete. However, the prosecution attempted to prove the allegations that the gasoline "was vital to the military effort" and that such diversion impeded the military war effort by asking the court to take judicial notice of the following documents:

a. A letter from Headquarters European Theater of Operations dated 16 October 1944 addressed to "Commanding Generals, U.S. Strategic Air Forces in Europe" which reads as follows:

> "1. Many cases have been reported to this headquarters of gasoline and other supplies either being sold or given to the local population. These supplies come from individual vehicles and truck convoys. Such disposal of government supplies, whether a gift or sale, is a violation of the 83rd Article of War, and must be stopped at once.
>
> 2. Gasoline for the local population, both civil and military, is furnished by proper US Army supply agencies to French authorities for distribution to those entitled to receive same. The unauthorized disposal of supplies, in its cumulative effect, impedes the military effort, increases the traffic problem through nonessential driving, and tends to create a black market condition.
>
> 3. Unit commanders will bring this directive to the attention of all members of their commands, will familiarize their personnel with the provisions of the 83rd Article of War, and will take prompt disciplinary action through court-martial for any violation.
>
> 4. Military police and all officers will make every effort to apprehend offenders in order that this practice may be stopped".

The above letter was distributed to the Commanding General, IX Air Force Service Command, and by him to all the commanding officers of his subordinate units.

b. A letter from Headquarters Ninth Air Force dated 7 November 1944 to subordinate units of that command including the Commanding General, IX Air Force Service Command, reading in pertinent part as follows:

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"1. It has recently come to the attention of this Headquarters that the misuse of gasoline is increasing within the Ninth Air Force. Specifically, the use of gasoline for dry-cleaning clothing, use in fires for heating purposes, wastage in filling tanks, and considerable unnecessary travel.

2. Forthcoming operations will require for strictly operational purposes every single gallon of gasoline available to the Ninth Air Force. Consequently, the responsibility for conserving gasoline is a personal one resting on every individual in the Ninth Air Force.

3. Supply Discipline is a responsibility of command. Correspondingly, laxity in supply discipline is a reflection upon command. It is desired that immediate steps be taken to suppress the growing misuse of gasoline in all elements of the Ninth Air Force, including disciplinary action, where appropriate, against those responsible".

The above letter was distributed to the commanding officers of all units of IX Air Force Service Command.

Assuming that the court was entitled to take judicial notice of the contents of each of said letters (Cf: CM ETO 1538, Rhodes), they fall far short of the evidence required to prove the exceedingly necessary elements of the Specification above underscored. At most the letter from Headquarters European Theater of Operations expresses the opinion of the Commanding General, European Theater of Operations that unauthorized disposal of gasoline "in its cumulative effect impedes the military effort". Such ex parte expression of opinion, as worthy as it is of belief, certainly does not constitute legal proof of the necessary factual allegations that accused's action in diverting the gasoline impeded the war effort. The Ninth Air Force letter insofar as it was more than a mere expression of opinion and policy of the Commanding General was unsworn hearsay made by a person not subject to cross-examination and possessed no evidential value. "Hearsay is not evidence" (MCM, 1928, par.113a, p.113; CM 228401, Webster, 16 BR 137 (1943).

"the court and the Board of Review [may] take judicial notice of the fact that the American Forces in the European Theater of Operations possess and have possessed thousands of motor vehicles powered by internal combustion engines; that a continuous supply of tremendous quantities of gasoline has been and is necessary in order to furnish the fuel for said engines and that the ultimate success of the American Arms in the States has been

and is largely dependent upon the movement of said vehicles" (CM ETO 6226, Ealy).

The maximum evidential value of these letters above quoted was to invite the attention of the court to above matters of general knowledge, but they did not supply necessary proof of specific conditions existing at the time and place alleged or that this particular

"gasoline was a vitally needed commodity and that accused when he diverted it prejudiced the success of the American Arms" (CM ETO 6226, Ealy, supra).

There was therefore a complete failure of proof with respect to the allegations of the Specification which elevated the Charge from a wrongful sale of Government property to the serious military offense discussed in the Young, Fleming and Hart cases.

The offense proved was the identical offense covered by Charge I and Specification. There cannot be a duplicate conviction on the same set of facts (CM ETO 5155, Carrollet al, supra). Hence the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification.

6. It was stipulated in open court between accused, the defense counsel and the trial judge advocate that the gasoline and jerricans involved in the specification were of a value of more than $50.00. The authorized punishment for the offense of which accused has been convicted, and which is legally sustainable (Charge I and Specification), is dishonorable discharge from the service, forfeitures of all pay and allowances due or to become due and confinement at hard labor for five years (MCM 1928, par.104c, p.99).

7. The charge sheet shows that accused is 27 years six months of age. He was inducted 26 August 1942 at Jefferson Barracks, Missouri, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and the offenses. 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 Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years.

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9. The offense of selling Government property issued for use in the military service under the 84th Article of War is essentially a military offense (Winthrop's Military Law and Precedents (Reprint 1920), pp.560,561; Davis, Treatise on Military Law of United States (3rd Ed. Rev.1913), pp.372-374), and is not recognized as an offense of a civil nature punishable by penitentiary confinement for more than one year by some statute of the United States or by a law of the District of Columbia (AW 42). The place of confinement of the accused should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 10 APR 1945

CM ETO 7518

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates MILBERT BAILEY (34151488), JOHN WILLIAMS (32794118), and JAMES L. JONES (34221343), all of 434th Port Company, 501st Port Battalion	Trial by GCM, convened at Cherbourg, France, 13,14 December 1944. Sentence as to each accused: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private John Williams, Private Milbert Bailey, and Private James L. Jones, all of 434th Port Company, 501st Port Battalion, acting jointly and in pursuance of a common intent, did, at La Pernelle, Hameau, Scipion, Normandy, France, on or about 11 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one M. Auguste Lefebvre, a human being, by stabbing him with a knife.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at La Pernelle, Hameau, Scipion, Normandy, France,

on or about 11 October 1944, forcibly and feloniously against her will, have carnal knowledge of Mlle. Marguerite Lefebvre.

Defense counsel stated that accused did not object to a joint trial. Each accused pleaded not guilty and, all members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and both specifications. Evidence was introduced, as to accused Bailey, of one previous conviction by summary court-martial for going without proper leave from his properly appointed place of assembly in violation of Article of War 61; as to accused Jones, of two previous convictions, one by special court-martial for absences without leave for 14 and 48 days respectively, and one by summary court-martial for going without proper leave from his properly appointed place of duty, both in violation of Article of War 61; and, as to accused Williams, of two previous convictions, one by special court-martial for absence without leave for two days and one by summary court-martial for going without proper leave from his properly appointed place of assembly, both in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing execution thereof pursuant to Article of War 50½.

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

At about 2000 hours, 11 October 1944, Madame Lefevre, her son, Eugene, and her 19 year old daughter, Marguerite, were at their home in La Pernelle, Hameau, Scipio, Normandy, France. M. Lefevre was away having dinner at the nearby home of his employer (R6,14,17). Three colored soldiers approached the house and asked Eugene for cognac which the boy refused (R6, 17). About ten minutes later they returned, knocked on the door, and said "Police". The door being locked, the soldiers prowled around the house and broke a window pane. Madame Lefevre noticed that they were wearing white masks (R6,7,17,18). The Lefevres called for help, and Marguerite escaped from the house, followed by her mother. As they were running down the road, one of the soldiers, a tall man wearing a mask and a raincoat, threw Madame Lefevre to the ground. She got up and ran toward the house of a neighbor, crying for help (R7,9). As she reached her neighbor's gate, one of the soldiers struck her on the head, and the neighbor and his wife, hearing her cries, came out of their house. The soldier, who was bareheaded and wearing a mask, ran away in the direction of the Lefevre home (R7,8,10,11,13).

Meanwhile, Lefevre and his employer, at the latter's house, heard cries for help coming from the direction of the Lefevre home. Lefevre immediately left for his house. He appeared to his employer to be in good condition at this time (R14,15). Both the employer and the neighbors to whom Madame Lefevre had fled had seen three colored American soldiers in the vicinity a short time previously (R10,11,13,16).

A few minutes later, Madame Lefevre and her neighbors returned to the Lefevre home. On their arrival they found Lefevre clasping his stomach with his hands. He said he had been cut with a knife and he was bleeding profusely. There was a wound about five centimeters long on the right side of his abdomen. He did not say how he had received it except to remark "Oh, those salauds [dirty beasts]". An attempt was made to apply bandages and to find a doctor. His face changed color, his speech failed, and in 15 minutes he was dead. He was 52 years old and had always been in good health (R8,9,11-14). Lefevre's employer was summoned and in the courtyard of the Lefevre house he found an American helmet, gray in color, with a white arc painted on it. Next day he observed bloodstains on the road about 50 meters from Lefevre's house (R15-16,25,26).

Marguerite Lefevre, having left the house at the same time as her mother, ran down the road toward the home of her father's employer for a distance of about 25 meters. A colored soldier apprehended her at this point, thre her to the ground, and slapped her face. Another colored soldier was present, and both struck her, wrapped her head in a raincoat, forced her to her feet, and took her into a field. When she cried for help, one of the soldiers hit her with his knife. On reaching the field, one of them thre her to the ground and while his companion held her, tore off her clothes. At this time, about five minutes after she had left the house, she noticed a third soldier standing near who she believed was not wearing a helmet. All three in turn then had sexual intercourse with her. This took about two hours. The soldiers then carried her to another field about two kilometers away and again "violated" her, each one having intercourse with her about three times. Two of them left, the third remaining asleep on top of her. She escaped and went first to the nearby home of a friend and then to her own home, arriving at about 0130 hours 12 October (R18-22). She was exhausted and showed signs of having been struck and bitten on the face. Her clothes, which her mother gave to the police, were torn to pieces. It was necessary to hospitalize her and she was still a patient in the hospital at the time of trial (R9,20,21). She was unable to see the faces of her assailants, except for eyes and mouth, since they wore white masks (R21). One seemed to her to be drunk (R21).

Written statements by each of accused, made to representatives of the Criminal Investigation Division, were admitted into evidence over objection by defense that they were obtained under circumstances involving duress and physical violence. The prosecution's evidence showed that the statements were made after warning to accused of their rights under Article of War 24 and without threats, promises of reward, or force (R33,34,40,41,43-45). Moreover, the investigating officer subsequently interviewed each of them

and, after being warned of their rights under Article of War 24, they acknowledged the authenticity of the statements without complaint of having been subjected to fear or duress (R47-49,58).

The three statements (Pros.Exs.R,T,U) were substantially in accord, although there was some confusion of detail as to the exact sequence of events. Each accused admitted having gone to the Lefevre house at about 2000 hours in the company of the others in search of cognac. All had been drinking and Bailey and Jones admitted being "pretty high". Jones was armed with a knife. He asked the little boy for some cognac which was refused, and the three left and walked down the road. Jones and Bailey had noticed a young girl in the house and they mentioned this to Williams. They decided to return to the Lefevre home with the hope, according to Williams, of getting some "pussy". Before returning, they covered their faces with masks made, in the case of Jones and Williams, from the sleeves of Williams' undershirt, and, in the case of Bailey, from a handkerchief. Jones stated that he lent Williams his knife for the purpose of cutting the sleeves from his shirt. Williams stated, however, that he tore them off. They prowled around the house frightening the women until both fled. The three statements varied somewhat with respect to the immediate pursuit of the women. Jones stated that he and Bailey followed them, accidentally knocking down the mother in the course of the pursuit. They then overtook the girl, slapped her, threwher down, and carried her toward a field. On the way they passed a man who, however, did not stop them. They were then joined by Williams. Bailey's version was the same except that he omitted reference to the collision with the mother or the passing of the man on the road. Williams, however, stated that he and Jones pursued the girl, threw a raincoat over her head, and carried her into the field, and that Bailey thereupon joined them. The statements were similarly confused as to exactly what happened in the field, Jones stating that all three had intercourse with the girl; Williams that Jones and Bailey had, but that his own efforts were unsuccessful; and Bailey that Jones and Williams had, but that he was unable to do anything because of being scared and nervous. After they finished, they took the girl to another field where Jones and Williams admittedly had intercourse with her. Bailey also had intercourse with her, according to his companions, but his own statement does not admit it. Jones then threw away his mask and left with Bailey. Williams remained behind, again getting on top of the girl. He "played around" for a while and then pretended to be asleep. The girl at this point escaped. Williams admitted that he lost his helmet sometime during the evening and that when he returned to camp his fatigues were stained with some "red stuff". He denied that he stabbed Lefevre or had any knowledge of the stabbing. Both Bailey and Jones, however, stated that Williams admitted the stabbing to them during the course of the night.

On the day after they had given their statements, each accused was individually taken out to the place where the rapes occurred. They had been warned the day before of their rights under Article of War 24 and no threats were made to induce them to return to the scene of the offenses. Each retraced the route from the first field to the second, and Jones located the sleeve which he had used as a mask and had discarded on the night in question. The sleeve was received in evidence (R35-39,45; Pros. Exs.W,X).

The statements of accused were further corroborated in part by certain additional evidence presented by the prosecution. Thus, Jones was absent from the detail to which he was assigned on the night of the rapes (R23,24). A suit of fatigues with reddish stains on the fly, a woolen undershirt minus sleeves, and a sleeve fitting and apparently originally a part of the shirt, were found the day following in Williams' barracks bag (R31; Pros.Exs.O,P,Q). The helmet found in the courtyard of the Lefevre home was a greyish off color "exactly like" the one Williams admitted having lost and bearing the number 7522 (R16,26). The bloodstained and torn clothing of both Marguerite and Lefevre was received in evidence without objection by the defense (R26-29;Pros.Exs.F-M).

4. a. Accused, having been duly warned by the law member of their rights, at their request and with the consent of the prosecution, were permitted to take the stand solely for the purpose of testifying under oath as to the circumstances surrounding the giving of their respective statements (R49,50). Each stated that immediately prior to the time his statement was taken, an unidentified lieutenant was present along with the CID agent. Bailey testified that the lieutenant struck him on the head and abdomen and pushed a knife in his stomach (R51-53). Williams' and Jones' stories were to the same effect except that they did not claim to have been threatened with the knife (R53-58).

b. Additional evidence for the defense showed that accused had been drinking early in the evening of 11 October but, although all showed some sign of drinking, they were neither drunk nor sober (R59-63).

5. Accused were found guilty of murder and rape, each offense being alleged to have been committed jointly and in pursuance of a common intent. This form of pleading is entirely proper. Where accused act as participants in a joint venture and in concert, each is chargeable as a principal regardless of the extent of his participation, and their joinder in a specification of this kind is proper (CM NATO 646, Simpson et al; CM NATO 779, Clark et al; CM NATO 1121, Bray et al; CM ETO 1922, Forester and Bryant; CM ETO 3933, Ferguson and Rorie; CM ETO 2686, Brinson and Smith). The distinction between principals, aiders, and abettors having been abolished by Federal statute (35 Stat. 1152; U.S. Criminal Code, sec.332, 18 USCA, sec.550), if murder or rape is committed in the course of a joint venture, each accused is responsible not only for his individual acts but for the acts of all his fellow participants performed in furtherance of the enterprise. Hence it is immaterial which of the participants actually committed the death producing act in the case of murder, or the intercourse in the case of rape (CM ETO 1922, Forester and Bryant, supra; CM ETO 5068, Rape and Holthus).

In the present case, the evidence, entirely apart from the statements of accused, leaves no doubt that Lefevre met his death as the result of being stabbed in the stomach with a knife or some equally sharp instrument. While no medical or other expert testimony as to the cause of death is provided, none was needed. Death followed soon after a serious abdominal wound accompanied by great loss of blood and a rapid failing of speech and strength. The circumstances are such therefore that no question of skill or science requiring resort to expert testimony was involved (see 2 Wharton's Criminal Evidence (11th Ed.1935), sec.1001, p.1764). That Lefebvre's

wound was neither self-inflicted nor accidental is clearly shown by his statement that he had been cut with a knife and his exclamation "Oh, those salauds". Although both these remarks were made within 15 minutes of his death, at a time when he was clutching his stomach, bleeding profusely, and failing rapidly, it is not necessary to decide whether they were admissible as dying declarations. The statement and exclamation were made so soon after he was wounded and under such circumstances that they were clearly admissible as part of the res gestae (CM ETO 3141, Whitfield; CM ETO 4043, Collins). Similarly, the prosecution's evidence, without reference to accused's statements, proves the rape of Marguerite Lefevre beyond any possible doubt. The girl was frightened into fleeing her home by three masked assailants, dragged into a field by two of them, and forcibly subjected to sexual intercourse by all three. She was then taken to another field where the performance was repeated. Under these circumstances, the failure of the record of trial specifically to show lack of consent is immaterial (CM ETO 3933, Ferguson and Rorie).

The identity of accused as the perpetrators of the crimes depends in large part upon their statements made to the CID investigator and received in evidence over objection of the defense. These amount in legal effect to confessions of the rape and hence are admissible and may be considered only to the extent that compliance was had with the legal requirements relative to independent proof of the corpus delicti, the voluntary character of the statements, and the impropriety of the use of each as against those other than the accused making it (see MCM, 1928, pars.114a and c, pp.114-116 and 117). As to the corpus delicti, it is so clear that the record contains "other evidence, either direct or circumstantial", that the offenses charged have "probably been committed", that no possible objection to the confessions exists on this score (see CM ETO 2007, Harris; CM ETO 559, Monsalve).

Regarding their voluntary character, the evidence of the prosecution and that of the defense is in square conflict. An issue of fact was accordingly presented for determination by the court, which concluded that the circumstances surrounding the making of the confessions were such that they were voluntary. The information, corroborating and elaborating accused's statements, which was obtained from them at the scene of the crimes was voluntarily given. The accused had been warned under the 24th Article of War on the preceding day, and the record of trial is completely devoid of any evidence or inference that compulsion or improper inducements were used in obtaining the information adduced at the scene. Although in some cases the fact that an accused is taken to the scene of the crime in the custody of police officers might serve as one of the aggravating factors causing a court to hold a confession involuntary, obtaining information from accused at such place is not per se objectionable (Cf: Murphy v. United States, (CCA 7th, 1923) 285 Fed.801, cert. denied 261 U.S.617, 67 L.Ed. 829 (1923); Lisenba v. California, 314 US.219, 86 L.Ed. 166 (1941); CM 252439, Peros and Johnson, 34 B.R. 55 (1944)). The controlling question is whether the confession in its whole was voluntary. In the instant case the court decided that the confessions were voluntary, and its determination will not be disturbed by the Board of Review in view of the substantial competent evidence supporting it (CM ETO 4055, Ackerman; CM ETO 3499, Bender and Owsley; CM ETO 2007, Harris).

There remains the question whether the court was properly warned not to accept or consider the confession of each accused as against the others (MCM, 1928, par.114c, p.117). As far as the rape is concerned, no great importance is attached to this issue since the confessions are essentially recapitulations of each other and each admits participation by the maker in the joint venture (CM ETO 2901, Childrey and Cuddy; Cf: CM ETO 7252, Pearson and Jones). While it is true that Bailey does not admit intercourse with the girl, whereas his companions state otherwise, this is immaterial since Bailey's role as an aider and abettor to the rapes is fully confessed, thus rendering him a principal in any event. On the issue of murder, however, the problem becomes important, particularly in view of the statements of Bailey and Jones that Williams admitted the stabbing to them and the denial by Williams that he either committed the act or knew anything about it. Had Williams been the only one of the accused charged with the crime of murder, it is possible that the admission of these statements of his fellow accused would be so prejudicial to his substantial rights that no warning to the court could possibly cure the damage (see CM 239239, Mitchell et al, 25 B.R. 93,113 (1943)). This, however, is not the situation here. All three were jointly charged with and convicted of murder, and in view of the joint character of the enterprise, it is unnecessary to affix the active commission of the act on any particular individual, all being equally guilty so long as the offense was committed by one of their number. Hence if the court, in determining that the stabbing was done by one of the group, was sufficiently mindful that Bailey's and Jones' statements were not to be considered as proof that it was Williams who did it, the confessions may properly be regarded as admissible in evidence under the general rule that such statements may be accepted if the court is duly warned to consider them only against the persons who made them (CM ETO 3499, Bender and Owsley; CM ETO 1202, Ramsey and Edwards). That the court, although not specifically warned at the time the confessions were admitted, was fully aware of this principle of law seems certain. In connection with testimony given at the trial as to oral statements made by the accused when their confessions were taken, the court definitely indicated familiarity and concurrence with the rule. The law member announced it in his rulings (R42,43,44). Similarly, the evidence dealing with the actions and words of each of the accused upon being taken to the scene of the offense was expressly limited in application to the particular accused in question (R35,36,38). It may be assumed, therefore, that the confessions were admitted with full understanding of their proper application and that the court in reaching its findings as to each accused did so without reliance upon matters referred to in the confessions of his fellows and not admitted in his own. There was no prejudice therefore to any of the accused individually or to all of them collectively.

The remaining question is whether the evidence, including the confessions properly limited as to scope, is legally sufficient to sustain the findings of guilty. No doubt exists on this score as far as the rape is concerned. The testimony of the victim shows clearly that she was raped as the result of a concerted attack by three colored soldiers. Each of the accused in his confession admits his participation in the project, the joint

character of which is demonstrated by the wearing of masks, the mode of pursuit of the victim, and the assistance each gave the other in the execution of the enterprise. Two admitted intercourse with the girl and while one denied that he succeeded in penetrating her, his story is inconsistent in this respect with that of the victim. In any event, he so clearly admitted participation as an aider and abettor that the question whether he actually had intercourse becomes immaterial. All three were therefore properly found guilty of rape.

The conviction of murder presents a more difficult problem. For the reasons previously stated, the statementsof Bailey and Jones that Williams admitted the stabbing of Lefevre are assumed to have been disregarded by the court in reaching its findings and must be disregarded by the Board of Review in determining the legal sufficiency of the record. The case therefore becomes one in which there are no eye witnesses to the killing and no confession or admission of guilt by any of the accused. Their identity must accordingly be established entirely by circumstantial evidence. There is of course no legal objection to this mode of proof (CM ETO 1202, Ramsey and Edwards; CM ETO 2686, Brinson and Smith), and the only question is whether the evidence adduced is sufficient to warrant the court's determination that Lefevre died as the result of a knife wound inflicted upon him by one of the accused in the furtherance of their common design to rape his daughter. If so, the killing was murder and the finding of guilty of such crime is proper as to all three accused, no matter which one actually did the stabbing (CM ETO 5584, Yancy; CM ETO 4292, Hendricks; CM ETO 1922, Forester and Bryant). As previously stated, theevidence is clear that death resulted from a knife wound inflicted by someone other than the deceased. On the evening of his death, shortly after 2000 hours, Lefevre heard cries for help emanating from his house, in response to which he left the residence of his employer to return home some 300 meters away. It was approximately at this time that his wife and daughter cried out for help and, pursued by accused, fled from their house. The daughter ran in the direction of the home of her father's employer and was apprehended on the road about 25 meters from the Lefevre house by two of the accused. One of the accused admits that at approximately this point they encountered a man on the road who, however, did not stop them. The accused unanimously agree that only two of them were present at this particular time, although they are in disagreement as to whether Williams or Bailey was absent. In any event, this person did not rejoin his companions until after they had taken the girl into the field where the first rapes occurred. The deceased was not seen again until his wife returned home with her neighbors. They found him outside the house suffering from a knife wound which was bleeding profusely and from which he died 10 or 15 minutes later. At that time he said "Oh, those salauds". The next day, bloodstains were found on the road between Lefevre's house and his employer's, approximately 50-60 meters from the former. One of the accused admitted having a knife large enough to require a scabbard at the outset of their expedition. The ultimate disposition of this knife is not shown and apparently the weapon with which Lefevre was stabbed was never found. These evidential facts taken together give rise to the unescapable inference that accused were observed by the deceased in the abduction of his daughter, and that one of them deliberately and coldbloodedly stabbed him with the intent and purpose of killing or disabling him so as to facilitate the execution of their jointly conceived plan of raping Marguerite. The findings of guilty of murder are therefore sustained

by the evidence (CM ETO 5068, Rape and Holthus and authorities therein cited; CM ETO 1453, Fowler).

6. The charge sheet shows the respective ages of the accused as follows: Bailey - 30 years and one month; Williams - 27 years and seven months; Jones - 31 years and ten months. Bailey enlisted 20 September 1941 at Camp Livingston, Louisiana. Williams was inducted 6 February 1943 at New York, New York. Jones was inducted 6 May 1942 at Fort Benning, Georgia. None 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 any of accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient as to each accused to support the findings of guilty and the sentence.

8. A sentence of death is authorized upon conviction of either rape or murder by Article of War 92.

B. Franklin Ritz Judge Advocate

Wm. T. Burnett Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(166)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates MILBERT BAILEY (34151488), JOHN WILLIAMS (32794118), and JAMES L. JONES (34221343), all of 434th Port Company, 501st Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published 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 7518. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7518).

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

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

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 116, ETO, 15 April 1945.)

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

BOARD OF REVIEW NO. 2 14 MAR 1945

CM ETO 7532

UNITED STATES	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U.S. Army, 7 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. No place of confinement designated.
Private PAUL J. RAMIREZ (39418219), Company B, 318th Infantry	)	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 Paul J. Ramirez, Company B, 318th Infantry, did, in the vicinity of Lixieres, France, on or about 26 October 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 Lixieres, France, on or about 31 October 1944.

Specification 2: In that * * * did, in the vicinity of Lixieres, France, on or about 8 November 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 in the vicinity of Feulen, Luxembourg, on or about 16 January 1945.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found, of Specification 1 of the Charge, not guilty, but guilty of absence without leave at the time and place and for the period alleged in violation of Article of War 61; of Specification 2 of the Charge, guilty, excepting the words "surrendered himself in the vicinity of Feulen, Luxembourg, on or about 16 January 1945" substituting therefor the words "returned to military control at the 503rd Military Police Battalion, Nancy, France, on or about 3 January 1945", of the excepted words not guilty and of the substituted words guilty; and guilty of the Charge. 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 40 years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that, in the middle of October, accused's company was in a defensive position in the vicinity of Nomeny, France. From the 26th to the 31st of October it was in Lixieres, France, and on 8 November 1944 again at Nomeny, approximately five kilometers from Lixieres. The company first sergeant, the only witness, testified that in the month of November

"we were in the attack until the first weeks of December when we went into a rest period in Freyming, and from there we went to Saar Union and then we went into the attack at Belgium and Luxembourg" (R7).

Accused first arrived in the company 5 October 1944

"and on the 7th, he went to the hospital with an injury and he was in the hospital approximately two weeks and then he went back to duty" (R7).

He was absent without leave from 26 to 31 October 1944 (R7-8). On 8 November he again went absent without leave (R8) and so remained until he

"returned to military control on the

3d of January 1945 at Nancy, France, reporting to the commanding officer of the 503rd MP Battalion" (R10).

4. The defense presented no evidence. Accused after being advised of his rights, elected to have defense counsel make the following unsworn statement for him:

"I would like to state at this time that I have been returned three times from my company for battle fatigue. The first time was because of a shell concussion that landed very near to where I was and I was in the hospital for two weeks. I returned to the company and had to be evacuated once again for battle fatigue. I remained in the hospital for a few days, returned once again and was evacuated once more for battle fatigue. I was examined by Major Tuerk after being returned for battle fatigue the third time and he told me I should have been his patient. I talked to my company commander and he told me nothing could be done about it" (R11).

5. When a specification alleges desertion with intent to avoid hazardous duty, this intentmust be proved and the burden is on the prosecution to establish it (CM 224765 Butler). 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 the specific hazardous duty of which he had knowledge at the time of his departure. In the case under consideration, with reference to Specification 2 of the Charge, 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 Nomeny 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 Nomeny, France. There is no evidence of notice to or knowledge on the part of the accused of any specific hazardous duty facing him as a member of his company on or about the date of his initial absence. To infer such knowledge from the meagre, 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 thebroad 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.

6. The charge sheet shows that accused is 23 years 11 months of age, and that, with no prior service, he was inducted 11 August 1943.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2 and of the Charge as involves findings that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until he returned to military control at Nancy, France on 3 January 1945, in violation of Article of War 61, and legally sufficient to support the sentence.

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

[signature] Judge Advocate

(Dissent) Judge Advocate

Benjamin P. Sleeper Judge Advocate

1st Ind.

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

1. In the case of Private First Class ALEX G. ONDI (35927291), Company K, 104th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The accused and his companion Montecino, committed a most flagrant military offense, in the immediate presence of the enemy, which they deliberately persisted in for several hours. It is difficult to imagine any offense more serious. Their conduct would have been more appropriately charged as misbehavior before the enemy in violation of Article of War 75. Conviction under the latter article brands one as a cowardly skulker, recreant to the primary duty of soldiers to fight the enemy. Disobedience of orders, whatever the circumstances, is generally regarded as an altercation between an officer and a soldier; and there is always an inclination to make allowances for the soldier. The sentence adjudged and approved is the equivalent of a life sentence, but is more vulnerable to public opinion, as unreasonably severe, unconsidered and imposed in a spirit of revenge rather than as an intelligent, reasoned, judicial judgment. The court-martial system is again on trial. The critics will not be judicial either but we should not make ammunition for them. A few bad practices, a dozen vulnerable cases held up to public view, will indict the whole system.

3. Penitentiary confinement is not authorized upon a conviction of the 64th Article of War (AW 42). The place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published court-martial order.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office

is CM ETO 7549. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7549).

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

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

BOARD OF REVIEW NO. 1

26 FEB 1945

CM ETO 7549

U N I T E D S T A T E S	)	26TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 26, U. S. Army, 8 February 1945.
Private First Class ALEX G. ONDI (35927291), Company K, 104th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 75 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 64th Article of War.

Specification 1: In that Private First Class Alex Ondi, Company K, 104th Infantry, having received a lawful command from Second Lieutenant Philip A. Revolinsky, Company K, 104th Infantry, his superior officer, to "Get out of your hole and get up to I Company", did at Nothum, Luxembourg, on or about 11 January 1945, willfully disobey the same.

Specification 2: In that * * * having received a lawful command from First Lieutenant Columbus J. Seawell, Company K, 104th Infantry, his superior officer,

to "Come out of your hole", did at Nothum, Luxembourg, on or about 10 January 1945, willfully disobey the same.

He pleaded guilty to Specification 1 and not guilty to Specification 2 of the Charge and to the Charge. Thereafter, during the trial, upon direction of the law member, the plea of guilty to Specification 1 was withdrawn as having been improvidently made and a plea of not guilty substituted therefor. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and 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 75 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The facts proved by the prosecution are as follows:

On 10-11 January Company K, 104th Infantry, was stationed at a crossroads northeast of Nothum in the vicinity of Wiltz, Luxembourg. The enemy was immediately in front of the company's position. Each combatant force was in foxholes. Some of the American foxholes were only 30 yards from those of the Germans. Any movement in one line could be heard in the other line. The Americans

> "were taking a good many pot shots during the day and night. If they moved we fired; if we moved they fired" (R12).

The artillery fire from the enemy was unusually heavy (R9,12). The company's actual strength was about 40 men (R12,14), but its Table of Organization strength was 104 men (R14). The first platoon consisted of its commander, Second Lieutenant Philip A. Revolinsky, Staff Sergeant Frank M. DeChristopher, nine riflemen, and four machine gunners (R16,17). The company commander on the above dates was First Lieutenant Columbus J. Seawell (R12). DeChristopher was leader of the first squad of the first platoon. Accused was a rifleman in DeChristopher's squad (R8).

Company I, of the 104th Infantry, was on the left of Company K at a distance of about 800 yards. Orders were issued which required Company K to maintain contact with Company I commenc-

ing at 1800 hours on 10 January by means of patrols which were chosen alternately between the first and second platoons (R9,12,16).

At about 1800 hours on 10 January accused, Private Charles J. Montecino (see CM ETO 7547, Montecino (Military Justice Division)) and a Private Van Winkle were in a foxhole. The first squad then consisted of six men. DeChristopher at 1800 hours went to the foxhole and directed the accused to prepare his equipment for patrol duty. Accused made no reply nor did he prepare his equipment. He made no movement indicating his intention to proceed on the patrol. DeChristopher reported accused's conduct to Lieutenant Revolinsky, the platoon leader, who proceeded to accused's foxhole and ordered accused and companions to leave the hole. They made no reply (R8,10). DeChristopher again ordered accused to leave the foxhole and warned him that he (DeChristopher) would report his refusal to the company commander. Receiving no compliance with his order, DeChristopher went to Lieutenant Seawell and reported the situation. The company commander directed DeChristopher to order the three men to come to his (Seawell's) foxhole (R9,12). DeChristopher returned to accused, Montecino, and Van Winkle and exhorted them to leave the hole. They refused, and about five minutes later DeChristopher returned to Lieutenant Seawell and reported the failure of his effort (R9). The company commander then went to accused's foxhole. He removed a shelter half which covered the hole and knelt down. The three soldiers were lying in the foxhole covered with blankets (R14). He gave accused and companions a direct order, "Come out of the hole" (R13). One of the men replied "'I wont come out of the hole'". Lieutenant Seawell was convinced that accused was in the hole and awake but he was unable to state that it was accused who answered (R13). The officer then stated, "'This will be taken care of in the morning'", and one of the soldiers asked, "'What's going to happen to us'"? (R13,14). The company commander did not know the sound of accused's voice. He stated that it was not accused who asked the question

> "because the man who asked that question was on the light side of the foxhole. He was also a man who, I would say, that I knew slightly better than the other two" (R15).

The men did not leave the hole nor did they go on patrol duty. DeChristopher went on the patrol in place of accused (R9,13,14).

At approximately 0130 hours on 11 January 1944, Lieutenant Revolinsky stood guard. He went to the foxhole occupied by accused, Montecino and Van Winkle. He removed a shelter half from the hole and found the three soldiers asleep. He poked them with his carbine until he was assured that they were awake. He saw them move. The platoon commander ordered them "to get up and get out of the hole". He received no answer (R17). He then explained to them that they were misbehaving before the enemy and would be court-martialed, and

> "that it was their duty to get up and maintain contact with another company as the rest of the members had done" (R17).

The platoon commander further testified:

> "I practically pleaded with them, and I told them that would be their last chance, and that they would be taken down as prisoners if they refused. * * * One voice came from the hole, I'm not quite sure if it was Van Winkle, and he said that he would go, but they wont go, so I wont go either. * * * I further pleaded with them that if they refused to do their job, the least they could do was to stand guard because we were so close to the enemy, and they refused to do that, too" (R17).

There was no activity around accused's foxhole for three-quarters of an hour later (R17).

In an extra-judicial pre-trial statement voluntarily given by accused, he stated:

> "First, I was told that I would go at 0200 on 12 January. Then Sgt Christopher said he would get us out at 2400 to go on patrol. I was with two other men. We were awakened at 2200 and we said we would go at 2400 but not at 2200 because it was not our turn. We then went back to sleep. Then Lt Revolinsky came down to our hole and said 'You Sons of a Bitches, get out of your hole'. I said, 'We're no Sons of a Bitches'. He walked away.

After that I do not remember being awakened" (R21; Pros.Ex.A).

4. Accused elected, after explanation of his rights to him, to make an unsworn statement. He asserted he was married and was the father of a daughter, nine years of age, and of a son, two years of age, and that his wife is an invalid incapable of working. He entered military service in February 1944. With respect to his physical condition he declared:

"I was in the 17th Replacement Center, and I complained that I had trouble with my leg, and the company commander arranged to have me go to Paris to have an X-ray taken. I went to the hospital and a captain took an X-ray of my leg. He said there was a little tumor there and you could feel it on the outside with your hand. He said he didn't know what it was. I told him I was in the infantry and that we made long marches, and he said he would make out a slip so that I wouldn't have to go on marches, although he said I could do light duty. He made out the slip and I took it back to the company commander. They made me a battalion guard at the replacement center, and I stayed on guard for two days, and a truck came up for replacements and my name was on the list to go to the 26th Division. I was on guard at the time they told me I was to go to the 26th Division. I came to the 26th Division and they put me in Headquarters on the weapon's patrol, and I worked on the weapon's patrol for a while. I don't know how long I worked at Headquarters in the A & P Platoon, but we carried ammunition and were subject to shelling quite often, but that's beside the point. Then they ordered me to "K" Company, and I told them about my leg. They asked me if there were any broken bones in it. I said there were no broken bones, but there was a tumor that makes my leg give way. They said there were no broken bones so we will put you back on duty, and I went up to "K" Company and stayed there for two months until this episode" (R23).

He further stated that he was mistaken in his pre-trial statement in the assertion that it was Lieutenant Revolinsky who came to the foxhole. It was Lieutenant Seawell.

> "Lt. Seawell had come down to our hole and pulled back the cover, and our clean rifles lay on the cover, and it was a dark night and when he pulled back the cover the rifles fell in the snow. He said, 'You son-of-a-bitches come out of that hole'. I didn't think I was refusing to obey a direct order because I didn't think I was a 'son-of-a-bitch', so he didn't give me an order there" (R24).

5. a. Specification 1. Prosecution's evidence is clear and positive that at 0130 hours on 11 January 1945 Lieutenant Revolinsky gave to the inmates of the foxhole a direct order "to get up and get out of the hole" and that the three men refused to obey this order. While it is alleged that the order was to "get out of your hole and get up to Company I", this variance between the allegation and proof is immaterial in view of Lieutenant Revolinsky's testimony that he, at the time he gave his order, explained to the three soldiers the consequences of their refusal to obey his order and "pleaded" with them at least to do guard duty if they refused to go on patrol. It is clearly evident that accused refused to leave the foxhole because he knew that he had been ordered to patrol duty with the mission of maintaining contact with Company I. His refusal to comply with the order was premised on his objection to patrol duty, and not merely on his desire to remain in the foxhole.

Accused in his pre-trial statement admitted he was in a foxhole with two other soldiers at the time and place alleged. The testimony of prosecution's witnesses is of such substantial nature that the court was fully justified in inferring therefrom that accused was one of the soldiers in the foxhole; that he knew the order was given by a superior officer; that he fully understood its meaning and portent; and that he willfully disobeyed same. Beyond all question the order was a legal one. All of the elements of the offense (MCM, 1928, par. 134b, pp.148,149) were proved and accused's guilt was established beyond doubt (CM ETO 2469, Tibi; CM ETO 3046, Brown; CM ETO 3078, Bonds et al; CM ETO 3147, Gayles et al; CM ETO 3988, O'Berry).

b. Specification 2. Likewise the evidence established conclusively that the company commander, Lieutenant Seawell, at about 1830 hours on 10 November 1944, went to the foxhole occupied by accused and gave him the direct and positive order, "Come out of the hole", which accused wholly ignored and refused to obey. There was substantial evidence from which the court was entitled to conclude that accused was in the foxhole at the time Lieutenant Seawell gave the order; that accused knew it was given by a superior officer; that he fully understood its purpose and meaning and deliberately and willfully refused compliance with it. Accused's guilt of the offense charged was proved (see authorities cited in par.5a, supra).

6. During the course of presentation of prosecution's case, it was shown that just after 1800 hours on the evening of 10 November accused committed two other offenses, viz., (a) disobedience of a direct order of Sergeant DeChristopher (AW 65) and (b) disobedience of a direct order of Lieutenant Revolinsky (AW 64). Accused was not charged with these derelictions. The admission of this evidence was proper as it was entirely relevant to the offenses charged. It served to inform the court as to the surrounding facts and circumstances of the offenses with which accused was charged.

> "The general rule is well settled that all evidence must be relevant. If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral and unrelated fact. Evidence of other acts to be available must have some logical connection and reveal evidence of knowledge, design, plan, scheme, or conspiracy of the crime charged" (Underhill's Criminal Evidence, 4th Ed., sec.184, pp.333-335).

The Board of Review in CM ETO 895, Davis et al approvedthe foregoing principle. In said holding there is an illuminating citation of authorities which support the rule. There was no error in admitting the evidence in question.

7. The charge sheet shows that accused is 27 years and 11 months of age. He was inducted 25 January 1944 at Cleveland, 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 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. Confinement in a penitentiary is not authorized for a violation of Article of War 64 (AW 42). The designated place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir.210, WD, 14 Sep.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

29 MAY 1945

CM ETO 7553

U N I T E D S T A T E S	XIX CORPS
v.	Trial by GCM, convened at Heerlen, Holland, 13 December 1944. Sentence as to each accused: Captain BESDINE: Dismissal, to pay a fine of $2000 and confinement at hard labor for one year and further additional confinement until said fine is paid but for not more than one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Lieutenant SCHNURR: To forfeit $70 of his pay per month for ten months.
Captain JEROME J. BESDINE (O-481117) and First Lieutenant ROBERT S. SCHNURR (O-1183616), both of Headquarters, 228th Field Artillery Group	

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

2. Accused, Captain Jerome J. Besdine, was tried upon the following charges and specifications:

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

Specification 1: In that Captain Jerome J. Besdine, Headquarters 228th Field Artillery Group, did, without proper leave, absent himself from his organization and duties at or near Eigelshoven, Holland, from about 2 November 1944 to about 3 November 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization and duties at or near Eigelshoven, Holland, from about 7 November 1944 to about 8 November 1944.

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

Specification 1: (Findings of guilty disapproved by confirming authority)

Specification 2: (Findings of guilty disapproved by confirming authority)

Specification 3: In that * * * did, at or near Brussels, Belgium, on or about 2 November 1944, wrongfully exchange Belgian francs for Dutch guilders in violation of Administrative Memorandum No. 35, Supreme Headquarters, Allied Expeditionary Force, 25 October 1944, subject: "Transactions in Currency and Foreign Exchange Assets", thereby unlawfully profiting to the extent of approximately five hundred and thirty-five dollars ($535.00).

Specification 4: In that * * * did, at or near Brussels, Belgium, on or about 7 November 1944, wrongfully participate in a transaction involving the exchange of Belgian francs for Dutch guilders in violation of Section IV, Memorandum No. 98, Ninth United States Army, dated 3 November 1944, prohibiting such transactions except through authorized agencies, thereby unlawfully profiting to the extent of approximately one thousand four hundred and twenty-five dollars ($1,425.00).

He pleaded guilty to Charge I and the specifications thereunder, not guilty to Charge II and the specifications thereunder, and was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to pay to the United States a fine of $2000.00, to be confined at hard labor, at such place as the reviewing authority may direct, for a period of one year, and to be further confined at hard labor until said fine is so paid, but for not more than one year, in addition to the one year thereinbefore adjudged. The reviewing authority, the Commanding General, XIX Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations disapproved the findings of guilty of Specifications 1 and 2

of Charge II, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Accused, First Lieutenant Robert S. Schnurr, with his consent was tried with Captain Besdine for violation of Article of War 96 as set forth in the Charge and two specifications thereunder preferred against him. He pleaded not guilty and was found not guilty of Specification 1 and guilty of Specification 2 and the Charge. No evidence of previous convictions was introduced. He was sentenced to forfeit $70 of his pay per month for ten months. The reviewing authority approved the sentence and ordered it executed.

The proceedings were published by General Court-Martial Orders No. 25, Headquarters XIX Corps, APO 270, 29 December 1944.

4. The undisputed evidence as to Captain Besdine excluding that under Specifications 1 and 2 of Charge II, showed as follows:

a. Charge I, Specifications 1 and 2.

Accused's absence without leave as alleged in each specification was conclusively established by his pleas of guilty (R7) and the evidence that he did not have permission to be absent at the times stated in the specifications (R16,18,19).

b. Charge II, Specifications 3 and 4.

Just prior to departure from England for France, accused, as well as other officers of his organization, was warned by a superior officer "that it was illegal and wrong to speculate in foreign currency and * * * that officers that had done such in Germany and in the army of occupation in the last war got into very serious trouble" (R17).

On or about 2 November 1944 accused was driven to Brussels, Belgium, by Technician Fifth Grade Frederick T. Corey, Headquarters 228th Field Artillery Group, and while there was approached by an unidentified civilian who proposed an exchange of Belgian for Dutch currency with resultant profit to the accused. As the first act in the proposed money-making scheme accused delivered to the civilian Belgian francs and received in return "double the amount in Guilders" which totalled 3000 guilders (R8-9,27-28,32; Pros.Ex.H). Accused and Correy were in Brussels two nights (R8-9). Thereafter accused exchanged the guilders for Belgian francs at one of the Corps finance offices (R28; Pros.Ex.H). On 6 November accused was again driven to Brussels, by another soldier. They remained in the city until 8 November (R15). Accused "made another deal" similar to the first one with the civilian and this time received 6000 guilders (R28; Pros.Ex.H).

These guilders were converted into Belgian francs for accused through the offices of his friend, Lieutenant Schnurr, who on 10 November delivered the money to Corey and another enlisted man and sent them to the Corps finance office. There they received Belgian francs for the guilders and delivered the exchanged money to Lieutenant Schnurr (R9,10,11; Pros.Exs.A,B,C, D,E; R22,23,24,32-33,34,35,36). The amount of profit, if any, was not disclosed.

The court took judicial notice of Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Force, dated 25 October 1944, subject: "Transactions in Currency and Foreign Exchange Assets" and Memorandum No. 98, Headquarters Ninth United States Army, dated 3 November 1944, also entitled "Transactions in Currency and Foreign Exchange Assets" (R28). The memoranda referred to were not offered in evidence, but the latter memorandum is a republication in its entirety of the former, each providing:

> "2. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from * * *
>
> b. Participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies * * *
>
> e. Participating in the transfer of any currency against any other currency on behalf of persons not belonging to the Allied Forces in liberated or occupied territory".

In addition, the directive of 25 October contained the following relevant paragraphs:

> "4. This order applies to all personnel in occupied German territory, or liberated territory who are subject to Allied military, naval or air force law, except those serving in and subject to the laws of their own country * * *
>
> 6. The provisions of this order will be brought to the attention of all personnel and will be conspicuously posted in appropriate places".

6. The defense stated that the rights of accused had been explained to him and he elected to remain silent (R31).

7. a. Specifications 3 and 4 of Charge II each allege accused's wrongful money transaction in violation of the memoranda respectively described and also set forth that he was "thereby unlawfully profiting" to the extent of the amount of dollars respectively stated. The evidence did not disclose the amount of the profit. The allegation with respect to the profit in each instance was surplusage, and may be disregarded (Cf: CM ETO 6694, Warnock). The offense on each occasion was completed when the exchange of money was effected.

b. The evidence, including accused's admission, is unimpeached that he violated the specific terms of the prohibition in the two memoranda, of which the court took judicial notice, by participating in transactions involving the exchange of one currency, Belgian francs, against another currency, Dutch guilders, through other than authorized agencies. The only question which requires consideration is whether such memoranda had the effect of legal, operative standing orders, binding upon accused at the time of his alleged offenses.

As to Specification 3, Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Force, dated 25 October 1944, (Revised 7 December 1944), is a "restricted" document, signed "By command of General Eisenhower" by the Adjutant General, and marked "Distribution 'D'". As to the authenticity of this memorandum there can be little question. The action of the President of the United States in concurring, on behalf of the United States, in the appointment of General Eisenhower as Supreme Commander of the British and United States Expeditionary Forces (The Stars and Stripes, 28 December 1943), later designated as Supreme Headquarters, Allied Expeditionary Force, was indisputably in the exercise of his constitutional powers in time of war as Commander in Chief of the Army. It was therefore binding upon all within the sphere of the President's legal and constitutional authority (United States v. Eliason (1842), 16 Pet. (41 U.S.) 291,301, 10 L.Ed.968,972) and could not be set aside by the civilian courts as it was not in conflict with the Constitution or laws of Congress (Ex parte Quirin, 317 U.S. 1,25, 87 L.Ed. 3,11 (1942)). The Board of Review will likewise not question the authority of General Eisenhower as Supreme Commander of the Allied Expeditionary Force to issue legal directives binding upon United States Army personnel of his command. In promulgating orders in their general military capacity, superior military commanders directly represent, and exercise the authority of, the Commander in Chief (Winthrop's Military Law and Precedents (Reprint, 1920), p.27 fn.10, p.39). Thus the Board likewise will not question the legality of an order promulgated by the Supreme Commander regulating matters of currency among United States Army personnel of his command in the absence of indication that it is in conflict with mandate of higher authority. The Board is of the opinion that the memorandum in question was a valid and legal directive.

The prohibition herein involved is a matter of importance, directive in nature and evidently of permanent duration. In paragraphs 4 and 6 it is referred to as "this order". It is thus in the nature of a general order, apart from its designation as "Administrative Memorandum", which in view of the foregoing is not controlling (AR 310-50, WD, 8 Aug. 1942, par.2). That it was operative on the date of accused's offense alleged in Specification 3, Charge II (2 November 1944)seems clear. It became effective as part of the written military law (Winthrop's Military Law and Precedents (Reprint, 1920), pp.17,38; 6 CJS, sec.2, pp.348-349), on the date of its promulgation, i.e., the date of its release and distribution by deposit in the mails (AR 310-50, supra, par.14b). In the absence of evidence to the contrary, it may be presumed that the directive was released and distributed on or about the date it bears in the regular course of performance of their duties by the officers concerned (Cf: CM ETO 5234, Stubinski, and authorities therein cited). Accused was thus chargeable with notice of the prohibition (CM ETO 1538, Rhodes; CM ETO 1554, Pritchard).

The transaction alleged in Specification 4, Charge II (7 November), violated the directive above discussed. Assuming that the draughtsman of this specification was not aware of said directive, this does not prevent its being applicable where the facts alleged in the specification set forth a violation of its provisions.

> "We must look to the indictment itself and if it properly charges an offense under the laws of the United States that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute" (Williams v. United States, 168 U.S. 382, 389, 42 L.Ed. 509,512 (1897).

The Board of Review has heretofore followed the principle of the Williams case in CM ETO 2005, Wilkins et al; CM ETO 1249, Marchetti and CM ETO 1109, Armstrong. Reference is made to said holdings for a detailed discussion thereof. It is applicable in the instant case.

Memorandum No. 98, Headquarters Ninth United States Army, dated 3 November 1944, was also violated by accused, whose organization, the 228th Field Artillery Group, was a component part thereof. With rspect to its promulgation, the Army Commander had authority and power equivalent to that of the Supreme Commander.For the reasons and the authorities above set forth, the Board of Review is of the opinion that it was a legal and valid directive.

8. The charge sheet shows that accused is 27 years of age. He entered on active duty 11 July 1942 in the Army of the United States for the duration of the war plus six months. No prior service is shown.

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 as modified and confirmed.

10. The penalty for violation by an officer of Article of War 96 is dismissal or such other punishment as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain JEROME J. BESDINE (O-481117), Headquarters, 228th Field Artillery Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as modified and confirmed and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7553. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7553).

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

(Sentence ordered executed. GCMO 196, ETO, 7 June 1945.)

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

BOARD OF REVIEW NO. 3 23 MAR 1945

CM ETO 7570

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
First Lieutenant JOHN F. RITNER (O-1552587), Ordnance Department, now at 19th Replacement Depot	) Trial by GCM, convened at Etampes, France, 11 and 23 November 1944. Sentence: To be dismissed the service.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by confirming authority).

Specification 2: In that 1st Lieutenant John F. Ritner, 586th Ordnance Company (Am), Ordnance Department, did at Adlestrop, England, on or about 28 April 1944, wrongfully fondle Staff Sergeant Augustus B. Taylor, 586th Ordnanae Company (Am), by placing his hand on his penis, and attempting to kiss, the said Staff Sergeant Augustus B. Taylor.

Specification 3: In that * * * did at Adlestrop, England, on or about 18 June 1944, wrongfully fondle Private Jerome Moolenaar, 586th Ordnance Company (AM), by attempting to unbutton the trousers of, and attempting to get in bed with, the said Private Jerome Moolenaar.

He pleaded not guilty to and was found guilty of the Charge and all specifications except, in Specification 3, the words "Adlestrop, England", substituting therefor the words "Cinderford, England", of the excepted words not guilty and of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 1 of the Charge, and confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused's unit, the 586th Ordnance Company (Am), arrived in England in October 1943 (R8) and was at Adlestrop from approximately 15 April to 29 May 1944 (R12). At midnight, on or about 28 April 1944, accused entered the pup tent occupied by Technical Sergeant Charles C. Chaplin and Staff Sergeant Augustus B. Taylor, both members of his organization (R5,8). Accused's entrance awakened Chaplin who shone his flashlight on the officer, identifying him (R5,6). After a conversation with Chaplin, in which he also verbally identified himself, accused attempted to kiss Taylor, caused his hands to roam over Taylor's body and touched Taylor's penis (R8,9). Taylor testified:

"My first reaction, naturally, was to stop him. I got hold of his hand and pushed him away. Then, he tried to kiss me, but I moved my head away. He tried to put his hand back on my penis. We sort of struggled, then I pushed him to the front of the tent and told him to leave. He promised to be quiet or words to that effect, and then I went to sleep" (R9).

Technician Fifth Grade Jerome Moolenaar, of accused's organization, testified that, while bivouacked in England, one night about 1:30, accused came into his tent. He identified accused by means of his flashlight. After remarking "Why don't you leave me alone?" the other enlisted man who shared Moolenaar's tent departed. Accused

thereupon proceeded to unbutton Moolenaar's pants and touch his privates. Moolenaar told accused he "didn't go in for that stuff" and pushed his hand away; after which accused remained in Moolenaar's tent until about six o'clock in the morning (R10,11).

On both occasions, the enlisted men concerned smelled liquor on accused's breath (R9,10).

4. For the defense, Captain Thomas J. McDonald, 586th Ordnance Company (Am), testified that he had been with the company since April 1943 and that accused was a member of his unit at that time. In June 1944 his organization was stationed at Cinderford, Wales (R12) or England (R13). Accused was still under his command on 18 June 1944 (R14). After his arrival in France, witness received "a report of some sort" of accused's discharge from the hospital. He identified a "certified" report which was received, marked Defense Exhibit A and read to the court, but which was not attached as an exhibit to the record proper (R12,13). Such a report does, however, appear among the accompanying papers and has been considered by the Board of Review as evidence for the defense. It shows that because of the accusations reflected by the charge sheet, accused was hospitalized from 20 June 1944 until examined by a Board of Medical Officers on 14 July 1944. It further shows accused's denial to the examining Medical board of having made the homosexual advances charged or "that he is a homosexual or that he has ever indulged in homosexual acts";and the Board's findings that accused was not a true homosexual, that he was deemed reclaimable and considered fit for further rehabilitation and that "alcoholic over-indulgence was a factor in the manifestation of the alleged overt homosexuality in /his/ case".

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

6. Substantial evidence supports the court's findings of guilty of Specifications 2 and 3 alleging wrongful fondling of the enlisted men respectively named therein. The acts alleged and shown were indecent; and each constituted a violation of Article of War 96 (CM 235746, Samuels, 22 BR 229 (1943); CM 236216, Richards 22 BR 351 (1943)). The only showing as to the date and place of the last offense was that it occurred in England, where accused's organization arrived in October 1943, and prior to accused's hospitalization on 20 June 1944. Since limitation had not run from the earliest possible date upon which such offense could have been committed in England, the vagueness in proof of time is not fatal (CM ETO 2972, Collins); and since the specific place, in this instance, is not of the essence of the offense (it being shown it occurred at accused's company's bivouac in England), failure to more particularly

established it was not material (Dig.Op. JAG, 1912-40, sec.416(10), p.270).

7. The charge sheet shows that accused is 25 years of age and that, with no prior service, he was inducted 17 March 1941.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed. A sentence of dismissal is authorized upon conviction of an officer of violation of Article of War 96.

Benjamin R Sleeper Judge Advocate

SICK IN QUARTERS Judge Advocate

B. V. Dewey Jr Judge Advocate

1st Ind.

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

1. In the case of First Lieutenant JOHN F. RITNER (O-1552587), Ordnance Department, now at 19th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 endorsement. The file number of the record in this office is CM ETO 7570. For convenience of reference, pleaase place that number in brackets at the end of the order: (CM ETO 7570).

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

(Sentence ordered executed. GCMO 89, ETO, 31 Mar 1945.)

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

BOARD OF REVIEW NO. 3

28 MAR 1945

CM ETO 7584

U N I T E D S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Captain HARVEY F. EMERY (O-451277), 29th Antiaircraft Artillery Group	)	Trial by GCM, convened at Namur, Belgium, 26 January 1945. Sentence: Dismissal and total forfeitures

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

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

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

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

Specification: In that Captain Harvey F. Emery, 29th Antiaircraft Group did, at or near Namur, Belgium, on or about 1 January 1945, fail to repair at the fixed time to the properly appointed place of duty.

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

Specification: In that * * * having received a lawful command from Colonel Webster F. Putnam, his superior officer, to dress and report to him at the office immediately, did at or near Namur, Belgium, on or about 1 January 1945, willfully disobey the same.

He pleaded not guilty and, was found guilty of Charge I and its Specification, guilty of Specification/Charge II, except the words "willfully disobey" substituting therefor the words "fail to obey", and not guilty of Charge II, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Advance Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, 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 was substantially as follows:

On or about 27 December 1944, accused was instructed by his immediate superior to report each morning at 0730 hours to the gun operations room of the group headquarters to take a summary of the reports and activities of the various gun positions maintained by the battalions for the previous day and night. This was a routine duty and accused was the only officer charged with its performance. Prior to 1 January 1945, he performed the duty as directed, but on that date he failed to appear at the gunnery room at the appointed time or at any other time during the day (R9-10). January 1st was not a holiday and, as all officers in the command had been notified, the hours of duty that day were the same as any other (R12-13).

Colonel Webster F. Putnam, Commanding Officer, 29th Antiaircraft Artillery Group, visited the gunnery room at 0810, 1 January 1945. He noticed that accused was absent and directed the S-2 to send for him. The colonel returned several times thereafter and finding him still absent, went personally to accused's quarters. This was at 1110 hours. Accused was not in his room but was found in the room of a friend. He was in his underclothes and had apparently just stepped out of bed. The colonel ordered him to dress and report to him at his office immediately. Accused replied "Yes, sir" and the colonel added that "if he didn't come over this time I would have him brought over". He asked whether accused understood this and he said that he did. The colonel returned to his office and waited until 1220 hours. When accused did not appear, he returned to his quarters and met him coming downstairs. Accused was fully dressed, although not for out-of-doors. In response to the question why he had not reported as he had been ordered, he explained that he had to get dressed. The headquarters was about a three or four

minute walk from accused's quarters. He did not appear to be ill or intoxicated and was at no time disrespectful in his language. The colonel was wearing the insignia of his grade at the times he spoke to accused and was recognized by him as his commanding officer (R11-13).

4. Accused, being warned of his rights by the law member (R17), elected to testify under oath in his own behalf. He admitted receipt of instructions to report at the gunnery room each morning at 0730 hours and stated that he had complied with them previously to January 1st but did not do so on that day. On 31 December, he attended a party at which he had several drinks and from which he returned at about 0030 or 0100 hours, 1 January. He retired and upon awakening next morning, went to the room of a friend to get some aspirin. Feeling ill, he lay on the bed in his friend's room. The next thing he recalled was Colonel Putnam's pounding on the door. He opened it and the colonel asked what he was doing there. He replied that he was resting, whereupon the colonel said "Get dressed and get over to headquarters before I have you drug over". Accused said "yes, sir" and proceeded to dress. Because of feeling ill, he was slow in dressing, and when he finished, he decided that he needed a cup of coffee. As he was going downstairs to the mess hall, fully dressed but without overcoat or weapons, he met Colonel Putnam who asked where he had been. Accused told him he had been getting dressed. The colonel then put him under arrest. This occurred shortly after 1200 hours. Accused intended to go to see the colonel, and in his 18 years of military service had never deliberately disobeyed an order. His permanent rank in the regular army was that of master sergeant (R18-22).

Other evidence for the accused consisted of the testimony of a fellow officer corroborating his statement that he returned from the party at about 0030 hours, 1 January 1945 (R14-15), as well as testimony of two additional officers to the effect that while accused was dressing between 1130 and 1200 hours, he told them that the colonel had been in and told him to report to the office. The witnesses had the impression that he was getting dressed for the purpose of complying with the colonel's instructions (R13-15).

5. Accused was convicted of a failure to repair at the fixed time to his properly appointed place of duty in violation of Article of War 61 and, by exception and substitution, of failing to obey a lawful order in violation of Article of War 96. In each case, the record of trial is legally sufficient to support the findings of guilty.

As to the failure to obey, the evidence shows that accused received and understood a lawful order from his recognized

to
commanding officer to report/him at his office immediately. Although he had only to dress and walk a distance of two blocks, he failed to obey within a full hour and when finally encountered by the colonel at his quarters, still apparently had no immediate intention of complying with the order. There is no doubt that under these circumstances, a failure to obey in violation of Article of War 96 existed. The order as given contemplated immediate compliance and in view of all the evidence, the court was justified in concluding that accused's delay in obeying it, assuming that he intended to obey it, was unreasonable and inexcusable (CM 226554, Crozier, 15 B.R.115,1942). In reaching its finding of guilty by exception and substitution, the court failed to include the phrase, "the said - being in the execution of his office", found in the model specification contained in Appendix 4, MCM, 1928, page 255. This phrase, however, may be regarded as surplusage in a specification alleging failure to obey, such import as it ordinarily has being supplied by the allegation that the order given was a "lawful command" (CM 196923, Frakes, 3 B.R. 47,1931).

With respect to the Charge under Article of War 61, the only question meriting discussion arises out of the absence of any allegation in the specification describing the nature, time and place of the duties to which accused is alleged to have failed to repair. This was a defect, but the defense raised no objection thereto and there is nothing in the record to indicate that accused was in any way misled or prejudiced in the preparation or presentation of his defense as a result of it. Hence, it need not be regarded as requiring disapproval of the finding of guilty reached by the court (CM 234414, Uihlein, 20 B.R.365,1943).

6. It is noted that the investigating officer in the case was appointed by the accuser. Such appointment was undoubtedly made as a matter of routine, the accuser in this instance being the group commander and commanding officer. The substantial rights of the accused do not appear to have been prejudiced either from the point of view of the reference for trial or the trial itself and hence the appointment is at most an irregularity not affecting the validity of the proceedings (CM 200989, Osman, 5 B.R. 11,1933).

7. The charge sheet shows that accused is 34 years and four months of age and began his commissioned service on 3 October 1941. He had enlisted service from 1 July 1926 to 12 July 1929 and from 8 October 1929 to 2 October 1941.

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

9. Dismissal and total forfeitures in the case of an officer are authorized as a penalty for violation of either Article of War 61 or Article of War 96.

Benjamin R. Sleeper Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

B. H. Levy Jr. Judge Advocate

(200)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain HARVEY F. EMERY (O-451277), 29th Antiaircraft Artillery Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7584. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7584).

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

(Sentence ordered executed. GCMO 90, ETO, 31 Mar 1945.)

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

BOARD OF REVIEW NO. 1

10 MAR 19

CM ETO 7585

U N I T E D S T A T E S	)	VIII CORPS
	)	
v.	)	Trial by GCM, convened at Ettelbruck, Luxembourg, 18 November 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for two years and six months. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant JOHN E. MANNING (O-1181027), Service Battery, 771st Field Artillery Battalion	)	

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

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

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

CHARGE I: Violation of the 93rd 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 Second Lieutenant John E. Manning, 771st Field Artillery Battalion, did, at Bastogne, Belgium, on or about 20 October 1944, with intent to do bodily harm, commit an assault upon Corporal Ludwig V.

Meyers, Jr., 3246th Quartermaster Service Company, by pointing at him a dangerous weapon, to wit, a machine pistol.

Specification 5: In that * * * did, at Bastogne, Belgium, on or about 20 October 1944, with intent to do bodily harm, commit an assault upon Private James J. Jones, 3246th Quartermaster Service Company, by pointing at him a dangerous weapon, to wit, an automatic pistol.

Specification 6: (Finding of not guilty).

Specification 7: (Finding of not guilty).

Specification 8: In that * * * did, at Bastogne, Belgium, on or about 20 October 1944, with intent to do bodily harm, commit an assault upon Corporal Ludwig V. Meyers, Jr., 3246th Quartermaster Service Company, by pointing at him a dangerous weapon, to wit, an automatic pistol.

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

Specification: In that * * * was, at Bastogne, Belgium, on or about 20 October 1944, in a public place, to wit, on the street, drunk and disorderly while in uniform.

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

Specification 1: In that * * * did, at Bastogne, Belgium, on or about 20 October 1944, wrongfully kick Private First Class Ralph A. Miller, Company A, 511th Military Police Battalion, in the groin.

Specification 2: In that * * * did, at Bastogne, Belgium, on or about 20 October, 1944, wrongfully strike Private First Class Arthur H. Bergstrom, Company A, 511th Military Police Battalion, with his fist.

He pleaded not guilty and was found guilty of all charges and specifications except Specifications 1,2,3,6 and 7, Charge I, of which he was found not guilty. 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 two years and six months. The reviewing authority, the Commanding General, VIII Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater 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 for the prosecution was substantially as follows:

In the afternoon of 20 October 1944, four colored soldiers, including Corporal Ludwig Meyers and Private James J. Jones, were passing down the street in front of a cafe in Bastogne, Belgium, when accused and two soldiers, one his driver and the other an interpreter, emerged from the cafe (R9,10,12,22,24). The manner of accused's speech and walk and the odor of alcohol on his breath made it apparent that he was intoxicated (R17,18,23,27,28,30-33,39). He was wearing an officer's field coat and combat trousers, but no headgear and, so far as appears, no insignia of rank (R21,31). He was carrying, muzzle down, a German machine pistol number 40 containing a clip of ammunition (R12,17,18,23-25). Upon seeing the four colored soldiers who were almost abreast of him he exclaimed that "he was going to shoot those black niggers", and pointed the pistol at Meyers. Fearing that he was going to be shot, Meyers told the interpreter accompanying accused to get the pistol away from him before he shot someone. At about the same time, two of Meyers' companions went to summon the military police. The interpreter succeeded in withdrawing the clip from accused's pistol and put it in his pocket. Accused and his companions then started for their command car parked nearby. Someone apparently had then taken the pistol from accused (R9-13,17-19,20,22,24,25,27). Throughout this episode, which consumed five or ten minutes, accused kept repeating in a loud voice that he wanted to shoot "those black niggers" or "black sons-of-bitches" (R9,14,15,18,20).

Feeling safe in view of the removal of the clip from accused's machine pistol, Meyers and one of his companions, the other two having gone for the military police, followed accused over to the command car (R10,13,24). "After they got his gun", accused entered the vehicle. Apparently remembering that he had a caliber .45 automatic pistol, accused started to ask the driver for it so that he could "shoot these black niggers". At this point, the military police arrived. Accused in a loud

boisterous voice said "he wanted to kill some black fucking niggers" and that "if I could get my German machine gun, I would kill those black fucking niggers right now". He kept asking for his .45 automatic pistol, and upon finding it in the pocket of his raincoat, pulled it out, threw the hammer back and pointed it at Meyers and Jones, saying "Let me shoot the black bastards". The military police seized him by the arms and one of them took the gun. Since there were some vehicles approaching, the military policeman who obtained the gun went to direct traffic. Accused followed him, saying boisterously that he still wanted "to kill those black fucking niggers". He demanded the return of his .45, but the military policeman refused to comply. At this point, a military police officer arrived to whom accused repeated his demand for his .45 so that he could shoot the colored soldiers. He was then taken to the military police information office in Bastogne. Upon examination, it was found that accused's .45 contained a cartridge in the chamber (R10,11,13-19,21-24, 26-30,32-34).

At the military police information office, several enlisted men, including Private First Class Miller and Private Bergstrom, were detailed to act as guards over accused. He was still drunk and engaged in considerable loud talk. Bergstrom appeared to be the only one capable of talking to him. He and Bergstrom were sitting on a small table when accused, suddenly and without provocation, turned the table over on Bergstrom and struck him on the cheek with his right hand. He then pushed him against the wall with the table. Miller went over to quiet accused and held his right arm. Accused thereupon kicked Miller just above the groin. Neither Miller nor Bergstrom required medical attention (R35-39).

4. Accused, having been duly advised by the law member of his rights elected to remain silent (R43-44). Other witnesses for the defense presented the following evidence:

Accused's interpreter testified that accused consumed about two or three bottles of champagne on the day in which the incidents referred to in the various specifications occurred, and was "very drunk" (R40,41). One of the guards at the military police office stated that while under guard, accused kicked Miller, but as far as the witness observed, did not strike anyone (R42). Accused's battery commander testified that accused had been a member of his command for seven months, and would be rated "excellent" in the performance of his duties and "very good" as to character. He had never seen accused drunk and as far as he knew, accused did not partake of intoxicating liquors with frequency (R43).

5. Accused was convicted of three assaults with intent to do bodily harm with a dangerous weapon in violation of Article of War 93, two assaults and batteries in violation of Article of War 96 and of being drunk and disorderly while in uniform in a public place in violation of Article of War 95.

a. With respect to the assaults and batteries, the uncontradicted evidence shows that accused deliberately and without provocation attacked two of the guards in whose custody he was placed, by kicking one in the groin and striking the other in the face with his hand. Since no specific intent is required in these offenses, the drunkenness of the accused is immaterial and the record of trial clearly is legally sufficient to sustain the findings of guilty (CM ETO 1197, Carr).

b. The assaults charged under Article of War 93, on the other hand, involve the specific intent referred to in the specifications and such intent must be proved as an element of each offense. There is no doubt that the pointing of a loaded pistol at an intended victim accompanied by threats and expressions of intent to kill him, constitutes an assault with intent to do bodily harm with a dangerous weapon within the meaning of the Article of War (CM NATO 774, II Bull. JAG 427). Where accused was intoxicated at the time of the assault, however, the question is necessarily raised whether his intoxication is such as to negative the existence of the required specific intent. The effect of intoxication from this point of view has repeatedly been held to be a question of fact for the sole determination of the court, whose findings will be disturbed only where they are unsupported by competent, substantial evidence (CM ETO 1585, Houseworth; CM NATO 774, supra). While in the present case the evidence is clear that accused was intoxicated, there is nothing to compel an inference that his drunkenness was such as to deprive him of a conscious intent to put into effect the threats which he expressed at the times he pointed the pistols. On the contrary, he appears to have been sufficiently in possession of his faculties to be clearly aware of what he was doing and wanted to do, and while his intoxication may have been a producing cause of his intent, the court was fully justified in finding that the intent existed. Hence the record is legally sufficient to support the findings of guilty as to these assaults (CM NATO 774, supra).

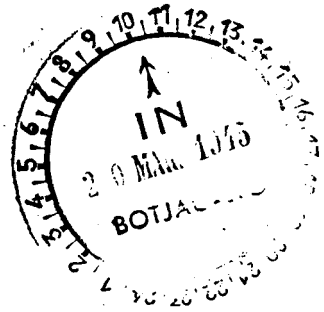
c. With respect to the drunk and disorderly conduct charged under Article of War 95, the circumstances of the case are such that the court was clearly justified in finding that

the conduct of accused reveals him as morally unfit to be an officer and to be considered a gentleman. Hence, as far as this offense, standing alone and apart from the others, is concerned, the record of trial is legally sufficient to sustain the finding of guilty (CM 229228, Griffen, 17 BR 85, II Bull. JAG 63; CM ETO 1197, Carr; Winthrop's Military Law and Precedents - Reprint, pp.711-712). However, consideration must be given to the question whether the court was consistent in finding that the accused's drunkenness was sufficiently gross as to constitute a violation of Article of War 95 and at the same time not so serious as to deprive him of the ability to entertain the specific intent required for the offenses charged under Article of War 93. An examination of the body of law which has developed under Article of War 95 reveals that the "gross drunkenness" required for a conviction is primarily a matter of the flagrant and disgraceful display of intoxication before military personnel or civilians (see Winthrop's Military Law and Precedents - Reprint, p.717). No cases are found wherein it has been required that the drunkenness be of such a degree from the point of view of its effect upon the accused's consciousness, as to deprive him of the ability to entertain the specific intent to do bodily harm to an adversary. Hence, there is no reason why the court could not consistently find that accused in this case was grossly drunk but at the same time capable of such specific intent, and having so concluded, its findings, in view of the substantial evidence supporting them, will not be disturbed (Cf: CM ETO 3937, Bigrow; CM ETO 4184, Heil). Moreover, it has been held that a finding of guilty of drunk and disorderly conduct under Article of War 95 may be sustained, although the drunkenness shown is not gross in character, where the disorderly conduct is in itself sufficient to constitute a violation of the Article (CM 234558, Field, 21 BR 41; CM 239172, Strauss, 25 BR 75). Under either theory therefore, the finding of guilty of a violation of Article of War 95 in this case is legally supported by the record.

6. The charge sheet shows that accused is 24 years of age and was appointed a second lieutenant on 22 April 1943. Prior service is shown as follows: "Served as enlisted man in Army of the United States from 18 August 1942 to 21 April 1943".

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

8. The penalty for assault and battery under Article of War 96 and for assault with intent to do bodily harm with a dangerous weapon under Article of War 93, in the case of an officer, is any punishment other than death which the court-martial may direct. Dismissal is mandatory upon conviction of violation of Article of War 95. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).



_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens Jr. Judge Advocate

(208)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOHN E. MANNING (O-1181027), Service Battery, 771st Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7585. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7585).

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

(Sentence ordered executed. GCMO 73, ETO, 18 Mar 1945.)

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

BOARD OF REVIEW NO. 2

CM ETO 7606

28 MAY 1945

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, 8 February 1945.
Private DALLAS E. PARKER)	Sentence: Dishonorable discharge,
(14017975), Company K,)	total forfeitures and confinement
317th Infantry)	at hard labor for life. No place
)	of confinement designated.

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 Dallas E. Parker, Company K, 317th Infantry, did, in the vicinity of Beidweiler, Luxembourg, on or about 20 December 1944 desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of 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 Heiderscheid, Luxembourg, on or about 13 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for one day's absence without leave and for possessing a falsely made military pass in violation of Articles of War 61 and 96 respectively. 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, did not designate 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, a private in Company K, 317th Infantry was missing from his company on or about 20 December 1944. At that time the company had moved two miles from its position south of Beidweiler to a new position northeast of the town. The first sergeant checked the area and also the town but the accused was not to be found. The accused surrendered himself to the regiment on 13 January 1945. At about that time and until the middle of January the company was occupying a holding position near Heiderscheid (R6,7).

The first sergeant testified as to the service which the company was performing during December 1944 and January 1945:

> "We were reorganizing, training and in combat with the enemy. We were at St. Avold, then to Saar Union, back up to Walferdange and Feulen. We attacked there and then we moved out to a holding position near Heiderscheid. * * * After that we moved out again and attacked the enemy again on 25 January * * * at Willowiltz and Pintz, Luxembourg" (R7).

Under date of 21 December the company morning report records a change in the status of accused from duty to absent without leave at 1500 hours 20 December 1944. Under date of 13 January a further change is recorded: from absence without leave to arrest in quarters (R7; Pros.Exs.A,B).

The first sergeant had never seen the accused in actual combat but he had a chance to observe accused's work and considered it good. The accused was "acting squad leader and later acting platoon sergeant of a weapons platoon for a certain length of time" (R8).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was introduced for the defense (R8).

5. The evidence for the prosecution consists only of a morning report entry of the absence without leave and the brief testimony of the first sergeant which, if considered alone, would be entirely inadequate. This case is almost identical with the case of United States v. Private Robert O. Carlson, Company K, 317th Infantry (CM ETO 6934, Carlson) which was sustained by reference to the pertinent maps of the country involved and events of the war known judicially to the Board of Review. (Carlson belonged to the same company and deserted 21 Dec.1944). When the evidence of record in the present case is interpreted in the same way from recent history and geography of which the Board can legally take judicial notice, it may be restated in summary as follows:

During December 1944 and January 1945 the company of which accused was a member was engaged in reorganizing, training, and combat in the Alsace section of France and in Luxembourg. On 20 December it was in position south of the Beidweiler, Luxembourg, about 10 miles from the southern flank of a serious "bulge" in allied lines which had resulted from the powerful offensive begun by von Rundstedt four days before. Many allied positions were overrun and new troop dispositions had to be made to meet the threatening situation. Accused's company was moved about two miles from its position south of Beidweiler to a new position northeast of the town and somewhat closer to the enemy lines. The accused absented himself at this time and did not return until 13 January when he surrendered himself tothe regiment, then at Heiderscheid.

In the Carlson case the record discloses that the company (the same Company K) was moved to Luxembourg from a position about 60 miles to the southeast which indicated that this was one of the units rushed into the area of the bulge to help meet the developing crisis. In the present case the sequence of the various moves and the times they were made are not disclosed in detail by the evidence, but it is known that it moved from St. Avold in Alsace to Beidweiler, Luxembourg. The company was in close proximity to the von Rundstedt salient and the evidence clearly presents the move of the company on 20 December from a position in back of Beidweiler to a position to the front and east. For this reason, the language used by the Board of Review in its conclusion on the facts of the Carlson case appears appropriate in this case. The Board in the Carlson case said:

> "In view of the gravity of the situation existing at the time, the obvious and widely known necessity for prompt counter measures to stem the advance, the previous movement in the direction of the southern flank of the salient and the proximity of the company to the enemy, the court was justified in inferring that at the time accused absented himself he had knowledge of facts which would reasonably lead him to believe he would shortly be engaged in hazardous duty. Under the circumstances here shown, the court was also warranted in concluding that he absented himself to avoid such duty" (CM ETO 6934, Carlson).

Considering the definite proof of absence without leave which the accused initiated at a time and place judicially-known to have been one of the most critical in the history of the war and hazardous beyond the usual hazards of warfare, the Board is constrained to hold the record legally sufficient to support the findings of guilty.

6. The charge sheet shows that the accused is 23 years of age and that without prior service, he enlisted 26 August 1940 at Fort McPherson, 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 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 designation of the United States Penitentiary, Lewisburg, Pennsylvania, or of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized. (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b; Cir.210, WD, 14 Sep. 1943, sec.VI, as amended).

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European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1 5 MAY 1945

CM ETO 7609

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Reims, France, 18 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Privates FRANCIS C. REED (16156757) and LEON J. PAWINSKI (35357884), both of 1992nd Quartermaster Truck Company (Aviation), 1557th Quartermaster Battalion, Mobile (Aviation)	)	

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

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

2. Accused were tried jointly with their own consent upon the following charges and specifications:

REED

CHARGE I: Violation of the 84th Article of War.

Specification: In that Private Francis C. Reed, 1992nd QM Trk Co, Avn, 1577th QM Bn, Mbl, Avn, did, at Dampierre, France, on or about 23 November 1944, unlawfully sell to Private Leon J. Pawinski, 1992nd QM Trk Co, Avn,

1577th QM Bn, Mbl, Avn, six (6), five-gallon, jerricans containing thirty (30) gallons of 80 octane gasoline, of a total value of more than twenty dollars ($20.00), and less than fifty dollars ($50.00), issued for use in the military service of the United States.

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

Specification: In that * * * did, at Dampierre, France, on or about 23 November 1944, unlawfully sell to Private Leon J. Pawinski, 1992nd QM Trk Co, Avn, 1577th QM Bn, Mbl, Avn, 30 gallons of 80 octane gasoline, issued and intended for United States government use at a time when 80 octane gasoline was vital for the military effort, such conduct being at that time in the nature of impeding the military war effort.

PAWINSKI

CHARGE I: Violation of the 84th Article of War.

Specification: In that Private Leon J. Pawinski, 1992nd QM Trk Co, Avn, 1577th QM Bn, Mobile, Avn, did, at Dampierre, France, on or about 23 November 1944, unlawfully sell to Arthur Henry, (a French civilian), six (6), five-gallon, jerricans containing thirty (30) gallons of 80 octane gasoline, of a total value of more than twenty dollars ($20.00), and less than fifty dollars ($50.00), issued for use in the military service of the United States.

CHARGE II: Violation of the 94th Article of War. (Nolle prosequi)

Specification: (Nolle prosequi).

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

Specification: In that * * * did, at Dampierre, France, on or about 23 November 1944, unlawfully sell to M. Arthur Henry, a French civilian, 30 gallons of 80 octane gasoline, issued and intended for United States government use at a time when 80 octane gasoline was vital for the military effort, such conduct being at that time in the nature of impeding the military war effort.

Each accused pleaded not guilty to and was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced as to either accused. 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 25 years. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action under Article of War 50½.

3. The offenses laid under the 84th Article of War (Charges I) are separate and distinct from the offenses laid under the 96th Article of War (Charge II, Reed; Charge III, Pawinski).

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not except the defendant from prosecution and punishment under the other" (Morey v. Commonwealth, 108 Mass.433).

The charges under the 84th Article of War describe the offense of selling government property issued for use in the military service of the United States. The offense alleged in the specifications laid under the 96th Article of War is diversion of vital supplies intended for, adapted to or suitable for use by the armed forces of the United States in connection with actual field combat then occurring in the Theater of Operations. Reference is made to the holdings of the

Board of Review in CM ETO 4570, Hawkins and CM ETO 5155, Carroll, et al. for a detailed discussion of the legal problem involved. Said holdings fully support the conclusion herein reached.

4. a. The evidence shows that accused, Pawinski sold and actually delivered to the French civilian, Henry, six (6) five gallon jerricans containing 30 gallons of 80 octane gasoline as alleged in Charge I and its Specification preferred against him. Pawinski's statement (Pros. Ex.B) recites:

> "Both of us had a drink of liquor and during our visit the civilians asked us to sell him some gasoline. I asked, 'How much?' He replied that he would pay Reed and myself 500 francs for a five gallon can. I replied that this was alright with us. * * * I believe that no gasoline was obtained from the trailer; but I do believe that some 5 gallon cans full of gasoline were removed from the body of the truck. I do not know the amount of gasoline taken. * * * I personnally did not receive any money".

The declaration "that he [the civilian] would pay Reed and myself 500 francs for a five gallon can" obviously refers to the price per jerrican and not the total amount of gasoline covered by the bargain. The discovery of the two five hundred franc notes and two 1000 franc notes or a total of 3000 francs (the computed purchase price, viz. six cans at 500 francs per can) in Henry's house (R30,32) by Captain Bates after Reed had revealed to him the place Pawinski hid the two 500 franc notes, coupled with the clear proof that six jerricans were found in Henry's courtyard, is certainly substantial evidence to support a finding that Pawinski sold six jerricans of 80 octane gasoline to Henry. The stipulation (R6-7) "that the six (6) five gallon jerricans, a total of thirty (30) gallons of 80 octance gasoline * * * is of a value of more than $20 and less than $50.00" and that the cans and gasoline were issued and intended for the military service completes the case against Pawinski.

b. As to Reed, the evidence is clear and conclusive that he "sold" six jerricans of gasoline to Pawinski. Reed completely inculpated himself by his statement (Pros.Ex.A). Corroboration of it is adequately supplied by proof of the discovery in the courtyard of the six jerricans containing gasoline and the finding of the two 500-franc notes (R30, 32; Pros.Exs.C-1,C-2) by Captain Bates at the exact location designated by Reed. The stipulation (R6-7) fixed the value of the six jerricans and contents at more than $20.00 and less than $50.00 and also determined that the cans and gasoline were issued for use in the military service of the United States. The finding of Reed's guilt of Charge I and its Specification preferred against him is sustained by substantial evidence.

5. The facts alleged in Charge II (Reed) and Charge III (Pawinski) constitute the offense of unauthorized interference with or diversion of materiel intended for, adapted to or suitable for use by the armed forces of the United States in connection with actual field combat. Neither the amount nor value of the articles or supplies is a material element in such offense. (CM ETO 8234, Young, et al; CM ETO 8236, Fleming, et al; CM ETO 8599, Hart, et al). However, there is the same failure of proof as in CM ETO 7506, Hardin. The B oard of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the aforesaid charges and their respective specifications (CM ETO 6226, Ealy).

6. The charge sheet shows the service of the accused as follows: Reed: Age 20 years, five months. Enlisted 11 December 1942 at Milwaukee, Wisconsin, to serve for the duration of the war plus six months. He had no prior service. Pawinski: Age 31 years, seven months. Inducted 17 June 1942 at Indianapolis, Indiana, 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 persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed at 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

accused Reed of Charge I and Specification preferred against him, legally insufficient to support the findings of guilty of accused Reed of Charge II and Specification preferred against him, and legally sufficient to support only so much of his sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, and is legally sufficient to support the findings of guilty of accused Pawinski of Charge I and Specification preferred against him, legally insufficient to support the findings of guilty of Charge III and Specification preferred against him, and legally sufficient to support only so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year.

8. The offense of selling Government property issued for use in the military service under the 84th Article of War is essentially a military offense (Winthrop's Military Law and Precedents (Reprint 1920), pp.560,561), and is not recognized as an offense of a civil nature and punishable by penitentiary confinement of more than one year by a statute of the United States of general application or by the law of the District of Columbia (AW 42). The place of confinement of each accused should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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APO 887

BOARD OF REVIEW NO. 1

11 MAY 1945

CM ETO 7686

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, 10 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.
Privates HARRY MAGGIE (36560714) and EDWARD E. LEWANDOWSKI (36560746), both of Company C, 317th Infantry	

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

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

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

MAGGIE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harry Maggie, Company "C", 317th Infantry did in the vicinity of Atton, France on or about 28 October 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 Heiderscheid, Luxemburg on or about 13 January 1945.

LEWANDOWSKI

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Edward E. Lewandowski, Company "C", 317th Infantry did in the vicinity of Atton, France, on or about 28 October 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 Heiderscheid, Luxemburg, on or about 13 January 1945.

Each accused pleaded not guilty and, all the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against either accused. All 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 sentences, did not designate the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The findings of guilty and the sentences are supported by the following evidence adduced entirely by the prosecution:

a. Second Lieutenant Robert D. Ross, who joined Company C, 317th Infantry, on 13 November 1944, testified that both accused were known to him; that they were in the military service and that neither accused had been present with the company for duty since he became one of its officers (R8,9). He narrated the combat activities of his organization since he joined it. His testimony indicated that Company C was one of the military units which was moved from the vicinity of Sarrebourg, in Lorraine, into Luxembourg immediately after 16 December 1944 on the occasion of the German mid-winter offensive (Cf: CM ETO 7413, Gogol). It was a highly mobile organization and it was in almost continuous combat with the enemy until after its attack on Wiltz about 25 January 1945 (R9). Lieutenant Ross further testified that Beanicourt, France, is about eight or nine miles distant from the town of Atton, France, and that

Heiderscheid, Luxembourg, is four or five miles distant from a ridge south of the town of Kehmen, Luxembourg, where the company was located on 13 January 1945 (R12).

b. Morning reports of the company for various dates hereinafter stated were presented to Lieutenant Ross for identification (R9-12; Pros.Exs.A to J inclusive). The exhibits were introduced in evidence without objection. With consent of the court the originals were withdrawn and extract copies, duly authenticated by Captain Frank J. Watson, personnel officer of 317th Infantry, were substituted (R12). The signatures of "Leslie E. Dickson, CWO, U.S. Army, Assistant Pers.O" which appeared on eight morning reports (Pros.Exs.A to F, H) and of "Frank J. Watson, Capt, 317th Inf. Pers.O." which appeared on three morning reports (Pros. Exs. G,I and J) were identified as genuine by Lieutenant Ross. The relevant morning report entries thus introduced in evidence were as follows:

"25 October 1944
RECORD OF EVENTS
'Company relieved Co "A" in front line position. Company in defensive position. During morning enemy shelled 1st Plat area but no casualties resulted. Mission - To hold present location until further orders'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
Chief W. O., US Army
Asst Pers. O."
(R9; Pros.Ex.A).

"26 October 1944
RECORD OF EVENTS
'Company remained in same defensive position all day. 2d Plat went in reserve and 3rd Plat replaced 2d Plat on front line. 3rd Plat received training on attack of fortified position. 1st Plat spotted enemy machine gun position and had artillery laid on it. Mission accomplished.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. Army
Asst Pers. O."
(R10; Pros.Ex.B).

"27 October 1944
RECORD OF EVENTS
'Company remained in same defensive position all day. 1st Plat pulled off of line and was relieved by 2d Plat. 1st Plat received training in attacking fortified position.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. Army
Asst Pers. O."
(R10; Pros.Ex.C)

"28 October 1944
RECORD OF EVENTS
'Company remained in same defensive position all day. CP was shelled late yesterday afternoon but no damage was caused.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. Army
Asst Pers. O."
(R10; Pros.Ex.D).

"29 October 1944
RECORD OF EVENTS
'Company remained in same defensive position.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. Army
Asst. Pers. O.
(R10; Pros.Ex.E).

"30 October 1944
RECORD OF EVENTS
'Company remained in same defensive position all day. Mission unchanged.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. ARMY
Asst. Pers. O."
(R10; Pros. Ex.F).

"31 October 1944
RECORD OF EVENTS
'Company remained in same defensive position all day. 2nd Plat men were fired on during evening of 30 Oct 44 when they went to river bank to relieve O P men there. Patrol was sent out bt nothing developed.'

s/ FRANK J. WATSON
t/ FRANK J. WATSON
Capt., 317th Inf.
Pers. O."
(R10; Pros.Ex.G).

"12 November 1944
Lewandowski, Edward E. 3650746 Pvt 745
Maggie, Harry 3650714 Pfc 745
Above EM fr dy to MIA 28 Oct 44.

RECORD OF EVENTS
'Co pushed forward and passed through town of Bechy. Co continued attack until almost dark when they crossed the Nied River and entered the town of Hans Sur Nied. Stiff resistance was encountered along the highway leading to Hans Sur Nied and the Bn suffered many casualties. Co remained in this town for night of 11 Nov 44. All civilians were gathered together and placed in different building under guard. Enemy shelled occasionally during the night and at approximately 0400 - 12 Nov 44 really laid in a heavy barrage. Have been continually shelling all day long trying to knock out bridge over the Nied River. Co in same position, reorganizing and holding. 1 EM wounded 1 EM MIA.'

s/ LESLIE E. DICKSON
t/ LESLIE E. DICKSON
CWO, U.S. Army
Asst Pers. O."
(R11; Pros.Ex.H).

"13 January 1945
CORRECTION
(12 Nov 44) 3656746 Lewandowski, Edward E. Pvt 745
36560714, Maggie, Harry NMI 745 Pfc
Above 2 EM fr dy to MIA 28 Oct 44
SHOULD BE
36560746 Lewandowski, Edward E. 745 Pvt
36560714 Maggie, Harry NMI 745 Pfc
Above 2 EM fr dy to AWOL 0600 28 Oct 44.
36560746 Lewandowski, Edward E. 745 Pvt
36560714 Maggie, Harry NMI 745 Pfc
Above 2 EM fr AWOL 0600 28 Oct 44 to conf
317th Inf PWE for violation of 61 AW.
RECORD OF EVENTS
'Company remained in defensive position.
Received light enemy artillery and rifle
fire during afternoon.'

s/ FRANK J. WATSON
t/ Frank J. Watson
Capt., 317th Inf.
Pers. O."
(R11; Pros.Ex.1).

"15 January 1945
CORRECTION
(13 Jan 45)
36560746 Lewandowski, Edward E. 745 Pvt
36560714 Maggie, Harry NMI 745 Pfc
Above 2 EM fr AWOL 0600 28 Oct 44 to conf
317th Inf PWE for violation of 61 AW.
SHOULD BE
36560746 Lewandowski, Edward E. 745 Pvt
36560714 Maggie, Harry NMI 745 Pfc
Above 2 EM fr AWOL 0600 28 Oct 44 to arrest
in qrs.

s/ FRANK J. WATSON
Frank J. Watson
Capt., 317th Inf.
Pers. O."
(R12; Pros.Ex.J).

After the morning report of the company for 28 October 1944 (Pros.Ex.D) was introduced in evidence the following colloquy occurred between the trial judge advocate and Lieutenant Ross:

"TJA (To Witness) I show you the morning report for 28 October 1944 for Company C, 317th Infantry Regiment, /Pros.Ex.D/ previously introduced in evidence, and I will ask you to read the station on that morning report.

A (The witness read as follows) '1 mile NE of Beanicourt, France'" (R12).

4. After his rights were explained to him each accused elected to remain silent (R13).

5. It is apparent that the legal sufficiency of the findings and sentences are wholly dependent upon the facts supplied by the entries on the morning reports above set forth. The testimony of Lieutenant Ross at its maximum value only established that the two accused were absent from the company from and after 13 November 1944.

The original morning reports were introduced in evidence and then withdrawn and extract copies substituted. The problems involved are simplified by this approved practice. We deal only with questions pertaining to the original reports. Authenticated extract copies are not involved.

a. With respect to the use of the morning reports as a historical record of the company. The following excerpts from AR 345-400, section IV, 1 May 1944 on "Morning Reports" are applicable in the instant case:

> "33. General.-a. The record of events consists of basic data from which the history of the organization is compiled".
>
> "36. Actions and battle casualties.-Action in which the unit or any part of it has been engaged will be entered, indicating time, places and dates. The number of officers and the number of enlisted men killed, wounded, captured, and missing will be reported separately".
>
> "38. Miscellaneous.-All reconnaissances, marches, maneuvers, and distances marched or traveled, modes of travel, time of departure and arrival, destinations; organizational duties, changes in assignment or attachments of the organization, reorganization, and everything of interest relating to the discipline, efficiency, or service of the unit will be noted".

The data and information included in Prosecution Exhibits A to H inclusive are obviously matters of historical relevance. They include descriptive matter of combat action in which the company was engaged on the dates and at the places indicated. The Board of Review in CM ETO 2481, Newton and CM ETO 4691, Knorr heretofore considered the problem here presented and sustained the practice of using morning reports for similar purposes. On the precedent of those cases supported by specific authority of the Army Regulations and by manifest logic it is concluded that the historical entries on Prosecution Exhibits A to H consisted of proper material to be entered on the company morning reports.

b. With respect to the validity of the morning reports and their admissibility.

1. Prosecutions Exhibits A to F and Prosecution Exhibit H were signed by Chief Warrant Officer Leslie E. Dickson, assistant personnel officer. Therefore, none of these morning reports was signed by

"The commanding officer of the reporting unit, or, in his absence by the officer acting in command".

as required by AR 345-400, 1 May 1944, section VI, paragraph 42. The presumption of regularity, viz that the morning report was signed by the authorized officer as applied in CM ETO 5234, Stubinski cannot arise in this case because it affirmatively appears that the morning reports were signed by an officer, to wit, the assistant personnel officer, not authorized by the Army Regulations to sign the same. The said morning reports were therefore not admissible in evidence. They possessed no efficacy as official writings (MCM, 1928, par.117a, p.121). Attention is particularly invited to the fact that paragraph 43, Army Regulation 345-400, 3 January 1945 was not in effect on dates of these morning reports.

In CM ETO 4691, Knorr, supra, the Board of Review held that although the morning report there involved was signed by the assistant personnel officer the original thereof was admissible in evidence as a writing or record made in the regular course of business as provided in the Federal "shop book rule" statute (28 USCA Sup.,sec. 695) and it was for the court to consider its weight and evidential value. Reference is made to the statements contained in the opinion of The Judge Advocate General, SPJGN 1945/3492 "Documentary Evidence: Morning Reports" set forth in the Memorandum of The Judge Advocate General, 30 March 1945. Resultant upon the comments made therein and in deference to superior authority the Board of Review (sitting in the European Theater of Operations) will not apply the principles of the Knorr case to the instant situation. However, the Knorr case is not overruled as the Board of Review believes that the Federal "Shop book rule" statute was correctly applied to the facts involved in said case and that the principles therein announced may be applied in other cases which present similar circumstances and conditions.

2. Prosecution Exhibits G (31 Oct.1944), I (13 Jan.1945) and J (15 Jan.1945) were signed by Captain Frank J. Watson, Personnel Officer. Prosecution Exhibit G is a historical record. In view of the exclusion of Prosecution Exhibits A to F and H, this entry becomes irrelevant to present considerations. With respect to Prosecution Exhibits I and J Army Regulations 345-400, 3 January 1945 paragraph 43a were in effect on the dates thereof. By virtue thereof morning reports will be signed by the commanding officer of the reporting unit, or by an officer designated by the commanding officer. 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 acting in command, or by the unit personnel officer (Cir.119, European Theater of Operations, 12 Dec.1944, sec.IV). It is therefore obvious that the morning reports (Pros.Exs.I and J) were signed by an authorized officer. The fact that they were "late entries", viz. entries made at a considerable time after the occurrence of the events reported therein affect their weight and

credibility and not their admissibility (CM ETO 4740, Courtney).

The Board of Review concludes that the morning reports evidenced by Prosecution Exhibits I and J were properly admitted in evidence and that the facts therein set forth were before the court for consideration.

6. The admissible evidence showed that both accused were absent without leave from their organization from 0600 hours 28 October 1944 to 13 January 1945. It does not appear whether they were apprehended or voluntarily surrendered themselves to military control. With the exclusion of Prosecution Exhibits A to F and H, there is no evidence in the record as to the tactical situation of accused's company or whether it was engaged in combat or about to be engaged in combat with the enemy on 28 October 1944, the date on which the absences of accused commenced. Under such circumstances the record of trial is legally sufficient to support only so much of the findings of guilty as to each accused as involves a finding that each was absent without leave from their organization during the period alleged.

7. The charge sheets show the following with respect to the service of accused: Maggie is 21 years one month of age. He was inducted 25 January 1943 at Detroit, Michigan. Lewandowski is 23 years eight months of age. He was inducted 18 January 1943 at Detroit, Michigan. Neither had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted, 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 only so much of the findings of guilty as involves a finding that each accused was absent from his organization from 28 October 1944 to 13 January 1945, the absence terminated by a method not shown and legally sufficient to support the sentence.

9. The punishment for absence without leave is such punishment as a court-martial may direct excepting death (AW 61). The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

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European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

9 MAR 1945

CM ETO 7687

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, 10 February 1945.
Private PAUL A. JURBALA (35833846), Company K, 317th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 58th Article of War.

Specification: In that Private Paul A. Jurbala, Company "K", 317th Infantry, did, in the vicinity of Colmarbruck, Luxemburg, on or about 23 December 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 Feulen, Luxemburg, on or about 29 December 1944.

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

Specification: In that * * * having received a lawful command from First Lieutenant Karl E. Wallace, his superior officer, to join and remain with his platoon, did, at or near Ringel, Luxemburg, on or about 11 January 1945 willfully disobey the same.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of both charges and 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 his natural life. The reviewing authority approved the sentence, did not designate the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

Company K, 317th Infantry, during the month of December 1944 and the early part of January 1945 was engaged in active and arduous duties in pursuit of the enemy in Luxembourg. The maneuvers required continuous movements on foot. During the period its activities included actual combat with the enemy, training operations and reorganization processes (R6,7). It received mortar fire each day (R8). On 23 December the company left Berringen, Luxembourg, on a forced march and pursued a circuitous journey which passed and repassed Feulen, Luxembourg, and finally terminated at that town on 29 December (R6,7). Accused was on 23 December a rifleman in the company (R9). On the march from Berringen to Feulen and while the company was halted not far from the latter town accused without authority left the company and was not present with it from that date until 29 December when he reported to it at Feulen while it was undergoing reorganization (R7,8). After returning to the company he asserted to the first sergeant of the company he was unable to stand the strain of the battle line. The first sergeant sent him to the "medics" who returned him to the company. He was then assigned to kitchen duty but was soon brought back to the platoon for combat service. On 4 January he was hospitalized for four days, and then returned to the company (R7).

On 11 January accused informed the first sergeant that he "couldn't go out to his platoon - couldn't stand it out there anymore". He was taken before the company commander, First Lieutenant Karl E. Wallace who gave him a direct order to return to his platoon on the line. He refused to obey the order and was placed under arrest (R7,8,10).

4. Evidence for the defense was as follows:

Major Isadore Tuerk, Medical Corps, Neuro-psychiatrist for the 80th Infantry Division, testified that on 5 January 1945 accused was sent to the hospital when it was discovered he was running a fever. On 14 January accused reported to witness that on 11 January he had refused to obey an order of his commanding officer to return to his platoon because he found the constant shelling unendurable. Accused asserted he was nervous, that he experienced terrifying dreams, that in combat he never fired a rifle because of an experience while deer hunting in 1936. On 9 February witness again examined accused who repeated his prior statements. In the opinion of the medical officer, accused was a neurotic individual who "knows the difference between right and wrong and the consequences of his acts" (R10,11).

The accused after explanation of his rights elected to be sworn as a witness on his own behalf. His testimony contains a recital of his physical disablements - primarily of his feet. He stated that on 23 December he was unable to proceed with his company on the march because of foot trouble and that he "lagged behind" and finally dropped out at the crossroads near Colmarbruck. He then received medical aid and was released for duty. Thereafter he spent a night and a day in an empty house while his feet were healing. He then wandered about aimlessly until he returned to his company on 29 December. His feet were then in "good shape" and he didn't go to the "Medics" (R16,17).

5. a. Charge I and Specification: Substantial evidence proved that accused's company for a considerable portion of the months of December 1944 and January 1945 was in continuous pursuit of and combat with the enemy. On 23 December, accused's platoon was under shell fire and was actively engaged with its opponents. During the course of the march of the company on that day, made necessary by its combat duties, accused without authority left his organization and remained absent for six days during which time he wandered about the neighboring countryside without any bona fide effort to rejoin his command. The court was fully justified in its conclusion that accused with knowledge of the prior combat activities of his platoon and the immediate prospects of continuous combat duty deliberately left it for the purpose of avoiding the hazards and perils of battle. His guilt was proved beyond doubt (CM ETO 5155, Carroll and D'Elia and authorities therein cited).

b. Charge II and Specification: Accused deliberately and knowingly refused to obey Lieutenant Wallace's order to return to his platoon on the line. His guilt of this Charge was conclusively proved (CM ETO 5318, Bender; CM ETO 3988, O'Berry and authorities therein cited).

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6. The charge sheet shows that accused is 30 years one month of age. He was inducted 20 April 1944 at Fort Benjamin, Harrison, Indiana, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 7688

2 MAR 1945

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, 8 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Place of confinement not designated.
Private STROTHER BUCHANAN (35440283), Company K, 317th Infantry.	)	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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. That accused's unit was in a hazardous tactical position prior to and on 4 January 1945 at the time he departed from it, is established by the testimony of First Sergeant Frank Dobozy, whose testimony, in pertinent part is as follows:

> "On the 25th of December we were attacking and the 26th we were attacking then we held the ground for a couple of days and then we went to Feulen for reorganization and training.
>
> * * *
>
> On the 4th of January 1945 the company moved out approximately one mile north of Feulen under security and at this time, Buchanan was missing from his platoon and when the company moved out,

> I searched the company area and could not find Private Buchanan" (R7) (Underscoring supplied).

The Dictionary of United States Army Terms (TM 20-205, p.246) defines "security" as follows:

> "1. measures taken by a command to protect itself from observation, annoyance, or surprise, and to obtain freedom of action for itself. Security includes measures taken against air, mechanized, and chemical attacks".

It thus may be seen that in army terminology Dobozy's testimony indicated that the unit was on the aforementioned dates either in contact or imminent contact with the enemy. Accused's unauthorized absence on 4 January was clearly established by competent and substantial evidence. At this time, the company was moving forward after a few days of rest and reorganization. On the basis of the above quoted evidence the court fairly inferred that accused at the time of his departure knew the perils and hazards confronting his unit and he absented himself with the intent to avoid them (CM ETO 6623, Milner and authorities therein cited).

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

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

B. Franklin Pitts — Judge Advocate

Malcolm C. Sherman — Judge Advocate

Edward L. Stevens, Jr. — Judge Advocate

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BOARD OF REVIEW NO. 1

4 JUN 1945

CM ETO 7702

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technical Sergeant VASCO SHROPSHIRE (34321770), Company A, 29th Signal Construction Battalion	Trial by GCM, convened at Le Mans, Sarthe, France, 30 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Technical Sergeant Vasco (NMI) Shropshire, Company A, 29th Signal Construction Battalion did, at Preaux, Orne, France, on or about 1830 5 September 1944, with intent to do her bodily harm, commit an assault upon Madame Irene Cottinet by shooting at her with a dangerous weapon to wit, a U.S. Carbine Caliber .30 M1.

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

Specification 1: In that * * * did, at Les Maisons Neuves, Commune de Preaux (Orne), France, on or about 1915 5 September 1944, forcibly and

feloniously, against her will, have carnal knowledge of Madame Lea Francois.

Specification 2: In that * * * did, at Preaux, Orne, France, on or about 5 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Monsieur Edourd Brouard of Hamean de Beauvais, Commune de Saint Agnan sur Eure (Orne), a human being by shooting him in the chest with a U. S. Carbine Calibre .30 M1.

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

3. Prosecution's evidence establishes beyond reasonable doubt the commission by a colored American soldier of each of the crimes charged at the times and places and in the manner alleged in each specification. His intent to do bodily harm to Madame Cottinet is clearly evidenced by the fact that during his lengthy pursuit of her he fired at her, although unsuccessfully, four times with a carbine (Specification, Charge I) (CM ETO 5584, Yancy, and authorities therein cited). His guilt of the murder of Brouard is established by the testimony of two eye-witnesses that he fired into a group of thrashers as they approached in order to aid Madame Cottinet, and the evidence that the shot killed Brouard, who was in the group (Specification 2, Charge II) (CM ETO 5584, Yancy; CM ETO 8166, Williams, and authorities therein cited). His guilt of the brutal rape of Madame Francois, who was menstruating at the time, is proven by her clear testimony, corroborated by evidence that there was blood on the soldier's trousers thereafter and by medical testimony that the victim had bruises on her thighs and stomach (Specification 1, Charge II) (Ibid.).

4. The only questions for determination are (a) the identity of accused as the perpetrator of the crimes and (b) whether his mental condition at the time thereof was such as to afford him a defense thereto.

(a) Identity is established by the following evidence:

Accused was seen in a vehicle leaving L'Hermiture, Orne, France, on the way to Preaux, about ten kilometers away, at about five pm on the day in question (R58,59). He left his bivouac area, which was about eight to ten miles from the Cottinet farm, the vicinity of the crimes, in a jeep assigned to him in which, he testified, was a weapon which he believed belonged to a Sergeant Hart (R55,57,66). A jeep, whose markings indicated it was assigned to accused's company, was parked at the Cottinet house by the guilty soldier before the crimes (R12,22,39; Pros.Ex.4), and a recently fired carbine, which had been issued to Sergeant Hart of accused 's company, was found in the vicinity of the scene of the crimes on the same day (R40). Accused testified he was with "Pvt." Hart in a cafe at Nogent earlier in the day (R63). An officer of accused's company testified accused was standing next to the jeep, parked near the Cottinet farmhouse, when witness arrived there in the evening after the crimes. Accused's belt was unfastened, his fly unbuttoned and his trousers stained with blood (R39). Although Madame Cottinet (R18), Madame Francois (R34), and Raymond Greneche, who was also on the scene (R38), could not identify accused in court as the soldier concerned, each of them identified the soldier at the Cottinet house after the crimes as the soldier involved in the crimes (R18,31,37). Also, Fernand Cottinet, the husband of the woman at whom the soldier fired, testified that upon request he identified the guilty soldier at witness' home after the crimes and that he believed that the accused present in court was the same man (R25). Accused emphatically protested to the officer above mentioned, when the latter arrived at the scene, that he had nothing to do with the crimes (R55), but in his testimony he did not deny his guilt other than to state that he had no recollection as to anything that transpired during the time of the crimes (R65).

In view of the convincing nature of the foregoing evidence, the Board of Review is of the opinion that the erroneous admission in evidence of certain expended cartridge shells, inadequately connected with the scene of the crime and with the carbine used by the culprit, and of hearsay testimony as to the identification and accusation of the soldier at the Cottinet farm by the French civilians concerned through an interpreter, did not injuriously affect accused's substantial rights within the purview of Article of War 37 (CM ETO 6193, Parrott et al, and authorities therein cited; CM ETO 5179, Hamlin).

(b) The defense introduced the testimony of a psychiatrist that a person who had been under the continuous and severe mental and physical strain of communications work under enemy fire for almost three months, as had accused, and who had imbibed large quantities of alcohol (accused testified he drank on the day in question one quart

of calvados, one pint of cognac and over one-half pint of wine (R63-64)), might, by reason of amnesia, epilepsy or dementia praecox, become so affected mentally as not to be able to know what he was doing, to discern the difference between right and wrong, or to adhere to the right; a man in such condition might commit rape and murder and not know what he had done (R45-47). No evidence was offered of past history, in accused's case, of epilepsy or dementia praecox, but he testified that he was not in the habit of drinking, and never drank calvados before the day in question. He stated that as a child he once had a period of "black-out" (R67). There was evidence that his eyes were very bright and shiny (R10,18) and that he was more excited than drunk (R10,26,35). He was nervouse, but able to drive without difficulty (R60). The witness who saw him about five pm of the day in question at L'Hermiture, testified that he did not seem normal but seemed to be deranged (R58).

> "He had a walk which was wholly abnormal. * * * A German /whom she had observed in 1940/ * * * had the same way of walking and the same wild look and vague gaze. * * * He didn't look so much to be drunk as he seemed to be crazy" (R59).

Accused testified that his last recollection was when he was drinking in a cafe and that he remembered nothing until "way along during the night" (R65). If this testimony as well as that as to the amount he drank are to be believed, it is apparent that he was intoxicated at the time he was seen by the last mentioned witness and at the time of the offenses. The record is devoid, however, of indication that his abnormality stemmed from anything other than intoxication and contains no authentic suggestion that he was insane (Cf: CM ETO 8474, Andoscia). Even assuming, in accused's favor, that he was "temporarily insane" (a somewhat elusive, paradoxical, and meaningless term)from intoxication, it would be no defense to the crimes with which he was charged. The rule is thus stated:

> "Insanity resulting from intoxication, in order to free one from responsibility for homicide, must be of such a degree as would render one irresponsible if the insanity were due to any other cause. Drunkenness alone, however, is not insanity; to be an absolute defense, the intoxication must have produced a fixed mental disease of some duration or permanence, and temporary alcoholic insanity, that is to say, the mental excitement or frenzy directly caused by voluntary excessive indulgence in intoxicating liquors, does not exempt one from responsibility for a homicide. As sometimes expressed,

> the mental disease must be the remote effect of intoxication, not the direct effect, and must last after the immediate effects of the intoxication have passed away" (40 CJS, sec.5d, pp.834-835).

Accused's assault, murder and rape were all committed in execution of a deliberate, reasoned, logical design to secure sexual gratification at all costs. As above indicated (par.3) the specific intent to do bodily harm to Madame Cottinet in order to obtain physical control of her is made manifest by his firing at her four times while pursuing her, and the court was justified in concluding that his intoxication was not sufficient to destroy the capacity to entertain such intent (see MCM, 1928, par.126a, p.136; CM ETO 3475, Blackwell et al, and authorities therein cited). Likewise accused's malevolent and malicious act in shooting into the group of thrashers for the obvious purpose of preventing their interference with his design, thereby causing Brouard's death, and the calculated brutality which accompanied his rape of Madame Francois justified the court in concluding that his general criminal intent to commit both offenses was intensified rather than diminished or removed by his intoxication. The court's findings of guilty will therefore not be disturbed by the Board of Review on appellate review (CM ETO 5561, Holden and Spencer; CM ETO 5584, Yancy; CM ETO 5747, Harrison, Jr.; CM ETO 5765, Mack; CM ETO 6229, Creech; CM ETO 7815, Gutierrez; CM ETO 9424, George E. Smith, Jr.). The court was not, in view of the evidence, bound to pursue further the question of accused's sanity. The presumption thereof was unrebutted (CM ETO 8474, Andoscia, and authorities therein cited).

5. The charge sheet shows that accused is 32 years three months of age and was inducted 26 May 1942 at Camp Forrest, Tennessee, 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

7. The penalty for murder and for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567) and upon conviction of murder by the same article and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the

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

B. Franklin Pikes Judge Advocate

Wm. T. Sumner Judge Advocate

Edward L. Stevens, Jr. 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. 1

17 MAR 1945

CM ETO 7735

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 12 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private ED J. BLEDSOE (6291973), Company G, 30th Infantry	

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

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

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

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

Specification: In that Private Ed J. Bledsoe, Company "G", 30th Infantry, did without proper leave, absent himself from his organization, then in a combat area, near Artena, Italy, from about 31 May 1944 to about 4 June 1944.

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

Specification: In that * * * did, at or near Rome, Italy, on or about 18 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Naples, Italy, about 10 October 1944.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of both charges and 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 50 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. Charge I and Specification: The evidence is clear and conclusive that accused was absent without leave from his organization from 31 May 1944 to 4 June 1944 (R7,9; Pros.Ex.A).

b. Charge II and Specification: Company G, 30th Infantry, was bivouacked in the environs of Rome, Italy, on 18 June 1944 (R9). On that date, without authority, accused absented himself from his company (R7,9,10; Pros.EX.A). He was apprehended in Naples, Italy, on 10 October 1944 (R11,12,13; Pros.Ex.C). During his absence his organization participated in the invasion of France (Pros.Ex.C) (Cf: CM ETO 7148, Giombetti). He was absent from his command for 114 days. By his own admission he was out of uniform during his absence, which he spent in Rome and Naples. His guilt of desertion was definitely established (CM ETO 1629, O'Donnell; CM ETO 7489, Rigsby and authorities therein cited).

4. The charge sheet shows that accused is 28 years old. He enlisted 9 February 1939. (His term of service 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. The penalty for 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 Jun 1944, sec.II, pars.1b(4) and 3b).

B. Franklin Riter Judge Advocate

Edward I. Stevens, Jr. Judge Advocate

Anthony Julian Judge Advocate

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

BOARD OF REVIEW NO. 2 15 MAY 1945

CM ETO 7760

U N I T E D S T A T E S	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 95, United States Army, 11 February 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 ROBERT A. VINCENT (33701828), Company H, 378th 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Robert A. Vincent, Company "H", 378th Infantry, did, at or near Neu Forweiler, Germany, while enroute to join his organization, on or about 15 December 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: Engage in combat with an armed enemy, and did remain absent in de-

sertion until he was apprehended at or near Metz, France, on or about 10 January 1945.

He pleaded guilty to the Specification except the words, "desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: Engage in combat with an armed enemy" and the words, "in desertion", substituting therefor the words, "without proper leave absent himself from his organization", to the excepted words, not guilty, to the substituted words, guilty; and not guilty to 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 Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for 23 hours on 28-29 October 1944, in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 the prosecution was substantially as follows:

Accused became a member of Company H, 378th Infantry about 1 November 1944. About four days later he was placed on special duty at regimental headquarters for security patrol military police work (R7-10). On 15 December the sergeant in charge of military police regimental platoon, assembled his men, including accused, and gave them the information he had received from the company commander that they were to return to their companies and would be loaded on trucks the next morning. Accused was present the following morning and boarded a truck (R7,19) but did not return to his company (R8-12). On 12 January, he was picked up in the city of Metz by an officer of the regiment who asked him if he knew he was absent without leave and told him "to get on the truck with me and come back to the organization, and he came back to the organization" (R13). The accused said he had been visiting friends (R15).

The morning report of accused's organization for 10 January 1945 states

"Vincent Robert A. 33701828

* * *

10 January 1945
CORRECTION 8 Jan 45
3370128 Vincent Robert A Pfc
dy 504 MOS 504 to missing in action since 15 Dec 44 EM was last seen when he left Regt Hq to go to Service Company for Transportation to Company Area Released from SD with Regt Hq as MP on 14 Dec 44 Dropped from rolls as a Battle Casualty
SHOULD BE
33701828 Vincent Robert A Pfc
Dy 504 MOS 504 to AWOL 1100 14 Dec 44 at Neuferweiler Germany

* * *

10 January 1945
WQ 2676
33701828 Vincent Robert A Pfc
Dy 504 MOS 504 AWOL since 1100 14 Dec 44 to arrest in qrs 1200 on 10 Jan 45" (Pros.Ex.A).

On 15 December, the date used in the morning report as the initial day of absence, the accused's company was "in the lines" (R10) at Ensdorf and remained in the lines there for about one week (R10). This was during the crossing of the Sarr River and fighting was taking place in Ensdorf. It was difficult fighting for the company and several casualties resulted. At the end of the week the company was pulled back into division reserve (R11). The company was short approximately twenty men (R13).

4. After his rights were explained to him, accused elected to be sworn and testified that when he was relieved from special duty with regimental headquarters at Neu Forweiler he went to another small town where the men returning to their companies were to be reloaded on other trucks. With some other men he stayed in a cellar there

for a few days when all went back except two other soldiers and accused, who decided

> "to get away from the war. I don't know how they felt about it but I was shaky and the longer I stayed there the more the idea came to me to get away and there is no other way to get away from the war except to run away from it. Mayhe I was scared and yellow but I kept thinking more and more about getting away from it so Silverman, Jonsey and I started for Metz and left this Service Company area about 23 December. We went past Metz with the intention of going Lord only knows where. Outside of Metz I decided to separate from them. They were always talking about how much trouble we were going to get into and I became nervous and decided to go on alone. I knew some people in a little town where I had been before in a little town about half way between Metz and Verdun, the village of Harger and stayed there about six days and on the seventh day started to come back intending to come back to my company and I came through Metz. I got a ride on a mail trudk to Metz and stopped in Metz for awhile and that's when I met Lt. Burkett and he advised me that it would be a good idea if I came back to my company. Naturally, seeing a chance to get a ride back I thought it would be a good thing to get in the truck and once they got started back there would be no way of my getting off and deserting any further. I did have intentions of coming back. I always was saying I would go tomorrow and days amounted up into weeks. I am glad Lt. Burkett came along and advised me to go back and the court know the rest" (R20,21).

> "When we were in this town with Service Company some of the outfits came in for supplies and we heard remarks about what

they were doing. I know from officers I overheard talking when I was standing guard at the regimental CP that things were pretty bad and that 'H' Company was pretty badly beaten up"(R21).

"I knew they were having a hard time. A lieutenant informed me everyday as liaison officer of what the regiment was doing up front" (R21).

The accused further testified that during his absence he went as far as 50 or 60 miles from where his company was in the lines. He was in Metz about two and a half weeks before he met the officer who returned him to his regiment. He just couldn't get up the courgage to return before that (R22).

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, sec.130a, p.142; AW 28).

It was necessary herein to prove (a) that accused absented himself without leave and (b) that he intended at the time to avoid hazardous duty.

The undisputed evidence shows and accused admits both of these essential facts. He was clearly guilty of a violation of Article of War 58 (CM ETO 5287, Pemberton; CM ETO 5291, Piantidosi; CM 6549, Festa).

6. The charge sheet shows that the accused is 23 years and eight months of age and was inducted without prior service on 11 September 1943, at Pittsburg, Pennsylvania.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). 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
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BOARD OF REVIEW NO. 1 23 MAR 1945

CM ETO 7764

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Aachen, Germany, 7 February 1945. Sentence:
Private First Class ALFONSO V. DEL RIO (39723149), Company C, 120th 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. 1
RITER, STEVENS 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 58th Article of War.

Specification: In that Private First Class Alfonso V. Del Rio, Company "C" 120th Infantry, did, at or near Alsdorf, Germany, on or about 28 November 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty: to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself to military authorities at Brussels, Belgium, on or about 4 January 1945.

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

Specification: In that * * * having been duly

placed in arrest at Malmedy, Belgium, on or about 16 January 1945, did, at Aywaille, Belgium, on or about 16 January 1945, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at or near Aywaille, Belgium, from about 16 January 1945 until he surrendered himself to the military authorities at Liege, Belgium on or about 17 January 1945.

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

3. Prosecution's evidence proved the following facts:

a. On 27 November 1944, the third platoon of Company C, 120th Infantry, was located in the environs of Alsdorf, Germany (R7,8). It was "dug in" but was under orders to attack the enemy then stationed in the town at dawn on 28 November (R8,9,10). Accused was a member of the third squad of the platoon. He had been absent from his organization. On the evening of 27 November, he was escorted from the company command post to his platoon lines and delivered to Staff Sergeant Andrew Bird-in-Ground, the leader of the first squad (R8). He remained in the foxhole with Bird-in-Ground during the night because he could not be accommodated in the foxholes of his own squad. Prior to the attack the next morning, Bird-in-Ground sent him to his own squad located about five yards distant (R9) and thereafter he was not seen with the platoon (R8,10). The attack was made and Alsdorf was taken by the Americans. Accused was missing when the assault commenced and after its completion he could not be found (R8,10). He surrendered himself to military authorities at Brussels, Belgium, on 4 January 1945 (R12).

b. On 16 January 1945, accused was brought by the military police to the command post of Company C, then located near Malmedy, Belgium (R10). The regimental commander interviewed him

and he was then placed under arrest by the regimental adjutant and was informed of such fact. He was given into the custody of Private First Class Lee B. Jones (R11) who was instructed to take him in a jeep to the rear. At a point about 20 miles from the company command post in the vicinity of Aywaille, Belgium, and about five miles short of the destination, a chain on the jeep became loose. Jones stopped and crawled under the vehicle to remove the chain. While he was thus engaged accused, without Jones' permission, jumped from the motor vehicle and disappeared. He surrendered himself to military authorities at Liege, Belgium, on 17 January 1945.

4. After an explanation of his rights, accused elected to make an unsworn statement. He asserted that he joined the 30th Infantry in Belgium. He served in the capacities of a first scout, a rifleman, and a demolition man. He participated in combat from August to November 1944, and was wounded and evacuated. Upon return to his company from the hospital he had trouble with his wounded leg. He complained to his commanding officer but "they were pretty busy, so there wasn't much they could do for me" (R14,15). He further stated that he did not desire to remain with his organization nor to return to combat assignment as he was afraid of front-line duty (R14). He declared:

> "As far as my physical condition, I am just as able to fight as any other man in the army" (R14).

5. a. Charge I and Specification: Accused spent the night of 27 November 1944 in a front-line foxhole. The next morning immediately prior to the commencement of an attack upon the enemy by his platoon, he left his place of duty without authority and disappeared. This is substantial evidence from which the court was fully justified in inferring that he intended when he absented himself without leave to avoid the perils and hazards of battle which he knew were imminent. The case is of the same pattern as and the conclusion is supported by CM ETO 7500, Metcalf and Wloczewski; CM ETO 5394, Quinn; CM ETO 5304, Lawson and Weitkamp.

b. Charges II and III and Specifications: A mere recital of the facts is all that is necessary to show accused's guilt of the offenses charged (CM ETO 6383, Wilkinson).

6. The charge sheet shows that accused is 20 years four months of age. He was inducted 7 January 1944 at Los Angles, California. He had no prior service.

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

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

17 MAR 1945

CM ETO 7814

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private LUKE J. HARDIGAN (32087089), Company C, 39th Infantry	)	Trial by GCM, convened at Paris, France, 7 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, STEVENS 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 Luke J. Hardigan, Company "C", 39th Infantry Regiment, European Theater of Operations, United States Army, did at APO 9, United States Army, on or about 27 June 1944, desert the service of the United States and did remain absent in desertion until apprehended at Paris, France on or about 19 October 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. 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. Substantial, uncontradicted evidence, which was corroborated by accused's extra-judicial voluntary statement and his testimony at the trial, proved that he was absent without leave from his company from 27 June 1944 to 19 October 1944 when he was apprehended in Paris, France, by the British Military Police. During a part of his total absence of 114 days he wore the British battle dress consisting of tunic and pants, British gaiters and Scotch Balmoral and was so clad when apprehended. During his absence he engaged in a prolonged drunken debauch. He traveled from the vicinity of Cherbourg to Paris during the course of which journey he was incarcerated by British authorities. By his own statement he broke confinement and thereafter wandered aimlessly about the country begging liquor and food. The court was fully justified in inferring from this evidence that accused intended to absent himself permanently from the American military service. He was guilty of desertion (CM ETO 7489, Rigsby and authorities therein cited).

4. The charge sheet shows that accused is 32 years five months of age. He was inducted 18 April 1941 at Fort Dix, New Jersey, to serve for the duration of the war plus six months. No prior service is shown.

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 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) and 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

24 MAR 1945

CM ETO 7815

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RODOLFO M. GUTIERREZ (38111739), Company E, 346th Engineer General Service Regiment	Trial by GCM, convened at Paris, France, 24 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Rodolfo M. Gutierrez, Company "E", 346th Engineer General Service Regiment, did, at Ecole des Loges, France, on or about 4 October 1944, with malice aforethought, willfully, deliberately, feloniously and unlawfully and with premeditation kill one Sergeant Joseph F. Nagy, a human being, by shooting him with a rifle.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence

without leave for one day in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, "for the rest of his natural life". The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent, substantial evidence for the prosecution supports the following factual narrative of the circumstances of this homicide:

The accused, deceased, and all soldiers involved in this episode were members of Company E, 346th Engineer General Service Regiment. On the evening of 4 October 1944 accused, in company with two fellow soldiers from his company, visited the French village of Poissy (Department of Seine et Oise), where he consumed a considerable amount of alcoholic liquor. He became intoxicated to an extreme degree but was able to return afoot to his barracks located about a mile distant from the village. He was accompanied by one of his drinking companions, Technician Fifth Grade Felix Leonard Walczyk. Upon reaching the barrack room at about 2330 hours, accused procured his rifle and held it across his knees as he sat upon his bed. He expressed his intention of "blowing his top". Walczyk heard this remark and understood it as a suicide threat. He approached accused, "asked him why he wanted to do a thing like that", took his rifle from him and carried it to his own bed (R7-9,11,12,27,28).

The barrack room, located on the third floor of the structure wherein Company E was quartered, was a room of greater length than breadth. In one corner of the room, partition walls composed of light material had been erected which inclosed a cubicle of a dimension of about eight feet by eight feet which was used as a barber shop. The beds - some of them single tier and others double tier - stood with their heads against the side walls of the barrack room and extended toward the center of it. An aisle between the two rows of beds was thereby formed (R14; Pros.Ex.1). The deceased, Sergeant Joseph F. Nagy, slept in a bed which stood about three or four feet from the barber shop partition, which faced the main part of the room. One bed, occupied by Technician Fifth Grade Donald M. Organ, stood between deceased's bed and the cubicle partition. On the evening of 4 October the deceased retired about 2330 hours and apparently fell asleep immediately (R34).

Gutierrez, the accused, remained seated on his bed after Walczyk took his rifle from him (R8) but finally lay down without undressing (R28). A short time later he arose and approached Technician Fifth Grade Albert J. D'Agostin, who occupied the eighth bed from the barber shop, and requested a pencil. Accused held in his hands a "V-mail" letter form. When D'Agostin indicated he had no pencil, accused requested the use of a pen. D'Agostin inquired "What was he going to write at this time of night?". Thereupon, without making reply, accused staggered in the direction of the barber shop (R12,13).

At some time between 2330 and 2400 hours, and about ten minutes after accused asked D'Agostin for a pencil, the sound of a rifle shot was heard, which awakened many of the sleeping men. It was followed about 15 seconds later by a second report. Thirty or 35 seconds passed and third and fourth shots were registered. The two latter shots were in rapid succession and the sound of falling plaster accompanied them (R17,29,34,35). Organ was awakened by the first shot. He looked in the direction of the barber shop and saw therein the silhouette of a man (whom he could not identify) in a crouched position who held a rifle at approximately port arms (R34,38). Staff Sergeant Joseph G. Weissman, who was awakened by Organ, heard the second shot. Weissman occupied a bed on the opposite side of the room from those of the other actors in this tragedy and he was able to look directly through an opening in the partition (R52,53). At that moment, by the flash of the shot, he saw accused in the barber shop cubicle. He appeared to be standing erect with half his body visible (R45,46,51,53).

Sergeant Truman Loggins slept in the fifth bed from the barber shop partition on the same side of the room as deceased and Organ. The first shot awakened him. Between the second and third shots he heard deceased call for medical assistance (R25). Sergeant Frank B. Minor occupied the third bed from the barber shop partition on the immediate left of deceased. After the fourth shot was fired, Minor heard deceased exclaim "I am hit" (R17,18). Deceased then left his bed and proceeded along the aisle in the direction opposite to the barber shop to a point about 20 feet from his bed where he collapsed (R19,29,38,55). He died almost immediately. A bullet had entered the right side of his chest, had cut or torn one of the large blood vessels around his hear, "crossed on the middle line to the left; and left approximately at the same level of the middle line to the rear". His death was caused through loss of blood (R5,55). There was a trail of blood from deceased's bed to the point in the room where he fell (R5,18,29,55).

After the fourth shot, Weissman and Organ, who had taken cover underneath beds, arose and entered the barber shop. They found accused lying on the floor, face upward, with his feet toward the exit to the barber shop which led into the main barrack room. He was apparently in an unconscious condition. Efforts to revive him were in vain. His hands were crossed on his chest. A rifle leaned against the wall at accused's right hand. He could not have reached it without moving his body. Weissman turned on the electric light in the barber shop, picked up the rifle and stood it outside of the cubicle (R46,47,51,53,54).

The accused, in an apparently unconscious condition and with his body limp, was carried to the guardhouse by Sergeant David R. Brown and another soldier. He was placed on a cot where he remained for the night (R42,57,67). By 0800 hours on the morning of 5 October he had regained consciousness (R57) and, when interviewed soon thereafter by Captain Leonard Shaw, Executive Officer of the regiment, gave a voluntary statement after timely notification of his right to remain silent, which was admitted in evidence without objection (R57; Pros.Ex.6). The statement described the drinking bout in the village of Poissy in which accused, Walczyk, and a soldier by the name of Davis engaged on the night of 4 October; asserted accused's intention to commit suicide; described the episode in the barrack room wherein Walczyk took his rifle away from him; and concluded with the following declaration:

> "After Walcyzk and Changalis finished talking to me and left me a short time elapsed when I again picked up another rifle, obtained a clip of cartridges from my belt and went into the small room with the idea of shooting myself. I placed the rifle perpendicular, butt on the floor near my feet and legs and bent over to put in the clip, then slid back the slide but my hand slipped off it and hit the trigger. The gun fired past my head and I fell to the floor with the gun. I 'passed out' and didn't know the number of shots fired or where they went. I didn't know I had shot anyone and remained unconscious until about 0800 hours 5 October 1944. I know I was drunk" (Pros.Ex.6).

The rifle discovered in the barber shop had been issued to Private Fred Davis (R61), whose bed was next to that of accused (R14). Sergeant David R. Brown entered the barber shop while accused was prone on the floor. He inspected the rifle found in the cubicle. He discovered one cartridge in its breach chamber and

two cartridges in the clip. He also picked off of the floor one live round of ammunition (R67,68). Sergeant Howard L. Southgate, the sergeant of the guard, came to the cubicle in response to a call by Brown (R45,67,68). He found a rifle exterior to the shop leaning against the partition, and he received from Brown the four cartridges above described (R44,45,67,68). Southgate asserted three of these cartridges (Pros.Ex.4) were "misfires" or cartridges "struck by the firing pin but failed to go off -- explode" (R44). He also picked up from the floor cartridge cases representing used bullets. While the number of these cases is not stated, there is an inference in the record that they were four in number. (The description of Pros.Ex.4 in the record index is "Cartridge clip with eight cartridges". Weissman testified that "eight rounds were gathered up" (R48)) (R42,44).

An investigation conducted on the morning of 5 October (R56) revealed the existence of bullet holes not existing theretofore as follows: (1) in the ceiling of the main barrack room about ten feet from the cubicle partition (R58; Pros. Exs.7,9); (2) in the ceiling directly over the barber shop area (R58, Pros.10); (3) in the wash basin, shattering it and the water faucet (R59; Pros. Exs.2,8,12); and (4) in the cubicle partition (which faced the main barrack room) to the right of the wash basin and about 2½ feet from the floor (R37,58; Pros.Exs.2,11). A synchronization of photographs (Pros.Ex.2 with Pros.Ex.3) (R40) and an allocation of same to Pros. Ex.1 (plan of third floor of barrack) make it obvious that the bullet which struck the wash basin passed through the partition wall at a point about from 2 3/4 to 3 feet above the floor. It must have passed over Organ's bed and would have struck him had he been in it. It undoubtedly continued its course and lodged in deceased, who occupied the bed next to that of Organ. There is no evidence as to the target of the projectile which passed through the partition to the right of the basin (R36,37).

Major Burton P. Grimes, Medical Corps, Chief, Neuro-Psychiatric Section, 48th General Hospital, examined accused on 7 November 1944. He appeared to be responsible mentally; he was not unusually depressed and his memory was good. In response to a hypothetical question propounded by the prosecution, which included the assumed fact that accused was discovered with his feet extended in parallel position and his hands folded over his chest, the witness expressed the opinion that if accused were unconscious "it would seem unlikely he would get his hands in a rather formal position" (R63-65). In answer to a hypothetical question propounded by defense counsel (based on a summary of prosecution's evidence), the witness expressed the opinion that accused suffered from pathological intoxication at the time of the homicide (R65,66). He defined pathological intoxication thus:

> "Pathological intoxication is alcoholic intoxication which results in some exaggerated behavior as much as an increased depressive rationalization which would not be present at other times. In other words, the man gives expression to an extreme degree of unhappiness which would not ordinarily be manifest when he was not under the influence of alcohol" (R64).

There has been purposely omitted from the statement of facts all reference to the extended testimony in the record of trial concerning accused's attitude toward the sergeants of his company and of certain implied threats made by him to inflict bodily injury upon them upon conclusion of his military service. In view of the theory adopted herein by the Board of Review with respect to the degree of accused's offense, such evidence is immaterial.

4. Evidence for the defense summarizes as follows:

Accused, after an explanation of his rights (R69-70), elected to be sworn as a witness in his own behalf (R70). He testified that he drank cognac in a considerable amount at Poissy during the evening of 4 October 1944 in company with two other soldiers. They arrived late at camp. He then "had it on my mind * * * to blow my top * * * I was going to kill myself" (R71). He obtained a rifle. Walczyk and another soldier, Changalis, "say what I want to do that for". Walczyk took the rifle from him and went to bed.

> "I grabbed hold of another rifle, went to the barber shop room; in there I got hold of the rifle, opened the bolt, put the clip in. When I put the rifle butt on the floor, lying down there this way, put the clip on, something slipped off, it went off. * * * Something slip, maybe my hand hit the trigger, went off in my face; I guess some concussion when the rifle went off, I hit the floor. From then on I don't know nothing what happened" (R72).

He heard only the first shot. He had the idea of suicide "a couple of times; I was unhappy, don't know what was wrong with my mind a couple of times" (R72).

Captain James H. Rankin, Medical Corps, 217th General Hospital, examined accused on 17 November 1944 (R79). By the Kent emergency test his mental age was determined to be eight years. He is therefore in the moron class. Accused informed witness of his suicidal thoughts after his becoming intoxicated. Due to his limited intelligence he would display emotional instability, depression, and would react childishly to situations. In response to a hypothetical question based on a summary of the facts involved in the homicide, the witness expressed the opinion that accused intended to commit suicide when he entered the barber shop cubicle (R80-82).

Technician Fifth Grade Felix Leonard Walczyk, as witness for the defense, testified that prior to 4 October accused had never said to him that he was "going to blow his top". Witness was prompted to take accused's rifle from him because they had been drinking together and it was unusual to see him with a rifle on his knees when ordinarily it would stand at the head of his bed (R85,86).

Corporal Floyd William Saunders stated that about 2330 hours on 4 October in the company barracks, upon accused's request he gave him a pencil (R86). At that time accused did not hold a piece of paper in his hand, but at a time later in the evening witness removed from accused's pocket a piece of paper upon which was written the name of accused's mother and her address in California. (This document was not introduced in evidence). Witness saw accused in the barber shop after the shooting. He lay on his back. His right hand was near his head and his left hand across his stomach. His rifle was on the floor at his left hand about 1½ feet from his body. Weissman picked it up and leaned it against the wall. Saunders was one of the men who carried accused to the guardhouse. He was then unconscious and very limp (R87,88). After accused had been removed from the barber shop, Weissman struck him in the face with his clenched fist - a blow which brought blood (R88,89).

5. Nagy died as the direct result of being struck as he lay in bed by a bullet which was fired through the partition wall of the barber shop. The evidence is clear, convincing, and substantial that the bullet came from a rifle which was manipulated by accused, who was the only person in the cubicle at the time the bullet was discharged. No doubt, therefore, can exist as to accused's responsibility for Nagy's death. The serious question presented by the record of trial is whether the homicide constituted murder or a homicide of lesser degree of culpability.

The situation presented by the evidence is controlled by the rules of law stated as follows:

"Murder is the unlawful killing of a human being with malice aforethought. * * * Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a, pp.162-164) (Underscoring supplied).

"When an action unlawful in itself was done with deliberation, and with intention of killing, or inflicting grievous bodily harm, though the intention be not directed to any particular person, and death ensues, it will be murder at common law; though if such an original intention does not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful. Thus if a person breaking in an unruly horse wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder at common law. If, also, a man recklessly and maliciously throw from a roof into a crowded street, where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death to such as it might strike, and death ensue, the offense is murder at common law. It is also murder to kill by firing maliciously into a crowd, or by maliciously putting an obstruction on a railway track. And upon the same principle, if a man, knowing that people are passing along the street, maliciously throw a stone likely to kill, or

shoot over a house or wall with intent to do serious harm, and one is thereby slain, it is murder on account of previous malice, though not directed against any particular individual; it is no excuse that the party was bent upon mischief generally, and not specially" (1 Wharton's Criminal Law, 12th Ed., sec.444, pp.683,684).

" If we are mistaken as to there being evidence of appellant's malice towards the deceased in particular, it is clearly established that the appellant, without lawful excuse, intentionally fired the pistol in a room crowded with persons. If he did this, not with the design of killing anyone, but for his diversion merely killed one of the crowd, he is guilty of murder. For such conduct establishes 'general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty, and fatally bent on mischief. And whenever the fatal act is committed deliberately or without adequate provocation,' the jury has a right to presume it was done with malice" (Brown v. Commonwealth, 13 Ky.L.Rep. 372, 17 S.W. 220, 5 AIR 604,605).

"He recklessly fired his gun into the crowd, not caring who might suffer from it. A more wicked and malicious act could hardly be conceived. The fact that an innocent man was the victim of his unlawful conduct makes his act the more reprehensible, for it is entirely beyond the bounds of palliation or excuse. Maliciously to fire into a crowd, regardless of consequences, is murder if death results therefrom" (State v. Young, 50 W.Va. 96, 40 S.E. 334, 5 AIR 605).

a. The evidence proved beyond all doubt that accused knew at the time he entered the barber shop, armed with a rifle and carrying ammunition, that the barrack room was occupied by his fellow soldiers and that with few exceptions they were in bed and many of them were asleep. Regardless of his purpose or motive, he intentionally fired his rifle into the room. Three of the shots were aimed in the direction of and among the men and one of them killed Nagy. No excuse or provocation existed.

Under these circumstances he is conclusively charged with the knowledge that his indiscriminate shooting into the room of sleeping men would "probably cause the death of, or grievous bodily harm to" one or more of them. The fact that he may not have intended such result offers no palliation or excuse. From this state of the evidence the court was fully justified in inferring that he acted with malice aforethought. The Board of Review is of the opinion that substantial evidence supports the findings of the court that accused was guilty of murder (Banks v. State of Texas, 211 S.W. 217, 5 ALR 600 with annotation at p.603 et seq.; Annotation, 23 ALR at p.1554 et seq.).

b. The court resolved against accused the conflicts in the evidence bearing on the issues whether his intoxication was of such degree as to deprive him of the mental capacity to possess a general criminal intent or to render him physically incapacitated to commit the homicidal act. These were essentially questions of fact within the peculiar province of the court for determination. There is substantial evidence that accused's intoxication at the time of the shooting was not of such severity as to deprive him of his powers of deliberation and that he did in fact discharge the bullet which killed Nagy. Such findings are binding on the Board of Review upon appellate review (CM ETO 3180, Porter; CM ETO 3932, Kluxdal).

c. Likewise the issue whether accused intentionally fired into the room occupied by sleeping men or whether the shots were accidentally discharged by him was one of fact for resolution by the court. By its findings the court indicated its disbelief that the shots were fired into the barracks accidentally by accused in the process of an attempt to kill himself. The findings in that respect are fully supported by the evidence. Except for the discharge of the first shot (which undoubtedly entered the ceiling above the cubicle), accused offered no explanation. He asserted he had "passed out". The fact that the rifle was thereafter fired three times belies this assertion. In view of the surrounding facts and circumstances, the finding of the court on this issue will not be disturbed on appellate review (CM ETO 3932, Kluxdal, supra).

6. The action of the approving authority in reducing the period of confinement from life to ten years, while unusual, is nevertheless legal (SPJGK, CM 241226, Gray, 26 B.R. 239, II Bull. JAG 379). A careful consideration of the evidence by the Board of Review convinces it that the approving authority was fully justified in effecting this radical reduction. While the evidence is legally sufficient to sustain the findings of accused's guilt of murder, the facts and circumstances surrounding the homicide create a pattern closely resembling that found in cases of voluntary manslaughter accompanied by extreme intoxication. There was therefore

presented a situation where justice might well be tempered with mercy.

7. The charge sheet shows that accused is 24 years 11 months of age. He was inducted 22 June 1942 at Fort Sam Houston, 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 the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. Confinement in a penitentiary is authorized for the crime of murder by Article of War 42 and sections 275, 330, Federal Criminal Code (18 USCA 454,567). Prisoners, however, 25 years of age and younger and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is therefore proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1),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 of Operations
APO 887

BOARD OF REVIEW NO. 1

21 JUN 1945

CM ETO 7867

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private FRED WESTFIELD (32774582), 571st Quartermaster Railhead Company	Trial by GCM, convened at Granville, Manche, France, 27, 28 November 1944. Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification 1: In that Private Fred Westfield, 571st Quartermaster Railhead Company, did, at La Basse-Cour, Champcervon, near La Hay Pesnel, France, on or about 4 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Desire Le Bourgeois, a human being, by shooting him with a carbine.

Specification 2: In that * * * did, at La Basse-Cour, Champcervon, near La Hay Pesnel, France, on or about 4 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Julienne Chenu Tainture, a French woman.

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

Specification 1: In that * * * did, at La Basse-Cour, Champcervon, near La Hay Pesnel, France, on or about 4 August 1944, with intent to commit a felony, viz., murder, commit an assault upon M. Marcel Dugue, a French man, by firing a shot at him with a carbine.

Specification 2: In that * * * did, at La Basse-Cour, Champcervon, near La Hay Pesnel, France, on or about 4 August 1944, with intent to commit a felony, viz., murder, commit an assault upon Mme. Aline Malenfant, a French woman, by firing a shot at her with a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

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

On the afternoon of 4 August 1944, between 4:00 and 4:30 pm, a colored American soldier armed with a rifle appeared at the farmhouse of Desire Le Bourgeois in the vicinity of Champcervon about four kilometers from La Hay Pesnel, France, and asked for cognac. He was not given any (R7,8,9). He then proceeded to an adjoining farmhouse occupied by Madame Julienne Chenu Tainture, where a neighbor, Madame Aline Malenfant, was using the laundry tank that stood in the courtyard about 50 meters from the Tainture home. The soldier approached Madame Malenfant and spoke to her, but she could not understand him. He tore a piece from the corner of a carton of Chesterfield cigarettes he was carrying, wrote on it and gave it to her, but she did not understand what was written. He thereupon motioned to her to follow him, showed her his rifle and impressed upon her that it was loaded by displaying the bullets that

were in it (R16,17,18). Fearing that he would shoot her if she refused to comply, she followed him as far as the entrance to the Le Bourgeois farm. There the soldier pointed to an open stable. When she realized that he wanted her to enter the stable, she ran towards the main road to make her escape. The soldier fired at her and the bullet grazed her head behind the right ear. She continued running and with her children reached a camp about 200 to 500 yards away where American troops were stationed. There she attempted to report in French what had happened (R19). Frightened by the sound of the shot, Madame Tainture, who was inside her house engaged in her housework, left the house to join her family out in the field about 200 to 300 meters away. She was intercepted by the soldier, who seized her and threw her to the ground. She arose and he threatened her with his rifle and a knife. She attempted to run away but he overtook her, threw her to the ground again, raised her dress and tore away the bandage she was wearing over her private parts. She cried out for help. Her outcries were heard by deceased, Desire Le Bourgois, and his farmhand Marcel Dugue, who were working in the upper part of the field. They started in her direction and as they came near the scene of the attack, Dugue saw the negro soldier and Madame Tainture lying on the ground in a field of buckwheat. The soldier stood up, moved toward them, shouted, and gestured at them to leave. He then aimed his rifle at Dugue, but the rifle failed to work. Dugue withdrew a few steps and the soldier fired at him and missed. Dugue threw himself on the ground for cover. Le Bourgeois kept advancing with his arms raised making signs to the soldier to desist and saying "Comrade, comrade". The soldier fired at him and killed him. After Le Bourgeois had fallen, the soldier turned his attention once more to the woman, pushed her to the ground a third time, overcame her resistance, and had sexual intercourse with her. He then arose, looked where Le Bourgeois was lying, and ran away taking the rifle with him (R22-26,28-30).

4. The foregoing facts were proved by competent and substantial evidence which was not disputed by the defense. The vital question in the case is whether accused was the colored American soldier who committed these crimes. Since the evidence tending to prove his identify is in large measure circumstantial and a substantial amount of inadmissible hearsay was received, it is necessary to consider in detail all the evidence presented as to the identity of the criminal.

Roland Fremond testified that he was 14 years of age, an apprentice farmer, and made his home with Le Bourgeois. On 4 August 1944 at 4:20 pm he saw and talked with the colored American soldier who came to the Le Bourgeois farmhouse and asked for cognac.

The soldier wore a field jacket, green trousers, khaki leggings, a helmet, and a cartridge belt with canteen. He carried two bottles, a carton of Chesterfield cigarettes, and a gun. This witness identified accused in open court with positiveness as the soldier he saw at the farmhouse, but he based his identification on the fact that accused was tall and had a gold tooth. He admitted that he had failed to identify anyone at identification parades held on 5 and 10 August, and also stated that the first time he had ever seen the gold tooth on accused was on 10 October when his attention was directed to accused's mouth. He said he was able to identify accused in the courtroom because he was alone (R7-15).

Madame Aline Malenfant, 43 years of age, the woman who was fired upon by the colored American soldier at the entrance to the Le Bourgeois farm, testified that she saw the soldier coming from the Le Bourgeois farm toward that of Madame Tainture, at about 4:00 pm, 4 August. He first spoke to her and then tore a piece from the corner of the cigarette carton he was carrying, wrote on it and gave it to her. Although she could not understand what was written. She noted that there were two lines of writing on it. Upon being shown a piece of cardboard (Pros.Ex.12) with two lines of handwriting on it, torn from the corner of a Chesterfield cigarette carton, she said, "It is like the paper, but it was bigger" and that it was the same kind of paper. She said that accused might have been the man who fired upon her, but she had failed to identify her assailant at all the identification parades she had attended. Long after the date of the crime, one colored soldier alone was brought to her whom she identified as her assailant, and it seemed to her that he was the same person as accused (R15-21).

Madame Julienne Chenu Tainture, 53 years of age, victim of the rape, testified that her assailant was carrying cigarettes, a carbine, and a knife. He wore a "yellow-beige" one-piece suit. Immediately after raping her he ran away from the scene taking his rifle with him. The rape occurred at 4:15 pm, 4 August. She went to the American camp twice on 4 August and once again on 5 August to identify the soldier who attacked her. The first time, she pointed out a soldier but was unable to say it was accused. She identified no one on the second or third occasion. She "could not say" that it was accused who raped her and shot Le Bourgeois. The face of accused was more "restful" than that of her assailant who was very nervous. She "could not say" her assailant was drunk (R21-27).

Marcel Dugue, 22 years of age, was fired upon by the same soldier who attacked Madame Tainture and shot Le Bourgeois. He saw the negro soldier lying on the ground with Madame Tainture. The scene was in a field of buckwheat. Although he was about 25 meters away from the soldier when fired upon, he was unable to recognize him. The soldier wore a jacket, khaki trousers tied at the bottom,

a cartridge belt, and no leggings. He thought the soldier wore a helmet, but he saw no canteen. The incidents in the field occurred at 4:30 pm, 4 August. He attended an identification line-up that same day but was unable to identify the soldier (R28-31).

Staff Sergeant Edgar C. Lane was a member of a unit of 13 men attached on 4 August to a railhead unit whose area was situated about two miles from La Hay Pesnel. On that day, possibly between 3:00 and 4:00 pm he heard some shots coming from the direction of a farmhouse about 200 yards away. A few minutes later a woman with two children arrived at the unit area. She was crying. As she was talking in French he was unable to understand her. Taking four soldiers with him, he proceeded to the farmhouse to investigate. They found no one in the farmyard and continued beyond towards a wooded area. There they met a soldier coming out of the woods. Lane stopped him and asked him if he had fired his rifle. The soldier at first denied that he had done any firing, but when Lane took the rifle from him and smelled it, he admitted it had been fired and added that someone had fired in the woods and he had fired back. After this explanation, he was handed back his rifle and left. Lane testified that the soldier he saw coming out of the woods had features similar to those of accused, and was as tall, but that he was not sure it was accused. Later that same day, he attended an identification parade at the area of the 571st Quartermaster Railhead Company to identify the soldier he saw coming out of the woods. There were six or seven men in the line-up. He stopped in front of one of them and asked him if he were the soldier he had seen coming out of the woods. He said he was not. Two or three of the men in the line-up were about the same size, the same complexion, and there was doubt in his mind. Before he could observe him more closely a disturbance broke out among the members of the company and the identification was interrupted (R31-35,78-82).

Corporal Harvey Barnes, one of the four men who accompanied Sergeant Lane on the search, corroborated in substance his testimony about the soldier who was seen coming out of the woods. He described the soldier as tall, wearing either fatigues or a one-piece suit, and carrying a carbine. He was not positive of the soldier's features, and when he attended the identification parade with Sergeant Lane, he was not sure of the man he saw there. He could not swear that accused was the soldier he saw coming out of the woods and he had never said that accused looked like him (R35-38, 82-85).

Morton S. Klaus and Roger L. Peters, Agents, Criminal Investigation Section, Headquarters, Third Army, testified that on 4 August, shortly after 8:00 pm they went to the Le Bourgeois farm to investigate the crimes. The entrance to the farm was about 500

yards from the area of the 571st Quartermaster Railhead Company. They saw the body of deceased, Le Bourgeois, lying on a table in the farmhouse. They were taken 300 or 400 yards from the house to a field of buckwheat where they were shown the spot where the rape was said to have occurred. Nearby, where Le Bourgeois was said to have fallen, there was a pool of blood. About 15 to 20 feet from where the rape had occurred, Peters found an expended cartridge shell, carbine, caliber .30, M1 (Pros.Ex.1). Klaus searched the same ground again the following morning and found a second expended cartridge shell, carbine, caliber .30 M1 (Pros. Ex.2) about ten feet from where the first shell was found. The same morning, he also searched the area near the entrance to the farm, where Madame Malenfant was said to have been fired upon, and found a third expended shell (Pros.Ex.3) similar to the first two. On the evening of 4 August at about 9:30, after the first shell was found, four suspects, all members of the 571st Quartermaster Railhead Company, were assembled in the company area. One of them was accused. The investigating officer called each man forward, took the rifle from him and asked him to give the number of his rifle. As each man stated the number, the investigating officer and Klaus checked the number on the rifle and as they were identical the rifle was assumed to belong to the soldier in each case. The investigating officer then loaded the piece and fired it. The expended cartridge shell in each instance was picked up and marked for identification. Accused gave the number of his rifle without hesitation and it was the same as the number on the rifle that was taken from him. Four expended cartridge shells were thus obtained for purposes of comparison (Pros.Exs.4,5,6,7). Prosecution Exhibit 5 was the expended shell fired with the rifle taken from accused. Specimen handwriting was also obtained from each of the four suspects (Pros.Exs.8,9,10,11). Prosecution Exhibit 9 was written by accused. The evidence shells (Pros.Exs.1,2,3), the test shells (Pros.Exs.4,5,6,7), the specimens of handwriting (Pros.Exs. 8,9,10,11), and the piece of cardboard with handwriting on it (Pros. Ex.12), were forwarded to New Scotland Yard, London, England, with a letter requesting that they be examined (R38-50,51-62).

Percy George Law, detective inspector at New Scotland Yard, chief of the photography department, and engaged in criminal photography for 19 years, testified that for purposes of comparison he had made micro-photographic enlargements (Pros.Ex.14) of markings made by the extractor on the periphery of the base of the shells marked as Prosecutions Exhibits 2 and 5. The enlargement was about 55 times. The markings on these two exhibits appeared similar to him. He did not photograph the other shells because he did not find marks on them that were similar. He also made enlarged photographs (Pros.Ex.13) of the piece of cardboard cigarette carton (Pros.Ex.12), and of specimen handwriting of accused (Pros.Ex.9) (R63-67).

Frederick Rupert Cherrill was in charge of the Fingerprint Bureau and Scientific Section of New Scotland Yard for 26 years. He made a special study of handwriting and did handwriting analysis for

26 years. In his opinion, the handwriting on the piece of cigarette carton was similar to the specimen handwriting of accused (Pros.Ex.9), but because there was such a small amount of handwriting on the piece of cardboard (only the word "food" was legible he would not go so far as to say that they were written by the same person. There was no similarity between the writing on the piece of cardboard and any of the other three speciments. It was more likely that the writing on the piece of cardboard was done by accused than by any of the other three. In his opinion, accused when writing the specimen (Pros.Ex.9) desired to write in a manner different from his natural handwriting. This was shown by the hesitancy with which he made the "f" in his own name, and the "d" in the word "induct". It is rare for a man to hesitate or make a mistake in writing his own name even if he has a small degree of education (R67-70).

Robert Churchill, of London, a gunmaker, testified that he has been a gun expert for the Metropolitan Police for the past 34 years. Police authorities in England have employed him as an independent expert in all cases requiring expert testimony of this nature. He studied the subject for many years. He believed he was the first to try to identify bullets. In 1925, in America, Goddard and Waite discovered the comparison microscope. He went to America and studied with Goddard. When he returned to England he tried to perfect methods of identification. His name is mentioned in most books dealing with ballistics. He is acknowledged as an expert in ballistics in England and North Ireland. He has been an expert for the American forces during this war and testified as an expert before American courts-martial. He made an independent and painstaking microscopic examination of the evidence shells (Pros.Exs.1,2,3) and the test shells (Pros.Exs.4,5,6,7). He found that the evidence shells matched and he was satisfied that they were fired by the same bolthead. He made a direct examination of each shell under the comparison microscope. He individually compared the evidence shells with the test shells and found that the evidence shells and test shell, Prosecution Exhibit 5, were all fired by the same bolthead. They all bore the same extractor marks. (Pros.Ex. 5 was the test shell fired by the rifle of accused). The other three test shells (Pros.Exs.4,6,7) were eliminated by the comparison. He also examined the striker marks and found nothing about them that conflicted with his conclusions. The striker marks were blurred by the rotation of the bolt as it unlocked after the cartridge was fired and were not a satisfactory source of identification. It would not be possible for bolts to have identical markings on the extractor even though they were made in mass production by the same manufacturer. In addition, he examined the micro-photographic enlargements (Pros.Ex.14) of the markings on evidence shell Prosecution Exhibit 2 and test shell Prosecution Exhibit 5 and found them to match perfectly (R70-76).

After the prosecution rested, the defense made a motion for findings of not guilty. The motion was denied (R77).

5. Accused, after his rights were explained to him, elected to remain silent and the defense offered no evidence (R78).

6. a. Murder of Desire Le Bourgeois (Specification 1, Charge I):

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed. 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944). The brutal killing of Le Bourgeois for the obvious purpose of eliminating his interference with the satisfaction of the soldier's carnal desires upon Madame Tainture is established by her testimony and that of Dugue, both of whom were eyewitnesses to the shooting and to the fact that it occurred in the course of the commission of the rape upon the woman. The evidence shows murder without any doubt (CM ETO 5584, Yancy; CM ETO 8166, Williams; and authorities therein cited).

b. Rape of Madame Julienne Tainture (Specification 2, Charge I):

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). The testimony of the victim, corroborated by that of Dugue and by her shouting and prompt complaint, establishes the commission of a violent assault upon and penetration of her person against her will, and leaves no doubt as to the guilt of the soldier involved of rape (CM ETO 5363, Skinner; CM ETO 5561, Holden and Spencer; CM ETO 5584, Yancy; CM ETO 8166, Williams).

c. Assaults with intent to murder upon Marcel Dugue and Madame Aline Malenfant (Specifications 1 and 2, Charge II):

The evidence is clear that the soldier fired deliberately and directly at each of his intended victims, grazing the woman's head and missing the man, who attempted to thwart his lustful design. Assaults with intent to murder upon both Dugue and Madam Malenfant are clearly established (CM ETO 2899, Reeves; CM ETO

4269, Lovelace; CM ETO 5137, Baldwin).

7. The vital question in this case is the identity of accused as the perpetrator of the crimes. As the only substantial evidence on the issue of identification is circumstantial, the following standards of proof, which are well established in our jurisprudence, must be met if the findings of guilty are to be sustained. The rules are probably best stated in two decisions which have frequently been cited by Boards of Review in their consideration of the legal sufficiency of circumstantial evidence (see CM ETO 3200, Price).

In Buntain v. State, 15 Texas Criminal Appeals 490, the court held that evidence of opportunity to commit a crime is alone insufficient to uphold a verdict of guilty. The court stated:

> "While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt. * * * It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen.
>
> This defendant may be, and most probably is, guilty, as found by the jury, but in our opinion the evidence tending to establish that guilt does not fill the measure of the law".

In People v. Razezicz (1912), 206 N.Y. 249, 99 N.E. 557, proof of the defendant's guilt was largely premised on the circumstance that previous to the homicide, which was committed by the use of a bomb, he had exploded a bomb of the same kind. The only evidence of the defendant's participation in the explosion of the bomb on the prior occasion was circumstantial. While the proof of the inculpating circumstances in the instant case is itself in some measure direct rather than circumstantial, nevertheless the principles in the Razezicz case are of extreme importante herein. The New York Court of Appeals confirmed its former holding in People v. Harris, 136 N.Y. 423, 429, 33 N.E. 65,67, in which the court used the following language:

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> "All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts".

The court continued in the Razezicz case:

> "There is no one fact or series of facts that point inevitably to the defendant's guilt. The facts shown by the people singly and combined are consistent with the defendant's innocence * * * Circumstantial evidence as has been frequently remarked is unsatisfactory, inconclusive and dangerous, or satisfactory, conclusive and safe according as it points to a certain result, and is not inconsistent (sic) with any other result or conclusion. * * *
>
> In a criminal case circumstantial evidence to justify the inference of guilt must exclude to a moral certainty every other reasonable hypothesis. Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will 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 inferences from the facts shown are not sufficiently conclusive * * * to exclude all other inferences and to justify the judgment obtained against him [the defendant]. The testimony as a whole is consistent with the defendant's innocence" (99 NE at 565-566; underscoring supplied).

Analysis of the competent evidence yields the following circumstances pointing to accused as the criminal:

a. Some five hours following the commission of the crimes, accused had in his possession the gun issued to him, which was shown by ballistics testimony to be the one from which were fired the shells found at the scene of the crimes

(see Evans v. Commonwealth (1929), 230 Ky. 411, 19 S.W. (2d) 1091, 66 ALR 360; CM 222443, Lieberher (1942), 13 B.R. 283; CM 237145, Phillips (1943), 23 B.R. 281, 285; CM 238389, Kincaid (1943), 24 B.R. 247,250).

b. All of the crimes were shown to have been committed by a tall soldier of about the same height as accused. Sergeant Lane testified also that the soldier he saw coming out of the woods had features similar to those of accused.

c. One witness (Roland Fremond) positively identified accused at the trial as the colored American soldier who came to the Le Bourgeois home at the time in question. His identification, however, was based upon the fact that accused had a gold tooth, whose presence he discovered long after the crimes, was tall, and was the only negro in the courtroom.

d. Three other civilian witnesses (Mesdames Aline Malenfant and Julienne Tainture and Marcel Dugue), while unable to identify accused as the culprit, in no manner excluded his identity as such and Madame Malenfant testified accused might have been the man who fired at her.

e. Expert handwriting testimony, as well as visual comparison, tends to show that it was accused who wrote on the piece of cardboard which he tore from the corner of the cigarette carton and gave to Madame Malenfant. The specimen which accused wrote reveals an apparent attempt to dissimulate his true handwriting, as indicated by hesitancy in making each of two letters in his own name on the specimen which were present in the only legible word in the writing on the cardboard.

f. There is not one word in the entire record of trial of explanation or denial of accused's evident connection with the crime.

The Board of Review is of the opinion that the foregoing evidence fails to meet the standard established for circumstantial evidence developed in the quoted authorities. The direct testimony tending to identify accused as the culprit is highly inconclusive in nature. So far as the record shows, no person ever unqualifiedly identified him at any time before or at the trial, even though identification parades, held shortly after the time of the offenses, were attended by Fremond, Madame Malenfant, Madame Tainture and Dugue. Likewise, the evidence as to the similarity between the handwriting of the guilty soldier and the specimen written by accused is far from conclusive. The expert expressly testified he could not say the two writings were by the same person. What appeared to be an attempt to dissimulate accused's true handwriting may well have been the result of his anxiety and nervousness.

attendant upon the circumstances under which the specimen was obtained. The fact that the culprit was similar to accused in height and facial features is as consistent with innocence as with guilt. The lack of explanation or denial of accused's connection with the crime is purely negative in character. He had the absolute constitutional right to remain silent.

The only valid substantial evidence tending to establish accused's identity is his possession of the lethal weapon some five hours after the commission of the offenses. It is true that such circumstance raises a strong suspicion and perhaps even a probability of accused's guilt. Such, however, is not enough, because it is not "sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt" (Buntain v. State, supra). It is certainly a reasonable inference that the soldier who committed the crimes did not use his own carbine. To deny the reasonableness of such hypothesis would be to close one's eyes to the realities of the situation among frontier troops in the early stages of the invasion of continental Europe, where it was a common and natural act for a soldier to pick up the nearest gun, whether or not it was the one assigned to him. Such hypothesis moreover is confirmed by the readiness with which accused gave the number of his weapon to the investigating officer after it was taken from him. In short, accused's possession of the lethal weapon, under all the circumstances, was far short of conclusive evidence of his guilt. This is not the case of the discovery of a lethal weapon in the possession of a civilian suspect in an orderly community in the United States during stabilized peacetime conditions. Accused's weapon was the implement of his trade. It was his right and duty to have it in his possession.

The Board of Review is therefore of the opinion that the inference of guilt is not the only one which can reasonably be drawn from the facts disclosed by the record (People v. Razezicz, supra). It is a thoroughly reasonable hypothesis under all the circumstances shown by the record, that a soldier other than accused appropriated accused's carbine, went to the scene of the crimes, and committed them. The fact that both the prosecution and the defense failed to adduce evidence pointing to the guilt of some other soldier cannot be permitted to cure the inconclusive nature of the prosecution's circumstantial proof. All the evils inherent in unsatisfactory circumstantial evidence are present in this case. To hold the record legally sufficient would therefore be directly contrary to the sound and well-established principles above set forth.

The Board of Review takes particular note of its decisions in CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith; and CM ETO 7702, Shropshire. In all of those cases the circumstantial evidence excluded every reasonable hypothesis except that of the accused's guilt.

8. But apart from the discussion in the preceding paragraph, the Board of Review is of the opinion that the admission of certain patently hearsay testimony as to accused's identity as the guilty soldier so prejudiced his substantial rights as to require a reversal of the conviction.

Over vigorous objection by the defense, the prosecution was permitted to introduce the testimony of Agent Peters, who was not present at the identification line-up at the company bivouac area, that Sergeant Lane stated to him on the day following the line-up that he had picked out a certain man (as the man he had seen coming out of the woods), but could not tell the name of accused or of the person he had picked out. Peters thereupon testified that from his own investigation, he knew that the person picked out was accused (R55). In elaboration he testified that Lane refused to attend a further identification parade at the company area and stated he was "not going to know anything" and had "never seen anything", because at the identification the troops began to riot and chased Barnes with their carbines, threatening to kill Lane and his men. Over a month later, Lane told witness he had picked out the man he had seen coming from the woods (R56-57). Witness learned that the identification parade was conducted by Lieutenant Frank Carr, who gave him a written report thereof stating "that Sergeant Lane and Barnes had picked out a man whom he, Lieutenant Carr, identified as Freddie Westfield" (R58-59). The law member overruled the defense objections on the theory that

> "A witness may testify that such a statement was made but not for the purpose of proving the truth of such statement" (see MCM, 1928, par.113a, p.113).

and upon the understanding, as expressed by the prosecution, that it was admitted

> "For whatever the witness might say and for whatever value his statement may mean to the court" (R59).

As hearsay, the testimony was not evidence and was improperly admitted (MCM, 1928, par.113a, p.113; CM ETO 8474, Andoscia). Even assuming that this highly incriminating statement in Lieutenant Carr's report was admitted under the guise of impeachment of a supposedly hostile witness, this could not give it any value as evidence which it did not otherwise possess. The generally recognized rule denies substantive evidentiary value to impeaching admissions in former inconsistent extrajudicial statements of a witness not a party to the action (Ellis v. United States (CCA 8th, 1943), 138 F(2d) 612, and authorities therein cited; Annotation, 133 ALR 1454 et seq.; CM ETO 4581, Ross). As lieutenant Carr was not present as a witness

available for cross-examination with respect to his identification of accused as the man picked out by Lane and Barnes, his report, even had it been offered in evidence, was clearly hearsay. Barnes' parol testimony as to the contents of the report was definitely not the best evidence. Such testimony was thus doubly incompetent. Its admission was at least as flagrant an error as the admission in CM ETO 2625, Pridgen, of a portion of an involuntary confession of the accused under the guise of laying a foundation for his impeachment upon cross-examination. The Board of Review there held that, in the absence of compelling evidence of guilt in the record, the error was seriously prejudicial to accused's substantial rights and required that the findings of guilty be set aside. Likewise the fact that the obviously hearsay character of the testimony was fully demonstrated to the members of the court cannot be held to lessen its damning effect. It was received under a formal ruling of the law member, as competent evidence. His misapplication of the rule permitting testimony as to the making of a certain statement, where the fact that it was made is material, was entirely misleading. His admonition that the statement was admissible but not for the purpose of proving its truth was not only meaningless but was inconsistent with the prosecution's statement, which the law member adopted, that the statement was admissible for whatever value it might have for the court. It was the most specific and positive testimony, even though legally inadmissible, of accused's identity as the perpetrator of the crimes. Had Lane testified positively that he identified accused emerging from the woods shortly after and in the vicinity of the crime, bearing a recently fired rifle, the case for the prosecution would have been immeasurably strengthened. The prosecution sought to bolster the weakness of Lane's testimony by resorting to patently incompetent testimony which the law member admitted over strenuous objections. Such procedure cannot be condoned in the administration of military justice. In definitely linking accused's name to Lane's identification, the testimony may well have dispelled the court's doubts as to his guilt. That it injuriously affected accused's substantial rights cannot be doubted, certainly in view of the inconclusive nature of the competent evidence upon the issue of his identity as the guilty soldier (CM ETO 1201, Pheil; CM ETO 1693, Allen; CM ETO 2625, Pridgen; CM ETO 3811, Kimball and Morgan). The Board of Review is therefore of the opinion that the findings of guilty must be set aside.

It follows that the defense motion for findings of not guilty was improperly denied (MCM, 1928, par.71d, p.56).

9. The charge sheet shows that accused is 20 years of age and was inducted 13 March 1943. No prior service is shown.

10. The court was legally constituted and had jurisdiction of the person and offenses. For the reasons above stated, the Board

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

B. Franklin Ritter Judge Advocate

Wm. F. Burrows Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private FRED WESTFIELD (32774582), 571st Quartermaster Railhead Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, 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 7867. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7867).

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

(Findings and sentence vacated. GCMO 238, ETO, 1 July 1945).

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

BOARD OF REVIEW NO. 2

4 MAY 1945

CM ETO 7868

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 95, U.S. Army, 16 January 1945.
	)	
Private PAUL M. J. KRAMER (36950216), Company I, 378th Infantry	)	Sentence: Dishonorable discharge, totalforfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
	)	
	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Paul M. J. Kramer, Company "I", 378th Infantry, did, at or near Ensdorf, Germany, on or about 9 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: Engage in combat with the enemy in his capacity as

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a rifleman, and did remain absent in desertion until he was apprehended at Creuzwald, France, on or about 20 December 1944.

He pleaded not guilty, and all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and guilty of the Specification except for the words "he was apprehended at Creuzwald, France", of the excepted words, "not guilty". No evidence of previous convictions was introduced. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence but recommended that it be commuted to dishonorable discharge, forfeitures of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, European Theater of Operations confirmed the sentence, but owing to special circumstances in this case, commuted it as recommended by the reviewing authority, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

On 9 December 1944, Company I of the 378th Infantry was engaged in combat in the town of Ensdorf, Germany (R7-10). In the past the company had been making good progress characterized by long drives and big gains but at Ensdorf they met what in the words of the company commander (R7-10) "possibly was the toughest thing we had been up against yet" (R9). They were under constant fire from artillery and smaller weapons. "Every street in the area was filled with snipers and machine guns" (R9,25). At the time the accused was a rifleman in the third platoon of I Company (R7,10). He stood guard with his platoon on the night of 8 December (R12) and on the morning of 9 December. At about 1630 that afternoon the enemy laid down a barrage which demolished a building across the street and the accused ran out through the rear of the building in which his squad was located (R24,25). He had no authority to leave

(R23,25). The enemy was just ahead, about 100 or 150 yards away. He ran directly away from the enemy. His squad leader called to him but "got got around the building" (R26). It was standard operating procedure for members of the squad to report to the squad leader in case of sickness. There was an aid man at the platoon CP. The accused never complained of sickness (R27).

Replacements were unobtainable and eventually the company became so depleted in the fight that the third platoon was inactivated and its remaining members were assigned to the first and second platoons. After his disappearance the accused did not return to his company until about 20 December after it had withdrawn to the rest area about 30 miles behind the lines (R7,8,13).

The morning report for Company I, introduced without objections, lists accused as absent without leave from 0001 on 9 December to 0001 21 December (R7,8; Pros.Ex.A).

In the rest area accused was interviewed by his company commander who explained to him he might remain silent and that anything he said could be used against him. He then asked accused why he had gone absent and the accused replied, "I was scared" (R7,9).

In a signed statement made to the officer investigating the charges, the accused, after being warned of his rights stated that he did not think he was absent without leave; that he had actually gone back to have his tonsils painted by medical personnel (R29,30; Pros.Ex.B).

4. After his rights were explained to him, accused elected to remain silent and no evidence was introduced for the defense (R30).

5. A question requiring consideration is the legal effect resulting from the introduction of certain evidence by the prosecution which strongly indicated that on a previous occasion the accused had deserted his organization to avoid the hazards of an advance into enemy fire. The incident occurred about a week before the offense for which accused was tried. The prosecution contended for the admissibility of the evidence in proof of accused's intent

at the time he absented himself on 9 December. The law member sustained the objection of the defense but much of the evidence was by that time before the court and there was no positive warning to disregard it (R10-12). Whether this particular testimony was admissible appears to be a close question on which the Boards of Review in this theater have not expressed an opinion. Nor is it necessary to express an opinion on the point in this case for, assuming that the testimony was inadmissible, its injection into the case should not be allowed to disturb the findings of guilty. The competent evidence of record compels the conclusion that the accused at the time and place alleged deliberately absented himself without proper leave from his organization and ran to the rear to avoid the increasing fire of the enemy. He went back because he was "scared" (R9,20). The only conflicting evidence on this point is found in a later statement by the accused that he went back to have his tonsils "painted by the medics" (Pros.Ex.B). Accused's explanation is completely unsupported by any other evidence and in view of the other circumstances it carries no conviction. The "record contains compelling evidence of accused's guilt" (CM ETO 3811, Moran, et al.). Accordingly the temporary admission of evidence tending to prove a prior similar offense for which the accused was not on trial could not injuriously affect any substantial right of the accused within the purview of Article of War 37 (Moran, et al, supra). The findings of guilty were based on evidence too impressive to have been influenced by the testimony under discussion. Insofar as it may have affected the severity of the sentence, both the reviewing and confirming authorities have sought to effect a readjustment. The confirming authority has commuted the sentence, as his action explains, because of the "special circumstances in this case and the recommendation of the reviewing authority", who in turn based his recommendation on the youth of accused and "the fact that irrelevant evidence was received which may have influenced the court in assessing the extreme penalty".

The Specification on which the accused was brought to trial alleges that his desertion was terminated by apprehension at Creuzwald, France. The failure to prove the manner and place of termination as alleged is not regarded as an omission of consequence. "The offense charged was committed at the moment accused absented himself without authority in order to avoid impending hazardous duty" (CM NATO 2044, (1944) III,Bull.JAG 232). The court made appropriate exception in its finding.

6. The charge sheet shows that the accused is 19 years four months of age and was inducted 23 February 1944 at Fort Sheridan, Illinois. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, The Branch Office of The Judge Advocate General with the European Theater of Operations. 4 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private PAUL M. J. KRAMER (36950216), Company I, 378th 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 7868. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7868)

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

(Sentence as commuted ordered executed. GCMO 153, ETO, 20 May 1945.)

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

BOARD OF REVIEW NO. 1

25 JUL 1945

CM ETO 7869

U N I T E D S T A T E S v. Privates HORACE G. ADAMS (38459762) and HUGH L. HARRIS (13178813), both of 344th Replacement Company, 71st Replacement Battalion	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 21,22 November 1944. Sentence as to each accused: To be hanged by the neck until dead.

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

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

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

ADAMS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Horace G. Adams, Detachment 71, Ground Forces Replacement System, did at or near Dimancheville, France, on or about 6 September 1944, forcibly and feloniously and by putting her in fear and against her will have carnal knowledge of Yvonne Bourbigot.

HARRIS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Hugh I. Harris, Detachment 71, Ground Forces Replacement System, did at or near Dimancheville, France, on or about 6 September 1944, forcibly and feloniously and by putting her in fear and against her will have carnal knowledge of Yvonne Bourbigot.

Each accused pleaded not guilty and, more than three-fourths but less than all of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against accused Adams. Evidence was introduced against accused Harris of one previous conviction evidently by special court-martial for absence without leave for 30 days. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The record states that the court's vote for finding of guilty as to each accused was by three-fourths of the members present at the time thereof (R61-62) and that its vote for the death sentence as to each accused was by all of the members present at the time thereof. Such votes were cast on 22 November 1944 (R63). The president of the court, who had authenticated the record of trial, executed a certificate dated 5 December 1944 which declared that the court's vote as to the findings and the sentence of each accused in the case was unanimous. As indicated in paragraph 2, supra, the reviewing authority upon approving the sentences forwarded the record of trial to the confirming authority for action under Article of War 48. The confirming authority returned the record to the reviewing authority, pointing out the inconsistency between the record and the above mentioned certificate, and stating that in view of the penalty imposed, the certificate was not acceptable and that the record should be submitted to the court for revision in accordance with paragraphs 82 and 87b, Manual for Courts-Martial, 1928, in order to determine the actual vote upon the findings and in order that the record might be made to speak the full facts concerning the findings. The reviewing authority forwarded the record to the president of the court by first indorsement dated 3 February 1945, thereafter at an undisclosed date the court (all members present) met and in closed session amended

and completed the record by adding, in pertinent part, that all members did not concur in the findings of guilty of each accused, but that such findings were with the concurrence of more than three-fourths, but less than all, of the members present at the time the vote was taken. Thereafter the confirming authority confirmed the sentences and, on 27 February 1945, forwarded the record to the Branch Office of The Judge Advocate General with the European Theater of Operations for action under Article of War 50½.

On 6 March 1945, the Assistant Judge Advocate General in charge of said Branch Office returned the record to the Theater Judge Advocate, European Theater of Operations, for such further action as he might deem proper, stating that in view of the advice of The Judge Advocate General with respect to the vote upon findings in cases wherein the death sentence was imposed [to the effect that execution of the death penalty be not recommended in any case where the record fails to show affirmatively that findings of guilty were reached by unanimous vote, pending final decision in the case of Stout v. Hancock, 146 F (2nd) 741] and because it was not known whether the decision in that case was final, it appeared that the submission of the record to the Branch Office was premature; stating further that upon revision proceedings the court took no action with respect to the sentences; that a situation was presented which impugned by inference the [unanimous] votes upon the sentences, emphasized by the certificate of the president in conflict with the record [as to the vote upon the findings]; that the presumption of correctness of the record was therefore seriously weakened; and suggesting the desirability of the confirming authority returning the record to the court for amplification and confirmation of its votes upon the sentences.

The record was again forwarded by the confirming authority to the said Branch Office, pursuant to carrier sheet dated 26 June 1945 from the theater judge advocate, stating that as the War Department has advised that the decision in the Hancock case has now become final, the case might now be reviewed under Article of War 50½. Meanwhile, on 10 April 1945, the staff judge advocate of the reviewing authority forwarded to the Branch Office for inclusion in the record certain papers indicating that the president of the court was of the honest opinion that the vote upon the findings was unanimous and that the conflict between his certificate of 5 December 1944 and the revision proceedings was due to faulty but untainted memory; (by affidavits) that three other members of the court believed the vote on the findings was unanimous; that four members believed there was one vote [out of 12] of not guilty, and that one member could not remember whether or not the vote on the findings was unanimous. The last mentioned eight members all stated that the vote on the sentences was unanimous.

With respect to the vote upon the findings of guilty, in view of the fact that the Supreme Court of the United States denied the petitioner's application for writ of certiorari on 30 April 1945 (US ; L.Ed. ; 65 Sup.Ct. Rep.1086 (1945) and that the time for filing a petition for rehearing in that court has now expired, the decision of the United States Circuit Court of Appeals for the Fourth Circuit in Stout v. Hancock, 146 F (2nd) 741 (1944) has become final. It may now be considered as settled that the long standing administrative interpretation of Article of War 43 is correct, viz: that, except as to Article of War 82, for violation of which the death penalty is expressly made mandatory, a two-thirds vote is sufficient for a finding of guilty of any offense, even though the death penalty is authorized therefor. Consequently it is immaterial whether or not the findings of guilty herein were by three-fourths vote of the members of the court or by a greater fraction or by unanimous vote, as the vote certainly exceeded the two-thirds required by Article of War 43. Review of this record by the Board of Review is thus no longer premature. As to the vote upon the sentences, it sufficiently appears from the record of trial, the certificate of the president of the court, and the affidavits of eight of the 12 members thereof, all of which are consistent, that this vote was unanimous and therefore in accordance with Article of War 43. There appears to be no occasion to doubt the verity/this statement.

4. Prosecution's evidence was substantially as follows:

On 5 September 1944, Andre Bourbigot lived with his wife, Yvonne, and their three children, of whom the youngest was two years of age, at Dimancheville, Loiret, France (R12,37). On that day the family retired about 9:30 pm and at about 11 pm the two accused knocked on the door of their house. Bourbigot inquired who was there and they replied "the police". He admitted them, each armed with a gun, into the house where with the use of a dictionary they conveyed to the Bourbigots that they (accused) were friends and wished to stay in the house to protect the inmates from "Boche" who were hidden in the woods nearby. Accused helped themselves to some nonalcoholic cider in the kitchen. Neither was under the influence of alcohol. Adams conducted Bourbigot outside to show him where the Germans were hidden, whereupon his wife followed him because she was afraid when Harris took her by the arm and directed her to stay in the house (R13-14,21,38,43). Thereafter accused told them to go to bed and they complied, without undressing. One of accused locked the outside kitchen door.

At midnight both accused left the kitchen, entered the adjoining bedroom, placed themselves at the door and window of the room respectively, and pointed their loaded weapons at Bourbigot and his wife (R14-16, 38-39). One soldier said "zig zig"

(R24,38). Madame Bourbigot, fearful that they would kill her husband, picked up her two year old child who had been sleeping in the room and stood with him in front of her husband to protect him. Until about 2 am accused endeavored to persuade the man and woman to return to bed and put the baby to sleep, but the couple pleaded with them to leave. Accuseds' response was that they did not understand and they continued to menace their victims with their weapons (R15, 39). About 2 am Adams approached Madame Bourbigot and forced her to lie on the bed, placed himself on top of her, forced her legs apart, and engaged in sexual intercourse with her against her will (R16-17,25,32,39-40,42). She testified that she tried to push him away from her (R32) but "I was obliged to give in because we were always threatened by the gun" (R17). Meanwhile Harris sat by the door covering the husband with his gun and Bourbigot took the baby, which was frightened, from his wife and, himself afraid to interfere, sat with it at the foot of the bed (R16,27,39-41). As soon as Adams completed the sexual act, Harris took his place, got on top of the woman, forced her legs apart and in turn engaged in intercourse with her against her will (R17-19,32,40). She testified that she likewise attempted to push her second assailant off her body (R32) but "I could not defend myself because he was threatening my husband" (R18). During Harris' intercourse, Adams in his turn covered the husband with his gun (R17,19,27-28,40). When the woman cried, accused "made me shut-up" (R31). After Harris completed his sexual act, both accused left the house (R17,40).

At daylight the following morning (6 September), the Bourbigots complained of the assaults to American authorities (R31,40). The victim and her husband each recognized accused and positively identified them as the assailants both en route to and at an identification line-up on that day (R19-20,40-41,45). Both also identified the accused in court (R12,38).

Testimony of a medical officer was stipulated to the effect that an examination of Madame Bourbigot

> "revealed a very apprehensive, trembling female, 34 years old complaining of palpitation and nervousness following an alleged rape about six hours previous. Pulse was 86, marked pallor. * * * From physical and laboratory examinations no conclusion can be drawn as to the alleged claim" (R49).

On 6 September each accused voluntarily executed a sworn statement which substantially accords with the foregoing testimony with respect to the assaults except that each stated that the Frenchman drank

cider with them at his home, emphasized that they told the occupants they would not harm them, and omitted reference to continued intimidation of them and to nonconsent to the intercourse (R45-49; Pros.Exs.A,B).

On 22 November (the second day of the trial) each accused was examined by a psychiatrist who testified that he concluded that neither accused was insane or feeble-minded and that each was mentally competent to distinguish right from wrong at the time of the offense (R35-36).

5. Evidence for the defense was substantially as follows:

After accuseds' rights were explained to them, Harris elected to take the stand as a witness in his own behalf. He testified, in material substance, that on the day in question he and Adams were armed with an M-1 rifle and carbine, respectively (R51). Because it was raining hard, Adams suggested staying at the house in question. They knocked on the door and the account of the ensuing conversation and events is in substantial agreement with the prosecution's evidence up to midnight. Harris testified that at that time they decided to leave and, therefore, entered the bedroom in order to tell the man and woman. They were not invited there (R53,56,59). The French woman took the weapons away from both accused (R53). Harris locked the door because the accused did not want the Bourbigots to go out - "somebody might hear it and think something was up" (R55). The acts of intercourse were thus described:

> "Adams then went into bed, and she got in by herself and Adams went with her. The frenchman was on this side of me, my left-hand side. He started saying some french words like "partie" and started patting me on the leg. Finally Adams got finished and he sat on the chair and put on his shoes and she was still on the bed and yelled at me, 'vieni, vieni', and I said, 'take your time, I'm coming, take your time'. I was taking off my leggins. I told her I was coming, and she was still insisting to hurry up. I took off my right leggin and then my shoes; in fact, I could not make up my mind to go or not. Adams said, 'go ahead don't worry'. So, I went to bed with her. When I got to the edge of the bed she was sitting sort of straight up against the pillar and her dress was up. I got on top of her meanwhile the frenchman and Adams went into the kitchen and by the time they came back I was finished. She then grabbed me by the cheek and kissed me on both cheeks" (R53-54).

Witness used no force on the woman and her dress was already lifted (R55). He told the man and woman he was not going to kill them and Adams had no gun while witness was having intercourse (R57). The woman said "'return tomorrow?'" and Harris said "'no'". The following day the woman identified each accused as "the two men" (R54), struck Adams on the neck and attempted to strike witness. She again identified them at the line- up (R55).

Thereafter a "Lieutenant" said "make a statement" and that Adams already made one,

> "so might as well quit my lying and so I had to make a statement" (R55).

Adams elected to remain silent (R61).

6. a. The officer who secured accuseds' pretrial statements testified that he warned each of his rights under Article of War 24 (R45) and each stated he understood them. He told them they did not have to make a statement but that he "would like to have one", and they had no objections (R46). "Possibly" he indicated to one of accused "here is a good chance to get it off your chest". No promises or threats were made to either accused, no compulsion was used in connection with the statements, and neither accused could have considered the officer's statement to be an order (R47). Witness at first stated that he told Harris he had already taken a statement from Adams, as was the case, and then denied this assertion (R48). Harris testified, as shown in paragraph 5, supra, that the officer said "make a statement" and that Adams already made one,

> "so might as well quit my lying and so I had to make a statement" (R55).

The issue whether accuseds' statements, which will be treated arguendo as confessions, were voluntarily given, assuming that Harris' testimony raised it, was for the court's determination which will not be disturbed on appellate review because of the presence in the record of trial of substantial evidence of voluntariness (CM ETO 3469, Conway Green; CM ETO 8581, George; CM ETO 11075, Chesak). Certain it is that the act of informing an accused that a statement is desired of him does not ipso facto render the same involuntary. Indeed instances are probably rare wherein an accused volunteers a statement without some solicitation. The issue is always the character and extent of the solicitation, which here was not sufficiently compulsory to require the court's conclusion of voluntariness to be set aside. Likewise mere adjurations to speak the truth are not regarded as sufficient to render statements made in response thereto as involuntary (CM ETO 72, Jacobs and Farley). The same is true of the advice to Harris that his co-

accused had already made a statement (McIntosh v. State of Nebraska (1920, Neb), 12 ALR 798; Cf: Murphy v. United States, 285 F 801 (CCA 7, 1923), certiorari denied, (1923) 261 US 617, 67 L.Ed.829).

b. The record shows (R1) that the trial took place only four days after the charges were served on accused. In the absence of objection or motion for continuance and of indication that any of the substantial rights of either accused were prejudiced, the irregularity may be regarded as harmless (CM ETO 8083, Cubley, and authorities therein cited).

c. After Harris concluded his testimony, the law member stated:

> "Any evidence arrested (sic) from the accused Harris which involves the accused Adams will not be considered by the court as against Adams" (R61).

The ruling was clearly erroneous, even by the common law rule under which each separately indicted accused was a competent witness for or against any other separately indicted accused. Such competency exists under Federal statute (Act. Mar.16, 1878, c.37; 20 Stat.30; 28 USCA 632) irrespective of whether the accused were separately or jointly tried (CM ETO 2297, Johnson and Loper, and authorities therein cited). The error was, of course, beneficial to accused Adams.

d. The testimony as to the extrajudicial identification of accused by the Bourbigots was admissible (CM ETO 12869, DeWar, and authorities therein cited).

7. 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 evidence presents an all too familiar pattern of joint nocturnal invasion of the privacy of a French home and intimidation of the occupants culminating in joint rape of the woman of the house. Recapitulation is unnecessary to demonstrate that the intercourse by each accused, whose identity is not in issue, with Madame Bourbigot was obviously effected by terrorization at the point of a gun and force

through mutual aiding and abetting. Even accuseds' pretrial statements indicate that one or both pointed their guns at the woman and her husband. Each accused took his lustful turn with the terror stricken woman while the other guarded the husband with his weapon. Her testimony as to nonconsent is corroborated by the presence of her family with her in the nighttime quiet of their home, the cold-bloodedly intimidative pattern of accuseds' conduct, and medical evidence of her distraught condition six hours after the assaults. Accused Harris' testimony, unlike his pretrial statement and that of his co-accused Adams, asserts that Madame Bourbigot and her husband each consented to Adams' intercourse with her and that the woman actively encouraged Harris to follow Adams' example and thereafter mentioned returning on the morrow. In view of the prosecution's evidence, including both accuseds' extrajudicial statements, as well as the other testimony of Harris, the court was fully justified in determining this factual issue against accused and in finding them each guilty of the vile crime of rape (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson and Rorie; CM ETO 4194, Scott; CM ETO 8450, Garries and Jackson; CM ETO 8837, Wilson; CM ETO 12662, McDonald; and authorities cited in those cases).

8. The charge sheets show that accused Adams is 22 years, 11 months of age and was inducted 4 May 1943 at Fort Sam Houston, Texas, and that accused Harris is of unknown age (corrected at the trial to 19 years of age (R63)) and enlisted 23 February 1942 at Philadelphia, Pennsylvania. The induction and enlistment were to serve for the duration of the war plus six months. Neither accused had prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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.

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

B. Franklin Riter Judge Advocate

Wm. J. Lynch Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(300)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Privates HORACE G. ADAMS (38459762) and HUGH L. HARRIS (13178813), both of 344th Replacement Company, 71st Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding, 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 7869. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7869).

3. Should the sentences as imposed by the court be carried into execution, it is requested that a complete copy of the proceedings be furnished this office in order that its files may be complete.

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

(Sentence confirmed, but after reconsideration commuted to dishonorable discharge, total forfeitures and confinement for life.
GCMO 315, (Adams) ETO, 4 Aug. 1945 .
GCMO 316, (Harris) ETO, 4 Aug 1945.)

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

BOARD OF REVIEW NO. 2 4 MAY 1945

CM ETO 7870

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at St.
	)	Trond, Belgium, 11 January
Private WILSON P. BELL	)	1945. Sentence: Dishonorable
(13030186), 3194th Quarter-	)	discharge, total forfeitures
master Service Company	)	and confinement at hard labor
	)	for life. United States Peni-
	)	tentiary, 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 and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Wilson P. Bell, Three Thousand One Hundred Ninety-Fourth Quartermaster Service Company, having received a lawful command from Captain Melvin R. Simpson, his superior officer, to pitch his tent and get his equipment in order, did, at Henri-Chapelle, Belgium on or about 6 November 1944, willfully disobey the same.

He pleaded not guilty and, all of the members of the court present at

the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eight 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, First United States Army, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for 25 years and that a Federal penitentiary be designated as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case and the recommendation for clemency 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 Article of War 50½.

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

Captain Melvin R. Simpson was commanding officer of the 3194th Quartermaster Service Company. On 6 November 1944, at about noon, accused arrived from a replacement depot to join the company which was then situated at a cemetery near Henri-Chapelle, Belgium. As a result of information he received from the first sergeant, Captain Simpson called accused into his office within 45 minutes after his arrival and inquired if he was dissatisfied or was having any trouble. Accused replied that he was a truck driver and did not like being assigned to a service company, and that if he, the captain, wanted him to stay he would have to place him under guard (R7,8,11). Captain Simpson explained that it was impossible for the Army to assign soldiers to units of their own choosing and, that in time of war he was required to serve with the unit to which he was assigned. Accused stated that he did not intend to stay in the company and would go "AWOL".

Captain Simpson thereupon asked him if he understood the Articles of War and accused replied that he did. The captain had his executive officer read Article of War 64 to accused and then gave the latter a direct order "to pitch his tent, to prepare his equipment, get his equipment in order and go to work in the cemetery". He directed a lieutenant and a sergeant to go out with accused and show him the place where he was to pitch his tent, and gave accused five minutes to comply with the order. The captain believed that after Article of War 64 was read to him and the order placed on such a definite basis, accused would not disobey. Accused left the office with the lieutenant and sergeant, but before leaving remarked to the captain that he would be back without pitching his tent. He was con-

ducted to an area about 20 yards from the orderly room where the lieutenant pointed out a vacant place and directed him to dig a foxhole and pitch his tent. Accused made no effort to comply, but affirmed his intention to go to the guardhouse rather than remain with the company. After staying in the area about five or ten minutes, the lieutenant reported to the captain and left for other duties. Accused returned with the sergeant to the captain and informed him "that he had not prepared to pitch a tent and had not prepared his equipment and further, that he did not intend to do so", and that he would not stay in the company. He also stated that he knew he would be court-martialed but if the case came before the proper authorities, they would "throw it out" and eventually assign him to a unit of his own choice (R8-12). Captain Simpson repeated the order, informed him again that it was a very serious offense to disobey a direct order and said to him that unless he carried out the order he would be confined in the stockade pending court-martial charges. Accused replied that he preferred the stockade because sooner or later he would be assigned to a truck company. The captain placed him in confinement (R9).

4. Defense counsel stated to the court that he had advised accused of his rights and that he elected to remain silent. In reply to a question by the president of the court, accused asserted that he understood his rights "thoroughly" (R12). The defense offered no evidence.

5. The evidence clearly proved that accused received a lawful command from his superior officer substantially as alleged and that he willfully disobeyed it. The disobedience was such as showed an intentional defiance of authority. The order given to accused related to a military duty and was one which Captain Simpson was authorized to give. Although there was no direct evidence on the point, the facts in evidence fully warranted the inference that at the time accused received and disobeyed the order he knew that Captain Simpson was his superior officer. The order was not one that was to be executed in the future; immediate compliance was obviously contemplated. The findings of guilty of a violation of Article of War 64 are fully supported by the evidence (MCM, 1928, par.134h, pp.148-149; CM ETO 314, Mason; CM ETO 1232, Baxter).

6. The charge sheet shows that accused is 21 years and eight months of age and was inducted 19 May 1941 at Holabird, Maryland. 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 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). Confinement in a penitentiary is authorized when imposed by way of commutation of a death sentence (AW 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

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private WILSON P. BELL (13030186), 3194th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7870. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7870).

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

(Sentence as Commuted ordered executed, GCMO 158, ETO, 21 May 1945.)

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

BOARD OF REVIEW NO. 2 24 APR 1945

CM ETO 7871

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Nancy, France, 9 December 1944. Sentence: To be hanged by the neck until dead.
Private GEORGE GREEN, JR., (38476751), 998th Quartermaster Salvage Collecting Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George (NMI) Green Jr, 998th Quartermaster Salvage Collecting Company, did, at Champigneulles, France (U838158), on or about 18 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Tommie Lee Garrett, a human being by shooting him with a carbine.

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

and Specification. Evidence was introduced of one previous conviction by summary court for being drunk and disorderly in uniform in a public place in violation of Article of War 96. 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, Third United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Evidence presented by the prosecution showed that accused was a private, 998th Quartermaster Salvage Collecting Company (R6). On 18 November 1944 between 0815 and 0830 hours, Corporal Tommie Lee Garrett, the deceased, and other soldiers of the 998th Quartermaster Salvage Collecting Company were working in the salvage warehouse near Champigneulles, France (R7,17-18, 21-22,28-29,34,38-39). Deceased had been sitting on a bench for about 15 or 20 minutes (R32-33,35), sorting and classifying "OD" clothing (R7,35-36). While deceased was leaning over from his sitting position with clothing in his hands (R8,30,36), Technician Fifth Grade Lawrence R. Jenkins saw accused aiming his carbine, "sighting it through the peep sight", at deceased (R23,25,26). As accused was standing in this position, about 10 or 12 feet away, (R12,24-25,35,37) at an angle from deceased (R23) a shot was heard and deceased crumpled forward into a pile of clothing (R8,13,24, 27,35,39). Accused backed up toward the end of the room (R8,26,39) holding his carbine at port arms (R14,24,26,39) acting "like he was hysterical" (R24). He worked the bolt of the weapon and a round "jumped" out (R8,13,29,35). A fired cartridge was found about two and one-half feet from where accused was standing (R19). Sergeant Albert Reynolds took the gun from accused, pulled back the operating bolt and a new cartridge "jumped" from the chamber (R19,30,39). When asked why he fired the shot accused replied "that man drew a knife on me" (R8,15,19-20,30). After the shot was fired another soldier heard accused remark that he intended to kill Corporal Garrett because he had "pulled a knife on him" (R24,26-28). Deceased used a "mess kit" knife in his work which he kept attached to his belt with a cord but did not have the knife in his hands at the time the shot was fired (R9-10,21,25,32,33,37). Accused was not seen in the warehouse that morning until he was observed aiming the gun at deceased, nor did he speak to the latter before firing the carbine (R33,35). Deceased had not mentioned the name of accused before he was shot (R37).

No previous ill-feeling existed between accused and deceased (R27,31,40) but at about 8:10 that morning Private Thomas Essex overheard accused remark "that there was someone he was going to get". When Essex asked who he was referring to, accused replied that it was none of his business (R18).

After he was shot, deceased "gasped" and then his body fell limp. He was not breathing shortly thereafter when placed on a stretcher to be removed to the hospital (R8,25). One of the soldiers observed that deceased had a wound where the bullet entered his left side and another wound on his right side about four inches below the arm pit (R15,17). It was stipulated between the prosecution, defense counsel and accused (R41; Pros.Ex.A) that if Captain Austin P. Boleman, Medical Corps, was present in court his testimony would be the same as appears in the Death Certificate and Autopsy Report incorporated in the stipulation. The report in pertinent part shows that an autopsy was performed on deceased at 1400 hours 18 November 1944 and that deceased died at 0830 hours from a gunshot enteringthe left chest causing perforating wounds of the heart, lungs and right chest at point of exit (Pros.Ex.A).

4. The evidence introduced by the defense was substantially as follows:

At about 0730, 18 November 1944, while the men were cleaning the squad room, deceased asked accused if he had spilled urine from a container on the floor. Accused answered "yes, but you don't have to talk so big about it". Deceased then "grabbed" accused by the collar and told him he would have to clean it up. Accused said he would do so and deceased released him and walked away laughing (R42-44,46-47). According to another soldier present, the deceased held an open knife in his hand, by his side, with his finger on the back of the knife, while telling accused to clean "it" up but he did not appear to be "mad" (R44,47,48). Deceased "was a pretty big man", larger than accused (R40).

The platoon sergeant of accused testified that accused had soldiered under him for about two years; that he never had any trouble with accused; and that he rated his general character and efficiency as a soldier as good (R49-51).

The accused, after his rights as a witness were fully explained to him, elected to remain silent (R51).

5. The uncontroverted evidence shows that accused shot and killed deceased as alleged.

> "Murder is the unlawful killing of a human being with malice aforethought.
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously

existed. It is sufficient that it exist at the time the act is committed. (Clark)

Malice aforethought * * * may mean * * * 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, 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 * * * " (MCM, 1928, par. 148a, p.162-164).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act" (CM ETO 3932, Kluxdal).

The evidence shows that while deceased was sitting at his work the accused entered the room, stood about 12 feet away from him at an angle, took deliberate aim with his carbine and fired a bullet into the body of deceased. In viewing the evidence introduced for the defense in its most favorable light, the only provocation shown was that about an hour before the shooting deceased grabbed accused by the collar with one hand, and while holding an open knife at his side told accused he would have to clean up some urine accused had spilled from a can. The evidence further shows that deceased was not angry when this incident took place and immediately walked away when accused said he would clean up. There was no provocation for the commission of the offense at the time it occurred. Approximately one hour elapsed between the time of the incident which the defense relied on as provocation and the time of the killing.

" * * * where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (MCM, 1928, par.149a, p.166).

The evidence is conclusive that deceased did not have a knife in his hand when shot and was apparently unaware that accused was in the room. The killing therefore, cannot be justified by accused on the ground that he was acting in self defense. The threat made by accused that he "was going to get someone", followed by the

deliberate manner in which he aimed and fired the weapon, and his statement following the shooting that he intended to kill deceased shows the necessary element of malice present to constitute murder. The evidence fails to disclose any circumstances serving to mitigate, excuse or justify the act. The Board of Review is of the opinion that the evidence is legally sufficient to support the finding of guilty (CM ETO 7253, Hopper; CM ETO 1941, Battles; CM ETO 3585, Pygate).

6. The charge sheet shows that accused is 20 years and six months of age. He was inducted 19 April 1943 and 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).

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

(312)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private GEORGE GREEN, JR (38476751), 998th Quartermaster Salvage Collecting 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 7871. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7871).

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

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

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 129, ETO, 1 May 1945.)

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

BOARD OF REVIEW NO. 3

13 APR 1945

CM ETO 7901

U N I T E D S T A T E S	)	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Second Lieutenant WALTER J. BARFIELD (O-270759), 306th Military Police Escort Guard Company	)	Trial by GCM, convened at Le Mans, France, 29 November 1944. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that 2nd Lieutenant Walter J. Barfield, 306th Military Police Escort Guard Company, did, at Alencon Prisoner of War Enclosure, Damigny, Orne, France and Thoree Branch, Continental Central Enclosure 13-2, between 31 August 1944 and 25 September 1944, fail to disclose to Captain Armand L. Helm, his Commanding Officer, that enlisted men of the 306th Military Police Escort Guard Company were violating a company order prohibiting them from sending home money in an amount in excess of their pay, plus fifty percent, when he, the said 1st Lieutenant Walter J. Barfield, knew about 40 enlisted men of the said company were violating said order.

H pleaded not guilty and was found not guilty of Specification 1, and guilty of Specification 2 and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay the United States a fine of $5,000. The reviewing authority, the Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as modified and approved, though describing it inadequate punishment for an officer guilty of such calculated misconduct, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence as regards Specification 2 of the Charge is summarized as follows:

In July 1944 accused was the administrative officer of the 306th Military Police Escort Guard Company, then stationed at Foucarville, France, and under the command of Captain Armand L. Helm, Corps of Military Police (R17-18). In connection with his duties of censoring mail of the enlisted men in the company, accused observed that certain men were sending home large sums of money. He therefore conferred with Captain Helm regarding this matter and as a result of their conversation a notice was placed on the company bulletin board on or about 15 July 1944 which read, according to Captain Helm's testimony: "No member of this command will send home an amount of money during the month in excess of his pay plus 50%"(R18,19,23). However, he could not "swear as to the whole contents of that order", remembered "nothing whatsoever about time being in the order" (R53) and it contained "no limitation, sir, to the best of my knowledge and belief, as to the place" (R54). There were no original copies of this order extant. The company moved from Foucarville about 16 August 1944 (R16) and from 31 August to 21 September was stationed at Alencon, France (R20), during which period accused was the executive and postal officer of the company (R26,30). He censored mail and passed on applications for postal money orders (R27,36). 638 applications totalling $49,145, filed in APO 58, U.S. Army, were identified and received in evidence without objection. It was not established by whom or the dates on which these were sent (R25,29; Pros.Ex.3). Two enlisted men of the company sent during September the amounts of $1,200 and $1,550 respectively (R37,38). Accused did not disclose to Captain Helm that the men of the company were sending home such large sums of money. Accused made a voluntary statement on 4 October 1944 to Major Leslie W. Boyer, Inspector General's Department, in which he admitted that between 1 September and 21 September he bought money orders which he indicated were payable "to a bank and other persons" in the amount of approximately $5,430, that he obtained most of this money by gambling and that

> "I have previously stated that I censor money orders for more than time and a half, sir, and also that I pass money orders because the men told me [they]

either won it gambling or buying and selling watches. * * * I am fully aware that I violated the company order by letting money orders go through" (R9; Pros.Ex.No.2).

4. After being warned of his rights, accused testified that he conferred with Captain Helm about drafting an order restricting the amount of money the men of the company might send home, that while the company was at Foucarville, France, such order was issued that "while at that * * * station" the men of the company would not send home money in excess of their pay plus 50%. At their new location after 1 September he took it upon himself, without consulting Captain Helm, to accept money orders. He was second in command and Captain Helm practically left the administration of the company to him (R46,47). He admitted telling Major Boyer that he violated a company order (R47; Pros.Ex.2,Q95), but this happened because the Major was abrupt and overbearing and did not give him time to get the full meaning of the questions which were more or less "leading" (R48). He did not consider that the order continued in effect after the company left Foucarville (R46-47).

First Lieutenant William A. Hannon of accused's company testified that the order as regards sending money home read "enlisted men of this command will not send money home in excess of the pay plus 50% while at this camp" (R30-31). That such order was effective only at the camp at Foucarville was the testimony also of First Sergeant James B. Kane (R34), Corporal Lawrence B. McCollister (R35-36) and Corporal John E. Balog (R37-38), all of accused's company. The defense offered to produce several other witnesses who would testify in the same manner and the president announced, after conferring with the law member, "No need to call them" (R39).

Captain Carl Patrick, 286th Military Police Company, Captain Thomas W. Buchanan, 630th Military Police Escort Guard Company, and Captain Helm all testified to accused's good reputation for honesty and integrity (R39-40,41-42,43-44).

5. This case was referred for trial on 23 November 1944 to a court appointed by the Commanding General, Loire Section, and the action was signed 13 January 1945 by the Commanding General, Brittany Base Section. A copy of General Orders No.66, Headquarters Communications Zone, European Theater of Operations, 30 November 1944 accomplishing the indicated changes or merging of commands should have been attached to the record (Mil.Jus. Cir.2, par.1, BOTJAG, 8 Feb.1944).

6. The large sums of money obtained by enlisted men and accused in July 1944 demonstrated the need for Captain Helm's order of 15 July 1944 to discourage probably illegal practices. Captain Helm's testimony did not clearly and positively show that his order of 15 July 1944 was unlimited as to time and place, while accused's testimony and that of defense witnesses was to the effect that the order applied only at the camp in Foucarville.

However, accused's voluntary confession to Major Boyer that he was fully aware he violated the company order strengthened measurably Captain Helm's testimony as to the unlimited effect of the order. Whether or not such order continued in effect in September 1944 as indicated by the prosecution or terminated upon the company's departure from Foucarville was a question which the court resolved against accused, and in view of all the evidence its findings will not be disturbed by the Board of Review (CM ETO 1065, Stratton; CM ETO 1901, Miranda; CM ETO 3937, Bigrow and cases therein cited; CM ETO 5561, Holden and Spencer). The court's findings of guilty are supported by substantial evidence which showed an intentional and calculated evasion by accused of duties required of him and this was conduct to the prejudice of good order and military discipline within the meaning of Article of War 96 (Winthrop's Military Law and Precedents (Reprint, 1920), p.722).

7. The charge sheet shows that accused is 36 years and one month of age. He was a second lieutenant, Officers Reserve Corps from 10 July 1930 to 30 May 1940 and entered on active duty 14 August 1942 with commission as second lieutenant, effective 31 July 1942.

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 thesentence, as modified, approved and confirmed.

9. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

Benjamin R. Sleeper Judge Advocate

Malcolm C. Herman Judge Advocate

B. V. Dewey Jr. Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant WALTER J. BAKFIELD (O-270759), 306th Military Police Escort Guard 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 [illegible]. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7901).

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

(Sentence ordered executed. GCMO 121 , ETO, 20 April 1945.)

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

BOARD OF REVIEW NO. 3

29 MAR 1945

CM ETO 7902

U N I T E D S T A T E S v. Second Lieutenant FLOYD E. TAYLOR (O-1183982), Field Artillery, Attached Unassigned, Detachment 94, Ground Force Replacement System	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM convened at Fontainebleau, France, 13 November 1944. Sentence: To be dismissed the service and to forfeit all pay and allowances due or to become due.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that FLOYD E. TAYLOR, Second Lieutenant, Field Artillery, attached unassigned, Detachment 94, Ground Force Replacement System, APO 545, U.S. Army, was, at Fontainebleau, France, on or about 30 September 1944 in a public place, to wit, Fontainebleau, France, drunk and disorderly while in uniform.

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

Specification: In that 2nd Lieutenant Floyd E. Taylor, Detachment 94, Ground Force Replacement System, was at Fontainebleau, France, on or about 25 October 1944 drunk in camp.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution shows that between one and two o'clock on the morning of 30 September 1944, a civilian resident of 29 Rue D'Avon, Fontainebleau was disturbed by poundings on doors in the neighborhood. A man, garbed in the uniform of an American soldier, was observed climbing the wall surrounding the adjacent house, and later going through a garden in the direction of the house numbered "29 ter". Shortly thereafter the sound of breaking glass was heard (R6-8). The matter was then reported to the American Military Police, who, upon investigation, discovered a broken window at the back of the house numbered "29 ter" Rue D'Avon. After effecting an entrance, they found accused inside, in a drunken condition (R9-10,19-20). The house was otherwise unoccupied, the doors were locked and the owner had given no one permission to enter it on the night in question (R14-15). An inspection the following morning disclosed damage during the night to panes in the kitchen window and front door, to a fence along the property line, and to a chicken coop outside and a salad bowl and flower pot inside the kitchen, resulting in an estimated financial loss to the owner of approximately $60.00 (R13-14).

Between 1600 and 1700 hours 25 October 1944 accused was in the Adjutant General's Office, 9th Replacement Depot Headquarters, where, in the opinion of four witnesses, he was drunk (R25-31). In this connection, testimony was adduced that he was unsteady on his feet, lacked coordination of mind and muscle, that his speech was incoherent and "his breath smelled of something he drank which contained alcohol" (R26); also that he blinked his eyes, stared into space, gasped for air and appeared to want to vomit (R28-31). At about 1815 hours the same evening he was physically examined by a medical officer who pronounced him under the influence of liquor but not drunk (R31-32). He

"seemed to be perfectly coherent, mentally clear, answered questions as to date and time and circumstances perfectly normally. He was sick in the office and vomited, but there was only a trace of liquor in the vomitus" (R32).

The medical officer believed, however that "he could have been quite intoxicated at four twenty-five and in good shape when I saw him" (R33).

4. For the defense, Second Lieutenant Reese S. Mark testified that, at about 1700 hours 25 October, he accompanied accused to Depot Headquarters in a government vehicle and observed nothing abnormal about accused's physical condition. "He offered me a cigarette" and "was able to give me a light" (R35). When he alighted at headquarters his condition "was normal; he jumped out and landed squarely on both feet". At 1600 hours that afternoon witness had walked into accused's room and found accused sleeping (R36). It was stipulated

"that if 2d Lieutenant Thomas P. Matula, F.A., were here he would testify that Lt. Taylor had been drinking, but was not drunk and was in full possession of his faculties at the time he reported to Major Bright's office" (R37).

The officer's records in the depot assignment section showed that accused was married, that he had over three years enlisted service in the field artillery, achieving the grade of sergeant, and that, as an officer, his ratings were (1) satisfactory (2) excellent (3) very satisfactory and (r) satisfactory. He had not been given a rating since 10 August 1944 when he was alerted for overseas service.

5. Defense counsel announced that accused had had his rights explained to him and elected to remain silent.

6. Accused's drunkenness in a public street in Fontainebleau was adequately established by competent evidence, which showed also that he created a disturbance there by indiscriminate poundings on doors after midnight, and then proceeded to commit various depredations in effecting an unauthorized entrance into an unoccupied private home. The finding that he was drunk and disorderly in a public place is thus supported by substantial evidence.

The Specification under the Additional Charge alleges drunkenness in camp. Substantial evidence was presented indicating

(322)

that accused was drunk at the time and place alleged. While there was evidence to the contrary, the issue of fact thereby raised was exclusively for the determination of the court (CM ETO 1953, Lewis).

7. The charge sheets show that accused is 23 years 7 months of age; that he enlisted at Fort Bliss, Texas, 29 December 1939 and was discharged 15 July 1943 to accept commission as second lieutenant, Field Artillery.

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

9. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

Benjamin P Sleeper Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

B. H. Dewey Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant FLOYD E. TAYLOR (O-1183982), Field Artillery, attached unassigned, Detachment 94, Ground Force Replacement System, 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 7902. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7902).

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

(Sentence ordered executed. GCMO 103, ETO, 5 April 1945.)

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

BOARD OF REVIEW NO. 1

26 APR 1945

CM ETO 7913

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Chaudfontaine,
	)	Belgium, 15 February 1945. Sentence:
Private CLYDE M. SMITHEY	)	Dishonorable discharge, total forfeitures
(34274704), 3708th	)	and confinement at hard labor for three
Quartermaster Truck	)	years. Loire Disciplinary Training
Company	)	Center, Le Mans, France.

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

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

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

CHARGE I: Violation of the 65th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: In that Private Clyde M. Smithey, Thirty-Seven Hundred Eighth Quartermaster Truck Company, did, in the vicinity of Rise de Balle, Belgium, on or about 2 January 1945, by his negligence in operating a United States Army Truck in a reckless and unauthorized manner, feloniously and unlawfully strike and seriously injure Jean Dorval and Arthur Kever, Belgian civilians, by running into and striking them with said truck.

Specification 2: In that * * * did, in the vicinity

of Welkenraedt, Belgium, on or about 2 January, 1945, while on duty as a truck driver, render himself unfit for duty by excessive use of intoxicants.

Specification 3: In that * * * having received a lawful command from First Lieutenant Clarence A. Nelson, his superior officer, to stay with his vehicle and not leave the scene of the accident, until said officer returned, did, in the vicinity of Rise de Balle, Belgium, on or about 2 January 1945, fail to obey to same.

He pleaded not guilty and was found not guilty of Charge I and its Specification and guilty of Charge II and the specifications thereunder. Evidence was introduced of three previous convictions by special court-martial, one for absence without leave for two days, one for absences without leave for one day and three and one quarter hours, respectively, both in violation of the 61st Article of War, and one for using threatening language toward a non-commissioned officer and being drunk on guard in violation of the 65th and 85th Articles of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, andto be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. At approximately 1340 hours on 2 January 1945 accused, having completed his detail at a Class 1 railhead, was instructed by the sergeant in charge to return to the company bivouac area (R7,15), which was two to four blocks distant (R16). At this time accused appeared to be in a normal condition (R8) and during the course of the day's operations there had been no reports that he was in an unfit condition to operate a vehicle (R19,22). An hour later First Lieutenant Clarence A. Nelson saw accused driving his 6 x 6 truck near Rise de Balle, Belgium (R9,19), approximately three miles west and south of the bivouac area (R16). When his truck was first observed by Lieutenant Nelson it was 70 or 80 yards distant from Kever and Dorval, the two civilians whom it later struck (R9,17). The wheels on the side of the truck to accused's right were in a ditch paralleling the side of the road while the wheels to his left remained on the road, which was slippery and wet (R9,13,14). The truck was travelling at about 20 or 25 miles an hour and was about 40 or 50 yards from the civilians when he lost control (R10). The truck struck and injured the two civilians, one seriously (R21), and traveled 40 yards before being brought to a halt (R10). Accused was under the influence of liquor and "was in no shape to drive a vehicle" (R11,16,17,19). He did not see the civilians who were struck by the truck (R25). He was ordered by Lieutenant Nelson to stay at the scene of the accident, not to drive away in the vehicle, and to wait until Lieutenant Nelson returned with an officer from accused's organization (R11, 25). When Lieutenant Nelson returned, 20 minutes to a half hour later, accused had driven away in the truck (R12).

CONFIDENTIAL

First Lieutenant Richard Tavlian, of accused's company, testified that the road on which the accident occurred led back to the bivouac area, and would have been a proper road to take if the direct route had been blocked (R17). On the day of the accident the direct route was not blocked and traffic upon it was normal (R20).

4. Accused, after being advised of his rights, elected to take the stand and be sworn as a witness in his own behalf. He testified that he had been drunk the night before the accident, had awakened about 0300 or 0400 hours and consumed the liquor left in the bottle, but didn't drink anything during the day (R23). He stated that he had taken the longer route because he thought he could make better time since there was vehicular traffic on the direct road; and that he was delayed by traffic from 20 to 30 minutes after he left the railhead (R24,25-26).

5. The important question presented is whether the record of trial is legally sufficient to support a sentence which includes three years' confinement at hard labor.

Specification 1 of Charge II alleges that accused

> "did * * * by his negligence in operating a United States Army Truck in a reckless and unauthorized manner, feloniously and unlawfully strike and seriously injure * * * Belgian civilians, by running into and striking them with said truck".

This offense is not covered in the table of maximum punishments nor is it denounced by the Federal Criminal Code or the District of Columbia Code. The Board of Review is of the opinion that the most closely related offense is that of reckless driving, which is punishable by a maximum sentence of three months' confinement at hard labor and forfeiture of two-thirds pay for a like period in accordance with the punishment designated for that offense in Section 40-605 (6:246), District of Columbia Code (CM ETO 2788, Coats and Garcia; CM ETO 2157, Cheek; CM NATO 1151, III Bull, JAG, 101-102). Unfortunately no provision has been made either by Act of Congress or by the Manual for Courts-Martial whereby the penalty for reckless driving of a motor vehicle may be increased because of the resultant injury to human beings.

Specification 2 of Charge II alleges that accused did "while on duty as a truck driver, render himself unfit for duty by excessive use of intoxicants" in violation of the 96th Article of War. This offense is most closely analagous to that of being found drunk on duty in violation of the 85th Article of War, for which the maximum punishment is forfeiture of pay for twenty days (MCM, 1928, par.104c, p.99).

Specification 3 of Charge II alleges that accused failed to obey a lawful command of a superior officer in violation of the 96th Article of War. The punishment for this offense is limited to confinement at hard labor for six months and forfeiture of two-thirds pay for

a like period by the table of maximum punishments (MCM, 1928, par. 104c, p.100).

6. The charge sheet shows that accused is 28 years 11 months of age and was inducted 22 April 1942 at Camp Shelby, Mississippi, to serve for the duration of the war plus six months.

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. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard laborfor nine months (MCM, 1928, par.104c, p.102).

8. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr.Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec. 1944, par.3).

B. Franklin Peters Judge Advocate

Wm. T. 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. 1 7 APR 1945

CM ETO 7925

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private AUBREY W. BUTLER (34799971), Attached Unassigned, 457th Ordnance Evacuation Company	Trial by GCM, convened at Cherbourg, Department of Manche, France, 6 February 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Loire Disciplinary Training Center, Le Mans, France.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and 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 86th Article of War.

Specification: In that, Private Aubrey W. Butler, Attached Unassigned 457th Ordnance Evacuation Company being on guard and posted as a sentinel at or near Hardinvast, France on or about 6 December 1944, was found drunk upon his post.

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 dishonorably discharged 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 approved the sentence

and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 87, Headquarters Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U.S. Army, 19 February 1945.

3. The pertinent evidence, which was undisputed, showed the following:

On 6 December 1944, at Depot 0620, Martinvast, France (R6), accused was on guard and posted at 1800 hours on post number 5. It was a roving post and covered the assembly area of about an acre or an acre and a half where vehicles were kept (R9-10). His instructions were to patrol the area and allow no one to pass without a dispatch (R10,16). His tour of duty was from 1800 to 2200 hours (R16) and he was observed to be sober when he went on post and also at 2030 hours by the acting sergeant of the guard (R9-10). At about 2200 hours when it was time for accused's relief, the officer of the day, the provost sergeant of the depot and the corporal of the guard searched accused's post without immediately finding him (R6-7,13). The relief guard was then posted on post number 5 (R12). Accused's rifle was found shortly after 2200 hours in the booth of post number 1, and at 2330 hours he was finally found in a truck parked on his post behind this booth (R11-12). He was "in a stupor", slouched "over the wheel". He was helped out, placed in a jeep and taken to the guardhouse where he was put in a bunk (R11-12,13). Observed at 2345 hours by the officer of the day, accused was "not in a conscious state" and did not speak or respond to shaking. In the officer's opinion he was drunk (R7-8). Other witnesses variously described his condition as "in a stupor" (R12), "looked like something was wrong with him", "couldn't say whether he was sick or whether he was drunk, or just what was wrong with him"(R14) and "he might have been drunk" (R15).

4. For the defense, it was shown as to accused's general reputation that "everybody seems to like him and thinks he is a good boy" and "the boys say he doesn't drink" (R19). The morning after his alleged offense accused "said he was pretty sick" (R20) and was taken to the hospital where

> "The Major made the remark he was a pretty sick boy and that he was only breathing six times a minute and he was stone blind" (R21).

5. After accused's rights were explained (R16-17), the defense moved for a finding of not guilty of the Charge and Specification (R17). The motion was denied (R19). The defense rested (R22) without expression by accused of a desire either to testify, to make an unsworn statement or to remain silent.

6. It was clearly shown by the evidence that accused was posted at 1800 hours on 6 December 1944 on post number 5 where his tour of duty was to continue until 2200 hours, that at 2200 hours a first search of this post failed to disclose his presence and his successor on guard was then posted. At 2330 hours he was at length found in a drunken stupor in a truck on the post. Fifteen minutes later he was still in an unconscious

condition. In view of the advanced degree of his drunkenness, it is a reasonable inference that he became drunk before his tour of duty ended and that it was for this reason that he was not performing his duties at 2200 hours. That he was found in an unusual place on his post in an unconscious state shortly thereafter, is substantial evidence from which the court could infer that his condition had continued for the elapsed time in the same place. It is a further significant circumstance that accused's rifle was found near the truck soon after 2200 hours. The question was purely one of fact for the court and as its determination against accused in its findings of guilty is supported by competent, substantial evidence, the same will not be disturbed by the Board of Review upon appellate review. In CM 236351, Ambutavicz, 22 B.R. 385 (1943), II Bull.JAG 309, accused was found drunk during his tour of sentinel duty at a point 300 yards from his post. He was found guilty of being found drunk on post as charged, but the reviewing authority approved only so much of the finding of guilty as involved a finding of guilty of being found drunk while on guard as a sentinel in violation of Article of War 96. The Board of Review (sitting in Washington) held that in essence, the finding as approved was that accused was found drunk on duty as a member of the guard. The reviewing authority removed from the case the element of accused's being on post. The case at hand presents a different situation because the findings of guilty of a violation of Article of War 86 stand unmodified by the reviewing authority and the Board of Review may and should examine the entire record to determine whether the unmodified findings of guilty are supported by competent substantial evidence. As indicated, they are so supported. It is clear that the offense denounced by the Article of War is the condition of drunkenness on post rather than apprehension in that condition (Cf: CM ETO 5531, Charlie Davis (sleeping on post)).

7. The charge sheet shows that accused is 26 years and seven months of age and was inducted 31 December 1943 at Camp Blanding, Florida, to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for a violation of Article of War 86 in time of war is death or such other punishment as a court-martial may direct. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement, is proper (Ltr. Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec. 1944, par.3).

D. Franklin Ritter Judge Advocate

Wm. F. Burrow 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. 1

1 JUN 1945

CM ETO 7977

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class WILLIAM G. INMON (34541426), 86th Chemical Smoke Generator Company, 25th Chemical Smoke Generator Battalion	Trial by GCM, convened at Castilly, Calvados, France, 23 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 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 First Class William G. Inmon, 86th Chemical Smoke Generator Company, 25th Chemical Smoke Generator Battalion, did, at Tour en Bassin, France, on or about 12 November 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Emile Paris.

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. Accused in his sworn testimony in open court admitted that he had engaged in sexual intercourse with Madame Emile Paris, a French civilian on 12 November 1944 at a lonely cabin in or near Tour en Bassin, France. The evidence for the prosecution proved substantially that accused and Madame Paris engaged in the sexual act at the time and place alleged in the Specification and admitted by accused. The accused and the woman were strangers. She and a 14 year old boy, at their own request, became passengers on a Government truck driven by accused. They had solicited transportation to Le Molay and thence to Bayeux, France, but accused carried them to the isolated spot where the intercourse occurred. The alleged victim testified that coition occurred without her consent and in spite of her protestations and resistance. Accused asserted that it was the result of a bargain entered into freely and voluntarily by the woman and himself whereby he was to pay her 300 francs in return for her favors. In consummation of the agreement he paid her 500 francs and without force or compulsion of any kind, she engaged in the sexual intercourse with him.

The pattern of the case is a familiar one to the Board of Review. The sharp conflict in testimony presented an issue of fact for the court, and, inasmuch as the findings are supported by competent, substantial evidence they are conclusive on appellate review. There is nothing improbable in the testimony of Madame Paris; it is not only inherently probable but also it postulates the truth. The credibility of the witnesses and the reliability of their testimony were matters for the court. The Board of Review is satisfied

that the findings are supported by substantial evidence (CM ETO 1402, Willison; CM ETO 1899, Hicks; CM ETO 2472, Blevins; CM ETO 4194, Scott; CM ETO 6224, Kinney and Smith.

4. The charge sheet showsthat accused is 21 years three months of age and that he was inducted 26 January 1943 at Camp Blanding, Florida to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Riter Judge Advocate

Wm. F. Brannan Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

7 MAY 1945

CM ETO 7988

UNITED STATES	) 80TH INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at APO 80, United States Army, 21 February
Private Joseph S. Honokowicz (13104174), Company C, 305th Engineer Combat Battalion	) 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 75th Article of War.

Specification: In that Private Joseph S. Honokowicz, Company C, 305th Engineer Combat Battalion, did, in the vicinity of Kleinreisdorf, Luxembourg, on or about 7 February 1945 misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by 2nd Lieutenant Joseph W. Byrd, to engage with an enemy of the United States, which forces the said command was then opposing.

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

Specification. Evidence was introduced of two previous convictions by special court-martial for absence without leave for five days and seven days respectively, in violation of Article of War 61. All members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 evidence for the prosecution shows that:

On 7 February 1945, accused was a member of the second squad of the third platoon of Company C, 305th Combat Engineer Battalion, of which Lieutenant Joseph W. Byrd was platoon leader (R6) and Staff Sergeant James H. Wiser, Jr., was platoon sergeant (R11). The company was in "support of the 319th" and was to follow them across the river Our (R8) to assault the enemy positions. The men understood there were pillboxes to be taken and the roads were to be cleared of mines and booby traps (R6). On the evening before accused had stated to a member of his unit, Sergeant Wallace N. Price, that he was "rather nervous and upset" and didn't think he would be able to make the trip the next day (R7). Accused also made a similar statement to Sergeant Wiser this same evening just after Lieutenant Byrd had finished "briefing" the platoon (R11). The company, including accused, loaded on trucks in the early morning of 7 February and proceeded to the detrucking point. When the order came to get started, accused again stated to Sergeant Price that "he didn't think he was going to be able to make the trip" and that "he didn't care whether the fellows called him yellow" (R7).

When the column formed and started on at about 1:30 a.m., it was checked by Sergeant Price and accused was missing (R8). The trucks returned to the company "CP" (R10). Price did not again see accused until "around the middle of the morning of the 7th" when he found accused back at their "CP" in their own squad room. Accused had visited the Battalion Aid Station a number of times for treatment of his back (R8,12) but Price had never noticed any nervousness about him nor had he ever mentioned his family to him (R9). The platoon actually did not cross the river but took over the crossing and ferried the infantry across, being so employed until daylight (R8,12), during which time the enemy were shelling and machine guns were firing over their heads and hitting behind them (R12). The platoon was very short of men and needed as many as possible. It started with 32 men and lost ten of whom two were missing and the others injured (R13). The driver of the truck

which carried the second squad of the third platoon to the river crossing the night of 6-7 February, testified that it was a very dark night and they had to drive slowly (R14). He saw accused when they detrucked, where he (the driver) waited possibly a half hour; and again when he got back to the Company about 2:30 after "leaving the boys", he saw accused get off his truck and go up "to the room where we were staying - up to the squad room" (R15).

4. Accused elected to remain silent after his rights as a witness were explained to him and no evidence was presented in his behalf.

5. The evidence for the prosecution clearly shows that the accused absented himself from his platoon, without authority, at a time when they were about to engage in combat with the enemy. From the circumstances surrounding the commencement of such absence, the court was warranted in finding that he left to avoid the hazardous duty involved in the advance with his command to engage with the enemy and that this conduct constituted misbehavior before the enemy as alleged. That his unauthorized absence occurred at a time when his platoon was short of men even before they suffered heavy casualties adds to the gravity of his offense. The Board of Review is of the opinion that the finding of guilty of the Charge and Specification are supported by competent evidence (CM ETO 4743, Gotschall).

6. The charge sheet shows that accused is 31 years five months of age and enlisted 1 October 1942 at Baltimore, Maryland, being assigned to his present company 7 November 1942.

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

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

REGRADED Unclassified
BY AUTHORITY OF TJAG
BY Carl E. Williamson, Lt. Col.
JAGC, Asst Exec ON 20 May 1954

REGRADED Unclassified
BY AUTHORITY OF TJAG
BY Carl E. Williamson, Lt. Col.
JAGC, Asst Exec ON 20 May 54