E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 4492

CM ETO 5414

VOLS. 13-14

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL., JAGC,
EXEC. ON 26 FEB 52

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 13 B.R. (ETO)

including

CM ETO 4492 - CM ETO 4949

(1944-1945)

Office of The Judge Advocate General

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Branch Office of The Judge Advocate General (1)
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

4 JAN 1945

CM ETO 4492

UNITED STATES	1ST BOMBARDMENT DIVISION
v.	Trial by GCM, convened at AAF Station 109, U. S. Army (England), 10 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Place of confinement not designated.
Private, formerly Corporal, CLYDE SHELTON (18161399), Private, formerly Corporal, LUTHER C. MARTINDALE (18041498, and Private, formerly Private First Class, VERNON K. HALVORSON (37326195), all of 325th Bombardment Squadron, 92nd Bombardment Group	

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

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

2. Accused were arraigned separately and tried together upon the following Charge and specifications:

SHELTON

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Clyde Shelton, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, then Corporal, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, did, in conjunction with Private Luther C. Martindale, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, then Corporal, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, and Private Vernon K. Halvorson, 325th Bombardment Squadron

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(H), 92nd Bombardment Group (H) AAF, then Private First Class, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, at AAF Station 109, on or about 1 September 1944, wrongfully take, and use, without proper authority, a certain motor vehicle, to-wit: a 1/4 ton 4x4 jeep, Serial Number 2076831, property of the United States, of a value of more than $50.00.

Specification 2: (Motion for finding of not guilty granted)

Specification 3: In that Private Clyde Shelton, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, then Corporal, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, did, at AAF Station 109, on or about 1 September 1944, wrongfully and unlawfully leave the scene of an accident without rendering the assistance called for under the circumstances to Private Eugene M. Lewis, after he had been struck and seriously injured by a motor vehicle, in which the said Clyde Shelton was a passenger.

MARTINDALE

CHARGE: Violation of the 96th Article of War.

Specification 1: Identical with Specification 1 (Shelton) as above set forth except for the appropriate transposition of the names and former grades of accused.

Specification 2: (Motion for finding of not guilty granted)

Specification 3: In that Private Luther C. Martindale, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, then Corporal, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, did, at AAF Station 109, on or about 1 September 1944, wrongfully and unlawfully leave the scene of an accident without rendering the assistance called for under circumstances to Private Eugene M. Lewis, after he had been struck and seriously injured by a motor vehicle, in which the said Luther C. Martindale was a passenger.

HALVORSON

CHARGE: Violation of the 96th Article of War.

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Specification 1: Identical with Specification 1 (Shelton) as above with appropriate transposition of the names and former grades of accused.

Specification 2: (Motion for finding of not guilty granted)

Specification 3: In that Private Vernon K. Halvorson, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, then Private First Class, 325th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, did, at AAF Station 109, on or about 1 September 1944, wrongfully and unlawfully leave the scene of an accident without rendering the assistance called for under the circumstances to Private Eugene M. Lewis, after he had been struck and seriously injured by a motor vehicle, which the said Vernon K. Halvorson was operating.

Specification 4: In that * * * did, at AAF Station 109, on or about 1 September 1944, wrongfully and unlawfully drive a motor vehicle while under the influence of intoxicating liquor.

Accused by written stipulation agreed to be tried together. Each accused pleaded not guilty, accused Shelton and Martindale were found guilty of the Charge and Specifications 1 and 3 preferred against them respectively, and accused Halvorson was found guilty of the Charge and Specifications 1, 3 and 4 preferred against him. Motions for findings of not guilty of Specification 2 as to each accused were sustained by the court. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved each sentence, did not designate a place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The findings of guilty of Specification 1 as to each of the three accused and of Specification 4 as to accused Halvorson are fully supported by competent, substantial evidence.

4. Specification 3 of the Charge as to each accused. a. The evidence for the prosecution established the following facts:

Accused were all members of the same organization and were stationed at a base in England (R12,14,43). At the time of the commission of the alleged offense, Martindale was a corporal, and Halvorson and Shelton were privates first class. On the evening of 31 August 1944 they went on pass to nearby towns, drank heavily and returned to their base at about 2300 hours. Halvorson was under the influence of liquor. Soon

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after their return they decided to go to the line mess to eat and for this purpose the three of them took and used without authority a 1/4 ton government truck commonly known as a jeep. Approximately an hour later, at about 0030 hours, 1 September, while riding back from the mess at a speed of about 20 to 25 miles an hour, they struck and seriously injured Private Lewis, an American soldier, a member of the medical detachment at the same base, who was pushing a bicycle on the road. At the time of the collision Halvorson was driving, Martindale was sitting in the front seat on the driver's right, and Shelton was riding in the back (R12-20,21,22,27,41,42, 44; Pros.Exs.14,15,16,17). It was a bright moonlight night and the road could be seen with a fair degree of clearness. The blackout lights on the vehicle were turned on. None of the three accused, however, saw the soldier on the road until they were almost upon him, and the brakes were not applied until after the soldier was struck. When they came to a stop, the three accused alighted and walked toward the front of the jeep. There they learned that the soldier had been injured by the impact and that the injuries were probably serious. After talking briefly among themselves, Halvorson climbed back into the jeep and drove away, while Martindale and Shelton walked away to their barracks. None of the three accused rendered, or attempted to render, assistance to the injured soldier or disclosed his plight to anyone. They left him lying unconscious on the side of the road, bleeding profusely. He was discovered by a passerby whose attention had been attracted by the noise of the collision, and was brought to the base where it was found that his injuries were of a serious nature (R21,27,28,30,33-39,41-42,47; Pros.Exs.6,7,8,14,15,16,17).

b. After their rights were explained to them, accused elected to remain silent. No evidence was offered by the defense.

5. a. The following provision in the Army Regulations is binding upon drivers of government vehicles:

> "In case of injury to person or damage to property the driver of a vehicle will stop the vehicle and render such assistance as may be needed" (par.18a (1), AR 850-15, 28 Aug 1943).

Substantially the same provision is found in a directive issued by the Commanding General of the European Theater of Operations, and in effect at the time of the collision (Maintenance and Operation of Motor Vehicles, Hq. ETOUSA, AG 451/2 Pub GC, 24 Jan 1944, sec.I, par.1a). The same directive contains the following provision:

> "The senior (officer, warrant officer or enlisted man) present in a vehicle is responsible for the proper operation of the vehicle" (Ibid., sec.XXXIII, par.6).

The evidence adduced by the prosecution proved that at the time of the collision, the three accused were engaged in a joint enterprise.

The evidence also showed that Martindale was a corporal, while Halvorson, the driver, and Shelton were privates first class. The duty of the driver to stop and render assistance in case of injury to a person, is an incident of the operation of a government vehicle. Under these circumstances each occupant was equally responsible with the driver for the latter's failure to render the necessary assistance to the injured soldier as required by the regulation and directive mentioned (CM ETO 393, Caton and Fikes; CM ETO 2788, Coats and Garcia). The findings of guilty are therefore sustained on the grounds stated.

b. The findings are sustainable on a ground applicable to military drivers of vehicles generally, whether the vehicles are owned by the government or not. Thus it has been held that an officer who drove his automobile into and damaged a parked car and left the scene without attempting to locate the owner or to report the accident to proper authority, was properly found guilty of a violation of Article of War 96 on the ground that his omission constituted a neglect to the prejudice of good order and conduct of a nature to bring discredit upon the military service (CM 221686, Hicks (1942), 13 B.R. 219, Bull.JAG, Vol.I, No.5, Oct 1942, sec.454(65a), p.277). Indicative of the discrediting nature of the conduct of the three accused is the fact that Congress has provided in the Code of Laws of the District of Columbia that any person operating a motor vehicle, who injures a person therewith and fails to stop and give assistance to such person is punishable for his first offense by a fine of not more than $500, or imprisonment for not more than six months, or both, and for his second offense by a fine of not more than $1000, or imprisonment for not more than one year, or both (D.C. Code, sec.40-609(6:247); Seher v. District of Columbia, 95 F.2d 118). It has also been held that failure on the part of an officer driving an automobile to stop and render assistance after striking and injuring a pedestrian is a violation of Article of War 95 (CM 185023 (1929), Dig.Op.JAG, 1912-1940, sec.453(20), p.345). In the instant case each accused was responsible for the operation of the motor vehicle. The failure of each of them to assist the victim of the collision constituted a neglect to the prejudice of good order, and conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

c. In addition to the bases of liability stated in paragraphs a and b above, there is a third and independent consideration which operated to impose a duty upon each accused to render assistance to the stricken soldier even if they did not cause his injuries. The general rule is that the law imposes no duty upon anyone to assist another whose injuries he has neither caused nor aggravated (Warschauer v. Lloyd Sabaudo, 71 F.2d 146,147; 2 Restatement of the Law of Torts, sec.322, p.870); but the rule is otherwise when the relationship existing between them is such that the law imposes a duty upon one to furnish the necessary assistance to the injured person (38 Am.Jur., sec.16, pp.658-659). A relationship of this character exists among soldiers of the Army of the United States. The Government has a vital interest in the preservation of the life and health of every soldier. It has pursued continuously

an active policy of conserving military manpower and of achieving its greatest possible utilization in the prosecution of the war. The victim of the accident in this case was an American soldier rendered helpless by his injuries. Under these circumstances, each accused was under a duty to the Government, by virtue of his status as a soldier, to render such assistance as he could reasonably provide to protect the injured fellow-soldier's life and to prevent the possible aggravation of his injuries. Every soldier is a member of a team engaged in the common enterprise of winning the war. The duty is predicated upon the need for surrounding with every reasonable safeguard the life, health and safety of every soldier in order to prevent waste of military manpower. Failure on the part of accused to fulfill this duty constituted a neglect to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service. The fact that the conduct required of accused for the fulfillment of this intensely practical obligation also accords with humanitarian and moral standards universally accepted among civilized people, is additional evidence of the validity of the rule.

6. The charge sheets show the following data on the age and service of each accused:

a. Shelton is 36 years and two months of age and enlisted at Muskogee, Oklahoma, 2 October 1942, to serve for the duration of the war plus six months. He had no prior service.

b. Martindale is 24 years and six months of age and enlisted at Texarkana, Texas, 6 August 1941, to serve for three years. His service period is governed by the Service Extension Act of 1941. He had no prior service.

c. Halvorson is 22 years and three months of age and was inducted at Fort Snelling, Minnesota, 23 October 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 persons and offenses. No errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JAN 1945 TO: Commanding General, 1st Bombardment Division, APO 557, U. S. Army.

1. In the case of Private, formerly Corporal, CLYDE SHELTON (18161399), Private, formerly Corporal, LUTHER C. MARTINDALE (18041498), and Private, formerly Private First Class, VERNON K. HALVORSON (37326195), all of 325th Bombardment Squadron, 92nd Bombardment Group, 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. It is noted that your action in this case did not designate the place of confinement. It is requested that supplemental action designating the place of confinement (MCM, 1928, Form 10, p.275) be executed and forwarded to this headquarters for insertion in the record of trial. It is to be noted that confinement in a penitentiary is not authorized for any of the offenses committed by accused.

3. There was no evidence of previous convictions by court-martial and the civil record of each accused fails to reveal bad character. The sentences of confinement at hard labor are for a period of two years. In view of this fact and of the nature of the offenses of which accused stand convicted, it is believed that they should not be separated from military service and freed from the hazards and dangers of war by incarceration until all possibilities of salvaging their value as soldiers have been exhausted. In view of the prevailing policy in this theater of conserving manpower, I recommend the designation of the appropriate disciplinary training center as the place of confinement, with suspension of the execution of the dishonorable discharge until the soldiers' release from confinement.

4. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4492. For convenience of reference, please place that number in brackets at the end of the orders (CM ETO 4492).

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

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Branch Office of The Judge Advocate General (9)
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

18 DEC 1944

CM ETO 4497

U N I T E D S T A T E S	)	VI CORPS
	)	
v.	)	Trial by GCM, convened at APO 46, (France), 20 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class CHESTER A. DeKEYSER (35326510), Battery "D", 433rd Antiaircraft Artillery Battalion	)	

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 charges and specifications:

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

Specification: In that Chester A. DeKeyser, Private First Class, Battery "D", 433rd Antiaircraft Artillery Battalion, did, at St. Tropez, France, on or about 12 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Charles W. Winbun, Private First Class, Battery "D", 433rd Antiaircraft Artillery Battalion, a human being by shooting him with a pistol.

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

Specification: In that * * * did, at St. Tropez, France, on or about 12 September 1944, with intent to do him bodily harm, commit an assault upon Elmer N. Lardy, Sergeant, Battery "D",

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(10)

433rd Antiaircraft Artillery Battalion, by shooting at him with a dangerous weapon to wit, a pistol.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for drunk and disorderly conduct in a public place, in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the 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 12 September 1944 the 433rd Antiaircraft Artillery Battalion was located near St. Tropez, France. Sergeant Elmer F. Lardy of this organization testified that on the date indicated, shortly after supper, he observed two soldiers of his battery, Private First Class Charles W. Winbun and accused, in an "argument and scuffle" near the kitchen tent. He heard some "loud talking" following which these soldiers "just swung at each other" and accused fell or dropped to the ground. The fight thereupon subsided or abated and Winbun returned to the kitchen tent to "resume brushing his teeth". For a few seconds, accused lay "flat on his stomach" then, "got up and ran to his tent" (R7,10). Once there, he hesitated a second, reached in his bag, "got his gun" and took it out of "his holster". Winbun also ran towards accused's tent, "only a matter of seconds" after accused started down there (R14-15,40). However, when Winbun reached the tent accused already had his gun and Winbun by-passed the tent and ran "almost due north" (R16). Accused followed him with his gun in his hand "at the same speed, in a run" (R18). Witness picked up a club, fell in behind accused, ordered him to "put his gun down", and clubbed him over the head as he ran (R9,11, 16,17). At the moment he was clubbed, accused fired at Winbun and missed. He then turned and "shot at" witness again missing (R9,17-18). At this time accused and Winbun had stopped running, with Winbun "about three or four yards" out in front. Winbun shouted to accused to "put his gun down" and "repeated this a half dozen times". Winbun was turned around somewhat for witness could see his face. "He was in a position * * * trying to duck". Accused fired a second shot at Winbun "which hit him". Winbun fell on his face and accused fled up the road (R9,16,18-19).

The testimony of Private Arthur H. Flottmann fully corroborates Sergeant Lardy's. He added that he and accused drank "some wine" and "had some drinks" at supper and that the trouble occurred

following "a few little words" about "an hour or an hour and a half" after supper (R22,23,24). This witness was of the opinion that Winbun got the best of the fist fight as there were "no marks" on him, whereas, DeKeyser had some blood on his face. He saw no cuts or serious wounds and observed no weapons in the hands of either at the time of the fight. Winbun only hit accused "with his fist" (R24,26).

Technician Third Grade William R. Graham, testified that on the date in question, shortly after supper, he apprehended accused "down the highway" near St. Tropez. He took from him a gun which had "one round in the magazine and three left in the clip". The weapon, a Baretta Caliber 9 pistol, was identified and received in evidence as Prosecution's Exhibit 1. According to Graham, accused "didn't stagger" and his speech did not indicate that he had been drinking (R31-33).

Captain William S. Brumage, Medical Corps, testified that on the evening of September 12, 1944, he examined the body of a deceased soldier. It was stipulated that this man was Private First Class Charles W. Winbun. The examination disclosed a "small-arm caliber" penetrating bullet wound which indicated that a shot had passed "through the left arm and completely through the chest". The cause of Winbun's death was "injury either to the heart or large internal blood vessel in the chest", resulting from the fire of a small arm weapon (R34-35).

4. The evidence for the defense consists of the testimony of Private First Class Henry F. Sutton of accused's organization, who stated that DeKeyser "had a drink" at suppertime, on the "day of the shooting" (R38) and a written statement made by Sergeant Lardy describing the fight substantially the same as his testimony (R13,39; Def. Ex.A). The accused did not testify.

5. Competent evidence conclusively shows that accused shot and killed Private First Class Charles W. Winbun and that he fired his weapon at, but did no injury to, Sergeant Elmer N. Lardy.

Two questions are presented by the record of trial. Does the record contain substantial evidence (1) that the killing was done with malice aforethought and (2) that the assault upon Lardy was committed with intent to do bodily harm, as alleged?

The issues raised will be discussed in the order above indicated:

Murder is legally defined as:

> "The unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM 1928, par.148a, p.162).

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Malice Aforethought, as employed in Criminal Law, means:

> "Not personal spite or hostility but simply the wrongful intent essential to the commission of crime * * * The intent to kill /is express where/ manifested by previous enmity, threats, the absence of any or sufficient provocation" (Winthrop's Military Law and Precedents - Reprint 1920, p.672-673).

The deliberate purpose to kill "need not have been long entertained; it is sufficient if it exist at the moment of the act" (Winthrop's Military Law and Precedents - Reprint 1920, p.673; CM ETO 739, Maxwell).

A homicide committed in the heat of sudden passion caused by provocation is manslaughter (MCM 1928, par.149a, p.165). Where, however, the provocation is legally inadequate to reduce the offense to manslaughter the killing is murder, even though committed in the heat of passion (MCM, par.149a, supra; CM 238138, Brewster, 24 BR 175).

In the instant case, the evidence shows that following a fist fight, accused obtained his pistol, and while pointing it at Winbun chased him some distance. During this pursuit the victim repeatedly shouted to accused to put his gun down. Sergeant Lardy also attempted to disarm him. Accused deliberate fired two shots at Winbun, the second of which caused his death. The evidence further shows that, after the fight and before the shooting occurred, some short time elapsed. There was at least a brief cooling period. During this interval accused had an opportunity to deliberate upon his actions and to plan a method of reprisal and revenge. The evidence fairly indicates that a malicious and felonious intent to murder existed at the moment accused fired his weapon at deceased, who was unarmed and unprotected. Such provocation as may have resulted from the sudden quarrel and personal affray, was legally inadequate - certainly as far as the record discloses - to either justify the murder or to reduce the offense to manslaughter (CM ETO 292, Mickles; CM ETO 422, Green).

It has been held that:

> "In any case where the provocation * * * is not excessive * * * where the person is assailed but not seriously * * * the law will, in general, hold the killing to be not manslaughter but murder" (Winthrop's Military Law and Precedents, supra, p.675).

The Board of Review is of the opinion that the record of trial contains substantial evidence to support the findings of the court that the killing was committed with premeditation and malice aforethought, as alleged.

Concerning the Specification of Charge II, the evidence shows that accused deliberately fired his pistol at Sergeant Lardy. The facts and circumstances surrounding the commission of this offense amply establishes an assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93.

6. The charge sheet shows that accused is 24 years of age. He was inducted, without prior service, at Camp Perry, Ohio, 15 April 1942.

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

8. Confinement in a penitentiary is authorized for the crime of murder (AW 42; sec.275, Fed. Criminal Code (18 USCA 454) 55 Stat 252). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir 229, WD, 8 June 1944, sec.II, pars.1b (4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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(14)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 DEC 1944 TO: Commanding General, VI Corps, APO 46, U. S. Army.

1. In the case of Private First Class CHESTER A. DeKEYSER (35326510), Battery "D", 433rd Antiaircraft 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 4497. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4497).

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

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

BOARD OF REVIEW NO. 1

10 APR 1945

CM ETO 4512

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at APO 83, U. S. Army, 25 August, (France), 24 October 1944 (Esch, Luxembourg). Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.
Private JOHN H. GAULT, JR. (34389556), Company I, 331st Infantry	

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

---

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private John H. Gault, Jr., Company I, 331st Infantry, did, at or near La Semallarie, France, on or about 10 July 1944, while before the enemy, shamefully run away from his company and did not return until apprehended by the military police.

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 shot to death by musketry. The reviewing authority, the Commanding General, 83rd

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Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations returned the record of trial to the reviewing authority who submitted the same to the court for reconsideration of its findings and sentence. The court reconvened, revoked its former findings and sentence and found accused, of the Specification of the Charge not guilty, but guilty of a Specification reading as follows:

> "In that Private John H. Gault, Jr., Company I, 331st Infantry, did without proper leave absent himself from his organization at or near La Semallarie, France, from about 20 July 1944, under circumstances which constituted a neglect of duty to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service, until apprehended by the military police between 23 and 26 July 1944" (Underscoring supplied);

of the Charge not guilty, but guilty of a violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the revised sentence, did not designate the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence in this case failed to establish the fact that accused ran away from his company on 10 July 1944. It does prove however that accused was absent therefrom without authority from 20 July 1944 until the time between 23 and 26 July 1944 when he was apprehended by the military police. However, there is no proof that on 20 July either accused's company or the accused himself was "before the enemy". Consequently the prosecution did not prove a vital element of the original charge. The court's action, upon revision proceedings which found him not guilty of a violation of the 75th Article of War was correct (CM ETO 1109, Armstrong; CM ETO 1249, Marchetti; CM ETO 2602, Picoulas).

The part of the substituted finding which recites that accused

> "did, without proper leave absent himself from his organization * * * from about 20 July 1944 * * * until apprehended by the military police between 23 and 26 July 1944"

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is permitted by the allegations of the original specification that accused

> "did * * * run away from his company and did not return until apprehended by the military police".

Absence without leave may be a lesser included offense of an offense charged under the 75th Article of War when the specification thereof includes allegations of an unauthorized absence by accused from his organization or station (CM 130412 (1919), CM 126647 (1919), Dig.Ops. JAG 1912-1940, sec.433(3), p.304; CM ETO 4564, Woods; CM ETO 4691, Knorr; CM ETO 5114, Acers).

The remaining part of the substituted finding that accused's unauthorized absence was

> "under circumstances which constituted a neglect of duty to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service"

stated no facts but was obviously a legal conclusion. That part of the finding of guilty which includes such language was without legal effect. The phraseology is nothing more than a paraphrase of a portion of the 96th Article of War, and added nothing to the factual part of the substituted findings that accused was absent without leave for a stated period. Every absence without leave is in some degree prejudicial of good order and military discipline or is of a nature to bring discredit upon the military service, but such view of the offense cannot convert it from the offense denounced by the 61st Article of War into one of greater import under the 96th Article of War and a declaration of such legal conclusion in a specification or a finding does not effect such transmutation. The conclusion therefore is that the court by its substituted finding found accused guilty only of absence without leave, an offense under the 61st Article of War. The part of the finding which declared that he was guilty of violation of the 96th Article of War was in legal effect a finding of guilty of the 61st Article of War.

4. The charge sheet shows that accused is 22 years four months of age and was inducted 10 October 1942 at Fort Jackson, South Carolina. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and the offense. Except as hereinabove noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the

opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did absent himself from his organization without leave in violation of the 61st Article of War from 20 July 1944 to a time between 23 and 26 July 1944 when he was apprehended by the military police, and legally sufficient to support the sentence.

6. The punishment for absence without leave is such as a court-martial may direct, except death (AW 61). 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 Riter Judge Advocate

Wm. F. Brown Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 10 APR 1945 TO: Commanding General, 83rd Infantry Division, APO 83, U. S. Army.

1. In the case of Private JOHN H. GAULT, JR. (34389556), Company I, 331st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did absent himself without leave from his organization from 20 July 1944 to a time between 23 and 26 July 1944 when he was apprehended by the military police in violation of the 61st Article of War and legally sufficient to support the sentence which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. By supplemental action (to be returned to this office for attachment to the record of trial) the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement.

3. In view of the reduction of the seriousness of the offense as a result of the courts' substituted findings, and the short period of accused's proved absence, a reduction must be made in the period of confinement. I suggest confinement for 10 years. The reduction may be included in the supplemental action required by paragraph 2 hereof.

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 4512. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4512).

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

(21)

BOARD OF REVIEW NO. 1

5 JAN 1945

CM ETO 4526

UNITED STATES v. Private ALBERT R. ARCHULETTA (38141808), Company K, 15th Infantry	3D INFANTRY DIVISION Trial by GCM, convened at Pozzuoli, Italy, 21 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Albert E. Archuletta, Company K, 15th Infantry, did without proper leave, absent himself from his place of duty with Company B, 29th Replacement Bn, at D'Agnano, Italy, from about 19 Oct. 1943 to about 30 April 1944.

CHARGE II: Violation of the 69th Article of War. (Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification: In that Private Albert E. Archuletta, Company K, 15th Infantry did. at Marcianise, Italy, on or about 7 May 1944, desert the

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service of the United States, and did remain absent in desertion, until he was apprehended at Naples, Italy, on or about 21 June 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Charge II and the Specification thereunder, approved the sentence but reduced the period of confinement to 50 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, but directed that pending further orders accused be confined in Natousa Disciplinary Training Center, Oran, Algeria, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused came overseas as a replacement in March 1943 and was assigned to the 3d Infantry Division. He developed an infected foot during the campaign in Sicily and was hospitalized for about seven weeks. Upon his release from the hospital he was sent to a replacement center and later to the 29th Replacement Depot at Salerno, Italy (R19,20; Pros. Ex.D). On 18 October 1943 this Depot was moved to the race track at Bagnoli, which is near Naples. Accused moved with it and was assigned to Company B, 29th Replacement Battalion (R5; Pros.Ex.D). On his first day there his name was taken, but he never stood formations thereafter. He began to absent himself without leave for two and three days at a time and later for periods of seven to ten days, but he always returned. He continued this until March 1944 when he absented himself without leave for about 20 or 30 days until apprehended by the military police in a woman's apartment in Naples on 30 April 1944. He had his service uniform with him but he also had a suit of civilian clothes which he had worn on several occasions to avoid being picked up by the military police (R7; Pros.Ex.D). He had in his possession a set of identification tags and a pass both of which were made out to another person. He stated that when he was transferred to the 29th Replacement Depot in Naples, his records were lost and his name was not called at morning roll calls. In order to be able to leave camp at will he did not report this fact (R7,8). He obtained money by gambling at the depot. After his apprehension he was confined in a Fifth Army stockade near Caserta (Pros.Ex.D).

On 7 May 1944 he escaped from confinement and made his way back to Naples. There he traded his uniform for some items of civilian

clothing, bought other items on the black market, and wore them to avoid identification and apprehension by the military police (R13; Pros.Ex.D). On 21 June 1944 he was arrested in civilian clothes as a violator of curfew regulations in Naples. When asked for his curfew pass he answered in Italian. While being taken to the military police station in a jeep he was seen reaching for what appeared to be a pistol in his hip pocket. The vehicle was stopped and accused was ordered to get off. He resisted and was pulled off. A pistol was removed from his hip pocket (R10-11, 14,16-17) and one of the military police sergeants slapped him (R13,15). In his statement accused denied that he attempted to draw his gun (Pros. Ex.A) but admitted it was loaded (Pros.Ex.D). At the police station he was taken to the booking desk for civilians. He produced an apparently genuine Italian identification card (R17; Pros.Ex.B) and an Italian birth certificate (R17-18; Pros.Ex.C). These documents were made out to "Ernesto Di Angelo" (Pros.Ex.D). He was about to be released by the military police in the belief that he was an Italian civilian (R17). When asked where he was born he replied "'Sicily'". The identification card showed the birthplace to be Naples. One of the sergeants thereupon grabbed him by the collar and jerked him, and accused said, "Take it easy sergeant, I am an American soldier". He then gave his true name and stated that he belonged to Company K, 15th Infantry. He was taken to the booking desk for military personnel where he said that he had procured the spurious identification card on the black market (R11). While standing at the booking desk for civilians and before it was discovered he was an American soldier, the same sergeant who had slapped him before, slapped him again because

> "When a man tries to get you from behind the back it makes you sore. He was a kind of wise guy" (R15).

After he disclosed he was an American soldier, no one laid hands on him except to conduct him across the hallway to the booking office for military personnel (R13). After his identity became known an officer of the military police warned him that he did not have to make any statement but that he could make one if he wished (R11). No promise of immunity or other favor was made to persuade him to talk. Accused then stated that "he wanted to come clean with everything" and made an oral statement (R12,13). On 4 July 1944, after first being warned of his rights under Article of War 24, accused made a signed statement to the investigating officer. The original was lost and a true copy was received in evidence, the defense stating it had no objection (R18,19; Pros.Ex.D).

4. The defense offered no evidence. Defense counsel at the request of the president advised accused of his rights in open court and then stated that accused elected to remain silent (R21).

5. One of the military police who apprehended accused admitted on the stand that he slapped him because of his resentment at accused's previous attempt to reach for his gun and because of his dislike for accused's general attitude. The use of force for either of these reasons is unlawful and reprehensible. Close scrutiny of the evidence, however, discloses that the treatment accorded to accused by the military police

did not affect the voluntary nature of his oral and written statements. The violations of Article of War 61 and Article of War 58 as alleged in the specifications are clearly established by the evidence. The intent to desert was properly inferred from accused's conduct (CM ETO 1737, Mosser; CM ETO 2343, Welbes; CM ETO 2842, Flowers).

6. The charge sheet shows that accused is 26 years of age and was inducted 7 April 1942 at Pueblo, Colorado, 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 the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

8. Confinement in a penitentiary for the offense of desertion committed in time of war 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 H. Sargent, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 JAN 1945 TO: Commanding General, 3d Infantry Division, APO 3, U. S. Army.

1. In the case of Private ALBERT R. ARCHULETTA (38141808), Company K, 15th 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 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 4526. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4526).

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

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BOARD OF REVIEW NO. 2

16 DEC 1944

CM ETO 4550

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters 2nd Advanced Air Depot Area, (France), 4 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor, as to Moore, for 50 years and, as to Jones, for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class CHRISTOPHER L. MOORE (34180992) and Private JOHN A. JONES JR. (32239434), both of 1938th Quartermaster Truck Company (Avn), 1587th Quartermaster Battalion Mobile (Avn)	

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 soldiers named above has been examined by the Board of Review.

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

MOORE

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

Specification 1: In that Christopher L. Moore, 1938th Quartermaster Truck Company (Avn), 1587th Quartermaster Battalion Mobile (Avn), on DS with 1515th Quartermaster Battalion Mobile (Avn) did, at his company area, on or about 1800 hours, 20 August 1944, offer violence against Captain Clarence T. Raine, his superior officer, who was then in the execution of his office, in that he, the said Christopher L. Moore, did attempt to strike the said Captain Clarence T. Raine with his fists.

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Specification 2: In that * * * did, at 1800 hours, on or about 20 August 1944, lift up a weapon, to wit a Carbine, .30 caliber, against Captain Clarence T. Raine, his superior officer, who was then in the execution of his office.

Specification 3: In that * * * having received a lawful command from Captain Clarence T. Raine, his superior officer, to hand over his rifle, did at his company area, on or about 1800 hours, 20 August 1944, willfully disobey the same.

CHARGE II: Violation of the 63rd Article of War.

Specification: In that * * * did, at his company area, on or about 1800 hours, 20 August 1944, behave himself with disrespect toward Captain Clarence T. Raine, his superior officer, by saying to him "Don't mess with me Captain", or words to that effect.

CHARGE III: Violation of the 65th Article of War.

Specification: In that * * * having received a lawful order from 1st Sergeant Johnus Ervin, a non-commissioned officer who was then in the execution of his office, to hand over his rifle, did at his company area, on or about 1800 hours, 20 August 1944, willfully disobey the same.

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

Specification 1: In that * * * did, at his company area, on or about 1800 hours, 20 August 1944, in violation of standing orders issued by his commanding officer Captain Clarence T. Raine, discharge a service rifle, Carbine, .30 caliber, in his tent.

Specification 2: In that * * * was at his company area, on or about 1800 hours, 20 August 1944, drunk and disorderly in quarters.

JONES

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

Specification: In that Private John A. Jones, Jr., 1938th Quartermaster Truck Company (Avn), 1587th Quartermaster Battalion Mobile (Avn), on DS with 1515th Quartermaster Battalion Mobile (Avn) did,

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at his company area, on or about 1800 hours, 20 August 1944, strike Captain Clarence T. Raine, his superior officer, who was then in the execution of his office on the head with his fists.

CHARGE II: Violation of the 63rd Article of War.

Specification: In that * * * did, at his company area, on or about 1800 hours, 20 August 1944, behave himself with disrespect toward Captain Clarence T. Raine, his superior officer, by saying to him "You are a rotten son-of-a-bitch. I'll fight you. You'll see what it's like to fight a man.", or words to that effect.

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

Specification: In that * * * was at his company area, on or about 1800 hours, 20 August 1944, drunk and disorderly in quarters.

Each accused announced in open court that he had no objection to a common trial. Each pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications against him. No evidence of previous convictions was introduced as to accused Moore. Evidence was introduced of three previous convictions of accused Jones, one by general court-martial for striking a civilian with his hands, one by summary court for leaving convoy without permission, each in violation of Article of War 96, and one by special court-martial for disobeying order of commissioned officer and for five days absence without leave in violation of Articles of War 96 and 61. Three-fourths of the members present when the vote was taken concurring as to each 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, accused Moore for 50 years and accused Jones for the term of his natural life. The reviewing authority approved the sentence of each accused, 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. For the prosecution, Technician Fifth Grade Edward Cooper of accused's unit testified that on 20 August 1944 he was waiting in a tent for a haircut when both accused entered. Accused Moore had a carbine which he laid down. Accused Jones then handled it for awhile and when he laid it down, Moore picked it up; he was asked by "some of the boys" to lay it down but he said it was his gun and he would do what he wanted with it.

"Jones told Moore not to be afraid to shoot the gun if he wanted to. So Moore shot the gun out the door over Sgt Henderson' head. Sgt Henderson asked him for the gun but he wouldn't give it to him. First Sergeant Erwin came over and asked for the gun but he wouldn't give it to him. While Sgt Erwin was talking to him and trying to get the gun Captain Raine came in and asked him for the gun but Moore wouldn't give it up. The next thing I saw was Chris Moore getting up off the ground" (R16).

Captain Raine said, "Give me that gun". Witness next saw Jones about two minutes later about 50 feet away outside the tent on top of Captain Raine with whom he seemed to be wrestling. When the captain went out of the tent, Jones followed him (R17) saying:

"You had no business hitting Moore",

cursing and calling him a "son-of-a-bitch". Both accused were cursing "and running off at the mouth a little bit". They "acted like they had been drinking" and were "staggering like a drunk man generally does" (R18) but they were "not out of their head" (R19).

Staff Sergeant Arnold R. Henderson of accused's unit testified that at the time of this incident

"I was sitting in front of the tent getting my hair cut and while sitting there I heard a shot fired over my head. I got up and saw Christopher Moore standing in the door of the tent with a carbine in his hand. I got up and asked him to give me the carbine. He refused but laid it down beside his bed and then I sat down and continued to get my hair cut. I then heard another shot and I told him to put the gun down. Sgt Erwin came over and demanded that Moore give him the gun and Moore refused. Sgt Erwin was trying to get Moore to give him the gun when Captain Raine came up. The Captain ordered him to give him the gun. Moore refused and put it behind his back. Captain Raine asked him again for the gun and he refused and Captain Raine hit him on the chin" (R21).

Moore appeared by his actions, "cursing and everything", to have been drinking. He could stand up and carry on a conversation all right (R21).

First Sergeant Johnus Erwin of accused's unit testified that he was in the orderly room on 20 August when he heard a gun shot, and

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as he went forward to the tent he heard a second shot. Moore had the gun when he got there and told witness he knew what he was coming for but that he wasn't going to give him the gun and though repeatedly asked for it, Moore refused to give it up. A few minutes later, Captain Raine came over and said:

> "'Moore, give that gun, give me that gun Chris Moore?' Moore said 'Go away Captain and stop messing with me'. The Captain asked him again for the gun and then told me to get out of the way and then the Captain hit him on the chin" (R23).

Moore had both hands on the gun and "it was pointed kindly at an angle". Moore told witness to move out of the way and then "the Captain hit him". He started for the captain and "they swung at each other a few times", then the captain struck him and knocked him down and then went out the door. Moore did not point the gun at Captain Raine but while witness was holding him he said

> "to turn him loose so he could get his gun and kill Captain Raine. That was when Captain Raine was walking away from him" (R27-28).

During this time Jones had been lying on a bed in the same tent where the scuffle occurred and he came out of the tent while witness was holding Moore. He called Captain Raine a "rotten son-of-a-bitch", and told him as the captain walked away that he would fight him (R24). The captain said "he didn't want to have anything to do with him" but Jones went "on up where the Captain was" and they "started struggling". Although both accused could talk intelligently "you could tell they had been drinking" by their "cussing and swearing". About four days before this incident an order was posted

> "on the bulletin board and Captain Raine had the whole squadron meet and told them about it. He said there would be no firing of rifles in the area" (R25).

Both accused were present (R27).

Captain Clarence T. Raine, commanding officer of accused's unit, testified that about 1800 hours on 20 August, while in front of the orderly tent, he heard three or four shots in the camp area. As he had previously issued instructions against such firing, he sent First Sergeant Erwin to investigate and pick up the gun. Hearing a loud argument from the tent, he went to investigate and

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"when I arrived at the tent I saw Sgt Ervin and Moore standing just inside of the tent. , Pvt Moore had a carbine in his hands and was holding it at his right side; Sgt Ervin was standing at his left. I heard Moore say 'No son of a bitch is going to get my gun'. He was refusing to give it up and the 1st Sgt was trying to get it. I walked up to Moore, held out my hand and said 'Moore, give me the gun'? Moore held the gun up to his right hip and said 'Don't mess with me Captain'. I stepped inside the muzzle of the gun and struck Moore on the right side of his face and a soldier standing behind him grabbed the gun from him at that time. I then backed out of the tent and Moore got up and came at me cursing and the 1st Sgt grabbed him when he came out the door and attempted to hold him. Moore struggled and continued cursing and kicked the 1st Sgt and I told him to let him go which he did. Moore immediately came at me feeling in his pockets apparently for a knife or other weapon. (witness indicated manner in which accused went through his pockets) I warned him not to pull a knife on me. He continued looking through his pockets, then he stopped and swung at me with his fist. I hit him in his stomach and knocked him on the ground and he lay there and moaned. There were approximately ten men grouped in the vicinity outside the tent at that time and Pvt Jones came out of the crowd and said 'You rotten son of a bitch, I'll fight you. You'll see what it's like to fight a man'. I told him to stay out of this, that this was none of his business. * * * I backed away from Jones and called on the other men to hold him. Jones struck me in the mouth and I closed with him and we both fell to the ground. While on the ground Jones struck me on the back of the head with his fist. Lt Anderson grabbed Jones and pulled him off of me with some difficulty because Jones had his fingers clenched in my hair and wouldn't release his hold. * * * I ordered Moore and Jones placed under arrest" (R29).

Witness demonstrated how Moore had pointed the gun in the "ready" position at his shoulders and chest. "The weapon was raised when I struck him" (R30). Moore did not strike him and seemed to be "about half drunk" (R31).

First Lieutenant Virgil D. Anderson of the same unit testified that from a distance of 75 or 100 yards he heard Moore curse Captain Raine (R33). He corroborated the testimony of Captain Raine beginning with the time when Jones came out of the tent after the Captain (R32) and struck him in the mouth and on the neck before they fell down (R33).

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First Lieutenant John L. Gibbs of the same unit gave similar testimony (R35). In his opinion both Jones and Moore were "so drunk that they either didn't know what they were doing or didn't care what they were doing" (R36).

First Lieutenant Eugene H. Carroll's testimony was approximately the same. He was of the opinion that both accused "had had quite a bit to drink" (R41) and in the opinion of witness both were drunk though they "could still get around alright" and seemed to know what they were doing (R42).

4. For the defense, Corporal Nathaniel Fuller, testified that he was in the tent where the haircuts were being given on 20 August 1944, that both accused "seemed to be pretty drunk". He saw Captain Raine strike Moore who at the time was standing there with the gun pointing down toward the ground (R43). At no time did he see it pointed toward the captain. Both accused were friends of witness (R44). He did not see Jones strike Captain Raine but did see him wrestling. He heard neither Moore or Jones use any profanity (R45).

Their rights as witnesses having been explained to them (R46), accused Jones remained silent (R49) but accused Moore was sworn and testified that he, Jones and another "boy" had drunk a quart of cognac about "5:30 P.M.". He did not remember any conversation with Captain Raine until he asked for his gun which accused was handing to him when "he hit me". After that he remembered nothing of what occurred. He recalled Sergeant Henderson asking for his gun and his saying he would give it to him as soon as he got the grease out of it. He "had broken the spring on it and the gun went off" and "that was why he asked me for it" (R47). He was "just shooting" and fired once before he got to the tent (R48).

5. There is substantial evidence that accused Jones did strike Captain Raine and that accused Moore attempted to do so (Charge I, Specification 1), that accused Moore lifted up a carbine against Captain Raine (Specification 2, Charge I) and willfully disobeyed the command of Captain Raine to hand over his rifle (Specification 3, Charge I). There is substantial evidence that each accused behaved with disrespect toward Captain Raine (Charge II and its Specification); that accused Jones at the time was drunk and disorderly in quarters (Charge III and its Specification) as was accused Moore (Specification 2, Charge IV); that accused Moore willfully disobeyed the order of First Sergeant Ervin to hand over his rifle (Charge III and its Specification)and violated a standing order issued by his commanding officer by discharging a rifle in his tent (Specification 1, Charge IV).

Whether accused or either of them were too drunk to entertain the specific intent to disobey the orders given is a question of fact for the sole determination of the court (CM ETO 1015, Branham) and when supported by competent, substantial evidence such determination will not be disturbed by the Board on appellate review.

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6. The charge sheet shows that accused Moore is 24 years three months of age, and was inducted at Camp Forrest, Tennessee, 2 December 1941; that accused Jones is 33 years six months of age and was inducted 19 February 1942 at Fort Dix, New Jersey. Neither had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences (CM ETO 1360, Poe; CM ETO 1413, Longoria; CM ETO 2642, Gumbs, Jr.; CM ETO 3300, Snyder). 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, par.2a, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 DEC 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private First Class CHRISTOPHER L. MOORE (34180992) and Private JOHN A. JONES JR. (32239434), both of 1938th Quartermaster Truck Company (Avn), 1587th Quartermaster Battalion Mobile (Avn), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The sentences, under the circumstances shown by the record of trial, appear excessive in comparison with sentences recently approved in similar cases. Accused had been drinking and their various offenses constituted separate phases of what was substantially one incident. The striking of Moore by Captain Raine precipitated the offenses by Jones. These cases will be re-examined in Washington, and the sentences, I believe, considerably reduced. In order to comply with instructions from the Commanding General, European Theater of Operations, with reference to uniformity of sentences, directing me to take action to forestall criticism of this theater for returning prisoners to the United States under sentences deemed there to require the exercise of immediate clemency action by the War Department, I recommend that you reconsider these sentences with a view to reducing the terms of confinement. If this be done, the signed action should be returned to this office to be filed with the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4550. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4550).

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

Branch Office of The Judge Advocate General (37)
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

13 JAN 1945

CM ETO 4564

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters, 36th Infantry Division, APO 36, U. S. Army, (France), 17 October 1944.
Private ERIC L. WOODS, JR. (34679045), Company G, 143d Infantry	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for ten years. NATOUSA Disciplinary Training Center.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and the sentence. 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 75 Article of War.

Specification: In that Private Eric L. Woods, Jr., Company G, 143rd Infantry, being present with his company while it was engaged with the enemy, did in the vicinity east of DOCELLES, FRANCE, on or about 5 October 1944, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until he returned to military control on or about 11 October 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 the

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Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated NATOUSA Disciplinary Training Center as the place of confinement.

The proceedings were published by General Court-Martial Orders No. 98, Headquarters 36th Infantry Division, APO 36, U. S. Army, 19 October 1944.

3. The charge sheet, accompanying papers and record of trial show the following:

The Charge was preferred on Wednesday, 11 October 1944. On the same day accused was placed in confinement in the stockade of the 36th Infantry Division. He was examined by the division psychiatrist on 13 October and found to be free from any "significant psychiatric disorder". On Sunday, 15 October, the Charge was forwarded to the investigating officer, who made his report under date of 16 October. The second paragraph of the report stated that a "Summary of Evidence" attached thereto included all the substantial evidence he had been able to find for and against accused. The "Summary of the Evidence", contained the statement that the investigating officer had considered extract copies of the morning report of accused's organization for 8 and 12 October 1944, the psychiatrist's report, and had personal knowledge, as personnel officer of the 143d Infantry, that Company G was engaged with the enemy on 5 October. He further reported that accused was 19 years and seven months of age and had been in the service one year and two months. He recommended that accused be eliminated from the service and that he be tried by general court-martial. The staff judge advocate by means of a mimeographed indorsement dated 17 October containing no summary or analysis of the available evidence, recommended trial by general court-martial. The Charge was referred to the trial judge advocate for trial by indorsement dated 17 October. A copy of the charges was served on accused 17 October. The court convened at 0910 hours on the same day and proceeded to the trial of accused. It does not appear whether or not any time intervened between the service of the charges and the beginning of the trial. Neither accused nor his counsel requested a continuance or objected to trial on any ground. The trial, including the closing of the court and voting on the findings and the sentence, consumed a total of 50 minutes. There is no indication in the record proper, or in the papers attached to the record, that the trial of accused on the same day he was served with the charges was required by any military necessity. Defense counsel was excused, because of other military duties, by the appointing authority through the president of the court (R2), but the assistant defense counsel was present throughout the trial. Accused stated at

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the opening of the trial that he desired to be defended by the assistant defense counsel in the absence of defense counsel (R3). The trial judge advocate and his assistant were both present (R2) The court which tried accused consisted of two captains, one first lieutenant and two second lieutenants. One of the latter was law member (R2,3).

4. The only evidence presented by the prosecution consisted of an extract copy of the morning report of Company G, 143d Infantry, for 8 and 12 October 1944 and an oral stipulation.

The extract copy of the morning report received in evidence without objection, contained an entry on 8 October showing a change in the status of accused from duty to absence without leave as of 5 October, and an entry on 12 October showing a change in his status from absence without leave to absence in confinement in the 36th Division stockade as of 11 October. It was authenticated by a certifidate purporting to be signed by the personnel officer of the 143d Infantry (R6; Pros. Ex.1).

The trial judge advocate announced to the court that it was stipulated that on or about 5 October 1944, Company G, 143d Infantry, was before the enemy in the vicinity of Docelles, France, and was part of the 2d Battalion, 143d Infantry, which was in regimental reserve. The stipulation was not in writing. Defense counsel stated that the stipulation was agreed to by himself and accused. The stipulation was admitted. The prosecution then rested (R6).

5. Defense counsel informed the court that the rights of accused had been explained to him and that he desired to make a sworn statement. The trial judge advocate asked accused if he fully understood his rights and if he desired to make a sworn statement. Accused answered both questions in the affirmative (R6). He was sworn and testified as follows:

He was 19 years of age and had attended school as far as the eighth grade. After leaving school he worked for his father. He entered the army at the age of 18, received 17 weeks of basic training and was sent overseas 1 March 1944 (R7). He joined the 36th Infantry Division in April, was in the line with Company G at Anzio as a member of a machine-gun squad, and participated in the attack north of Velletri about 26 May. Wounds caused by a fragment of an "88" shell hospitalized him from 25 June until the end of July. He was awarded the Purple Heart. He rejoined the 36th Infantry Division upon his discharge from the hospital and was assigned to the defense platoon at the command post. He served in that platoon until September, after his arrival in France. The defense platoon was broken up and accused was returned to the weapons platoon of Company G. He did not know any of the men in the company (R7-8,9). Asked if he "went up" to his company on 5 October, he testified "Yes, sir. It was the 5th I believe. It was around the first of October" (R8). At this point in his testimony accused lapsed into

what threatened to be hearsay and opinion evidence and was interrupted by objections from the prosecution which were sustained. There was here a break in the narrative (R8). Accused had spoken with "them" (it does not appear to whom he was referring). They were all back in the rear and he slept with them that night. Since the company commander did nothing about it, accused stayed there, had breakfast, and left with them after breakfast. The following interrogation by defense counsel then occurred:

"Q. When you were with the company were they before the enemy?
A. No, sir. I hadn't fired a shot.

Q. They weren't engaged with the enemy that night?
A. No, sir.

Q. What was their tactical situation?
A. Sir, they came back there for hot meals. They came back every so often" (R9).

After he left the company he proceeded about 2000 yards and met a member of the military police. He surrendered to him but was told that since he would be charged with absence without leave for what he had already done, he might as well take two or three days off before turning himself in. He therefore proceeded to go to town where he met several of his "buddies". After an absence of three days he and his companions were apprehended by the military police and held until transportation was available to take them back to their units. When accused reached his regiment a lieutenant talked to him and offered him an opportunity to return to his organization and to show that he was a good soldier. He was given a rifle and cartridge belt and taken to his company. The company commander asked him where he had been, and accused replied he had been to town. When asked if he were one of the men who had been at "division forward" and were limited service, accused answered in the affirmative. The sergeant then said, "I don't want you then". Accused was not in fact limited service but had been on detached service. He was thereupon placed under guard by order of the company commander and taken back to the regiment (R9). It was accused's intention to go back to his company for duty, and he did so, but since he was not wanted there, he preferred not to fight with that company. He told them he would rather be court-martialled than return to the same company (R10). Accused could hear artillery fire when he was at the division forward command post before he rejoined Company G but did not remember hearing it when he was with the company (R10).

The defense offered no other evidence.

6. The allegation that accused being present with his company while it was engaged with the enemy shamefully abandoned the company and sought safety in the rear, is equivalent within the purview of Article of War 75 to the allegation that accused ran away from his company when it was before the enemy. It was unnecessary, therefore, to allege or prove that it was his duty to defend the company (CM ETO 1249, Marchetti; CM ETO 5475, Wappes).

The stipulation which tended to concede the existence of one of the essential elements of the offense charged was not expressly assented to by accused himself (see CM ETO 364, Howe). If he assented at all he must have done so by implication. Ordinarily when defense counsel asserts in open court in the presence of accused that the latter agrees to a stated stipulation and accused remains silent, the court may conclude that accused understands the stipulation and assents to it. In this case, however, accused later testified that his company was not before the enemy and was not engaged in combat. In the face of accused's sworn denial of the stipulated fact, defense counsel made no attempt to secure the withdrawal of the stipulation. Neither he, nor the personnel of the prosecution, nor any member of the court inquired into the truth of the stipulation. In view of his testimony, his youth, inexperience and limited education, the court should have rejected the stipulation and required proof of the vital fact supposed to have been covered by the stipulation, continuing the trial, if need be, to enable the prosecution to produce the necessary evidence.

> "With a view to saving time, labor, and expense, he /defense counsel/ should join in appropriate stipulations as to unimportant or uncontested matters" (MCM, 1928, par. 45b, p.35) (Underscoring supplied).

> "A stipulation need not be accepted by the court, and should not be accepted where any doubt exists as to the accused's understanding of what is involved. * * * In a capital case and in other important cases a stipulation should be closely scrutinized before acceptance. The court is not bound by a stipulation even if received. For instance, its own inquiry may convince the court that the stipulated fact was not true. The court may permit a stipulation to be withdrawn. If so withdrawn, it is not effective for any purpose" (MCM, 1928, par.126b, p.136).

The morning report established that accused absented himself without leave on 5 October. Even if it be assumed that the stipulation was properly accepted by the court, it was an admission that the company was before the enemy on or about 5 October. There was no evidence which directly or inferentially fixed 5 October as the date when the company was before the enemy. It was thus left entirely to speculation whether the company was before the enemy on 5 October, or on another date reasonably encompassed by the words "on or about". That

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phrase "cannot be said to cover any precise number of days or latitude in time" (MCM, 1928, App.4, Instructions, par.g, p.237). The mobility of troops and of the front lines in the present war is such that it would be improper, in the absence of a showing of surrounding circumstances, to indulge in a presumption that a company which was before the enemy on or about 5 October was in fact before the enemy on 5 October. Proof that the company was before the enemy on 5 October when accused absented himself without leave was essential to the prosecution's case under Article of War 75. The coexistence of the act of leaving and presence before the enemy must be shown. It is an elementary principle of criminal law that the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of the offense charged. This principle is applicable to prosecutions before courts-martial (MCM, 1928, par.78a, pp.62-63). The evidence as a matter of law was insufficient to prove that the company was before the enemy at the time accused absented himself without leave. Therefore, a finding of guilty of a violation of Article of War 75 was not warranted.

Since abandonment of his company by accused necessarily connotes separation therefrom without authority, the Specification sufficiently alleges that accused absented himself from his company without leave. In such case absence without leave under Article of War 61 may be a lesser included offense of an alleged violation of Article of War 75 (CM ETO 5114, Acars and cases therein cited). The morning report showed that accused was absent from 5 to 11 October. In his own testimony he admitted being absent for three days. The evidence was thus sufficient to warrant a finding of guilty of the lesser included offense of absence without leave in violation of Article of War 61, unless that finding was vitiated by a fatal defect in the trial of the case.

7. The trial of accused for a capital offense on the very day he was served with a copy of the charges requires a careful examination of his right to a reasonable opportunity to prepare for trial and of his right to the effective assistance of counsel, and a determination of whether he was deprived of these rights and suffered substantial injury by reason of such deprivation.

a. Accused was entitled to a reasonable opportunity to prepare for trial and to the effective assistance of counsel in the preparation of his defense.

(1) These rights are recognized and provided for in Articles of War 11, 17 and 70 and in the pertinent provisions of the Manual for Courts-Martial, 1928, hereinafter quoted.

> "For each general or special court-martial the authority appointing the court shall appoint a * * * defense counsel, and for each general court-martial * * * one or more assistant defense counsel when necessary" (AW 11).

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"The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11" (AW 17).

"The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance * * * In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him" (AW 70).

"Immediately on receipt of charges referred to him /the trial judge advocate/ for trial he will serve a copy of the charge sheet as received and corrected by him on the accused and will inform the defense counsel of the court that such copy has been so served" (MCM, 1928, par.41e, pp.32-33).

"Immediately upon charges being referred for trial to the court he /the defense counsel/ will inform the accused of that fact and of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection. Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel" (MCM, 1928, par.43b, p.34).

"His /defense counsel's/ preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that such evidence as he proposes to introduce in defense may be confined to relevant evidence, and that he may be ready to make appropriate objection to any irrelevant evidence that might be offered by the prosecution * * * Ample opportunity will be given him and the accused properly to prepare the defense, including opportunities to interview each other and any other person" (MCM, 1928, par. 45b, p.35) (Underscoring supplied).

The Judge Advocate General in a letter on the subject "Time Element in Trial by Courts-Martial", dated 14 February 1944, addressed to officers exercising general court-martial jurisdiction, after quoting the above quoted provision in Article of War 70, stated:

> "It is by reason of military necessity alone that this provision does not apply in time of war. The exception does not mean, however, that even during time of war, an accused may be deprived of the right to prepare his defense. It means rather that during time of war he may be tried as soon after service of charges as he has had reasonable time to consult with counsel and prepare his defense. * * * occasions are rare, even in time of war, in which military necessity requires trial of an accused on the same day charges are served upon him. Obviously, he has insufficient time to consult with his counsel who likewise has insufficient time to study and prepare the defense. Even in those cases where there is no defense, there might be extenuating circumstances which could be offered in mitigation if adequate time is allowed" (Underscoring supplied).

This construction of the quoted provision of Article of War 70 was applied in CM 231119, Lockwood (1943), 18 BR 139 and in CM 245664, Schuman, (1944), Bull JAG, March 1944, Vol. III, No. 3, sec.377, p.95, 29 BR 225.

The legislative and executive provisions hereinbefore quoted are to be so construed and applied as to meet the requirements of due process of law under the Fifth Amendment to the Federal Constitution. Thus in determining whether an accused was deprived of the privilege against self-incrimination embodied in Article of War 24, the Board of Review declared that

> "it is both logical and consistent to consider the Article as the statutory equivalent of the relevant provision in the /Fifth/ Amendment and to apply to the Article the same principles as have been applied to the non-self-incriminating clause of the Amendment. Under this method of reasoning the rights and immunities under the 24th Article of War of an accused on trial before a Federal military court are identical with rights and immunities of a defendant on trial before a Federal civil court" (CM ETO 2297, Johnson and Loper, citing Grafton v. United States, 206 U.S. 333, 51 L.Ed. 1084).

(2) The right to a reasonable opportunity to prepare for trial is a fundamental right secured to accused by the guarantee of the Fifth Amendment to the Federal Constitution that "no person shall * * * be deprived of life, liberty or property, without due process of law".

The guarantee of due process of law in the Fifth Amendment extends to persons on trial before Federal courts-martial. It was so held in the well-considered case of United States ex rel. Innes v. Hiatt, 141 Fed. (2d) 664 (1944). The reasons for the decision are cogently states as follows:

> "We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that "no person shall * * * be deprived of life, liberty, or property, without due process of law," makes no exception in the case of persons who are in the armed forces. The fact that the framers of the amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a grand jury which is contained in the earlier part of the amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause. This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody" (at p.666) (Underscoring supplied).

In Sanford v. Robbins, 115 Fed (2d) 435, (1940) the same view was adopted with reference to the guarantee against double jeopardy. The court said:

> "We have no doubt that the provision of the Fifth Amendment 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions" (p.438).

In the case of Schita v. King, 133 Fed. (2d) 283 (1943) the court held that a court-martial may not deprive an accused of liberty without due process of law. The legal import of the phrase "due process of law" is essentially the same in both the Fifth and Fourteenth Amendments to the Constitution (French v. Barber Asphalt Paving Co., 181 U.S., 324, 45 L.Ed. 879; Twining v. New Jersey, 211 U.S. 78, 101, 53 L.Ed., 97, 111; Heiner v. Donnan, 285 U.S. 312, 326, 76 L.Ed. 772,779; CM ETO 567, Radloff). Decisions of Federal courts defining the content of "due process of law" under either Amendment are therefore equally illuminative of the requirements of that provision as applied to this case.

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose" (Roller v. Holly, 176 U.S. 398, 409; 44 L.Ed. 520, 524).

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case * * * What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law regardless of the merits of the case" (Commonwealth v. O'Keefe, 298 Pa 169, 173, 148 Atl.73, quoted with approval in Powell v. Alabama 287 U.S. 45,59, 77 L.Ed. 158, 165-166).

It was decided in Powell v. Alabama, supra, that

"in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case" (p.172) (Underscoring supplied).

In the Lockwood case, supra, the principle was succinctly expressed in these words:

"The right to prepare for trial is fundamental. To deny this right is to deny a trial" (Underscoring supplied).

This principle was reaffirmed and applied in the Schuman case supra.

In a recent case, the Commanding General of the European Theater of Operations disapproved a finding of guilty for the reason, among others, that under the circumstances of that case accused's rights under the Fifth Amendment to the Federal Constitution had been violated in that he was arraigned and tried on the day the charges were served on him (CM ETO 3718, Steele).

b. The right to an opportunity to prepare for trial may be waived by an accused either expressly or by implication.

In the following cases the right was held to have been expressly and effectively waived where accused, or his counsel in his presence, stated to the court that accused did not object to going to trial, and there was no indication of prejudice to the substantial rights of accused:

CM ETO 3475, Blackwell et al. Because of "military necessity" trial was commenced on the day on which charges were served. Defense expressly stated it had no objection to the procedure.

CM ETO 4988, Fulton. Charges were served on accused the day before trial. Accused stated to the court before arraignment that he did not object to being brought to trial at that time.

CM ETO 5255, Duncan. Trial was held at 1311 hours on the day after charges were served. Defense counsel stated in open court that accused had had sufficient time to prepare his defense.

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CM ETO 5359, Young. Trial was held two days after service of charges and accused stated he had had sufficient time to prepare his defense and desired no additional time.

CM ETO 4443, Dick. Charges were served three days before trial and accused stated he had no objection.

CM ETO 4004, Best. Accused was tried four days after service of charges and consented in open court to trial at that time.

United States ex rel Innes v. Crystal 131 Fed. (2d) 576 (1943). Counsel assigned to accused was transferred elsewhere for military duties during course of trial and he thereupon assumed his own defense. When asked whether he objected to going to trial in the absence of the regularly appointed defense counsel he stated he had no objection. It was held that there was no error in the procedure.

In the following cases it was held that where accused did not object to going to trial, made no motion for a continuance, and there was no indication that his substantial rights were prejudiced, he waived his right to a longer period of preparation:

CM ETO 3937, Bigrow. Accused was tried the day after service of charges.

CM ETO 5004, Scheck. Trial was held at 1125 hours on the day following the day the charges were served and six days after the commission of the offense.

CM ETO 4095, Delre. Trial was held one day after charges were served.

CM ETO 5179, Hamlin. Trial was held one day after service of charges.

CM ETO 3948, Paulercio. Trial was held two days after service of charges.

CM ETO 5114, Acers. Trial was held three days after service of charges.

CM ETO 4820, Skovan. Trial was held four days after service of charges.

The constitutional right to assistance of counsel is a personal right and may be waived by accused (Adams v. United States ex rel McCann 317 U.S. 269, 87 L.Ed.268; Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461; Odom v. Aderhold, 115 Fed. (2d) 202; Amrine v. Tines, 131 Fed (2d) 827). For the same reason the fundamental right to a reasonable opportunity to prepare for trial may also be waived.

c. Accused in this case did not waive his right to a reasonable opportunity to prepare for trial.

Neither he nor his counsel made any statement which could be construed as an express waiver. Where accused has not already received a reasonable opportunity to prepare for trial his failure to object to trial or move for a continuance is evidence that he waived his right. Such evidence, however, is not conclusive. (see Odom v. Aderhold, 115 Fed. (2d) 202). Comparable to the power of an accused to waive his fundamental right to a reasonable opportunity to prepare for trial, is the power of a defendant in a criminal case before a federal civil court to waive the equally fundamental right to counsel guaranteed by the Sixth Amendment to the Federal Constitution. Therefore cases involving the waiver of right to counsel are by close analogy applicable to waiver of the right to an opportunity to prepare for trial.

In the case of Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461 (1937), which involved a petition for a writ of habeas corpus, the court remanded the case to the district court for a determination of whether accused had waived his right to the assistance of counsel at his trial. He was indicted 21 January 1935. On 23 January he was taken to court and was there first given notice of the indictment. Upon arraignment he pleaded not guilty, said he had no lawyer, and in response to an inquiry by the court, stated that he was ready for trial. He was then tried, convicted and sentenced. He had little education, and no relatives, friends or acquaintances in the city where he was tried. He had no funds and had never been guilty of or charged with any offense before. The court said:

> "There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. * * * Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional

> right to assistance of counsel. If in a habeas corpus hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ" (Ibid, 304 U.S. 458, 464, 468-469, 82 L. Ed. 1461, 1466, 1468-1469) (Underscoring supplied).

The principle established in Johnson v. Zerbst was applied in United States ex rel Nortner v. Hiatt, 33 Fed. Supp 545 (1940). It was there held that the uncontradicted testimony of accused that he was 18 years of age when he was sentenced, that he was ignorant of the exact facts and charges in the indictment and of the legal effect and significance of his pleas of guilty, that he was ignorant of his right to counsel and was not advised thereof by the judge or any other official, that he was without funds and had no friends or relatives in or near the city where he was tried, - was sufficient to sustain the burden of proving by a preponderance of evidence that his constitutional rights were infringed. Failure to request counsel did not amount to an implied waiver of that right. The conviction was held void.

In Evans v. Rives, 126 Fed. (2d) 633 the petitioner was convicted in the juvenile court upon a plea of guilty of refusing to provide for the support of his minor child. At the time of his arraignment he was not told that he was waiving his right to counsel, was not represented by counsel and was not advised of his right to counsel. It was held that the petitioner did not under these circumstances waive his right to counsel and that therefore his constitutional rights to the assistance of counsel were violated. His conviction and sentence were held void. The court rested its decision on the authority of Johnson v. Zerbst, supra.

Every reasonable presumption will be indulged against the waiver of fundamental rights by one charged with crime (Glasser v. United States, 315 U.S. 60, 70, 86 L.Ed. 680,699).

The Board of Review takes a realistic view of accused's immature years, inexperience and limited education and recognizes the obvious fact, in the absence of any indication to the contrary, that he was ignorant of his fundamental right to a reasonable opportunity to prepare for trial and of the danger of going to trial on a capital charge without a sufficient opportunity to prepare his defense with the assistance of counsel. Since he was unaware of this right he could not competently and intelligently waive it.

d. Accused in this case was in fact denied a reasonable opportunity to prepare for trial and the effective assistance of counsel in the preparation of his defense.

The facts themselves are eloquent on this score and need no elaboration. On 17 October the staff judge advocate recommended trial by general court-martial. On 17 October the appointing authority referred the charge to the trial judge advocate for trial. On 17 October the trial judge advocate served a copy of the charge on accused. At 0910 hours, 17 October, the court convened for the trial of accused and the trial was concluded 50 minutes later. It is presumed that the trial judge advocate in compliance with the requirement of the Manual for Courts-Martial, 1928 (par.41e, pp.32-33, quoted supra) informed the defense counsel or assistant defense counsel that a copy of the charge had been served on accused. It must be obvious to any person with experience in the preparation and trial of cases that neither accused nor his counsel had sufficient time to prepare for trial in the interval available to them that morning between the service of the charge and the commencement of the trial, - if indeed there was any substantial interval.

In CM 231119, Lockwood (1943), 18 B.R. 139, supra) accused was not served with a copy of the charge and did not learn of the date of his trial until 1230 hours on the day of the trial. Defense counsel first learned of his appointment and of the time set for the trial at 1215 hours on the day of the trial. The court convened at 1400 hours. He informed the court he had had no opportunity to prepare for trial, to interview the witnesses or see accused. A motion for a continuance made by defense based on these grounds was denied. Accused pleaded not guilty and was found guilty. There were substantial issues of fact. The record of trial was held legally insufficient on the ground that failure by the court to grant a reasonable continuance to afford accused an opportunity to prepare for trial was an abuse of discretion.

In CM 245664, Schuman (1944) 29 B.R. 225, supra) the charges were served on accused on 24 October and the court convened on 25 October at 1330 hours at a point 100 miles from accused's and his counsel's station necessitating departure for the place of trial at 0800 hours 25 October. At the outset of the trial, counsel moved for a postponement of two hours to enable him to prepare for trial. The motion was denied. It was held that the denial of the motion was an abuse of discretion, that accused was deprived of a reasonable time to prepare his defense, and that the conviction was therefore illegal. What is a reasonable period of time for accused to advise with counsel and prepare his defense "will of course vary with the facts and circumstances involved in each particular case".

The Board of Review is of the opinion that the opportunity for preparation contemplated by the Articles of War and the Manual for Courts-Martial and guaranteed by the due process clause of the Fifth Amendment to the Federal Constitution was denied to this accused. He was also denied the effective assistance of counsel secured to him by the Article of War 17 and by paragraphs 43b and 45b, Manual for Courts-Martial, 1928, pages 34 and 35.

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e. The denial to accused in this case of a reasonable opportunity to prepare for trial and of the effective assistance of counsel injuriously affected his substantial rights.

The declaration of the Supreme Court concerning the denial of the right to have the effective assistance of counsel is applicable to this case:

> "Admittedly the case against Glasser is not a strong one. * * * in all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt. * * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial" (Glasser v. United States, 315 U.S. 60, 67, 70, 86 L.Ed. 680, 697-698, 702).

It was held in the Glasser case that the denial of the defendant's right to have the effective assistance of counsel guaranteed by the Sixth Amendment required that the verdict of guilty be set aside (Ibid, at p.76, 702).

There must nevertheless be some showing of harm before it can be held that the findings of guilty were vitiated by the denial of accused's fundamental right to prepare for trial (see National Labor Relations Board v. American Potash and Chemical Corp. 98 Fed. (2d) 488; Neufield et al. v. United States, 118 Fed. (2d) 375 (1941)).

In the case of Avery v. Alabama (308 U.S. 444, 84 L.Ed. 377 (1939), the sole question presented was whether in violation of the Fourteenth Amendment the "petitioner was denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial" because after competent counsel were duly appointed their motion for a continuance was denied. In that case the defendant was arraigned on 21 March and pleaded not guilty. Two attorneys were appointed to defend him and the case was reached for trial on 24 March. It was found that appointed counsel had performed their full duty intelligently and well. The conviction was upheld because it did not appear that counsel could have done more had additional time been granted.

"That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for a new trial, that they could have done more had additional time been granted" (Ibid, 308 U.S. 444, 452, 84 L.Ed. 377,383).

The court made the following comment:

"But the denial of opportunity for appointed counsel to confer, to consult with accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment" (Ibid, 308 U.S. 444, 446, 84 L.Ed. 377,379).

In the instant case the right to assistance of counsel secured to accused by Article of War 17 and the pertinent provisions of the Manual for Courts-Martial is to be evaluated in the light of the right to counsel guaranteed to an accused in a criminal prosecution by the Sixth Amendment to the Constitution.

"The right to the effective assistance of counsel in a criminal proceeding guaranteed by the Sixth Amendment to the Constitution, is a basic and fundamental right secured to every person by the due process clause of the Fourteenth Amendment" (Amrine v. Tines, 131 Fed. (2d) 827 (1942).

In determining whether an accused suffered prejudice from the denial of a fundamental right, the Board of Review is not aided by facts brought out by any procedural device available to accused after trial by court-martial, such as a motion for a new trial and hearing thereon. The staff judge advocate's review in this case is not helpful since it entirely ignores the grave question of the denial of accused's right to a reasonable opportunity to prepare for trial and to the effective assistance of counsel and contains no indication that any consideration was given to possible injury to the rights of accused by reason of the shockingly summary nature of the hearing accorded to him.

Close scrutiny of the record of trial and accompanying papers discloses that neither accused nor his counsel was prepared for trial. Counsel improperly joined in a stipulation as to the existence of an essential element of the capital offense with which accused was charged and made no attempt to withdraw it when accused showed by his testimony that he had no appreciation of what was involved in the stipulation. No attempt was made to present extenuating circumstances although accused's testimony alludes to their existence. The prosecution produced no witnesses but relied entirely on a certified extract copy of a morning report and on a highly improper stipulation. The investigation by the investigating officer, and the consideration given to the case by the staff judge advocate before recommending trial were both perfunctory and inadequate. The case itself was perfunctorily, hastily and carelessly tried. Although accused was on trial for his life, the court was composed of the minimum number of officers, and all of them junior officers - two captains, one first lieutenant and two second lieutenants - in disregard of the policy laid down in Article of War 4 that those officers should be detailed to courts-martial who in the opinion of the appointing authority "are best qualified for the duty by reason of age, training, experience, and judicial temperament". A second lieutenant was detailed and sat as law member. Ten members of the court were excused. Accused was only 19 years of age and presumably possessed the immaturity and improvidence which normally characterize a youth of that age. His inexperience and limited education make it improbable that he could have appreciated, without adequate assistance, the questions involved in the preparation and presentation of his defense.

The totality of these facts appraised in the light of the denial to accused of a reasonable opportunity to prepare for trial and of the effective assistance of counsel, shows that he was not given a fair trial.

The Board of Review is of the opinion that accused was deprived of liberty and property without due process of law and that the findings of guilty and the sentence are therefore invalid and should be vacated.

8. The charge sheet shows that accused is 19 years of age and that he was inducted at Fort Bragg, North Carolina, on 10 August 1943 to serve for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. Errors affecting the substantial rights

of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

J. Franklin Bell Judge Advocate

Edward H. Longest Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 JAN 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 ERIC L. WOODS (34679045), Company G, 143d Infantry.

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

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

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

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

(Findings and sentence vacated. GCMO 114, ETO, 12 Apr 1945)

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

BOARD OF REVIEW NO. 1

2 FEB 1945

CM ETO 4570

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Nancy, France, 24 October 1944, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private JAMES C. HAWKINS (34505895), Company L, 137th 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 James C. Hawkins, Company "L", 137th Infantry, did, at or near St. Remimant, France, on or about 11 September 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he rejoined his company on or about 24 September 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. 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 Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Charge in this case as originally drafted alleged an offense under the 75th Article of War in the following language

> "In that * * * being present with his company while it was engaged with the enemy, did at Moselle River, at or near St. Remimant, France, on or about 11 September 1944, shamefully abandon the said company, and did fail to rejoin it until on or about 24 September 1944".

The original charge sheet was signed by the accuser, First Lieutenant Lawrence Malmed, 137th Infantry, and was verified by him on 30 September 1944 before Captain Lloyd D. Friedman, Infantry, Adjutant. The charge was referred for investigation pursuant to the 70th Article of War by the commanding officer of the 137th Infantry to Major Budd W. Richmond, 3rd Battalion Headquarters, 137th Infantry. The investigating officer thereafter conducted the investigation and on 8 October returned his report of investigation and allied papers to the commanding officer, 137th Infantry, who forwarded the same on 15 October 1944 with his recommendation for trial by general court-martial to the commanding general, 35th Infantry Division. The staff judge advocate of the 35th Infantry Division in his report and recommendation to the commanding general of said division, under date of 17 October 1944 commented as follows:

> "It is noted that the accused has absented himself on prior occasions during action. In accordance with letter ETOUSA, 5 October 44, Subject: Desertion, recommend that the charge and specification be amended to allege desertion to avoid combat with the enemy in violation of AW 58.

Since the facts are the same, it is believed that further investigation is unnecessary".

The charge sheet discloses that the Charge and Specification under the 75th Article of War were stricken. Said cancellation bears the marginal initials of "CEW" which are obviously those of Lieutenant Colonel Carl E. Williamson, the staff judge advocate. In lieu of the eliminated charge and specification there are inserted in the charge sheet the Charge under the 58th Article of War above set forth and upon which accused was arraigned and tried. However, there is no evidence that the accuser in any respect consented to the alteration of the Charge theretofore verified by him, or that the Charge was reverified or reinvestigated. On 18 October 1944, the Chief of Staff returned the file to the staff judge advocate, stating "The Commanding General directs trial by general court-martial".

The Charge was referred for trial on 19 October 1944 and a copy of the charge sheet was served on accused on 20 October 1944. The trial occurred on 24 October 1944.

The letter from Headquarters, European Theater of Operations, 5 October 1944, to which reference is made by the staff judge advocate in his report and recommendation, reads as follows:

"1. Misbehavior before the enemy (AW 75), may constitute desertion (AW 58) with intent to avoid hazardous duty or shirk important service (AW 28).

2. Authority for the Theater Commander (AW 48) to order executed a sentence to death on conviction of desertion, after confirmation by him and compliance with AW 50½, places upon him the sole responsibility of the exercise of that authority for the purposes intended--of accomplishing the military mission entrusted him and of providing security for the forces under his command. To these ends he is obligated.

3. The Theater Commander directs that I acquaint you with his desire that, where the expected evidence in any case establishes prima facie guilt by any member of the forces under his command

of such misbehavior before the enemy as constitutes desertion, consideration be given to charging the offense as a violation of AW 58".

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

On 11 September 1944 accused was a rifleman in Company L, 137th Infantry, which on said date was located near the small town of St. Remimant, France, on the west bank of the Moselle River. On the morning of said date the designated mission of the company was to cross the Moselle River and secure high ground on the east bank thereof in order to protect the river crossing for other units (R6,7,9, 11). The advance movement of the company was commenced at daylight by means of boats. As the boats carrying two of the platoons of the company left the west bank of the river the Germans commenced a cross-fire of machine guns, "88's" and heavy artillery (R7,9,12). About 600 yards from the west bank of the river was a parallel canal. Accused crossed the canal with his platoon (the first platoon). When the enemy opened fire, the platoon, was on open ground between the canal and the river. It was compelled to take cover temporarily. When the enemy fire lifted the platoon reached the river and entered boats (R12). As soon as it embarked, the enemy

"opened up again with cross-fire from machine guns and the men withdrew back to safer cover, and when they went to get in the boats the second time he [accused] wasn't there" (R7).

Accused did not cross the river (R7,9) and he was not seen by his officers and comrades for the remainder of the day (R9,12). No permission had been granted accused to leave his platoon (R9,11,12). He remained absent until 24 September 1944 when he voluntarily returned to his company (R10,12). During his absence his company was engaged in combat, although during part of the time it was only alerted to engage the enemy (R10).

5. After an explanation of his rights, accused elected to appear as a witness in his own behalf. Pertinent parts of his testimony are as follows:

"We came up to some part of the Moselle River and bivouacked that night. No blankets or nothing. Just lying on the ground. Didn't sleep. It was cold.

I had a headache next morning come down about 3 o'clock. We was coming down here to some part of the Moselle River and cross and occupy the high ground on the other side. I went down there and our troops throwed a little artillery on the other side of the canal. They went across. * * * Well, we got up the river bank and it was getting daylight. Machine gun fire opened up on us. I got so nervous I didn't know what I was doing. Sometimes I get so I think I'm going crazy. I got behind a little bridge when they said "Scatter out!" I couldn't leave there. They took off. * * * Well, I couldn't leave. I was behind a little old bridge of a thing. It was good cover and I stayed there. It was just like that Captain Schwartz said. I could have went across, but I don't know. I like the company. I like the outfit and most of the boys. Most of the boys of the company was gone, but I like the replacements. * * * I believe it was next morning I went across on the bridge. * * * We went across the bridge and got messing around through the woods and ran into a field artillery outfit about six kilometers from Luneville, and asked them where our outfit was. He said he thought they were messing in Luneville. Later on, they said the Germans was in Luneville. I knowed that was the wrong track. The Captain gives us an overlay where the Third Battalion was. * * * We took off in that direction. I seen the overlay. I didn't have it; I only seen it. One of the other boys had it. We went on. I went one way; they went the other way. I thought I was going right and walked to an MP and asked him about the 137th and he didn't know nothing about it. He said 'Wait around. I'll get you a ride from somebody knows something'. I waited around that evening, but nothing ever come by. He got me a ride in an MP beep and sent me into the kitchen" (R18-19).

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Upon cross-examination accused admitted he did not cross the river with his company; that he knew his company was "supposed to occupy high ground on the other side"; that it completed its mission but that he was not with it; that he was absent without leave from his company and voluntarily returned to it on 24 September (R20). He explained the reason for his failure to cross the river thus:

> "I don't know. I just got so nervous, and I just couldn't do it. I tried to. I hated to do like I did. * * * I get nervous, and that gets me. * * * I would have went ahead if I wasn't so jittery and nervous" (R20).

Captain Harry H. Schwartz, Medical Corps, division psychiatrist of the 35th Infantry Division, testified that he examined accused and under date of 21 October 1944 submitted his written report which was admitted in evidence (R13; Def.Ex.1) to the staff judge advocate. The relevant portions of this report are as follows:

> "Opinion of Examiner: This soldier was in such a mental state that he could not cross the river at the time his company was so ordered. He is not responsible for failing to do so, but from the time he did cross the river until he joined his company he was responsible for his acts. This examiner feels that entire question rests upon whether or not the tactical state of affairs during this phase of battle was such that a soldier who had lagged behind would find difficulty in rejoining his outfit. To this point examiner cannot venture an opinion. Nevertheless, this soldier did not in the beginning voluntarily go AWOL.
>
> Diagnosis:
> A. Mental deficiency, borderline type.
> B. Psychoneurosis, anxiety state" (Def. Ex.1).

The testimony of the witness is cogently summarized in this colloquy:

> "Q. Could he actually have gone ahead with his company that day? Or was he using this as an excuse to keep from going with his company?

A. He could have gone with his company; yes. If an officer or platoon sergeant came over and gave him a swift kick * * * he could. You have to get someone from your company to go and take him along. You therefore have two men whose value is lost to you. You could have made that soldier go on across that river, but he would have been there only in body and not in spirit.

Q. Could he have gone across of his own volition?

A. I say no. The mechanism of fear was so over-powering in this individual, that it would be impossible for his own volition. When a man is scared * * * he doesn't want the volition to go forward; he wants the volition to go back.

* * *

Q. Captain, do you think his physical condition at the time prevented him from going forward?

A. I don't think there is anything physically wrong with this soldier" (R14,15).

6. A summary of the facts connected with accused's dereliction makes it obvious that he was guilty of a violation of the 75th Article of War in that he

> "being present with his platoon while it was engaged with the enemy did * * * shamefully abandon the said platoon and did fail to rejoin it until the engagement was ended" (See Form No.46, Appendix 4, MCM, 1928, p.244; CM ETO 1249, Marchetti; CM ETO 3196, Puleio; CM ETO 3948, Paulercio; CM ETO 4783, Duff).

Pursuant to the directive of the Theater Judge Advocate, dated 5 October 1944, above quoted, accused was charged with the offense of "short desertion" under the 28th and 58th Articles of War (Cf: MCM, 1921, par.409, p.343). "Misbehavior before the enemy" (AW 75) and "desertion" in time of war (AW 58) are both capital offenses.

With respect to the latter, the Commanding General, European Theater of Operations, may confirm and order executed a sentence of death (AW 48); with respect to the former, he may confirm a sentence of death, but may not confirm the same without commuting the sentence to a less severe punishment (AW 50). Only the President of the United States is authorized to confirm and order executed a sentence of death imposed for a violation of the 75th Article of War (AW 48).

As to accused's civil status and rights, conviction of the offense of desertion produces serious consequences not resultant upon a conviction under the 75th Article of War. In the event the penalty of death is not imposed an accused forfeits all rights under his National Service Life Insurance contract (Act Oct.8,1940, ch.757, Title VI, part I, sec.612; 54 Stat.1013; 38 U.S.C.812), and he loses his nationality as an American citizen (Act Oct.14,1940, ch.876, Title I, Sub.ch. IV, sec.401; 54 Stat.1168; 8 U.S.C.801(g). (The loss of Federal citizenship is subject to restoration as provided by Act Jan.20, 1944, Public Law 221). In addition, his rights of citizenship in the state of his residence may be seriously affected or impaired dependent upon the constitutional and legislative provisions of such state (14 CJS sec.2; p.1131; 16 CJS sec.457, pp.904,905). It is therefore manifest that the action of the staff judge advocate in changing the charge from the original charge of misbehavior before the enemy to the substituted Charge of desertion had the effect of raising the Charge to one which (death penalty being absent) carried heavier and more drastic penalties than the original Charge. It is a generally accepted principle that

> "The same act or group of acts may constitute two or more distinct offenses, different in kind as well as in degree. Under such circumstances the state may elect to prosecute for either offense, or where separate and distinct offenses are committed the offender may be indicted for each separately" (16 CJ sec.9, pp.58,59).

Of particular application to the problem are the following quotations:

> "But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as

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are made punishable by the Act of Congress" (Morgan v. Devine, 237 U.S. 632,640; 59 L.Ed. 1153,1156).

"The doctrine of merger does not solve the question, but the doctrine of 'carving' does to some extent aid in its solution. Says Mr. Bishop: 'There is a difference between a crime and a criminal transaction. A criminal transaction may be defined to be an act or series of acts proceeding from one wrongful impulse of the will of such a nature that one or more of them will be indictable . . . . In reason there may be any number of distinct crimes in a single criminal transaction. This comes from the fact that the words of our language being limited, while the transactions of life may almost be termed infinite in variety, and the lines to be drawn around specific offenses being necessarily incomparably more limited than the words, it is impossible there should be an exact outline of crime whose circumference shall exactly coincide with every criminal transaction. The consequence is that the law does, what it must, declare this combination a fact and intent to be indictable, then another combination, and another, and so on, until it is supposed to have proceeded far enough, when it stops. And when this is done, it is impossible the inhibitions should be so distinct that no one shall embrace anything forbidden by another. Therefore it is established doctrine that more than one offense may be committed by a man in one transaction. Whether a prosecution for one crime carved out of the one transaction should be held to bar an indictment for another crime carved out of the same transaction is a different question; but the authorities appear to be that in some circumstances it will be, and in others it will not" (Whitford v. State, 24 Tex.A. 489, 6 SW 537, 5 Am.SR 896).

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"The same methods may be used in committing two crimes, and the processes employed may be part of the same transaction, and yet the two things be distinct and independent of each other. Thus, a person who shoots at random on the highway may be convicted of that offense after he has been convicted of the offense of carrying concealed the pistol with which he did the shooting, although except for the fact that he had the pistol he could not have done the shooting. And so a person who forges a paper may be convicted of uttering it, and afterwards be convicted of the forgery, yet he could not utter the paper until he had forged it" (Hughes v. Commonwealth, 131 Ky, 502,512,115 S. 744, 31 LRANS 693).

"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 exempt the defendant from prosecution and punishment under the other" (Morey v. Commonwealth 108 Mass.433).

"It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion that while the transaction charged is the same in each case, the offenses are different" (Gavieres v. United States, 220 U.S. 338,342; 55 L.Ed. 489,490).

"It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same <u>in law</u> and <u>in fact</u>. The plea [<u>autrefois acquit</u>] will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, <u>however nearly they may be connected in fact</u>', Commonwealth v. Roby,

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12 Pick 502" (Burton v. United States, 202 U.S. 344,380, 50 L.Ed. 1057,1071).

"Separate acts, though parts of a continuous transaction may be made separate crimes by the legislative power, as in the case of one who unlawfully breaks and enters a building with intent to steal, and thereupon does steal while in the building" (Massey v. United States, 281 Fed. (8th Cir) 293,296).

"* * * when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and where the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act" (Dowdy v. State, 158 Tenn. 364, 13SW (2nd) 794, quoted with approval in Usary v. State, 112 SW (2nd) (Tenn) 7, 114 ALR 1401, 1406).

The foregoing authorities support the conclusion that it was legally competent for Congress to denounce accused's conduct as constituting two separate and distinct offenses.

The offense of abandoning his platoon while the accused and his organization are before the enemy is complete when the accused leaves the place with his unit where duty requires him to be.

"It is the fact that accused departed from the place where duty required him to be when his unit was 'before the enemy' that constitutes the offense (CM ETO 1404, Stack; CM ETO 1249, Marchetti" (CM ETO 1659, Lee) (See also: CM ETO 1663, Ison, and CM ETO 5475, Wappes).

His act must be a voluntary, conscious act but only the general criminal intent is necessary. (Winthrop's Military Law and Precedents - Reprint, pp.623,624). A specific intent to avoid hazardous duty need not be proved when the overt act of abandoning his organization is shown (CM ETO 1249, Marchetti, supra).

Oppositely, the specific intent to avoid hazardous duty is a primary element of the offense with which accused, in the instant case, was charged and of which he was found guilty. It must be proved by the prosecution beyond a reasonable doubt (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton; CM ETO 2396, Pennington; CM ETO 3234, Gray; CM ETO 5293, Killen).

Evidence establishing an accused's conduct in abandoning his unit while before the enemy will in many instances include proof of a set of facts which will form the basis of a charge of absence without leave with intent to avoid hazardous duty, but it is clear from the above comparison that a successful maintenance of the latter charge will compel proof of an additional element, viz., the specific intent to avoid hazardous duty. Although the same methods are used in the commission of the offenses and the processes employed are part of the same transaction, nevertheless the offense of abandoning one's organization while before the enemy (AW 75) is distinct and independent from the offense of absenting one's self from his organization with intent to avoid hazardous duty (AW 28-58).

A corollary to the foregoing is that the prosecuting authority may elect to prosecute for either offense (16 CJ sec.9, pp.58,59; 226 CJS sec.9, p.60; United States v. One Ford Coupe Automobile 272 U.S. 321, 71 L.Ed. 279, 47 ALR 1025; United States v. One Nash Auto, 23 Fed. (2nd) 126,127). In this instance the Commanding General, 35th Infantry Division, occupied a position similar to that of a prosecuting attorney in his consideration and disposition of the charges against accused. He was vested with a broad discretion. He could have ordered other charges to be drafted consistent with the facts of the case. He could have refused to refer any charges for trial and to require other disciplinary action or disposition of the accused. He could have referred the charges for trial by a special court-martial and he was free to determine the charges upon which accused should be tried. His election, evidenced by his reference to trial, to cause accused to be prosecuted for the offense denounced by Articles of War 58-28, was binding upon all concerned (MCM, 1928, par.34, pp.22-24; MCM, 1921, pars.76b-78, pp.66-73; CM ETO 1554, Pritchard).

The critical inquiry, therefore, arises whether the Commanding General, European Theater of Operations, attempted by and through the letter of 5 October 1944, quoted above, to limit or circumscribe the authority and discretion vested by law in the Commanding General, 35th Infantry Division, as an

officer possessing authority under the 8th Article of War to appoint general courts-martial. It will not be gainsaid that the Commanding General, European Theater of Operations, has been granted by Congress a broad discretion in the matter of discipline and control of the forces under his command. The administration of military justice occupies the largest and most important area in the field of discipline. It is, therefore, not only his prerogative but also his duty to announce to his subordinates his policy or policies with respect to the maintenance of discipline and the administration of justice within his command. In the exercise of the discretion vested in them by law, the officers holding power to appoint general courts-martial may be guided by these pronouncements of policy by their superior without in the least infringing upon or limiting the discretion with which Congress has endowed them. Should the Commanding General, European Theater of Operations, attempt by specific order or command to direct in positive, mandatory terms the actions of his subordinate officers who hold this authority to appoint general courts-martial, in cases where the law and regulations vest them with discretion, a serious question involving the Commanding General's authority would be presented. However, the Board of Review does not consider the action indicated by the letter of 5 October 1944 to be of that nature. It expresses the "desire" of the Commanding General, European Theater of Operations that

> "where the expected evidence in any case establishes prima facie guilt * * * of such misbehavior before the enemy as constitutes desertion, consideration be given to charging the offense as a violation of AW 58" (Underscoring supplied).

It may be suggested arguendo that the Commanding General's expressed "desire" is, in military custom and tradition, equivalent to a "command". If such be the interpretation of the above quoted excerpt then he commanded only that "consideration be given to charging the offense as a violation of AW 58". He did not order that it be so charged. The discretion of the approving and referring authority remained uninhibited. The situation closely resembles that of an appellate court ordering a subordinate court to enter its judgment while refraining from directing the nature or terms of the judgment. Such mandate respects the discretion of the trial judge and is valid (Grossmayer, Petitioner 177 U.S. 48, 44 L.Ed. 665).

The Board of Review does not believe the Commanding General, European Theater of Operations, entered an area forbidden him by law or regulation in expressing his "desire" in the

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manner and form herein considered. Whether the policy indicated by the letter of 5 October 1944, is wise or unwise, whether it is necessary or unnecessary or whether it is simply an expedient to eliminate the necessity for confirmation of sentences of death by the President of the United States in cases where he alone is empowered to act, the Board of Review will not inquire. They are matters within the exclusive judgment and discretion of the Commanding General, European Theater of Operations. The Board of Review is concerned only with the question of the legality of the practice followed in the instant case. It concludes that when the Commanding General, 35th Infantry Division, referred for trial the charge upon which accused was arraigned and tried he signified his election that the accused be tried on said charge; that in making such election he was acting within the ambit of the discretion vested in him by Congress and that such discretion was not limited or repressed by the expressed "desire" of the Commanding General, European Theater of Operations.

In reaching the above conclusion the Board of Review (sitting in European Theater of Operations) has carefully considered the opinion of the Board of Review (sitting in Washington) in the case of CM 216707, Hester, 11 B.R. 145,156, wherein the action of the Commanding General, 31st Infantry Division, in directing a communication to members of general courts-martial appointed by him with respect to severity of sentences to be imposed by the courts was condemned as prejudicial to the substantial rights of accused because it infringed upon and limited the full and free exercise of the judgment and discretion of the court membership in adjudging sentence. The appointing authority informed the court in pertinent part:

> "* * * when a case is referred to a general court, it may be considered as a fixed policy that should the accused be found guilty the court will, in the absence of unusual circumstances, sentence the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a fixed period in excess of six months" (Ibid., 11 B.R. 145,158).

A comparison of the condemned communication with the letter of 5 October 1944 expressing the "desire" of the Commanding General, European Theater of Operations with respect to form of charges indicates clearly the line of demarcation between the two communications. The former virtually directed

the court that its sentences must include confinement "in excess of six months" -- an obvious compulsion visited upon the court by higher authority. The latter communication expresses the "desire" of the Commanding General, European Theater of Operations, that "consideration be given to charging the offense as a violation of AW 58". The principle of the Hester case is most salutary, but it does not apply to the facts in the instant case. The Commanding General, 31st Infantry Division, attempted to impose his will upon the court notwithstanding the mandates of Congress that a court should be a deliberative, judicial body free from exterior influences in the exercise of its duties and functions. The Commanding General, European Theater of Operations, recognized the function and responsibility of his subordinates and simply expressed his "desire" that "consideration be given" to a certain form of charges "when the expected evidence in any case establishes prima facie guilt" of the accused of the offense of desertion. The former was a usurpation; the latter is merely an expression of policy without limiting the discretionary power of the appointing and referring authority.

7. The papers accompanying the record of trial show that the charge laid under the 75th Article of War was investigated as required by AW 70 and par. 35, MCM, 1928. Thereafter the staff judge advocate cancelled the charge thus investigated and submitted to the Commanding General of the 35th Infantry Division the Charge under Articles of War 58-28 upon which accused was arraigned and tried. The charge sheet was not re-signed and was not re-verified by the accuser and no further investigation was made of the new charge. It has been established that the investigation of the charge is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, Floyd, 17 B.R. 149). It has also been determined that

> "The provision of AW 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution, and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, Nickerson).

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The situation which arose in the present case was strikingly foreshadowed by the facts involved in CM ETO 106, Orbon, which received painstaking consideration by the Board of Review (sitting in the European Theater of Operation). The Board's discussion of this issue is comprehensive and cogent. The following quotation therefrom is decisive in the instant case:

> "While the charges form the basis of the investigation it is the transaction or event which gave rise to the charges which is the true subject of investigation. This conclusion is supported by: (a) The fact that 'no appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all of the information relating to the case' (Underscoring supplied) (MCM, sec.34) and (b) 'The investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline.' (Underscoring supplied) (AW 70). The underscored words and clauses above quoted indicate clearly that the investigation envelopes the entire situation. It may be that the charges are inappropriate to cover the offense or offenses revealed by the investigation. Hence, the convening authority is empowered to amend and adjust and should amend and adjust the charges to meet the facts (MCM, sec.34) before referring the charges for trial. The only limitation on his authority in this respect is that the 'redraft does not include any substantial change or include any person, offense, or matter not fairly included in the charges as received.' (Underscoring supplied) (MCM, sec.34). This limitation prevents the insertion of a new charge which is alien to the situation revealed by the facts disclosed by the investigation or preferring charges against persons not originally included, but it does not prevent the convening authority from re-drafting or re-stating the charges so as to make them allege an offense or offenses supported by the facts discovered and shown by the report of investigation. An opposite conclusion leads to the

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absurd situation of requiring a new investigation which would yield the exact state of facts as the first investigation. It would be a futile effort, which would delay the trial and not protect any rights of the accused. This construction of AW 70 is supported in spirit by C.M. 179142 (1928), C. M. 182078 (1928), and JAG. 220.26, Aug.30, 1932,digested in Dig.Ops. JAG.1912-40, sec.428(1), pg.292. It is, therefore, the opinion of the Board of Review that there was no violation of AW 70, in the instant case, because a new and additional investigation was not made on Charge II and its Specification, and that the court acquired jurisdiction to try the same.

However, the accused was compelled to go to trial upon a Charge and Specification which were not supported by the oath of the accuser. It has been held that the quoted provision of AW 70, requiring that the charges be supported by the oath of the accuser is procedural, and not jurisdictional, is for the benefit of the accused and may be waived by accused either explicitly or by failure to object to the irregularity (C.M. 197674 (1932), sec.1267, Supp. VIII. Dig. Ops. JAG. 1912-30; C.M. 210612 (1939), Maddox; C.M. 220625 (1942), Gentry)(Dig. sec.1267, Dig.Ops. JAG. 1912-30). In the case timely and proper objection was made. There was no waiver, either expressed or implied, of the irregularity.

The supporting of charges by the oath of the accuser is not universally required. MCM, 31 particularly provides that the charges need not be sworn to if the accuser believes in the innocence of the accused. In criminal prosecutions, in the civil courts the absence of a verification to an information where one is required by statute, is ground for quashing the information, but it does not render the information void or deprive the court of jurisdiction, and, after committing error in overruling a motion to quash on this ground, the court still holds jurisdiction (31 C.J., sec.166, pg.648). The record of trial in this case fails to show how accused was prejudiced in any respect by the court's ruling

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which compelled him to stand trial on Charge II and Specification although it was not verified. Nothing appears in the record of trial that accused's rights were injuriously affected by this irregularity in pleading. He was neither surprised nor misled as to the charges against him. The accused made no attempt to controvert the prosecution's evidence which supports the conviction of violation of AW 63 (Charge II and Specification). He denied all knowledge of his conduct because of being intoxicated. Under such circumstances the verification of Charge II and Specification would have added nothing to his defense, nor does its absence injure him".

The Nickerson and Floyd cases, above cited definitely determine that the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdictionnor do such defects and imperfections in the pre-trial procedure necessarily prejudice the substantial rights of an accused.

In the instant case the accused made no objection to the charge on the ground that it was not sworn to, but the absence of any objection may be explained by the fact that the irregularity does not affirmatively appear upon the face of the charge sheet. It only so appears when examination is made of the papers and documents accompanying the record of trial, including the staff judge advocate's report and recommendation. The Board of Review therefore prefers not to place its conclusion upon the narrow ground that accused failed to make proper objection at trial. It will be assumed that hedhe known of the irregularity he would have objected.

Had such objection been made and sustained what would it have yielded him? Such objection is in the nature of a plea in abatement, which upon being sustained only delays the trial; it does not terminate it. If the objection had been upheld then an application for a continuance would have been in order. It is obvious that a denial of the application would not have injured accused's substantial rights, (MCM, 1928, par.66, pp.51-52). The substituted Charge and Specification, although unsworn fully informed accused of the nature of the charge againat him. The addition of an oath to the charge would not have changed or altered the issues in any degree. The trial proceedings based

on sworn charges would not differ from those based on the unsworn charges. The trial would have been as fair and just on one as on the other. All the accused would have suffered was injuria sine damno, a technical wrong which could have done him no harm (CM 206697, Brown). The purpose of the requirement that the charges be sworn to by the accuser was to protect an accused from frivolous or malicious prosecution (CM 172002, Nickerson, supra). There was no thwarting of such purpose in the practice followed herein. The irregularity involved in the prosecution's arraigning and trying accused upon an unsworn charge, although not condoned, was a harmless error, within the provisions of the 37th Article of War.

The following comment of the Board of Review in the Floyd case is adopted:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground" (Ibid., 17 BR 149,156).

The Board of Review is clearly of the opinion that the practice followed in the instant case affords no reason for disturbing the findings of the Court that accused was guilty of desertion.

8. Substantial, uncontradicted evidence produced by the prosecution, which was corroborated by accused's admissions as a witness on his own behalf, showed that accused knew that the duties imposed upon his unit compelled him to cross the Moselle River in the face of heavy enemy fire, and if he survived the crossing, to participate in the attack upon the heights beyond, which were held by the enemy. At the crucial moment when his platoon embarked in river boats he took shelter behind the abutment of a bridge and deliberately avoided the perils of the river crossing. He thereafter remained absent from his organization for nearly two weeks during which time he avoided the contest on the high ground on the east bank of the Moselle and other battle-field engagements. All of the elements of the offense of absence without leave with intent to avoid hazardous duty were proved beyond reasonable doubt (CM ETO 3380, Silberschmidt; CM ETO 3473, Ayllon; CM ETO 3641, Roth).

9. Whether or not accused was mentally responsible for his acts was essentially a question for fact for the court. The defensive evidence on this issue was contained in the opinion of an expert that he was dominated by fear to the extent that it was impossible for him to carry out and perform the order to cross the river and participate in the attack on the other side. Opposed to this testimony there is contained in the record of trial substantial evidence, including his own admissions, that accused acted deliberately and willfully and with full consciousness that he was guilty of cowardice. Under such circumstances the findings of the court will be accepted as final and binding upon appellate review (CM ETO 314, Mason; CM ETO 739, Maxwell; CM ETO 5747, Harrison, Jr.).

10. The charge sheet shows that accused is 21 years of age. He was inducted on 15 January 1943. No prior service is shown.

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

12. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in a disciplinary barracks is authorized (AW 42), but the designated place of confinement should be changed to 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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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 FEB 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private JAMES C. HAWKINS (34505895), Company L, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. While the practice followed in this case has been upheld as legal, it is not approved as correct. The provisions of Article of War 70 and the Manual for Courts-Martial, even though held directory and not jurisdictional, are intended to be followed. When charges are changed in a substantial way and particularly where severer penalties attach on conviction, it is not necessary to have a re-investigation if the complete facts are already disclosed, but the new charges should be re-verified by the accuser or another. The adherence to established practices produces better trials, insures justice and eliminates serious legal questions, which may be reached later by habeas corpus with the outcome uncertain.

3. Pursuant to the provisions of Cir. 210, WD, 14 Sept. 1943, Sec.VI, as amended by Cir. 311, WD, 26 Nov. 1943, Sec. VI, and Cir.321, WD, 11 Dec. 1943, Sec.II, par.1, the place of confinement of the accused should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published general 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 4570. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4570).

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

5 APR 1945

CM ETO 4581

U N I T E D S T A T E S	XX CORPS
v.	Trial by GCM, convened at Headquarters XX Corps, APO 340, U.S. Army, vicinity of Conflans, France, 9 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Atlanta, Georgia.
Private WILLIAM L. ROSS, (6287102), Battery B, 274th Armored Field Artillery Battalion	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private William L. Ross, Battery B, 274th Armored Field Artillery Battalion, did, at Brugay, near Epernay, France, on or about 28 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Alfred Hannemann, a human being by shooting him with a carbine.

Specification 2: In that * * * did, at Brugay, near Epernay, France, on or about 28 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Richard Ederling, a human being by shooting him with a carbine.

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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 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, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

On 28 August 1944 at about 1400 hours (R7,11) the 7th Armored Division proceeded in line of column, to an attack upon the enemy near Epernay, France. Its forward movement was delayed by enemy anti-tank fire. At the time of the episode giving rise to the instant charge the portion of the convoy consisting of the Headquarters 23rd Armored Infantry Battalion and the headquarters company thereof was halted on the right hand side of the road facing forward (R7,12).

Captain Pugh E. Kyle, commander of the Headquarters Company, 23rd Armored Infantry Battalion, left his company as it stood in the column and in his "peep" drove forward on the left hand side of the road for the purpose of determining the situation ahead. He entered the column at a hiatus therein in front of four half-tracks and halted. At that moment a quarter ton truck approached from the rear on the left hand side of the road (R6-7). Within the truck were four soldiers of Battery B, 274th Armored Field Artillery Battalion; accused (who sat behind the driver in the rear seat on the left hand side thereof facing forward); Private George F. Ott, (who sat in the rear seat on the right hand side thereof facing forward) (R14); Sergeant William E. Camp, (who was the driver of the truck and who sat behind the steering wheel in the front seat of the truck on the left hand side thereof facing forward) (R14,23); and Technician Fourth Grade Melvin P. Stenger, (who sat in the front seat at the driver's right facing forward) (R14). Accused and Ott were armed with carbines (R19).

Seated on the hood of the truck and each facing forward with his feet on the front bumper were two German prisoners of war, who were afterwards identified as the deceased, Alfred Hannemann (Specification 1) and Richard Ederling (Specification 2) (R7,12,14, 22). The prisoners were in German uniforms and were unarmed (R11,44). The prisoner on the right facing forward had his left hand on the hood of the truck and held his right hand against his head. The prisoner on the left facing forward had his right hand on the hood of the truck and held his left hand to his head (R8,28).

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About six miles to the rear of the point where Captain Kyle halted in front of the four half-tracks, accused, Ott, Camp and Stenger (hereafter designated "accused's group") had been parked at the roadside in their truck. Two American soldiers, driving a "peep" and carrying the two prisoners mentioned, stopped and asked accused's group to accept custody of the prisoners. They were transferred to the truck, driven by Camp, which proceeded forward in the direction of the head of the column. En route, inquiry was made by accused's group of a military policeman as to proper disposition of the prisoners, who informed them that "S-3" was accepting prisoners of war. Accused's group continued to go forward and after several halts and inquiries finally reached a half-track in front of which stood Captain Kyle and Captain James P. Wilson, 23rd Armored Infantry Battalion, who were engaged in conversation (R7,12,14,15,29,30). A member of accused's group inquired of Captains Kyle and Wilson where disposition should be made of the prisoners. Captain Kyle directed the group to the S-3 half-track which was forward in the column (R7,12). As the quarter-ton truck occupied by accused's group and the two prisoners of war moved forward (R21,29) Captains Kyle and Wilson heard one of the four American soldiers of accused's group yell:

> "Unless we find it damn soon, we'll shoot these" (R20)
>
> or
>
> "If we don't get rid of them, we'll shoot them" (R29).

At the time of this exclamation Captain Kyle was about eight feet from the truck driven by Camp (R29). Captain Wilson stood about 15 feet from said truck (R20,21). Captains Kyle and Wilson were unable to identify the author of the above exclamation, although both of them were positive that one of the members of accused's group uttered it (R20,27,29).

Circumstances of the homicides as related by Private George F. Ott, as witness for the prosecution:

After the meeting with Captains Kyle and Wilson, accused's group with the prisoners of war proceeded toward the front and stopped at an S-3 half-track (which was the last half-track in line before the locus of the homicide was reached) (R15,20). An officer in charge thereof informed the group:

"he wasn't taking any prisoners and that he didn't want them because there was a machine gunner holding up the column ahead * * * /R16/ * * * We was told to take the prisoners back to town * * *" (R15).

The quarter-ton truck was then driven about 40 or 45 yards forward in an effort to find a place to turn around (R16,20). At this point the highway was extended through a wooded area and on the right hand thereof facing forward a forest road projected into the woods (R16). In order to reach the forest road on the right hand side of the column from the point which the quarter-ton truck had reached after it was driven past the S-3 half-track, it was necessary to pass through the military column. However, there was a hiatus in the column at the point opposite the quarter-ton truck occupied by accused's group and it would have been possible for the prisoners to pass through this hiatus and reach the forest road (R15,16,18).

At this point the two prisoners of war were seen by Ott to move. The prisoner on the right pulled his hand down from his head and looked to the right side of the road (R16-18). The quarter-ton truck was then operated in first gear (R15,18). One of the prisoners spoke in German, and Stenger, shouted, "Watch it! They're going to jump!" (R18). Accused, seated in the left rear position of the quarter-ton truck, discharged his carbine at the prisoner seated on the right and then at the prisoner seated on the left. "Stenger let the warning out and Ross shot at the same time". The prisoner on the right fell to the ground; the prisoner on the left turned and his hand grasped the windshield. Stenger released his hand and he fell to the ground (R15,16).

Circumstances of the homicides as related by Captains Pugh E. Kyle and James P. Wilson, prosecution's witnesses.

The truck containing accused's group and the prisoners of war drove about 25 to 35 yards beyond the point where Captain Kyle stood. When it had attained that distance, he heard shots, but did not see the actual shooting, because he was not looking in the direction of the disturbance. He saw a member of accused's group push a prisoner from the truck (R8-10).

Captain Wilson testified that he continued to look at the quarter-ton truck after it left the point opposite to where he stood. It proceeded about forty yards and then halted. He saw accused fire his weapon. The prisoner sitting on the right fell off the vehicle (R21,23).

"* * * the other prisoner fell to the left, across the hood of the vehicle. Private

Ross raised up in the back of the vehicle and appeared to step forward and pushed the second prisoner off. * * * The one on the left, the prisoner on the left" (R21).

From the time the quarter-ton truck approached his half-track until the shooting, Captain Wilson did not see the prisoners make any threatening motion (R22). As the vehicle proceeded down the road those 40 yards he at all times watched the "peep", the prisoners, and the four occupants of the vehicle (R23,28). During this period a conversation could have occurred between the men in the truck which he did not hear (R23) and it was possible for the prisoners to have said something which witness could not hear. At the time accused's party stopped before Captain Wilson its attitude was hostile (R24). He considered the men hostile because of the statement: "If we don't get rid of them pretty soon, we'll shoot them" (R25).

After the shooting Captain Wilson yelled to the men in the quarter-ton truck "to hold that peep!", called for medical officers and then went forward, disarmed accused's group and placed them under arrest. Upon inspecting the prisoners he found both of them to be dead (R21,22).

Captains Wilson and Kyle then escorted accused's group to the rear and brought them to the company commander. Accused after his arrest volunteered the statement to them: "I did the shooting" (R9,22,23). The first mentioned officer returned to the scene of the homicides after having delivered accused's group to the company commander. The bodies of the two prisoners had been moved to the side of the road. Captain Wilson examined them and from identification cards they carried identified them as two German soldiers named respectively Ederling and Hannemann. They were buried near where they were shot (R22).

The motorized column was at close interval (R12). The vehicles were five yards apart. A road intersected the highway on the left hand side, but there was no intersecting road on the right. On the left "there was a draw that ran down for about 75 yards and there was a hill beyond that" (R22).

With respect to the statement he made to Major Meem the investigating officer, in the pre-trial investigation (Def.Ex.1) to the effect that he was close enough to hear any conversation of accused's group immediately prior to the shooting, Captain Wilson explained on cross-examination that such statement was made in response to a question of the investigating officer that

"was referring to the time that they were alongside my vehicle and not during the time that they had gone up the road" (R24).

4. Accused's defense consisted of the following evidence:

(a) Without objection there was introduced in evidence the written statement made by Captain James P. Wilson on 26 September 1944 to Major Stephen H. Meem, Jr., the investigating officer (R32; Def.Ex.1). The principal statement is as follows:

"We were parked on the side of the road in column, a ¼ ton truck bearing four men and two prisoner of war came up the column from the rear. The truck stopped beside my vehicle and one of the men asked for the location of the S-3 half-track. We told them that the S-3 half-track was about three vehicles forward. One of the men stated 'We had better find them in a hurry or we will kill these, and proceeded about 15 yards forward. One of the men who later identified himself as Private Ross, Battery 'B', 274th Armd F A Bn started firing into the prisoners. The prisoners died instantly. I disarmed Pvt Ross and the other three men and put them under arrest".

Upon Captain Wilson's cross-examination during the investigation by Major Meem, the following pertinent colloquy appears in the exhibit:

"MAJOR: Do you speak German?
CAPT : No sir.

MAJOR: Did you hear any conversation between any members of the vehicle and the German prisoners?
CAPT : No sir.

MAJOR: Were you close enough to hear any conversation immediately prior to the shooting?
CAPT : Yes sir.

MAJOR: What apparently was the attitude of the men in the vehicle toward the prisoners?
CAPT : No attitude demonstrated.

MAJOR: Did the prisoners appear to be in a position to jump and run at any time?
CAPT : No they were along side an armored column.

MAJOR: Did the prisoners have their hands behind their heads?
CAPT : Yes one hand.

MAJOR: Did you see them take their hands down at any time?
CAPT : No sir".

(b) Private George F. Ott, one of the members of accused's group who had testified for the prosecution, was recalled as a witness for the defense. He described the position of accused and himself in the quarter-ton truck thus:

"Well, there was a tool box on each side of the peep and I was sitting on one and Ross was sitting on the other. Ross was sitting half on the toolbox and half over the seat, sir" (R33).

The men who sat on the front seat of the truck were lower than accused and witness (R33).

(c) Sergeant William E. Camp, a member of accused's group, supra, testified to facts prior to the stop of the group at the S-3 half-track which corroborated the prosecution's evidence except as to the alleged threat by one of the group members relative to shooting the prisoners. Descriptive of events subsequent to such stop he stated:

"we finally came to the S-3 halftrack and they didn't want the prisoners. They said to turn around and go back to the town that we had just come from and turn them over to the MP's. We passed the S-3 half-track and got about forty yards in front of it and Stenger says to Ross: 'You better watch them they're going to jump'. One of the prisoners took his hand from behind his head and put it on the hood of the jeep and started to get up and that's when Ross shot him" (R35).

Stenger made the above statement after Camp heard the prisoners conversing between themselves (R35). Camp denied that anyone in the truck said that if S-3 were not found someone would shoot the prisoners (R36). He described the terrain at the site of the homicides thus:

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"Well, it was going on a grade and on our left was woods and on our right was woods and where the shooting occured there was woods to the right and a fire-break about twenty yards beyond where they were shot. It was a little opening that could have been used as a fire-break" (R37).

There were no vehicles between the quarter-ton truck and the fire-break and none behind or at the side of the truck (R37). There was a space between the S-3 half-track and the rear vehicle of the next company ahead of at least 150 yards (R38). The prisoner on the right "pitched right forward on the ground" when he was shot. He died in two seconds. The prisoner on the left hung to the windshield brace (R39). Stenger released his hold. Captain Wilson came to the truck and asked who had done the shooting, placed accused's group under arrest and took them to the battery (R37).

Technician Fourth Grade Melvin P. Stenger, also of accused's group, testified that he understood the German language (R40). It was the first language he learned. It was spoken in his home. When he was young he learned to speak German and later he learned to speak English (R41). The two prisoners were obtained by Stenger and Ott from members of the 7th Armored Division. Stenger searched them and found a pocket knife. Thereafter Camp and accused appeared in a "jeep". The prisoners were placed on the hood and Stenger and Ott entered the "jeep". Accused did not object to placing the prisoners on the vehicle (R44,45).

Accused's group with the two German prisoners drove forward in the truck parallel to the armored column. A stop was finally made at the S-3 half-track where request was made that the custody of the two prisoners be taken. The group were instructed to take the prisoners "back to the next town" (R40).

"We started out and went about fifteen yards and then everything happened at once. The one man on the right side said: 'This is a good place to jump off!'* * * and he put his hand down behind him and put his butt on the hood of the peep and then I kind of turned around and gave them a warning to watch them * * *" (R40,41).

The prisoners had between themselves engaged in conversation during the trip along side of the column "but it wasn't anything important". The statement "This is a good place to jump off" was the first statement Stenger heard the prisoners make with respect to their intended escape. This statement was made a "split-second" before the shooting and yet there was time for Stenger to give the warning (R42,43). There was more than one shot fired at the prisoners (R43).

> "One prisoner, after he was shot, fell clear. The one on the right -- that is the one who started getting up -- fell clear. The other one still had his hand on the windshield and I reached out and unhooked him. And then a man came running over from the halftrack and he asked who done the shooting and Private Ross told him that he did it and he said that we were placed under arrest and he took all our names and took the firearms and I gave him mine too * * *" (R41).

Stenger denied that accused or any one else in the quarter-ton truck made the statement in substance that if they did not find the S-3 soon the prisoners would be shot. If the statement had been made he would have heard it (R41,44,45).

On the right hand side of the road there was a fire-break. There was an open space in the column of vehicles between the S-3 half-track and a point opposite the locus of the shooting (R43).

Accused, after his rights were explained to him, elected to be sworn and testified in substance as follows:

He denied that he had made the statement to the effect that if accused's group "didn't find the S-3 during this ride that he would shoot the prisoners" and he further denied that any member of his group made such statement (R46). He gave the following description of the homicides:

> "Well, the officer/I know now as Captain Wilson directed us to the S-3 halftrack. The officer in charge was of company grade and he told us that he was not taking prisoners and to take them back to the town and there turn them over to the MP's and then he told us not to go too far in turning around the vehicle. We went thirty-five yards up the road,

that

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> when Stenger gave me the warning that they were going to jump. I was in the best firing position. I was sitting on something that was up high and the prisoner on the right, at the same time that I was given the warning, released his hands and faced the woods. I fired two rounds at him: one while he was in motion and one while he was in flight and then I fired one round at the prisoner on the left. Stenger removed his body. Meantime, Sergeant Camp had stopped the peep the instant I fired my first round and then Stenger removed the prisoner on the left and let him off. Captain Wilson came running and yelled to hold the jeep and he said: 'Who was doing that firing?' Then he said: 'Somebody get the medics.' I said that I did the firing, that's all I could do. Then he disarmed us and took our rifles and our names. During the firing there was an American soldier wounded who had been standing over to the side. And the Captain said: 'I'll see you burn in hell for shooting an American soldier'" (R46).

With respect to the prisoner on the left he testified that he fired at him because

> "He had made a motion when I glanced back and I just fired one round, hoping to hit him in the arm or leg (R46).

The prisoners had a reasonable chance of escaping

> "Because it was thirty-five or forty yards to the nearest vehicle and there was a small lane to my right flank and if he got out of the peep and run into those woods they could have gotten away. I would have been in no position to fire after they had jumped" (R47).

However, he admitted that he did not take this fact into consideration when he fired the shot (R47).

5. Captains Kyle and Wilson testified over vigorous objections by defense that during the time the quarter-ton truck, containing accused's group and the two prisoners of war, was halted before the two officers, one of the four American soldiers exclaimed 4581

"Unless we find it [referring to the S-3 half-track] damn soon we'll shoot these [referring to the two prisoners of war]" (R20)

or

"If we don't get rid of them [referring to the two prisoners of war] we'll shoot them" (R29).

Neither of the witnesses was able to identify specifically the author of this remark, but they declared that one of the four soldiers while in the presence of the other three gave utterance to the same (R7,20,29). From the absence of proof that it was accused who made this statement it must be assumed that he did not make it, but that it was spoken in his presence by either Camp, Stenger or Ott immediately following the time accused's group was instructed by Captains Kyle and Wilson to take the prisoners of war to the S-3 half-track then ahead in the convoy column. In view of the conclusion of the Board of Review with respect to the legal insufficiency of the record of trial to sustain the findings of accused's guilt, no extended discussion is necessary of the legal issue involved. Upon the assumption indicated above the prosecution will be given the full benefit of the questioned testimony and it will be treated as legally admitted evidence (Cf: 16 CJ, sec.1121, p.579; 1 Wharton's Criminal Evidence (11th Ed., 1935), sec.288, pp.377,378 and sec.495, pp.755-762; MCM, 1928, par.115b, p.118; 20 Am. Jur., sec.674, p.568; Jones on Evidence(2nd Ed., 1912), sec.374, pp.433,434 and sec.350, pp. 438,439; Wigmore's Code of Evidence, (3rd Ed., 1942), sec.1757, pp. 326,327; Alexander v. United States, 138 U.S. 353,356,357, 34 L.Ed. 954,956,957 (1891); St. Clair v. United States, 154 U.S. 134,149, 38 L.Ed. 936,942 (1894); Arkansas Power & L. Co. v. Heyligers, 188 Ark. 815, 67 S.W. (2nd) 1021, 101 ALR 1200 (1934); Heg v. Mullen, 115 Wash. 252, 197 Pac. 5, 76 ALR 1128 (1921).

6. a. The status of Hannemann and Ederling, the deceased, requires special consideration and treatment. There is substantial, uncontradicted evidence in the record of trial that these two men were prior to their capture German soldiers. The inference is definite and certain that they had been captured in the course of combat between units of the American and German armies. At the time they were delivered to accused's group they were in German military uniforms and were unarmed. They remained in such condition until their deaths. Therefore, they were entitled to all of the rights and perogatives of and protection due prisoners of war. Likewise there were imposed upon them certain duties and obligations.

The following comment is relevant:

"The treatment of prisoners of war was regulated by the provisions of the Brussels Declaration of 1874, which were adopted, with additions and modifications, by the Hague Conference of 1899. The rules of the latter, again, were, with certain emandations, adopted by the Hague Conference of 1907; so that the regulations of the second conference indicated the law governing the subject, though, as has been seen, it is impossible to hold that they were binding on the belligerents in 1914-19. On July 29, 1929, a Convention was signed at Geneva by thirty-three Powers dealing with the treatment of prisoners of war. Fourteen States represented at the Conference signed later. Article 89 of the Convention provides that it shall be regarded as complementary to Articles 4-20 of the Hague Convention; as a matter of fact it contains all of the regulations, except those in Articles 10-12 dealing with release on parole". (Underscoring supplied) (2 Wheaton's International Law - WAR (7th Eng. Ed., 1944), p.179; Cf: 2 Oppenheim's International Law (6th Ed.,1940),sec. 125,p.294).

The United States of America and Germany signed the Geneva Convention of July 29, 1929 (TM 27-251, Treaties Governing Land Warfare, 7 January 1944, p.151).

b. Pertinent extracts from the Geneva Convention of 1929 are as follows:

"Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them.

They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity.

Measures of reprisal against them are prohibited" (Article 2, Title I, p.67).

"Prisoners of war have the right to have their person and their honor respected. Women shall be treated with all the regard due to their sex.

Prisoners retain their full civil status" (Article 3, Title I, p.67).

"Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining Power.

An act of insubordination shall justify the adoption towards them of the measures provided by such laws, regulations and orders.

The provisions of the present chapter, however, are reserved" (Article 45, Title III, p.91).

"Escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment.

Prisoners who, after having succeeded in rejoining their army or in leaving territory occupied by the army which captured them, may again be taken prisoners, shall not be liable to any punishment on account of their previous flight". (Article 50, Title III, p.95).

"Attempted escape, even if it is a repetition of the offense, shall not be considered as an aggravating circumstance in case the prisoner of war should be given over to the courts on account of crimes or offenses against persons or property committed in the course of that attempt.

After an attempted or accomplished escape, the comrades of the person escaping who assisted in the escape may incur only disciplinary punishment on this account" (Article 51, Title III, p.95).

The above quoted Articles of the Geneva Convention are incorporated in and are part of FM 27-10, Rules of Land Warfare, 1 October 1940.

c. The provisions of the Geneva Convention with respect to prisoners of war should be read in the light of prior official pronouncements of the United States and its civil and military authorities on their status:

(1) "'Prisoners of war are to be considered as unfortunate and not as criminal, and are to be treated accordingly, although the question of detention or liberation is one affecting the interest of the captor alone, and therefore one with which no other government ought to interfere in any way; yet the right to detain by no means implies the right to dispose of the prisoners at the pleasure of the captor.

That right involves certain duties, among them that of providing the prisoners with the necessaries of life and abstaining from the infliction of any punishment upon them which they may not have merited by an offense against the laws of the country since they were taken.'
/Mr. Webster, Sec. of State, to Mr. Ellis, Feb. 26, 1842, MS. Inst. Mex. XV. 151/".

"'The law of war forbids the wounding, killing, impressment into the troops of the country, or the enslaving or otherwise maltreating of prisoners of war, unless they have been guilty of some grave crime; and from the obligation of this law no civilized state can discharge itself.'
/Mr. Webster, Sec. of State, to Mr. Thompson, min. to Mexico, Apr. 5, 1842, Webster's Works, VI. 427,437/" (7 Moore, Digest of International Law (1906 Ed.), sec.1128, p.218).

(2) "A prisoner of war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape" (par.77, Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, series 3, III, 154, reprinted in 7 Moore, Digest of International Law (1906 Ed.), sec.1128, p.221).*

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*Spaight in his "War Rights on Land" (1911) comments as follows on the foregoing "Instructions":

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(3) The policy of the Commanding General, European Theater of Operations with respect to prisoners of war is elucidated in the following excerpt which was effective on the date of the homicides:

"1. Commanders of combat units and other units responsible for the handling of prisoners of war will insure that the personnel of such units have a thorough knowledge of the principles to be observed in relation to prisoners of war, as set forth in FM 27-10, 'Rules of Land Warfare'. Particular emphasis will be placed on the provisions of the Geneva convention of July 27, 1929, relative to the treatment of prisoners of war.

2. Attention will be especially directed to the fact that the rights of prisoners of war, as set forth by treaty, are not theoretical, but are binding on all US troops in the same manner as are the laws and Constitution of the United States. Violation of such rights by US troops may result in retaliation by the enemy in the form of reprisal.

3. Questions requiring interpretation of the Geneva convention of July 27, 1929, relative to the treatment of prisoners of war, will be submitted to this headquarters" (Cir.67, Hq European Theater of Operations, 12 Jun 1944, sec.VIII).

"Indeed, in many respects the Secession War is the most instructive of all wars to the student of International Law. Just as this war gave modern fighting many of its distinctive features—the cavalry screen, the use of rifle-pits and wire-entanglements, the employment of mounted infantry, the attack by short advances under cover—so it gave belligerents the first written code of land war. This was the very remarkable manual of Instructions for the Government of the Armies of the United States in the Field, which was drawn up by Professor

d. Intrinsic in the instant case is the question whether a prisoner of war may be summarily shot while he is attempting to escape. Acknowledged authorities speak as follows in regard to such question:

> "It is simply cold-blooded murder to shoot a prisoner unless he has forfeited his immunity by some definite act of resistance or hostility" (Spaight, War Rights on Land (1911) p.267).

> "Prisoners of war are not criminals and must not be confined except as an indispensable measure of safety" (Ibid, p.280).

> "But if it is no crime to attempt to escape, it is an infraction of the disciplinary regulations of the capturing army, and for this, as for any other infraction, disciplinary punishment may be inflicted: not because the act punished is malum in se, but because it is malum prohibitum to use a useful legal distinction" (Ibid., p.287).

Lieber, on Mr. Lincoln's initiative, and which is not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative. Its principles and its philosphy are sound, elevated, and humane. In a few special points its detailed teachings have been modified by the subsequent action of International Conferences or the influence of changing ideas on usage, but, taken as a whole, it reads like an admirable paraphrase of the existing Hague Reglement. Any student of war law must find, as I have found over and over again, that its teachings throw a flood of light on the dark places of International Law. It passed through its ordeal by fire in the grim struggle of 1861-5 and was not found wanting. Apart from the devastation of Georgia and the Carolinas by Sherman and the Shenandoah Valley by Sheridan--devas-

"War law, therefore, while allowing the killing of a prisoner to prevent his escaping, does not allow it as punishment except where there has been a conspiracy or plot. Anything in the nature of concerted rebellion may be severely punished -- even with death; but as regards ordinary attempts to escape on the part of prisoners who have not given their parole, these, as the German Manual points out 'must be considered as manifestations of a natural desire from [sic] freedom, not as crimes'" (Ibid., p.288).

"The conviction in time became general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms again, and should as a matter of principle be distinguished from imprisonment as a punishment for crimes" (2 Oppenheim's International Law (6th Ed., 1940), sec.125, pp.292,293).

"Every individual who is deprived of his liberty not for a crime, but for military reasons, has a claim to be treated as a prisoner of war" (Ibid., sec.127, p.299).

"However, prisoners who have been punished as a result of an attempt to escape may, subject to the general safe-guards of the Convention, be put under special regime of surveillance. Prisoners who are recaptured after having succeeded in rejoining their armed forces must not be punished for their previous escape" (Ibid., sec.128, p.300).

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tations which were made militarily necessary by special circumstances, just as was the devastation of the Transvaal in 1901-2--the conduct of the Union forces, almost wholly composed of civilians with no previous training or discipline, compares more than favorably with that of regular armies in European wars" (p.14).

"Such force as is found necessary may be employed to prevent the escape of a prisoner; and for this purpose violence resulting in the fugitive prisoner's death may be applied, if less severe measures prove inadequate" (2 Wheaton's International Law-WAR (7th Eng. Ed., 1944), p.183).

7. The fact that accused shot and killed the two German prisoners of war, Hannemann and Ederling, was not only proved by the prosecution, but was also admitted by accused. His defense was based on the premise that he killed them in the performance of his duty to prevent their escape and therefore the homicides were legally justified. The court by its findings rejected such contention. It evidently accepted the prosecution's theory of the case that no factual or legal necessity existed which compelled accused to use extreme force and violence to prevent their escape; that the deaths of the two prisoners were motivated by the desire of accused's group to be rid of the burden of their care and custody and that consequently the killing was with malice aforethought so as to constitute the crime of murder (MCM, 1928, par.148a, pp.162-164).

a. The duty of the Board of Review, sitting in appellate review, is to examine the record of trial for the purpose of determining whether there is substantial, competent evidence to support these findings of the trial court. It will apply the following principles:

"Convictions by courts-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the 'slightest particle or trace', is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience" (CM 223336 (1942), I Bull. JAG, 159,162).

"In the exercise of its judicial power of appellate review under Article of War 50½, the Board of Review treats the findings below as presumptively correct and attentively examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice" (CM 192609, Hulme, 2 B.R. 19,30).

> "The weighing of the evidence and determining its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence" (CM ETO 895, Fred Davis et al).

The Board of Review (sitting in the European Theater of Operations) has scrupulously observed the foregoing principles (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 422, Green; CM ETO 492, Lewis; CM ETO 804, Ogletree et al; CM ETO 5464, Hendry).

b. Accused was charged with and tried for the crime of murder denounced by the 92nd Article of War. The burden was therefore on the prosecution to prove beyond a reasonable doubt all of the elements of said crime including the highly necessary fact that accused killed the two deceased with malice aforethought (Davis v. United States, 160 U.S. 469,487, 40 L.Ed. 499,505 (1895); CM ETO 422, Green). The vital question in the case revolves about the sufficiency of the evidence to prove that accused at the time he shot the two prisoners of war possessed the necessary malice. The following comment from the Manual for Courts Martial, 1928 is relevant:

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden

passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; intent to commit any felony" (par.148a, pp.163,164).

The foregoing definition of "malice aforethought" is affirmed by the leading authorities (1 Wharton's Criminal Law (12th Ed., 1932), sec.419, pp.625-630; 29 CJ sec.61, pp.1084-1087; Stevenson v. United States, 162 U.S. 313,320, 40 L.Ed. 980, 983 (1896)).

The determination whether there is substantial evidence in the record of trial proving that accused acted with malice aforethought when he killed the two prisoners of war requires not only a discriminating examination of the evidence, but also an approach to the problem not usually required in homicide cases. There are two fundamental principles, demonstrated above, upon which such examination and determination must be premised:

FIRST: The two deceased were not criminals, but were prisoners of war and were entitled to be accorded the treatment provided by the rules of international law and relevant provisions of the Geneva Convention.

SECOND: The accused was a soldier of the Army of the United States and with three other soldiers had received the custody of the two prisoners and thereby there was imposed upon him (and the other soldiers) the serious responsibility of retaining the custody of the prisoners until they were delivered to proper military authorities. Incidental to this general obligation was the specific duty to prevent the prisoners from escaping.

The principal evidence of the prosecution material to the present consideration consisted of the testimony of Captain Wilson and of Private Ott, who was one of the four soldiers into whose custody the prisoners had fallen. Captain Kyle's testimony as to events following the halt of the quarter-ton truck before him and Captain Wilson is without probative value because he stated that he looked at it only "part way" as it was driven forward and then turned his head away. He did not see the actual shooting and his attention was called to the truck only after the shots were fired (R8,10,11).

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Captain Wilson testified that after the quarter-ton truck resumed its journey after stopping before him and Captain Kyle he watched it and its occupants as it proceeded forwarded to a point about 40 yards toward the front of the column. He stated he kept continuous watch and he saw the prisoners at all times (R21,23,28). He further asserted that

> "Private Ross was sitting in the left rear seat. Private Ott was also in the rear seat, sitting on the right. A staff sergeant, whose name I don't know, was driving and the other man was sitting in the right front seat" (R23).

He declared he saw the two men in the back seat and the other four men including the two prisoners (R23,28). He witnessed Ross fire his weapon (R21).

> "One of the prisoners, the one sitting on the right, fell off the vehicle and the other prisoner fell to the left, across the hood of the vehicle. Private Ross raised up in the back of the vehicle and appeared to step forward and pushed the second prisoner off" (R21).

He admitted that it was possible for a conversation to have occurred between the occupants of the truck that he could not hear (R23) and that it was possible for the Germans to have said something which he had not heard (R24).

Of crucial importance on this issue is the following colloquy between the trial judge advocate and Captain Wilson, which terminated the latter's direct examination after he was recalled to the stand:

> "Q - From the time that this vehicle approached your halftrack until the shooting; did you see the two prisoners on the front of the vehicle make any threatening movement or motion?
> A - No, sir" (Underscoring supplied) (R22).

The above summarized testimony of Captain Wilson concerning the conduct of accused's group, and of the actions of the prisoners of war from the time they departed from the presence of Captain Kyle and himself until the occurrence of the homicides is opposed by defensive testimony given by members of accused's group:

(100)

Ott, in his testimony as the prosecution's witness, testified that after the stop at the S-3 half-track (a fact of which Captain Wilson omitted all mention) where accused's group were directed to take the prisoners back to town; the quarter-ton truck was driven ahead in order to find a place to turn around (R15,20). There was then conversation in the German tongue between the two prisoners which Ott did not understand (R17). Forthwith Stenger shouted, "Watch it! They're going to jump!" (R18,19). Instantaneously accused discharged his carbine (R15,16). When Stenger gave the warning one of the prisoners moved and brought his hands down from his head (R16,18). Both Camp and Stenger were in the front seat of the truck and were seated at a lower elevation than accused and Ott who were in the rear seat (R33).

Camp, the driver of the quarter-ton truck, as a defense witness stated that after the truck was driven about 40 yards in advance of the S-3 half-track, Stenger exclaimed to Ross "You better watch them they're going to jump" (R35).

> "One of the prisoners took his hand from behind his head and put it on the hood of the jeep and started to get up and that's when Ross shot him" (Underscoring supplied) (R35).

A moment or two prior to Stenger's warning there was conversation between the prisoners (R35).

Stenger as a defense witness testified that he understood the German language and that when the quarter-ton truck had been driven about 15 yards ahead of the S-3 half-track one of the prisoners said: "This is a good place to jump off!" (R40).

> "he put his hand down behind him and put his butt on the hood of the jeep" (R41).

Promptly thereafter, Stenger gave his warning to watch the prisoners (R41,42). Within a "split second" accused fired at the prisoners (R43).

Accused as a defense witness testified that at a point about 35 yards beyond the S-3 half-track Stenger gave him the warning that the prisoners were going to jump.

> "I was in the best firing position. I was sitting on something that was up high and the prisoner on the right, at the same time I was given the warning, released his hands and faced the woods. I fired two rounds at him: one while he was in motion and one while he was in flight and then I fired one round at the prisoner on the left * * * He had made

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a motion when I glanced back and I just fired one round hoping to hit him in the arm or leg" (Underscoring supplied) (R46).

c. Certain well established principles of law govern the juridical situation revealed by the foregoing evidence:

(1) To uphold a verdict of guilty where the evidence is circumstantial a conviction must be founded

"upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt" (Buntain v. State, 15 Tex. Crim. App. 490).

"While evidence, to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence as produced is entirely consistent with innocence in a given transaction" (Hayes v. United States, (C.C.A. 8th, 1909), 169 Fed. 101,103).

The Manual for Courts-Martial has elucidated the foregoing principle in this language:

"The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty" (MCM, 1928, par.78a, p.63; Cf: CM ETO 3200, Price).

(2) While the burden of establishing that the homicide was justifiable is upon the accused unless the evidence of the prosecution itself establishes this fact, that burden is sustained when, as a result of the whole evidence, a reasonable doubt has been created in the minds of the court as to whether or not the homicide was justifiable. If, from a consideration of the whole evidence, the court entertains a reasonable doubt upon that question, the doubt is to be determined, like all other doubts in the case, in favor of the accused (Davis v. United States, 160 U.S. 469, 40 L.Ed. 499 (1895); Frank v. United States (C.C.A. 9th, 1930), 42 F (2nd) 623). The accused

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"should receive the benefit of all the evidence in the case, whether offered by him or by the state. If any fact proved against him by the prosecution satisfies the jury that the killing was excusable or justifiable, the jury should acquit him" (Underhill's Criminal Evidence (4th Ed. 1935), sec.575, p.1149; 2 Wharton's Criminal Evidence (11th Ed., 1935), sec. 882, p.1521).

(3) "While the jury are the judges of the weight and value of all testimony, ordinarily positive testimony is of more value than negative testimony. For example, the testimony of a witness who swears that he saw the act committed is to be given more weight than the testimony of another witness who swears that he was present and did not see the commission of the act. But circumstances may be shown which make such negative testimony strong affirmative evidence, and it is for the jury to say whether, in the particular case, such circumstances have been shown" (2 Wharton's Criminal Evidence (11th Ed. 1935), sec.879, pp.1519-1520).

"Juries may not arbitrarily and capriciously disregard testimony of witnesses not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case, and if they do, and render a verdict contrary thereto, it is against law, unless it appears that some essential part of the evidence is inherently improbable. Where there is no conflict in the evidence, a jury is not authorized to disregard the direct and positive evidence which shows that the defendant is not guilty of the offense charged. If the defendant or his witnesses are the only eye-witnesses to a homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts, or by the facts of common knowledge. But even though a party is bound by the uncontradicted testimony of a witness called by him and may not impeach the character of such witness, he is not concluded

> by the testimony of the witness as to a particular fact, but may prove the fact to be different by other competent testimony" (Underscoring supplied) (Ibid., sec. 880, p.1520).

d. Under the established principles of international law and the declarations of the Geneva Convention hereinbefore set forth, accused, as one of the captors of the prisoners of war was authorized to use such force as was found necessary to prevent their escape,

> "and for this purpose violence resulting in the fugitive prisoner's death may be applied, if less severe measures prove inadequate" (2 Wharton's International Law-WAR (7th Eng. Ed., 1944), p.183).

Proof that accused killed the two prisoners by use of a firearm immediately created the presumption that the homicide was with malice aforethought and hence murder. However, it was a rebuttable presumption which could be overcome by proof that the prisoners were killed in the course of the attempt to escape or that the killing was, under the circumstances, reasonably deemed necessary by him in order to prevent their escape (29 CJ, sec.74, pp.1099-1101; 1 Wharton's Criminal Evidence (11th Ed., 1935), sec.130, pp.145-149; 26 Am.Jur, sec.286, p.352, sec.308, pp.362-363).

There was therefore indigenous in the case the question of fact whether the deceased prisoners of war attempted to effect their escape from captivity at the time they were shot and killed by accused. If there was substantial uncontradicted evidence in the case in proof of such fact there then arose the second issue of fact whether the killing of the prisoners was necessary to prevent their escape. As has been shown by the above authorities, the burden was on the prosecution to establish beyond a reasonable doubt the fact that the prisoners did not attempt to escape or, failing in that proof, that accused used more than necessary force to prevent the escape. The task before the Board of Review is to determine whether there was substantial evidence adduced at the trial either directly proving these facts or of such substantial character as to permit the court to infer them from the facts proved.

As to the question of attempted escape:

The four soldiers, (accused, Ott, Stenger and Camp) each testified positively that there was a conversation between the two prisoners and then Stenger gave this warning: "You better watch them they're going to jump". Stenger declared that in this conversation the prisoner on the right said, "This is a good place to jump off!". Simultaneously with Stenger's warning the prisoner on the right brought his hand down from his head and moved. Accused stated

that he "faced the woods". Against this positive testimony, must be placed Captain "ilson's mere "No, sir", responsive to a leading question of the trial judge advocate:

" * * * did you see the two prisoners * * * make any threatening movement or motion?"

It will be noted that the leading question did not pose the proposition whether Captain Wilson saw the prisoners make any motion indicative of an attempt to escape but whether he saw them make "any threatening movement or motion". The question may well be asked: threatening to what? Threatening to the four captors? Threatening to Captain Wilson? Threatening to other soldiers? Threatening to escape? The ambiguity when coupled with the further fact that the Wilson testimony was only negative evidence virtually destroyed its evidential value on the issue of the physical movements of the deceased. Moreover, he did not testify that the two prisoners did not make any threatening movement or motion but merely that he did not see them do so. A similar weakness developed in Captain Wilson's testimony concerning the conversation between the prisoners. He admitted that there could have been conversation he did not hear. Opposed to this statement is Ott's and Stenger's positive testimony that the deceased did speak to each other and Stenger's declaration as to the substance of the remark of the prisoner on the right. Although Ott was a prosecution's witness, accused was entitled to the benefit of his testimony. Under these circumstances the only conclusion that can be reached is that the evidence showed substantially and overwhelmingly that the prisoners attempted to escape. This situation presents not a conflict in the evidence for resolution by the court but a question of law for the determination of an appellate tribunal (sec.7a. and 7c. (1), supra).

As to the question concerning application of unnecessary force by accused: Consideration of the question whether accused used excessive force and violence to prevent the escape of the prisoners must be premised on the fact that they attempted to escape, as was established by substantial, competent evidence. There is an accurate verisimilitude between the relationship of accused to the two prisoners of war and that of a civilian police officer toward a person held by him in custody after the commission of a felony. As has been shown, the duty of the accused (as one of the custodians of the prisoners) was to prevent their escape and he was authorized to use force resulting in their deaths if less severe measures were inadequate. The same rule applies in the case of the civilian police and a putative felon (1 Wharton's Criminal Law (12th Ed.,1932), sec.534, p.775; 26 Am.Jur. sec.232, p.316; 30 CJ sec.195, pp.40-41). The similarity becomes more pronounced in view of the fact that in the administration of military justice the distinction between felonies and misdemeanors does

not exist (Winthrop's Military Law and Precedents (Reprint, 1920), p.108; United States v. Clark (C.C. Mich., 1887), 31 Fed. 710,713).

The rule of the civilian law is the result of years of experience in dealing with the difficult problem of responsibility of police officers for their acts. There exists the necessity of arming the representatives of law with authority adequate to permit them to perform their duties efficiently and promptly, but there must also be the exercise of vigilance to protect the private citizen from unnecessary force and violence at the hands of a cruel or ruthless sheriff or policeman, or one whose judgment is subordinated to the emotions or enthusiasms of the moment. The same reasoning may be well applied to soldiers in the exercise of the serious responsibility of guarding prisoners of war. They must be authorized to perform such acts/as are reasonably necessary to prevent the escape of their charges, but likewise the human tendency to be overly quick in the resort to violence must be effectively circumscribed if the rules of international law and the relevant provisions of the Geneva Convention are to be more than pious gestures.

It is the considered opinion of the Board of Review that these well established and tested rules of the civilian law may be adopted in the administration of military justice without impairing the discipline and control of soldiers in time of war and with full recognition of the serious obligations of the Government of the United States under and consequential upon the provisions of the Geneva Convention governing the rights and obligations of prisoners of war.

It is ordinarily a question of fact for the determination from the evidence by the jury whether an accused had reasonable grounds to believe and did so believe that killing or seriously wounding a prisoner was necessary to prevent his escape (United States v. Carr, 1 Woods 480,484, Fed. Cases No. 14,732 (1872); United States v. Clark, supra; Stinnett v. Commonwealth of Virginia (C.C.A. 4th, 1932) 55 F (2nd) 644,647; 30 CJ, sec.579, p.329,fn.16). However, when the facts are undisputed and the only reasonable and logical inference therefrom is that reasonable grounds existed for accused to believe that it was necessary to kill or seriously wound a prisoner to prevent his escape, and the proof is clear and uncontradicted that accused acted on such belief, the issue becomes one of law, and its sufficiency as a defense may be considered by the appellate tribunal upon examination of the record of trial to determine its legal sufficiency to support the verdict or findings (17 CJ, sec.3593, pp.262-263, fns. 76-78; CM 223336 (1942), I Bull. JAG, 159,162; Metropolitan Railroad Company v. Moore, 121 US 558, 30 L.Ed. 1022 (1887).

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The evidence is clear and undenied that the prisoners conversed between themselves and that Stenger, who understood the German language, heard one of the prisoners exclaim "This is a good place to jump off!". Immediately he gave the warning, "You better watch them they're going to jump". Simultaneously with Stenger's warning, the prisoner on the right withdrew his hand from his head and attempted to move from his seat on the truck. It was then accused fired upon the prisoners.

This is the evidence upon which must be based a finding that accused used excessive force and violence in preventing the escape of the prisoners. In order to sustain the finding it is necessary to conclude from the foregoing facts that the prisoners had not advanced their project of escape sufficiently near to the point of successful execution to justify action by accused. Stated otherwise it was the duty of accused to wait until the prisoners had actually jumped from the truck before he fired. Such conception of the evidence must also place upon the accused the duty to give prisoners timely warning that he would shoot. This interpretation denies the realities of the situation which confronted accused. The convoy line was not engaged in combat but its forward movement was halted by enemy machine gun or anti-tank fire. The atmosphere of battle environed accused. The fact that he was one of the custodians of prisoners of war is indicative of the conditions under which he operated. Cries of warning by accused, Ott or Camp to the prisoners would have been an idle gesture because there is no evidence they understood the English language and these soldiers did not speak German, or that they would have heeded if they did understand English. Stenger might have given the prisoners the warning to halt. He elected however to warn his fellow soldiers of the expressed and overtly indicated intention of the prisoners. It certainly cannot be the law that under such circumstances it was the duty of accused to allow the prisoners, before he took action, the advantage of dismounting from the truck. Placed as accused was at that time he cannot be held to the same standard of prudance as might be suggested upon a calm judicial review of his conduct. He is entitled to be judged upon the facts and circumstances as they existed at the instant he took action to prevent the escape of the prisoners. The law does not require him "to weigh with scrupulous nicety the amount of force necessary" to prevent the escape; "the exercise of a reasonable discretion is all that is required" (Cf: United States v. Carr, 1 Woods 480,484, supra; Winthrop's Military Law and Precddents (Reprint, 1920), p.675, fn.64).

The following quotation from United States v. Clark, supra, is peculiarly appropriate:

"His position is more nearly analogous to that of an armed sentinel stationed upon the walls of a penitentiary to prevent the escape of convicts. The penitentiary--and for this purpose we may use the house of correction in Detroit as an example--may contain convicted murderers, felons of every grade, as well as others charged with vagrancy or simple breaches of the peace, and criminals of all descriptions between the two. If the guard sees one of those prisoners scaling the wall, and there be no other means of arresting him, may he not fire upon him without stopping to inquire whether he is a felon or a misdemeanant? If he prove to be a felon, he will be fully justified; if he prove to be a misdemeanant, is he therefore guilty of murder?

* * *

While human life is sacred, and the man who takes it is held strictly accountable for his act, a reputable citizen, who certainly does not lose his character as such by enlisting in the army, ought not to be branded as a murderer upon a mere technicality, unless such technicality be so clear as to admit of no reasonable doubt. Thus, if a sentinel stationed at the gate of a fort should wantonly shoot down a civilian endeavoring to enter in the day-time, or an officer should recklessly slay a soldier for some misconduct or breach of discipline, no supposed obligation upon his part to do this would excuse so gross an outrage" (Underscoring supplied) (31 Fed.715).

Prosecution's evidence (which was emphatically denied by accused's group) that immediately preceding the actual shooting a member of accused's group, other than accused, uttered threats against the lives of the prisoners is not of sufficient probative force to create an issue of fact for the court and upon which to base the finding of guilty. At most it is but a scintilla of evidence and under the long established rule of the Federal courts, a scintilla of evidence is not sufficient to require the submission of the case to the jury for determination (Ewing v. Goode (C.C. Ohio, 1897) 78 Fed.. 442; Schuylkill Improvement & R. Co. v. Munson, 81 U.S. 442, 20 L.Ed. 867 (1872); National Labor Rel. Bd. v. Columbian E. and S. Co., 306 U.S. 292, 300; 83 L.Ed., 660,665 (1939); Courier Post Pub Co. v. Federal Communications Commission (App.D.C., 1939), 104 F (2nd) 213,217).

Likewise in the administration of military justice a scintilla of evidence is not sufficient to support a finding. (See quotation from CM 223336, in par.7a, supra).

Defense Exhibit 1 was the statement of Captain Wilson to the investigating officer. It was introduced for the purpose of impeaching certain parts of Captain Wilson's testimony as a prosecution witness. However it contains the following colloquy between him and the investigating officer.

"Major: Did the prisoners have their hands behind their heads?
Capt : Yes one hand.

Major: Did you see them take their hands down at any time?
Capt : No sir"(Underscoring supplied).

Under the generally recognized rule denying substantive evidentiary value to impeaching admissions of former inconsistent extra-judicial statements of a witness not a party to the action the above underscored portion of Captain Wilson's pre-trial examination can have no evidentiary weight and must be entirely disregarded (Ellis v. United States (C.C.A. 8th, 1943) 138 F (2nd) 612 and authorities therein cited; Annotation, 133 ALR 1454 et seq.).

The evidence upon which accused's conviction is based certainly does not "satisfy a reasonable man when guided by normal human experience and common sense springing from such experience" that accused did other than perform his duty as a custodian of the prisoners. His reaction was not in the least abnormal or extraordinary under the circumstances, but was exactly what an experienced, reasonable man would expect under circumstances and conditions in which accused was placed. The prosecution not only failed to prove a vital element of its case, viz that accused killed the prisoners with malice aforethought, but also the prosecution's own evidence carried within it the seed of defeat of its own cause. It demonstrated without aid of defense's evidence that accused killed the two prisoners of war to prevent their escape and that the force applied by him was reasonably necessary under the circumstances. As a result the findings that accused committed the crime of murder must fail. The homicides were justifiable.

The question whether accused might be held guilty of the crime of voluntary manslaughter cannot arise in this case for the reason that the evidence shows that the homicide was justifiable (30 CJ, sec.185, p.36). Under such circumstances the exculpation of accused from the guilt of the greater offense (murder) also relieved him from liability for any lesser included offense (manslaughter) (Ball v. United States, 163 U.S. 662,670, 41 L.Ed. 300,303 (1896); 16 CJ, sec.449, p.271).

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8. The charge sheet shows that accused is 24 years three months of age. He enlisted 13 August 1941 at Fort Sam Houston, Texas, to serve for three years. His service period is governed by the Service Extension Act of 1941. He had prior service as follows: Battery B, 30th Field Artillery 15 July 1938 to 14 July 1941. Discharged as sergeant; character excellent.

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

B. Franklin Potter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. O'Leary Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 APR 1945 TO: Commanding General, XX Corps, APO 340, U. S. Army.

1. In the case of Private WILLIAM L. ROSS (6287102), Battery B, 274th Armored Field Artillery Battalion, 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 and this indorsement. The file number of the record in this office is CM ETO 4581. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4581).

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

21 DEC 1944

CM ETO 4589

U N I T E D S T A T E S v. Privates EDWARD POWELL (36788337) and ANDREW CLAY, JR. (36891523), both of 656th Port Company, and Privates EBBIE SWEET, JR. (34790277) and J. B. KETCHUM (18011823), both of 657th Port Company and all of 483rd Port Battalion	NORMANDY BASE SECTION COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, France, 10 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 Powell was tried on the following charges and specifications:

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

Specification: In that PRIVATE EDWARD (NMI) POWELL, 656th Port Company, 483rd Port Battalion, Transportation Corps, did, in conjunction with PRIVATE ANDREW (NMI) CLAY Jr., 656th Port Company, 483rd Port Battalion, Transportation Corps, and PRIVATE J. B. (initials only) KETCHUM, 657th Port Company, 483rd Battalion, Transportation Corps, and PRIVATE EBBIE (NMI) SWEET JR., 657th Port Company, 483rd Port Battalion, Transportation Corps, did, at Cherbourg, France, on or about 2230 hours, 9 September, 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Marcelle Galy.

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

Specification: In that * * * did, at Cherbourg, France, on or about 2230 hours, 9 September 1944, unlawfully enter the dwelling of Madame Marcelle Galy, with intent to commit a criminal offense, to wit, rape.

Accused Clay, Sweet and Ketchum were each tried upon charges and specifications identical with the charges and specifications above set forth except for appropriate transposition of the names of accused and proper designation of their military organizations.

The accused made no objection to being tried together. Each accused pleaded not guilty and, three-fourths of the members of the court present at the times 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 accused Powell and Clay. Evidence was introduced of one previous conviction by summary court against accused Sweet for absence without leave and for drunkenness in quarters in violation of the 61st and 96th Articles of War respectively, and one by special court-martial against accused Ketchum for absence without leave for an unstated period in violation of the 61st Article of War. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and "pending action under Article of War 50½", withheld execution of the sentence.

3. Competent, substantial and uncontroverted evidence presented by the prosecution proved the following facts:

On the night of 9 September 1944, Madame Marcelle Galy, a French citizen of the age of 31 years, resided at 54 Rue Emanuel Liais, Cherbourg, France (R17). If she were not a professional prostitute she was at least a woman of easy virtue who sold the favors of her body for trifles. Immediately prior to the events which gave rise to the present charges she had engaged in sexual intercourse with a white American soldier, and there awaited about the entrance of her domicile at the above address other white American soldiers who desired to engage in sexual intercourse with her (R12-14, 16). At the conclusion of her act of intercourse with the white soldier above indicated she announced that she was "finished for the night" and would entertain no more patrons (R15). The white men evidently acquiesced in her wishes and some of them were about to

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depart through a rear door of the house (R14-16). Marcelle was in the act of locking the front door of the house when there was a noise and commotion and five, six or seven colored American soldiers knocked the door open and rushed into the hallway of the house. One of them shouted, "let me at her I got a gun" (R12, 15,18). Another said, "Madame Zig-Zig". The woman replied, "no, no" and attempted to leave the house. The negroes grabbed her and forced her into an empty store room which is entered from the hall. They took from her a lamp which she held in her hand. Then they threw her to the floor on a pile of straw. She resisted and called for help, but each time she shouted one of the assailants cried "shut up". She was struck with an unknown object and was kicked in the head. In the struggle one of her shoes was removed. A negro held one arm, a companion held the other arm and others pulled her legs apart. Her feet were held by another. While in this position one of the soldiers inserted his penis in her genitals. He made entrance "only a few centimeters". He was pushed aside by another who effected full penetration. During this process her mouth was first covered by a hand to prevent her screaming, but finally a colored soldier placed his penis in it (R18-19,22). The struggle continued for about an hour (R19) during which time two men had normal intercourse with her and two committed sodomy per os upon her (R22).

Two of the white soldiers (Page and Maxwell) who were present when the negroes entered the house, escaped therefrom and sought the military police. They finally contacted a United States Navy shore patrol which went to Marcelle's house (R13,15,27,29,32). As the members of the patrol approached the house at approximately 2230 hours they heard a woman scream. The white soldiers (Page and Maxwell) directed the patrol to the house (R13,15,27,29,33). It was necessary for the patrol to force open the front door as it was held from within (R27). Upon gaining entrance one of the patrolmen (Ship's Mate Robert W. Allison) entered the store room. He discovered Marcelle on the floor "rolling, screaming and kicking, and pleading". One negro knelt beside her and the accused Sweet was on top of her. "She was kicking and pushing and trying to put him off". She lay on her back on the pile of straw (R29,30).

There were five colored men in the room with the woman (R29-30). Allison ordered them outside where they were taken into custody by another member of the patrol (Seaman, First Class, Henry Nadel). He placed them in a line against a wall, ordered them to hold up their hands (R27) and held them under guard until Allison appeared and searched them for knives (R27,30,32). Nadel went for Criminal Investigation Department agents (R27,32). When the agents arrived the five colored soldiers were taken to shore patrol headquarters (R27,33). Straw was taken from the persons of the four accused and Marcelle (R28-30; Pros. Exs. A,B,C,D,E).

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Allison saw marks on the woman's face and wrists where she had been beaten (R30). Ship's Mate Taylor Owen (R31), another member of the shore patrol, described Marcelle's condition as he observed her after the five men had been taken into custody:

> "She was leaning against the doorjamb and sobbing and groaning at the same time holding one hand to her stomach and one on her head. She was in a dazed condition, hysterical. I walked in to her and tried to talk to her in what little French I know. She grabbed hold of me and was telling me what had happened (R32). * * * Her lips were swollen and one eye was slightly discolored. There were abraisions [sic] about her head. One shoe was missing from her foot. When I tried to walk her outside she was limping and I saw she was minus a shoe. I took her back inside and found the shoe behind the door about ten feet from the place she pointed out as being attacked" (R33).

Marcelle received a physical examination on 12 September 1944 at 298th General Hospital by Major P. Crabtree, Medical Corps. He testified that

> "'the examination revealed that the patient had multiple contusions, by contusions meaning minor bruises or black and blue spots about her face, both thighs, both arms in the region of her wrists and both buttocks. The largest of these was three inches in diameter. A black eye, the lids were not shut, she could open her eye - as if some blunt instrument had struck her in that region. An examination of the remainder of her body showed nothing unusual'" (R26).

4. After their rights were explained to them, each of the accused elected to remain silent and no evidence was introduced by the defense (R34).

5. As is usual in cases of this pattern wherein colored American soldiers are accused of rape upon a French female citizen, the primary issue before the court was the identification of the accused as the assailants. Such issue was solely one of fact. It was the duty of the prosecution to prove beyond reasonable doubt that it was the accused who attacked Marcelle at the time and place alleged. The evidence in the instant case leaves no doubt on that issue. While the victim's testimony is characterized with uncertainty as to which of the accused engaged in

normal intercourse with her and which of them practiced sodomy per os upon her (R23-25), she did testify positively that Sweet and Powell had either natural or unnatural connections with her (R25) and that the four accused were in the room with her and participated in the attack upon her (R19,24). Her testimony was equally positive that two of them had vaginal intercourse with her (R18,23) and two committed sodomy per os (R18-19,23). While her testimony on this issue is not all to be desired it is substantial that two of the four men had normal sexual intercourse with her.

The testimony of the members of the Navy shore patrol (Allison, Nadel and Owen) is clear beyond all peradventure that the four accused were taken from Marcelle's house by them (R27,28,30-33). At the time of disorder, Allison saw Sweet on top of the victim (R30). He saw another of accused as he knelt by the woman and the two remaining accused in the room (R30-31). There were five colored men taken in custody. The four accused were taken in the act; the fifth man was arrested but evidently escaped after he was taken to patrol headquarters (R30,33). The four accused however were firmly held by the Navy patrol separate and apart from other persons and are positively identified by the patrolmen as the men taken from Marcelle's domicile (R28,31,33). Particles of straw taken from their persons and from the person of their victim at patrol headquarters is incriminating evidence of the complicity of accused.

The evidence substantially supports the findings of the court that accused were Marcelle's assailants at the time and place alleged in the specifications and fully meets the tests prescribed by the Board of Review on the issue of identification. The findings are final and conclusive upon appellate review (CM 3200, Price, and authorities therein cited; CM ETO 4292, Hendricks; CM ETO 3837, Bernard Smith).

6. All of the elements of the crime of housebreaking, alleged in Charge II and its Specification (against each accused) was proved by substantial evidence (MCM, 1928, par.149d, p.168; CM ETO 78, Watts; CM ETO 3754, Gillenwaters).

7. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not. * * * Force and want of consent are indispensible in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165).

Marcelle's testimony that two of the accused effected penetration of her genitals stands undenied. Notwithstanding the difficulties attending the procurement of the woman's evidence through an interpreter and

uncertainties in other aspects of her testimony, her repeated assertion that penetration of her vaginal orifice by the male organs of two of the negroes was effected, remains unqualified and unshaken. It must be accepted as an established fact in the case.

The pertinent question is whether the carnal knowledge was obtained by force and without Marcelle's consent. The record of trial definitely carries the implication that Marcelle was a woman of easy virtue, if not a professional prostitute. The testimony of Page and Maxwell supports such inference notwithstanding the woman's denials of her meretricious relations with Page. However under the evidence in the case her standard of personal morals is irrelevant and immaterial. At least two of the accused engaged her sexually as a result of force and violence. There can be no doubt of this fact. Her own testimony is clear and positive on this issue. She described specifically the force, restraint and violence practiced upon her by the assailants in their efforts to engage her sexually. She was held on the pile of straw by four and probably five of them while normal sexual connections were made with her by two of the men. In addition two others practiced sodomy per os upon her. Her testimony was corroborated not only by evidence of the physical injuries sustained by her in her resistance, but also by Allison who was an actual eye witness to part of the maltreatment accorded her by the accused. In addition Owen saw her immediately after her rescue by the shore patrol and his description of her condition belies any implication that she was a willing or cooperative party to the orgy. A prostitute has the right to preserve the sanctity of her person when she elects. In this instance the evidence is clear that she not only made that election, but resisted vigorously the attempts by the accused to violate it. The evidence substantially and without contradiction proves all of the elements of the crime of rape (CM ETO 3837, Bernard Smith; CM ETO 4608, Murray, and authorities therein cited; CM ETO 4444, Hudson et al; CM ETO 3709, Martin; CM ETO 3375, Tarpley, and authorities therein cited).

The evidence is also clear and positive that each and all of the accused (with probably an unidentified fifth man) were engaged in the common and joint enterprise of securing sexual gratification on the body of Marcelle. Accused are identified without equivocation or qualification as being active participants in the assault upon her which included her actual physical restraint upon the straw pile while the accused were engaged in their brutal, animalistic and savage endeavor to satisfy their lustful desires. While the evidence does not establish with positiveness or clarity the identification of the two negroes who raped Marcelle, it does beyond reasonable doubt prove that she was raped by at least two of her joint assailants. Each accused is charged with raping Marcelle "in conjunction" with the three other named accused (Cf: CM ETO 882, Biondi and White, Bull. JAG, Vol. III, No.2, Feb.1944, sec.428(4a), pp.59-61). The Charge and Specification

against each accused is identical except for transposition of names (Charge I and Specification).

The distinction between principals and aiders and abetters has been abolished by Federal statute and an aider and abetter may be convicted as a principal (sec.332, Federal Criminal Code, 18 USCA 550; 35 Stat.1152) and the distinction is not recognized in the administration of military justice. All are principals (Winthrop's Military Law and Precedents - Reprint p.108).

> "Under sec.332 of the Federal Criminal Code, above quoted, the acts of the principal became the acts of the aider and abetter and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (DePreta v. United States, 270 Fed. 73; Conelli v. United States 259 Fed. 791; Kelly v. United States, 258 Fed. 392, certiorari denied 249 U.S. 616, 63 L.Ed. 803). Premised on the above stated doctrine is the established and well recognized rule that an accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse (52 CJ, sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl. 7; People v. Zinn, 6 Cal. App. (2nd) 395, 44 Pac. (2nd) 408; People v. Rieto, 14 Cal. App. (2nd) 707, 58 Pac. (2nd) 945; People v. Durand -- Cal. App. (2nd) --, 134 Pac. (2nd) 305; CM NATO 385 Speed)" (CM ETO 3740, Sanders et al).

Under this principle of law it is immaterial who of the four accused actually engaged in sexual intercourse with Marcelle as long as the proof is certain that one or more of them raped the woman. As has been demonstrated, this crucial factum of proof was shown beyond a reasonable doubt. All of the accused were therefore guilty of the detestable crime of rape (CM ETO 4444, Hudson et al, and authorities therein cited; CM ETO 3740, Sanders et al, and authorities therein cited).

8. The record of trial indicates that the accused did not object to being tried together, but it also shows that they did not affirmatively consent to such trial. However, the right of each accused to a separate peremptory challenge was particularly recognized and preserved (R5,6). There were no motions for severance of the trial. The accused might with legal propriety have been charged jointly with the rape of Madame Galy instead of severally and separately. Under such joint charge the granting of severance of trials would have been for the decision of the

court in the exercise of its sound judicial discretion and in the absence of proof of abuse of that discretion its decision would not be disturbed on appellate review. Because of this situation the Board of Review concludes that no prejudice to the substantial rights of the accused accrued because they were tried together (CM ETO 3147, Gayles et al; CM ETO 3740, Sanders et al).

9. The charge sheets show the following concerning the age and service of accused:

Powell is 24 years, four months of age. He was inducted 30 October 1943, at Chicago, Illinois.

Clay is 22 years, ten months of age. He was inducted 23 November 1943, at Detroit, Michigan.

Sweet is 27 years, nine months of age. He was inducted 15 July 1943, at Camp Blanding, Florida.

Ketchum is 22 years of age. He enlisted in the Regular Army of the United States 16 August 1940 at Fort Sam Houston, Texas.

Powell, Clay and Sweet were inducted to serve for the duration of the war plus six months. Ketchum's service period is governed by the Service Extension Act of 1941. None of accused had prior service.

10. The court was legally constituted and had jurisdiction of each accused and the offenses. No errors injuriously affecting the substantial rights of any of the 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.

11. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and Sections 278,330 Federal Criminal Code (18 USCA 457,567). Inasmuch as the sentence included confinement for more than 10 years, i.e. life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania is proper (Cir.229,WD, 8 June 1944, sec.II, pars. 1b(4) and 3b).

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 DEC 1944 TO: Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U. S. Army.

1. In the case of Privates EDWARD POWELL (36788337) and ANDREW CLAY, JR. (36891523), both of 656th Port Company, and Privates EBBIE SWEET, JR. (34790277) and J. B. KETCHUM (18011823), both of 657th Port Company and all of 483rd Port Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient as to each accused, to support the findings of guilty and the sentence which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4589. For convenience of reference please place the number in brackets at the end of the orders: (CM ETO 4589).

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

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BOARD OF REVIEW NO. 2

CM ETO 4606

24 NOV 1944

U N I T E D S T A T E S	IX TROOP CARRIER COMMAND
v.	Trial by GCM, convened at United States Army Air Force Station 484, 22 September 1944. Sentence: To be dismissed the service.
Second Lieutenant RALPH C. W. GECKLER (0-687689), 49th Troop Carrier Squadron, 313th Troop Carrier Group.	

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 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: In that Second Lieutenant Ralph C. W. Geckler, 49th Troop Carrier Squadron, 313th Troop Carrier Group, did, at Nottingham, Nottinghamshire County, England, on or about 12 August, 1944, with intent to do her bodily harm, commit an assault upon Miss Kathleen Bentley, by willfully and feloniously striking the said Miss Kathleen Bentley in the face with his fists, and kicking the said Miss Kathleen Bentley in the back with his feet.

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

Specification: In that * * * was, at Nottingham, Nottinghamshire County, England, on or about 12 August, 1944, in a public place, to wit, Corporation Oaks, disorderly while in uniform.

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. The reviewing authority, the Commanding General, IX Troop Carrier Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, "though grossly inadequate punishment for the vicious, brutal assault of which accused was found guilty", and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution showed: By Miss Kathleen Bentley of Nottingham, that she "came in contact with", met accused at about 8:30 p.m. on the evening of "12" August 1944, in a public street, in Nottingham. Accused, in the military service of the United States, was accompanied by "another Lieutenant and an ATS girl". Accused persuaded Miss Bentley to join them for a meal at the Golden Dawn Cafe. The other officer and his companion were the first to leave. Accused said he would take Miss Bentley home. "He appeared to be all right" until they reached a park, Corporation Oaks. That was about 11:00 p.m. She went in the park with him. They were sitting on one of the benches and after "some time", accused took hold of her handbag, looked into it, took all the things out, threw it on the ground and said she had stolen 25 pounds from him. He then started to strike her. "He kept hitting" her and kicking her and pulled some of her hair out. The girl made outcry. Two paratroopers came along and asked accused if he was a paratrooper too. Accused told them the girl had stolen 25 pounds from him and they refused to interfere. Finally Miss Bentley "got away from him", ran out of the park onto the road, and called at the first house for water. "They rang the police up" and then she was taken to the hospital where she remained one week. Miss Bentley said she did not take 25 pounds from accused. She described her injuries. She had bruises on her arms and face, her eyes were all bloodshot and she bled from the mouth and nose. In addition, some of her hair was pulled out (R4-9).

Detective Officer John Cooper, of the Nottingham City Police Force, testified that at about 5:30 a.m., 12 August (undoubtedly the morning following the events related by Miss Bentley), accused came to him at his station when he was on duty and complained that he had 22 pounds stolen from him and that he suspected a girl in whose "company" he had been. Accused then handed him an "identity card", and a "clothing ration book" (Pros. Exs. 2,3), which belonged to Miss Bentley (R8,13,14). Accused

said he had taken them from the girl in order to trace her. Officer Cooper continued:

> "He handed those to me and said, 'I took these from the girl. I think they might help in tracing her.' I then received a telephone call from an associate officer who said that the girl had been taken to the hospital suffering from facial injuries and contusion. I checked up and found that the name and address on the identity card was related to the person who had been taken to the hospital. I saw that accused's hands were bloodstained and badly bruised. I examined the accused's clothing and found that he had spot of blood on his trousers and there was a cut in the right knee of his trousers. I then cautioned him and I told him that he needn't say anything unless he wanted to and that whatever he said would be taken down in writing and given in evidence. And I said to him that at 4:00 o'clock a.m. that day a girl had been taken to the General Hospital suffering from facial injuries and contusion as a result of being attacked by an American soldier and that I suspected he was the soldier and that in fact the books he had handed to me related to that person. He replied, 'I had quite a lot to drink last night. I am not clear on what happened. I remember accusing the girl of stealing my wallet, but I don't remember assaulting her.' The accused then handed me a compact, a cigarette case and the powder bag and said, 'I took these from the girl also'" (R14,15).

The compact, cigarette case and powder bag also belonged to Miss Bentley (R7-9,15; Pros. Exs. 1,5,6). Accused told Officer Cooper that he had met the girl "and had walked along to some place on Mansfield Road. He didn't know exactly where it was or where he had been. And they had been in some public park but he had no idea where it was" (R15). Later the same morning, at six o'clock, Miss Bentley's handbag was found near an overturned seat at the reservoir in Corporation Oaks park by Police Constable Hopper (R8,16,17; Pros. Ex. 4). Near the seat he also found a "tuft of hair", and accused's silver identity bracelet which bore his name inscribed thereon, which he returned to accused at the latter's request (R17,18).

Around midnight on 11 or 12 August, or early in the morning of 12 August (R22), Miss Bentley was examined by a physician at the Nottingham General Hospital (R20). This examination disclosed to the physician massive lacerations of the face, malar regions (cheek bones). The eyes

were completely closed. In addition, the forehead, the whole scalp and the temporal regions were generally swollen, "one large bruise in fact". Some hair had been torn from the scalp. The forehead and face were abraised. There had been nosebleed. And there were bruises of both elbows and wrists, the right upper region of the abdomen, in the region at the border of the thighs and abdomen, of both hips, and of the external aspect of the thighs and knees. "There was no evidence of violence in the genital region. The underclothing was very soiled" (unexplained further than that "the bowels had been opened" during the occurrence) "but in position. There were no signs of fracture" (R19-21).

4. The defense recalled Constable Hopper as its witness (R22). He was on duty at the park on the night of 11 or 12 August. He was near the reservoir at midnight. There were about 20 couples, a number of couples that particular night, between 11 and 12 o'clock, present in region of the reservoir where he later found Miss Bentley's handbag. These couples were "sufficiently close to the region of the reservoir to have heard any outcry made by a young lady in that region". The report concerning Miss Bentley was telephoned in to Guildhall at 3:50 a.m. This officer testified that he "cleared out" of the park all persons who were there when he made his 12 o'clock, midnight round, and that at that hour "there wasn't anybody at the place where" he (subsequently) found the handbag (R22-24). The examining physician was also recalled as a defense witness. He stated that some of the injuries to Miss Bentley, disclosed by his examination, could have been caused "in other fashions", by means other than by an assault delivered on her person, but he "couldn't positively state" (R26). The defense showed, also, during its cross-examination of the prosecutrix and the hospital physician, that the injuries to Miss Bentley were not permanent, left no scars, and that in their treatment no stitches were taken or clamps employed (R12,22).

Accused, advised of his rights as a witness on his own behalf, elected to remain silent.

5. The evidence thus adduced reveals an assault by accused on Miss Bentley at the time and place and as alleged in the Specification of Charge I. He used not only his fists on the woman but also his feet which undoubtedly were shod with shoes capable of inflicting serious physical injury. The Specification alleges that he kicked her in the back. The physical examination revealed no injuries in the back, but did disclose injuries to the thighs. Miss Bentley testified that accused kicked her. The court was justified, by this evidence, in finding as it presumably did, that accused kicked the woman in the thighs. This variance between proof and allegation was immaterial, as accused was not misled thereby. The force, violence, and means employed in the attack, together with the nature and character of the injuries sustained by Miss Bentley make it clear that the assault was committed with intent to do her bodily harm (Underhill's Criminal Evidence, 4th Ed., sec. 596, p. 1168). The evidence does not show that accused was intoxicated or other than

described by Miss Bentley "all right up until the attack". Such an assault is a violation of Article of War 93, the Article of War under which this Specification was laid (MCM, 1928, par. 149m, p. 180).

Charge II is laid under Article of War 95. The Specification alleges that accused was disorderly in public and in uniform at a time and place similar to that alleged in the Specification of Charge I. The validity of Charge II rests upon the conduct of accused as shown by his attack on Miss Bentley. This occurred in a public place and while accused was in uniform, which latter fact is susceptible of presumption by the fact that he was recognized as a soldier by two paratroopers to whom accused was a stranger (Dig.Ops. JAG, 1912-40, sec. 453(11), p. 342, CM 121825 (1918)). The disorder consisted of the attack upon Miss Bentley. Such an attack, upon a female, was conspicuously disorderly. It was unbecoming an officer and a gentleman. It is difficult to imagine any justification, other than self-defense, for such an attack and the infliction of such injuries. If accused was actually the victim of larceny by this woman, he had her identity card, and proper redress was available in orderly fashion. The conduct of accused was clearly violative of Article of War 95 (Bull. JAG, Vol. I, No. 6, Nov. 1942, sec. 453(10), p. 327, CM 226357; Ibid., Vol. III, No. 7, July 1944, sec. 453(10), p. 288, CM 250293; Ibid., Vol. II, No. 1, Jan. 1943, sec. 453(7a), p. 13, CM 227747, Wescott). It was not improper to charge the same offense under two Articles of War when one is based on the civil aspect of the offense and the other its military aspect (Bull. JAG Vol. III, No. 1, Jan. 1944, sec. 428(5), CM 241597, Fahy).

6. Accused is now 21 years of age. He was in the Enlisted Reserve Corps 13 May 1942 to 29 July 1943; and was appointed Second Lieutenant in the Army of the United States 29 July 1943 at Frederick, Oklahoma. Extended active duty as of same date.

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. Dismissal is mandatory on conviction of a violation of Article of War 95, and authorized on conviction of a violation of Article of War 93.

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. 24 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RALPH C. W. GECKLER (O-687689), 49th Troop Carrier Squadron, 313th Troop Carrier Group, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4606. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4606).

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

(Sentence ordered executed. GCMO 128, ETO, 12 Dec 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 4607

29 NOV 1944

UNITED STATES	)	V CORPS
	)	
v.	)	Trial by GCM, convened near St. Vith, Belgium, 19 October 1944. Sentence: Dismissal.
Captain LEROY B. GARDNER (O-382850), 109th Infantry, 28th Infantry Division.	)	

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

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

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

Specification: In that Captain LeRoy B. Gardner, 109th Infantry, was, in the vicinity of Ambleve, Belgium, on or about 10 October 1944, grossly drunk and conspicuously disorderly in the Rear Echelon Command Post of Headquarters V Corps, in the presence of military personnel, both officers and enlisted men, and in the presence of female American Red Cross personnel.

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

Specification: In that * * * did, in the vicinity of Ambleve, Belgium, on or about 10 October 1944, commit an assault and battery upon Private First Class Richard A. Heaton, Headquarters Company, First United States Army, by striking him about the nose with his fist.

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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. The reviewing authority, the Commanding General, V Corps, approved only so much of the finding of guilty of Charge I as involves a finding of guilty, in violation of Article of War 96, approved the sentence with the recommendation that higher authority commute the same to a forfeiture of $75.00 per month for six months, and forwarded the record of trial for action pursuant to Articles of War 48 and 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing execution thereof pursuant to Article of War 50½.

3. Evidence introduced bythe prosecution shows that accused is a Captain, 109th Infantry, United States Army. On 10 October 1944 he was in the vicinity of Ambleve, Belgium, at the Rear Echelon Command Post of Headquarters V Corps (R6). Between 1600 and 1700 hours on that date, at that place, accused and Captain William M. Twitty, 28th Quartermaster Company, consumed between them, except for one drink, a full bottle of Scotch (R38,40,41). These two officers at 1700 hours, entered an American Red Cross Clubmobile, named "Cowboy", which was parked at one corner of the command post (R6). Clubmobiles are vehicles where doughnuts and coffee are made and distributed to the troops. The floor space inside was about fifteen feet long and four feet in width (R7,10,16). In this particular vehicle, at the time, were Captain Abraham I. Doktersky, Medical Corps, Headquarters Company, V Corps, and "two American Red Cross girls", Miss Nellie Barland and Miss Elizabeth Sillcocks (R6,9,10,18,19). Accused, on entering, asked for doughnuts and coffee (R7,10). The clubmobile was crowded (R11). Accused said "Who the Hell's pushing me", turned and asked Miss Sillcocks who the hell she was pushing, putting a hand on her shoulder. Captain Doktersky testified that at that point he noticed accused "was drunk". Accused on being requested by Doktersky to modify his voice stated that "nobody was going to tell him what to do, he had been on the front line and had seen a lot of fighting and so on". Miss Barland, who had an engagement for supper with Captain Doktersky, asked him to leave with her. The two departed (R7,11). Miss Barland testified that she walked by accused once and that "you could smell liquor definitely" on his breath (R11). At this time Private First Class Richard A. Heaton on detached service with the American Red Cross attempted to enter the clubmobile car to service it. Accused, standing in the doorway, stopped him and said "Where the hell are you going?" According to Heaton, he went on in and accused followed and asked if he wanted to fight (R12,14). Heaton described accused as "intoxicated, quite drunk" at that time. He listened and said nothing. He testified:

> "The Captain came closer to me. His breath smelt so, I held my hand up like this (indicating right forearm held hanging in front of chin palm outward)- more or less holding back from his face. I didn't

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like the smell or oder. He told me to take my hand down, or he would take a poke at me. I didn't think he would. All of a sudden a right came up to my nose. I grabbed the person to protect myself. I didn't want to fight. There was no place to fight in the clubmobile. We stumbled over a coffee urn on the floor. I didn't want to fight and tried to get out of the clubmobile. Then we were separated by two other people" (R14).

Miss Sillcocks saw blood on Heaton's nose (R20). During and after this altercation, accused was using profane and obscene language (R15,24,27). Two military police came and one assisted Captain Twitty in escorting accused away (R24). Accused was taken to the aid station. He staggered, was "glassy-eyed", and smelled of liquor (R24,26,28). Captain Doktersky saw accused again at about 1745 hours at the aid station, at which time the witness observed that accused had a band-aid on his left eyebrow. This he removed and found a small abrasion one-half inch long over his left eye. A "Colonel Patterson" came in the tent. Accused stood at attention with the rest "although he swayed back and forth". Colonel Patterson went out and called Captain Doktersky out after him. The two talked, Captain Doktersky then returned to the tent and accused "just passed out from alcoholic stupor" (R7,8).

Accused voluntarily signed a written statement on 11 October 1944, in which he said that he had started drinking at about 1600 hours on 10 October and had underestimated his capacity since "he had not had anything to drink for a long time". He said further that at 1700 hours he and Captain Twitty, with whom he had been drinking, "went to the Red Cross Clubmobile to have some coffee and doughnuts" but that before he reached the Clubmobile Area he "was completely unaware" of what he was doing (R28,29; Pros.Ex.A).

4. After being advised of his rights, accused testified on his own behalf (R48-50). He told, first, of having been in the military service since 10 July 1941. He then described his past drinking habits. He said that he drank occasionally, was more or less a "social drinker" taking more than one or two drinks only infrequently, and had never gotten into trouble through drink prior to the occasion in question. He said that he and Captain Twitty began drinking out of a bottle about 1600 hours, expecting to have a few drinks before supper, but that they "did continue for no good reason". But for one drink, the two consumed an entire bottle (R50). They decided to go for coffee and doughnuts and it was while on their way to the clubmobile that the alcohol hit him and he remembered nothing thereafter. Accused was asked about "any emotional strain" he might have been under for the few days preceding 10 October, and replied

"I do admit the relief of my command more or less was a blow to me" (R50).

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Captain Twitty, a defense witness, substantiated accused's account of the amount of liquor consumed by the two. His testimony tended to show that accused was not the aggressor and had not hit the enlisted man as alleged in the Specification of Charge II. He denied the occurrence of any unusual incidents thereafter (R38-43). Captain Dektersky was recalled as a witness for the defense and testified as an expert on the effect that alcohol has on the brain. He described accused's condition at the time in question as pathological alcoholic intoxication. In such condition a man who is ordinarily not aggressive and who later is charged with being not aggressive enough in combat would actually become aggressive and "Nobody would be able to tell him what to do" (R43-45). Miss Gertrude Bradurn, an American Red Cross Clubmobile worker, testified she knew Private Heaton, the enlisted man whom accused is alleged to have struck. She said that Heaton is a hard worker and has a very good character. She characterized him further as "temperamental - easily at times to antagonize", likable but not "exactly an easy person to get along with all the time" (R46,47). Lieutenant Colonel Carl L. Peterson, Headquarters 112th Infantry, Lieutenant Colonel Harry S. Messec, Headquarters 28th Infantry Division, Lieutenant Colonel Benjamin Trapani, 28th Division, and two other officers were called as character witnesses for accused. They testified in high terms of his general character, demeanor, gentlemanliness, and ability as a combat officer. They had all had occasion to know him and observe his work and his personality for some time (R30-39).

5. The evidence thus presented, shows without question that accused was drunk and disorderly in violation of Article of War 96. Captain Twitty's testimony must be largely discounted. Accused was admittedly drunk; and the testimony of Captain Dektorsky and the two Red Cross workers as to the conduct and the profane and obscene language of accused in the Clubmobile "Cowboy" are sufficient to support the allegation (Specification, Charge I) that he was disorderly. The assault and battery on Private First Class Heaton was a disorder (Dig.Ops. JAG, 1912-1940, sec. 453(11), p.343, CM 196426, Fleming, 2 B.R. 359). There can be no question that accused struck Private First Class Heaton, as alleged (Specification, Charge II). Heaton testified to this and others saw the two struggling together. Miss Sillcocks saw blood on Heaton's nose, which Heaton said accused had hit. Accused by his proven pugnacious attitude, if not by striking the first blow, was the aggressor in this conflict with Heaton. The blow was unjustified.

6. This drunkenness and disorder (Specification, Charge I) was prejudicial to good order and military discipline and was service discrediting, an offense in violation of Article of War 96, to which the reviewing authority reduced it (Dig.Ops. JAG, 1912-1940, sec.453(10), p.342, CM 195373, Beauchamp, 2 B.R. 229, CM 202846, Shirley, 6 B.R. 337).

To strike Heaton with his fist was an assault and battery, in violation of Article of War 96, as alleged and charged (Specification,

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Charge II) (MCM, 1928, par.152c, p.189). An assault and battery laid under Article of War 96, as distinguished from an assault, in violation of Article of War 95, does not require proof of specific intent as an essential element of the offense. The voluntary drunken condition of accused at the time was not exculpatory (MCM, 1928, par.126, 149l, pp.135, 177).

7. The charge sheet shows that accused is 29 years old. He was commissioned second lieutenant, Officers Reserve Corps, 27 July 1939; entered active duty 10 July 1941; promoted to first lieutenant 8 July 1942; assigned to 109th Infantry 3 August 1942; promoted to Captain 30 July 1943.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed. Dismissal, in the case of an officer, is authorized as punishment for 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. 29 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain LEROY B. GARDNER (O-382850), 109th Infantry, 28th Infantry Division, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4607. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4607).

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

(Sentence ordered executed. GCMO 131, ETO, 13 Dec 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 4608

28 NOV 1944

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates CLARENCE R. MURRAY (33243889), and NATHANIEL MILES (34469464), both of 583rd Ordnance Ammunition Company	Trial by GCM, convened at Rennes, Brittany, France, 20, 21 September 1944. Sentences: MURRAY: To be hanged by the neck until dead. MILES: Disapproved.

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

1. The record of trial in the case of the soldier named above (Murray) 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 Clarence R. Murray, 583rd Ordnance Ammunition Company, did, at or near Laignelet, France, on or about 11 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Andree Ollivier, a French woman.

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 its Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for three hours, in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer,

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

3. Private Nathaniel Miles (34469464), 583rd Ordnance Ammunition Company, was charged with the crime of rape alleged to have been committed by him on 11 August 1944 upon the person of Andree Ollivier, the young French woman who was the alleged victim in the instant case. Miles and the present accused Murray were, with their respective consents, tried together. By unanimous vote the court found Miles guilty of the offense charged and sentenced him to be hanged by the neck until dead. The rape of the young woman by a colored soldier in addition to accused Murray was proved beyond reasonable doubt but the evidence failed to identify Miles as the rapist. The reviewing authority therefore disapproved his sentence. The acts of intercourse involved in the Miles case were different and separate from those which formed the basis of the Charge in the instant case.

4. The facts as proved by substantial competent evidence presented by the prosecution are as follows:

Andree Ollivier (hereinafter designated Andree), whose address was 36 Rue Rene LePey, Fougeres, France, was on 11 August 1944 of the age of 22 years and unmarried (R7,12a,14). She was an orphan and was employed as a shop girl (R15,26). On that date she and her elderly grandmother were living as war refugees at the farm, La Buliere, located about two kilometers from Laignelet, Department of Ille et Villaine, France (R7, 8,14-15). Fougeres had been recently bombarded. There was a total of 17 refugees sheltered at the farm on that date (R14). The farm house consisted of a principal dwelling house to which was attached a shed. There was no entrance from the shed into the house. Entrance to the shed was gained through a single exterior door which could not be locked or barred. However, there was a latch on the door which could be manipulated from either side so as to gain ingress or egress (R14-15,18).

Seven of the refugees on the farm lived and slept in the shed (R18). This group consisted of persons who were acquainted with each other and lived on the same street in Fougeres (R15) and were as follows: Andree, the grandmother of Andree, Monsieur Jean La Fort and his wife, Therese, Madame Therest La Fort, daughter-in-law of the La Forts, and her young daughter, and Mademoiselle Simone Angubault, a 19 year old girl (R34, 37,40,41). The remainder of the refugees lived and slept in the farm house (R14). Monsieur La Fort was 64 years of age (R34).

On the afternoon of 11 August 1944 the accused and Private Nathaniel Miles, mentioned in paragraph 3, supra, both colored soldiers, appeared at the farm, La Buliere, at about 2 pm official French time. They entered the farm house without invitation or preliminary request and seated themselves. They demanded and were served cider diluted with water. Andree saw them at that time but went into the shed to dress as she and a lady friend were about to visit Fougeres. When she had completed her toilet she returned to the house in order to meet her companion. The colored soldiers were then in the house. Accused showed Andree photographs of a woman and child. The negroes were friendly and conducted themselves in an orderly manner. Andree and her friend left while accused and Miles were yet in the house. The two soldiers departed after visiting about 30 minutes (R16,17,38,39,42,45).

About 8 pm official French time (6 pm sun time), accused appeared at the door of the farm house where he remained for about five minutes. He did not talk to anyone (R42,45,46). At 11 pm official French time (9 pm sun time), accused was seen passing through the court yard of the farm house. He talked to Monsieur Angubault (R42,46,47).

Andree returned from Fougeres at 10 pm official French time (8 pm sun time) and an hour later, she went into the farm house to bid the people sleeping therein good night. Accused was at the door and solicited Andree for cider to which solicitations she replied, "no, no cider". He was accompanied by another "dark soldier" but Andree could not identify this companion (R17,18,42).

Andree retired to the shed with the other six persons named above, and prepared for bed. She did not undress herself.

> "From the bombardment I did not undress myself. I went to bed all dressed and over my dress I put a light blouse" (R19).

After the refugees in the shed were abed there was a violent pounding on the door of the farm house. This door was locked. Meeting with no response the persons who were seeking admission to the farm house turned their attention to the shed door, pounded loudly upon it and cried, "Here Boche". The inmates of the shed replied, "Here French". The intruders then struck the door with their rifles and one of the planks of the door was broken. Thereupon Monsieur La Fort, the only man in the shed, opened the door (R9,18,35,36,39,46). Two colored American soldiers, one of whom was accused, stood at the entrance. They struck matches and looked about. Monsieur La Fort spread his arms and attempted to bar their entrance. Accused and his companion did not enter the shed but remained by the door. In the meantime the women occupants (except Andree) were able to escape

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from the shed into the house. Andree was the last to leave. One of the negroes grabbed both of her arms. She freed her right arm and grasped Monsieur La Fort by the shoulder. He stumbled and fell and this precipitated the young woman on to a manure pile. One negro held her arm; the other grabbed her hair. A fight ensued between Andree and the negroes. She shouted and called for help, but they overpowered her and carried her to an adjoining beet root field (R19, 36,39). In the field the assailants tore her slippers and under pants from her; hit her with their fists and attempted to stifle her cries by placing their hands on her mouth. Notwithstanding these acts of violence she was able to shout for help. In the melee, she was strangled. The proof of identity of accused as the rapist of Andree at the time and place alleged consists of the following evidence:

(a) He is identified as being present at the farm, La Buliere, on four occasions during the afternoon and evening of the crime.

Andree identified him in the court room as being one of the two negroes who intruded himself into the farm house at 2 pm official French time, and to whom cider was served. She described him as the "mulatto" (R14,16,17,22). Andree was corroborated in this testimony by Madame Therese La Fort (R38), Mademoiselle Simone Angubault (R41, 42) and by Mademoiselle Germain Angubault (R45).

Accused was next seen at the door of the farm house by the Angubault sisters at about 8 pm official French time where he remained for about five minutes (R42,45,46).

He made a third appearance and entered the farm house at 11 pm official French time when he was seen by Andree (R17,18), and at approximately the same hour he was seen in the court yard of the farm house by both of the Angubault girls (R42,46).

Approximately one half hour later accused in company with another negro - "the black man" - pounded at the shed door and demanded admission. At this stage of the episode, he is identified positively and without qualification by Andree (R22,24) and by Mademoiselle Simone Angubault (R42,43).

(b) Andree was equally positive that it was accused who engaged in the first act of sexual intercourse with her in the beet root field immediately after she had been taken from the shed (R20,21).

> "they closed my throat. I don't know with their hands or with their knees, but I nearly got strangled" (R19).

It was then that accused forced his penis into the girl's vagina and engaged in sexual intercourse with her (R19).

After the act of intercourse, the "blackest man", who was not accused, picked up the girl, carried her into an adjoining field and there forcibly engaged in intercourse with her on three separate occasions (R20). It was for these acts of rape that accused Miles was charged and convicted (R20). However, as above stated, this sentence was disapproved by the reviewing authority because of failure of proof of his identity. Andree returned to the farm, La Buliere, about two and one-half hourse after she had been forcibly taken away by accused. She knocked at the door of the farm house and was met by the farmer's wife. She was in a highly distraught condition. She was put to bed and she then related to the farmer's wife the events and circumstances of the attacks upon her (R25,36,40,43,47).

There was introduced in evidence without objection by defense (R32) an "affidavit", signed by accused, dated 13 August 1944 of which the following is the pertinent part:

> "Yesterday morning, 11 August 1944 I went out to the area with my section. I didn't feel like working so I fooled around. I went over to a house nearby and got some cider, drank that and then went to another house and got some more. I came back to the area and at 11:30 I went to a third house and got some more. I showed the people in this house my wifes and babies pictures. I then went back to the area where a Frenchman sold me some cognac. I went back to camp and stayed awhile and then came back out. I never left the area from 2000 that evening until 0800 the following morning. But I did go to the third house with Miles. Everett, Hynds, Ivory, and several others were with me at all times at that night" (Prox.Ex.2).

> "The first one is the mulatto. The mulatto is the first one" (R20).

(c) At 1330 hours 12 August 1944 an identification parade was held at the camp of the 583rd Ordnance Ammunition Company. The personnel of the company present consisting of approximately 100 colored soldiers marched by Andree in column of files. Accused and Miles were separated by eight or ten intervening soldiers. Andree stood by Lady Bertram, an English woman who acted as interpreter (R7, 28). Without hesitation she made a positive identification of accused. She spoke in French to Lady Bertram in making her identification. Accused excitedly replied:

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"What's she talking about. I didn't see her last night" (R29).

There had been no explanation to the soldiers of the purpose of the identification parade (R29).

With respect to this identification of accused on the occasion of the parade, Andree graphically testified on cross-examination by the defense counsel:

"They brought me to different camps with colored soldiers, and in the last camp I recognized-- I identified first of all the mulatto. They made them pass all before me. The mulatto I could pick out from the crowd. * * * As soon as the auto stopped at the camp I said to Mrs. Bertram, the interpreter, 'There is the mulatto. He is trying to hide himself behind his comrades'" (R24).

The defense counsel did not move to strike all or any part of Andree's answer (R24).

In the court room identification of accused by various witnesses, including Andree, he was interspersed among ten other colored soldiers and Miles, and in each instance the identification of accused was effected by the witness actually pointing to the accused who stood or sat in the group (Andree: R13,14,20,21; Madame La Fort: R38; Mademoiselle Simone Angubault, R41; Mademoiselle Germain Angubault, R45).

On the morning of 12 August 1944, Andree reported the attacks upon her to Monsieur Francois Leloutre, the Mayor of the township of Laignelet (R6,7). He escorted the girl to the American military camp and then proceeded to the farm, La Buliere, when in company with certain American Army officers and Andree he made an inspection(R7,8). In an adjoining beet root field he found a pair of slippers and lady's under pants - small and white but very soiled. The buttons had been torn loose and pieces of the material "clung to the buttons" (R8,9). Andree was present when the slippers and pants were discovered and she claimed them as her own (R11,22,25).

Upon stipulation of the trial judge advocate and defense counsel, it was agreed that if Captain Louis L. Gewertz, Medical Corps, were present, he would testify as follows:

"1. I have examined the person of Andree Ollivier and have made the following findings:

a. Ecchymosis beneath right eye.

b. Linear markings as of having been dragged upon buttocks, or perhaps finger nail scratches.

c. A vaginal examination, reveals bleeding and a laceration of anterior commissure of vaginal outlet. Since bleeding may be residue of recent menstrual period it cannot be used as guide of degree of trauma.

2. Microscopic examination of cervical secretion does not reveal presence of spermatazoa.

3. Conclusion: Forcible entry of vagina has occurred within the past approximately 24 to 48 hours.

4. The above examination was made at 1330, 12 August 1944 at the request of the Battalion Commander at the Battalion Aid Station, 65th Ordnance Battalion near Laignelet, France" (R33-34; Pros.Ex.3).

5. After his rights were explained to him, accused elected to remain silent, and submitted no evidence in defense (R77-78).

The record of trial contains evidence in defense but the same relates to the charge against Miles and is not relevant in consideration of the charge against accused (R51-76).

6. As a preliminary matter, consideration must be given to the admission of certain evidence at the instance of the law member and over the objection of the trial judge advocate and defense counsel.

In response to interrogations by the law member, Mademoiselle Germain Angubault testified that she conversed with Andree the following morning (12 August) and that

"She told me that she had been raped and that was all. I replied that it was a terrible thing. * * * She told me that it was the mulatto who we had seen during the daytime" (R48).

The following colloquy followed:

"Law Member: How many men did Miss Ollivier tell you raped her? One, two, three, four?

Defense: Excuse me, sir, all that is hearsay.

Law Member: It is to be used in corroboration. If you want to interpose an objection, you may.

Prosecution: For the sake of the record, the Trial Judge Advocate objects to that because we don't think it is proper" (R48-49).

Thereupon argument between the trial judge advocate and the law member ensued and following same, the law member announced:

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"Subject to objection from the Court I will deny your motion to strike from the testimony the evidence that I attempted to elicit from the witness for the following reasons:" (The Law Member then presented an argument to demonstrate that Andree's statements to Germain were part of the res gestae.) (R49).

The president of the court interjected:

"The ruling of the Law Member is the ruling of the Court".

A member of the court (Lieutenant Colonel Keller) objected to the ruling. The court then closed and upon being reopened the law member announced:

"Law Member: The Court closed to discuss an objection raised by a member of the Court, Lt. Col. Keller, concerning the admissibility of evidence characterized by the Trial Judge Advocate as hearsay, and after the Court was closed, in discussing the objection, the objection was overruled by a majority vote of the Court and this testimony is admitted into evidence for the purpose of corroborating the statements made by the prosecutrix concerning the alleged rape" (R49).

The law member pursued his interrogation of the witness thus:

"Law Member: Did Miss Ollivier tell you now many men had intercourse with her that preceding evening?
A. Two men.
Law Member: Did she describe the men to you?
A. Yes, she told me it was the mulatto which we saw at twelve o'clock, and a black one.
Law Member: Did she engage in any further description of the so-called black man?
A. She told me that as to size it was the one that came at twelve o'clock" (R50).

The above summary demonstrates that both the law member and the president of the court misunderstood the authorized practice in respect to rulings on objections to admission of evidence. The question raised on the objections of the prosecution and defense to the admission of Mademoiselle Germain's recital of the victim's statements to her on the

morning following the eposide was an "objection to the admissibility of evidence offered during the trial" (AW 31). It was the duty of the law member to rule upon same and his ruling was conclusive and binding upon the court by virtue of statutory mandate. The announcement of the president adopting the ruling as that of the court was wholly unnecessary. It was not open to objection by the court membership and the closing of the court for deliberation on the ruling and the vote of the court thereon added nothing to its legality. The ruling remained that of the law member (AW 31; MCM, 1928, par.51, pp.39,40).

The substance of the objections remains for consideration by the Board of Review upon appellate review. Several hours had intervened between the occurrence of the events and Andree's report of same to the witness. The complaint was not, therefore, part of the res gestae (CM ETO 709, Lakas). The witness' recital of the victim's complaint to her was admissible, however, for the purpose of corroborating the victim's testimony as to the rape (CM ETO 611, Porter; CM ETO 709, Lakas; CM ETO 3141, Whitfield).

7. The crime of rape under the 92nd Article of War had been defined and described as follows:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> The offense may be committed on a female of any age.
>
> Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> * * *
>
> It has been said of this offense that 'it is true that rape is a most detestable crime * * * but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent'" (MCM, 1928, par.148b, p.165).

(a) The evidence of the prosecution identifying the accused as the "mulatto" who engaged in sexual intercourse with Andree in the beet root field has been set forth in detail above. It stands unimpeached and uncontradicted. The circumstances that accused was present at the farm, La Buliere, on the afternoon of 11 August 1944 on three occasions prior to the assault upon the shed which terminated in the kidnapping of Andree, and that he actually saw and conversed with the

young woman on two of these occasions are highly incriminating facts which fully justify the inference that he was one of the negroes who returned the fourth time in pursuant of their lustful purpose. Andree's identification of accused, both at the identification parade on the day following the attack and at the trial, was positive and direct. The trial identification was made by her without doubt or hesitation. She selected accused from a group of eleven colored soldiers which included Miles. The evidence in support of the finding that accused was the negro who attacked the girl in the beet root field is substantial, complete and convincing (CM ETO 3200, Price; CM ETO 3740, Sanders, et al; and authorities therein cited).

(b) The evidence that penetration of the young woman's sexual organs was effected by accused's penis also stands uncontradicted. Her own testimony on the issue is corroborated by the medical examination by Captain Gewertz, Medical Corps (Pros.Ex.3). Substantial, competent and uncontradicted evidence proved this element of the crime (CM ETO 3375, Tarpley; CM ETO 3197, Colson and Brown).

(c) Accused and an unidentified colored soldier - "the black one" - forcibly kidnapped Andree near the hour of midnight and took her to an adjoining beet root field where accused had sexual intercourse with the girl. Her testimony is clear and positive and is corroborated by that of Monsieur and Madame La Fort and Mademoiselle Simone Angubault that she resisted her captors and was taken to the field against her protests and in spite of her resistance. The negroes were armed. The Angubault sisters assert that a shot was fired (R43,46). Arriving at the field the young woman offered further resistance.

> "I shouted and I cried for help. I had such a fight I don't know exactly what happened. They drew me into a field of beetroot. There they tore off my slippers and my pants. At that moment I wanted to shout and they hit me with their fist and they put their hand on my mouth to prevent me from crying, but notwithstanding I shouted. Then they closed my throat. I don't know with their hands or with their knees, but I nearly got strangled. Then the mulatto raped me. I am sure it was the mulatto who raped me" (R19).

This evidence of the conduct and attitude of the victim preceding the act of intercourse not only remains uncontradicted but is corroborated by the discovery on the morning of 12 August of the slippers and under pants - the latter in a torn condition - at the scene of the crime and by the evidence of the girl's resistance to her seizure and kidnapping by accused and "the black one" immediately prior to and during the process of forcing her into

the beet root field. The testimony of the victim was further corroborated by her complaint to Germain Angubault the following morning that she had been raped by the "mulatto" whom they had seen the previous day. This evidence is substantial and convincing that the act of intercourse was without Andree's consent, either actual or implied, and that it was achieved in spite of active and persistent measures taken by her "to frustrate the execution" of accused's design. The evidence is therefore irrefragable that the act of intercourse was obtained by accused through violence exerted by him upon Andree whereby her resistance was forcibly overcome. Proof of the detestable and heinous crime of rape is complete (CM ETO 1810, Hicks; CM ETO 2472, Blevins; CM ETO 3141, Whitfield; CM ETO 3197, Colson and Brown; CM ETO 3709, Martin, and authorities therein cited; CM ETO 3718, Steele).

8. The charge sheet shows that the accused is 27 years six months of age and was inducted 31 October 1942 at Harrisburg, Pennsylvania. 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 rape is death or life imprisonment (AW 92).

B. Franklin Pitts Judge Advocate

Edward Nisbet Jr. Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private CLARENCE R. MURRAY (33243889), 583rd Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 4608. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4608).

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.

(On reconsideration sentence commuted to dishonorable discharge, total forfeitures and confinement for life. Sentence as commuted ordered executed. GCMO 140, ETO, 6 May 1945)

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

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BOARD OF REVIEW NO. 1

9 DEC 1944

CM ETO 4616

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ALBERT A. MOLIER, (38378388), 3398th Quartermaster Truck Company.	Trial by GCM, convened at Rennes, Brittany, France, 7 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 61st Article of War.
Specification: In that Private Albert A.Molier, 3398th Quartermaster Truck Company, did, without proper leave, absent himself from his organization and station near Plouay, Morbihan, France, from about 1700 hours, 16 August 1944, to about 1900 hours, 16 August 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in confinement under an armed guard, in the 3398th Quartermaster Truck Company bivouac area, near Plouay, Morbihan, France, on or

about 16 August 1944, did, near Plouay, Morbihan, France, on or about 22 August 1944, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 92nd Article of War.
Specification: In that * * * did, at or near Kerduel, Morbihan, France, on or about 23 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Marie Yhuel.

CHARGE IV: Violation of the 96th Article of War.
Specification: In that * * * did, near Plouay, Morbihan, France, on or about 16 August 1944, wrongfully and willfully discharge a service carbine at or near his bivouac area.

He pleaded not guilty and all 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 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 Officer, Brittany Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, vacated so much of the findings of guilty of the Specification of Charge III and Charge III as involved findings of guilty of an offense by accused other than assault with intent to commit rape at the place and time and upon the person alleged, in violation of Article of War 93; "commuted" the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years; designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Competent, substantial evidence established accused's guilt of absence without leave at the time and place alleged in violation of the 61st Article of War; (Charge I and Specification); escape from confinement at the time and place alleged in violation of the 69th Article of War (Charge II and Specification) and wrongful discharge of firearm at the time and place alleged in violation of the 96th Article of War (Charge IV and Specification). The record is legally sufficient to support the findings of guilty of said offenses. No further discussion is required concerning the same.

4. The evidence is positive and substantial that at or near Kerduel, Morbihan, France, on 23 August 1944, the accused assaulted Marie Yhuel, a French female, age 61 years with the intent of

obtaining sexual intercourse with her without her consent. All of the elements of this offense were clearly established (CM ETO 4292, Hendricks; CM ETO 4056, Brown and authorities therein cited). Adequate and substantial evidence of penetration of the victim's genitals by accused's penis (Cf: CM ETO 3044, Mullaney; CM ETO 3375, Tarpley; CM ETO 3859, Watson and Wimberly) was lacking. The prosecution therefore failed to prove the element in this case which would have converted the assault with intent to commit rape into the offense, viz, rape.

5. The confirming authority was authorized to confirm a sentence of death imposed as punishment for the crime of rape committed in time of war (AW 48). The power to confirm the sentence of a court-martial includes:

> "The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm the evidence of record requires a finding of only the lesser degree of guilt" (AW 49, subpar (a)).

The crime of assault with intent to commit rape is a lesser included offense of the crime of rape (MCM 1928, par.148b, p.165). It therefore follows that the confirming authority in the instant case was authorized by Congress to vacate so much of the findings of guilty of the crime of rape as involved findings of guilty of an offense by accused other than an assault with intent to commit rape at the place and time and upon the person alleged in violation of the 93rd Article of War.

Death is not an authorized sentence for the crime of assault with intent to commit rape (AW 43; AW 93; MCM 1928, par.14, p.10, par. 103, p.92). The maximum punishment which may be imposed for said crime is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years (MCM 1928, par.104c, p.99).

Upon the vacation of the findings of accused's guilt of the crime of rape the sentence imposed by the court as approved by the reviewing authority as punishment for that offense was entirely nullified and ceased to exist. Pertinent is the statement by Winthrop:

> "The sentence should be consistant with the finding. By this it is meant that the sentence must not impose a punishment not authorized by the finding. Thus, where there are several charges, and the accused is acquitted upon some and convicted upon others, the sentence must adjudge only such punishments as are authorized for the offenses of which the accused is convicted;

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> otherwise it will be inconsistent with the finding. So, where the finding upon a capital charge is Not Guilty but Guilty of conduct to the prejudice of good order and military discipline, a sentence of death will be inconsistent with the finding and therefore illegal" (Winthrop's Military Law and Precedents - Reprint - p-403) (Underscoring supplied).

Consistent with the above principle it has been held, where upon revision the court revoked its findings and made new findings but did not pass sentence based upon the new findings, that

> "the sentence originally imposed is inoperative since it is based upon findings which were revoked" (CM 130296 (1919), Dig.Ops. JAG 1912-1940, Sec.395 (37) p.227).

Likewise it has been determined that where an accused is found guilty of two specifications, but is found not guilty of the charge a legal sentence cannot be imposed upon the findings (242.11, 15 Oct. 1919, Dig.Ops. JAG Sec.395 (44) pp.229,230).

Premised upon the principle advanced by Winthrop is the following provision from the Manual for Courts-Martial, 1928:

> "Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A.W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing" (MCM 1928, par.87b, p.74; Cf: CM 217172 Rosenbaum, 11 B.R.225).

Therefore, when the confirming authority carved from the approved findings of the court the lesser included offense of assault with intent to commit rape, the question arose as to how and by whom should the sentence, legally appropriate to the offense approved by him, be imposed. In so far as the Board of Review (sitting in the European Theater of Operations) can determine from its examination of available authorities the problem is one of first impression.

There was presented to the confirming authority, the question as to which of two alternatives he should adopt. Should he return the record of trial to the court with directions to reconsider the sentence and to impose one consistent with his approved findings (Cf: MCM 1928, par.83, p.69, sec.87b, p.75; CM NATO 544(1933), Bull, JAG Nov 1943, Vol.II, No. 11, Sec.450, pp.426-427) or should he determine and fix the sentence by

his own direct action? He adopted the second alternative. Under the provisions of par.(a), AW 49, above quoted, Congress endowed him with authority to confirm only so much of a finding of guilty as involves a finding of guilty of a lesser included offense, but it did not expressly include in this grant of authority the power to fix and determine the sentence appropriate to such offense as confirmed by him. Did Congress otherwise confer this authority upon him?

The first paragraph of Article of War 50 provides:

> "The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence" (Underscoring supplied).

The Board of Review (sitting in Washington) exhaustively considered the meaning of the word "mitigate" contained in the foregoing quotation in CM 210256 Delph, 9 B.R. 235 and its conclusion is expressed thus:

> "The greater part of this opinion has been an effort to define 'mitigate' as used in the first paragraph of Article of War 50, above quoted. Is it not clear that it means something other than 'commute', when, later on in the same article, 'mitigate' and 'commute' are both used, and used in such a way as clearly to mark the distinction between them? Also, when, in the first paragraph of Article of War 50, the power is conferred on every reviewing authority to 'mitigate' sentences, and no power is given him to commute them; when, in the third paragraph of that article, power is conferred upon certain reviewing authorities only, when empowered to do so by the President, to 'commute'; and when in the third and fifth paragraphs of article of War 50½, power is conferred upon the President to 'commute'; is not the inference clear and inescapable that Congress did not intend every reviewing authority to have the power to commute? Yet the action taken by the reviewing authority in the present case in imposing a sentence to confinement was commutation, i.e., a change in the species of punishment."

There can be no disagreement with this conclusion if the facts of the Delph case are properly oriented against the same. In that case the reviewing authority by his action attempted to change the court's sentence of dishonorable discharge and total forfeitures (no confinement was included in the sentence) to confinement at hard labor for 27 days

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and forfeitures of $12.00 of the soldier's pay. In connection with these facts the Board of Review held that the reviewing authority by his action did not mitigate accused's sentence but attempted to commute the same inasmuch as the approved sentence was a substitution of a different species of punishment and not a reduction either in quality or quantity of the species of punishment imposed by the court. It therefore concluded that the reviewing authority exceeded its power. The Delph case, while highly informatory and most valuable in its meaning to be attributed to "mitigate" does not directly concern itself with the present problem. However, contained in the Delph opinion are comments which bear directly upon it. It is convenient and appropriate to quote the same in extenso:

> "19. The general rule is well established by the foregoing and many other authorities that 'mitigate', as used with reference to action upon a court-martial sentence, means to reduce the sentence in degree, quantity or duration, without changing its character. To that rule there is an exception as well established as the rule itself, namely, that the President may substitute some less severe punishment for a sentence of dismissal of an officer or death. This exception is mentioned in some of the quotations made in the preceding paragraph as well as in many of the other opinions and treatises quoted or cited.
>
> 20. The fullest and best statement of the reasons for this exception appears in 1 Ops. Atty. Gen. 327. Private William Bansman, U.S.M.C., had been sentenced to death by a naval general court-martial. The Secretary of the Navy inquired of the Attorney General whether the President might change the sentence to 'service and restraint' for one year, then to be drummed from the Marine Corps as a disgrace to it. The opinion thus answers that question (pp.328-330):
>
> > 'By the 42d article of the rules and regulations for the government of the navy of the United States, (to which the marine corps is subjected by vol. 3, Laws United States, p.96,) it is provided that "the President of the United States shall possess full power to pardon any offense committed

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against these articles, after conviction, or to mitigate the punishment decreed by a court martial," (same vol., p.358). The power of pardoning the offense does not, in my opinion, include the power of changing the punishment; but the power to mitigate the punishment decreed by a court-martial cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial; in which sense, it would justify the sentence which the President purposes to substitute in the case under consideration. The only doubt which occurs to me as possible, in regard to this construction, is whether the power of mitigating a punishment includes the power of changing its species; whether it means anything more than lessening the quantity, preserving nevertheless the species of the punishment. But there is nothing in the force of the terms in which the power is given that ties us down to so narrow a construction. Had the phraseology been - "the President shall have power to remit in part, or in whole, the punishment decreed by the sentence of a court-martial," he would have been restricted to the single mode of mitigation which the objection supposes - that of lessening the quantity; but a power of mitigation, in general terms, leaves the manner of performing this act of mercy to himself; and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation. Such is precisely the case under consideration. A sentence of death cannot be mitigated in any other way than by changing the punishment. To deny him the power of changing the punishment in this instance, is to deny him the power of mitigating the severest of all punishments; while you

leave open to him the comparatively insignificant power of mitigating the milder class of punishments; or, in other words, to refuse mercy in the case in which, of all others, it is most loudly demanded. To say that the President may pardon a capital offense altogether, and thereby annul the sentence of death, is no answer to this argument. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they, therefore, in the first branch of the article under consideration, give to the President the power of entire pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offense entirely; in which there ought to be some punishment; but in which, nevertheless, it might beproper to inflict a milder punishment than that decreed by the court-martial: and hence, in another and distinct member of the article, they gave him, in general terms, the separate and distinct power of mitigation. To deny him the exercise of this power in relation to a sentence of death, and to throw him, in such a case, on his own power of entire pardon, as the only act of mercy which he can exercise, would be to compel him, contrary to his reason and judgement, to extend the greatest mercy to those who deserve the least; for while it is true that sentencesof death are those which appeal most strongly to mercy, because they deal in blood, it is no less true that they are precisely those which are least worthy of an entire pardon, because they are pronounced only in cases of enormity. In other words, they are those in which the power of mitigation applies with peculiar propriety. I think, therefore, from the generality of the terms in which the 42d article of the rules and regulations for the government of the navy of the United States gives to the President

> the power to mitigate the punishment (any punishment) decreed by a court-martial, as well as from the obvious reason of the power, that the President has the right to mitigate a sentence of death; and that every argument for the exercise of the power in inferior cases, applies a fortiori to such a sentence. And since a sentence of death can be mitigated has the power, in the case of William Bansman, to substitute the milder punishment which he contemplates.'

21. Some of the language used in the above quotation must be considered limited or overruled by the subsequent opinion in Commander Ramsey's case (4 Ops. Atty. Gen. 444), already discussed (par.18,19), but the principle laid down in the opinion just quoted that the President may change a sentence of death to one involving other forms of punishment has been followed in many subsequent cases, among which may be cited, G.C.M.O. 54, War Department, August 10, 1921, Wylie, G.C.MO. 62, War Department, August 23, 1921, Jackson; G.C.M.O. 4, War Department, April 2, 1928, Bennett; and G.C.M.O. 6, War Department, July 2, 1936, Hayes.

22. In Aderhold v. Menefee (67 Fed., 2d, 347), an enlisted man in the Navy was sentenced to death by a naval general court-martial for murder committed on a naval vessel at sea. The Secretary of the Navy changed the sentence to imprisonment for life. The Circuit Court of Appeals for the Fifth Circuit upheld the sentence as thus modified, citing and following the opinion of the Attorney General in 1 Ops. Atty. Gen. 327.

23. In 2 Ops. Atty. Gen. 286, 289; 4 Ops. Atty. Gen. 432, and much more recently in 31 Ops. Atty. Gen. 419, 426, the Attorney General has upheld the right of the President to substitute loss of files, suspension without pay, or similar punishment, for a sentence of dismissal imposed by a court-martial.

24. Mullan v. United States (212 U.S. 516) was a case in which a commander in the Navy

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had been tried by a general court-martial and sentenced to dismissal. The President changed the sentence to reduction to the foot of the list of commanders and suspension from rank and duty on half-sea pay for five years, during which time Mullan should remain at the foot of said list. After three years, the President remitted the unexecuted part of the sentence. Mullan then sued for the difference between waiting orders pay and what he had received during his suspension. The Supreme Court quoted Article 54 of the Articles for the Government of the Navy, as follows:

> 'Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm.'

The Supreme Court then continued (p.521):

> 'The Court of Claims was of opinion that this section did not apply to the action of the President of the United States. If it be conceded for this purpose that it is applicable to the President (sec. 1624, arts. 38 and 53 of the Rev. Stats.), we are of the opinion that the President's action did, in fact, mitigate the previous sentence of the court-martial as approved by the Secretary of the Navy. It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. Bouvier's Law Dictionary, vol. 1, 374; Ib. vol.2, 428.
>
> 'When the President otherwise confirmed the sentence of the Navy Department from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do, and by lessening of the severe penalty of dismissal from the Navy, approved by the

department, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor.'

25. The cases last cited have been followed by the President many times in acting upon sentences of dismissal imposed by Army courts-martial, within the past year in the cases of Lieutenant Colonel J. Merriam Moore, Infantry, and Second Lieutenant Thomas R. Connor, 8th Engineers. They were sentenced by the court to dismissal, but the President commuted their sentences to loss of files (G.C.M.O. 3, War Dept., Apr. 13, 1938; G.C.M.O. 8, War Dept., June 6, 1938).

26. It may be admitted that there is a certain lack of logic and consistency in the opinions which have been cited, notably in the opinion of the Supreme Court in Commander Mullan's case, in that they define 'mitigation' as a reduction in the amount of a punishment without a change in its species, and then support as mitigation the change of a sentence of death to one of confinement, or of a sentence of dismissal to loss of files or forfeiture of pay. If there is any logical way to reconcile those antinomies, it would seem to be on the theory that, as death is the severest possible punishment, summum supplicium, any other punishment whatever is a mitigation of it. As to dismissal, it may likewise be argued that to an officer a dishonorable expulsion from his position, his profession, and the Army is so severe a punishment that any sentence permitting him to retain his commission is a mitigation of that imposed. However, as Justice Holmes has said (The Common Law, p.1):

'* * * The life of the law has not been logic: it has been experience. * * *.'

Applying that pragmatic test, there can be no doubt that, for the reasons ably set by the Attorney General (10ps. Atty. Gen. 328-330, ante, par 20, this opinion) it has worked well for the President to have the right to change sentences of death or dismissal into milder forms of punishment."

From the foregoing it is manifest that the word "mitigate" has not always received in the administration of military justice

the restricted, technical interpretation applied to it in the Delph case and this is particularly true in cases involving sentences of death and dismissal requiring the President's confirmation. In this connection it is appropriate to refer to the Mullan opinion of the United States Supreme Court quoted in the Delph case. While as suggested by the Board of Review the conclusion of the court in the Mullan case may lack certain logic and consistency, it nevertheless clearly demonstrated the fact that "mitigation" is a word of large import and that it has been used as a term which includes both the power to "mitigate" (to reduce in quantity or quality the same species of punishment) and the power to "commute" (to substitute a different species of punishment). It is the belief of the Board of Review (sitting in the European Theater of Operations) that in applying the first paragraph of AW 50 to the "commanding general of the Army in the field", in the exercise of his authority under Articles of War 48, 49 and 50 that the word "mitigate" should be given this plenary meaning.

The above interpretation of "mitigate" is wholly consistent with and receives substantial support from the overall authority granted by Congress to "the commanding general of the Army in the field" in time of war. He is authorized to confirm and execute death sentences in cases of persons convicted of murder, rape, mutiny, desertion or as spies (AW 48). With respect to other offenses for which the death sentence may be imposed, he may, when empowered by the President

> "approve or confirm and commute (but not approve or confirm without commuting), mitigate or remit, and then order executed as commuted, mitigated or remitted" (AW 50).

This extraordinary authority virtually substitutes the "commanding general of the Army in the field" for the President in time of war within the general's theater of operations. In the exercise by the commanding general of the power thus granted him by Congress, (when authorized by the President) to commute sentences to sentences of lesser severity in all cases where the death sentence may be imposed, he exercises a discretionary power of determining new (commuted) sentences. It is hardly reasonable to believe that after vesting this tremendous power in the commanding general, Congress did not intend likewise to confer upon him the authority to determine appropriate sentences for those lesser included offenses which he is particularly authorized to extract from greater offenses, notwithstanding the absence from par.(a), AW 49 of specific mention of this authority.

In the instant case the commanding general

> "did what in terms he undertook to do; and by lessening the severe penalty of /death/ approved by the /reviewing authority/ reduced and diminished, and therefore mitigated the sentence which he was /required to fix and determine for the lesser included offense which he was authorized/ to confirm against /accused/" (Mullan v. United States, supra).

In exercising the power to "mitigate" given him by the first paragraph of AW 50 he applied to the lesser included offense (assault with intent to commit rape) which he segregated from the greater offense (rape) the appropriate authorized punishment. The sentence of death as applied to the lesser included offense was, of course, illegal. In the exercise of his power to "mitigate" he, in legal effect, replaced this void sentence with a legal sentence. Ordinarily the exercise of the power to "mitigate" a sentence assumes that the sentence "mitigated" is a legal sentence, but it is not an unreasonable extention of the meaning of the word "mitigate" to include within its sphere of action the adjustment necessary to impose a sentence which is legally applicable to the lesser included offense. The confirming authority is of course, bound by the Table of Maximum Punishments in cases of enlised men (MCM 1928, par.104c, p.96-101).

Regardless of the language used by the confirming authority in his action in the instant case his purpose and intention are clear. The fact that he declared he "commuted" the sentence when he in fact "mitigated" the sentence under the authority of the first paragraph of AW 50 is entirely immaterial. Such refinement of language is neither expected nor is it necessary when intention is otherwise manifest.

The conclusion herein reached finds support in analogous action of the President of the United States (GCMO No. 180 War Department, 3 August 1943, CM 233543, McFarland, 20 BR 15; GCMO 234 War Department 15 Sept. 1943 CM Winters).

6. The charge sheet shows accused is 30 years eight months of age, that he was inducted at New Orleans, Louisiana, 11 January 1943, to serve for the duration of the war plus six months and that he had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial, which have not been corrected by the action of the confirming authority. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty to the extent the same were approved by the confirming authority, and the sentence as fixed and determined by the confirming authority.

8. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and Sec.276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, Sec.II, pars.1b(f), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private ALBERT A. MOLIER (38378388), 3398th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved, and the sentence as fixed and determined by you; 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 4616. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4616).

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

(Sentence as commuted ordered executed. GCMO 140, ETO, 17 Dec 1944)

Branch Office of The Judge Advocate General (159)
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

25 NOV 1944

CM ETO 4619

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Leslandes, France, 15 August 1944, and at Spa, Belgium, 12 October 1944. Sentence: Dismissal.
	)	
Captain WALTER P. TRAUB, (O-377697), 22nd Infantry	)	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, JUDGE ADVOCATES

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

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

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

Specification: In that Captain Walter P. Traub, 22nd Infantry, was at southeast Cherbourg, France, on or about 25 June 1944, found drunk while on duty as Company Commander of Company "E", 22nd Infantry.

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

Specification: In that * * * having received a lawful order from Major Earl W. Edwards, 22nd Infantry, Commanding Officer of Second Battalion, 22nd Infantry, to have no drinking of wine, cider, or other intoxicants by any member of the command, the said Major Earl W. Edwards being in the execution of his office, did, at southeast Cherbourg, France, on or about 25 June 1944, fail to obey the same.

He pleaded not guilty to and was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deplorably inadequate punishment for the grave military offenses of which accused was found guilty, but remitted that portion thereof adjudging forfeiture of all pay and allowances due or to become due, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution summarizes as follows:

On 25 June 1944 accused was commanding officer of Company E, 2nd Battalion, 22nd Infantry, which command he had held for approximately ten days prior to that date (R5,9). The battalion, located about four miles southeast of Cherbourg (Pros. Ex A), attacked toward the coast east of that town and many prisoners were taken. Upon reaching the coast, it proceeded to "clean out" the eastward area, part of which was assigned to Company E, for its part in the operation (R5). Although some elements of the battalion had encountered heavy combat engagements for several days prior to 25 June (Pros.Ex.B), the same was not true as to Company E (R7,10), which was in battalion reserve, acting largely in a defensive capacity, and encountered only sporadic sniper fire on that day (R7;Pros. Ex.B).

About 2000 hours Major Earl W. Edwards, commanding officer of the 2nd Battalion, 22nd Infantry, accompanied accused to his company area for the purpose of approving it and noticed some of the men drinking cider or a similar beverage from a bottle. He asked accused if the men were drinking in the company command post and accused replied "no, they shouldn't be". Major Edwards (since promoted to Lieutenant Colonel), testified that he stated that it looked as if they were and directed

> "if they were to immediately have it stopped throughout his (accused's) company. He said 'all right' and I left him" (R5,8).

Major Edwards on numerous occasions prior to this incident ordered that when in contact with the enemy, no men, including accused, were to drink intoxicating beverages, and discussed the matter at several meetings attended by company commanders or their representatives. Wide publicity was given to such orders. (R6,7,10;Pros.Ex.A). There was no evidence that accused was specifically informed of the order (R7,12).

Accused, who in the late afternoon had commenced drinking cognac from a full quart bottle, continued

> "taking a drink every few minutes. He kept staggering and nearly fell once or twice and he couldn't put his foot on his shovel to dig his foxhole. He finally fell and went to sleep there. * * * All of his actions took place in plain view of the company. * * * At the time he passed out he didn't know there was a war on. * * * His condition was due to excessive drinking of alcoholic beverages" (Deposition of First Lieutenant William L. Camper, Jr., Pros.Ex.A).

About 2200 hours Major Edwards, accompanied by his S-3 officer, Captain Thomas C. Harrison (R5,9), again visited the company area for the purpose of checking for security. He discovered accused "apparently sleeping" against a bank, awakened him and finally aroused him, but accused was unable to recognize him or to answer or understand his questions. After allowing him a few minutes in which to awaken (R5), Major Edwards renewed his efforts to arouse him (R6). At this time the cognac bottle was nearly empty (Pros.Ex.A). Lieutenant Colonel Edwards testified:

> "By that time I saw that he wasn't going to get in a condition to talk to me, that he was intoxicated. * * * He couldn't talk coherently and couldn't understand a question. * * * he obviously had no idea of what I was talking about. * * * He had a bad time standing up. * * * His eyes had a wild look to them" (R6).

With the aid of other officers, accused complied with Major Edward's direction to put on his equipment and accompanied him and Captain Harrison to the battalion command post. Thence, having been relieved of his command at Major Edwards' order, accused was taken in a jeep to the regimental command post by the battalion S-2 officer, First Lieutenant Arthur O. Newcomb (R6,12). The testimony of Captain Harrison and Lieutenant Newcomb and the deposition of Captain James B. Burnside (Pros.Ex.B) all of accused's regiment, are in agreement with the Edwards testimony and the Camper deposition that accused was drunk, based upon the following manifestations: he experienced great difficulty in arising and stumbled when he did arise; he was able to walk, but not straight (R11); when endeavoring to enter the jeep at the battalion command post, "he missed it by two or three feet"; the odor of alcohol was discernible on his breath (R13); his speech was thick (Pros.Ex.B); he was not in a fit condition to command troops at the time (R6,13;Pros.Exs.A,B.). There was evidence that his physical condition before the time in question was normal (R7,11, 13), although Captain Burnside deposed that he did not believe accused "ever became acclimated to combat" and that "he reacted slowly and hesitantly" (Pros.Ex.B). Lieutenant Colonel Edwards testified that accused had been "pretty nervous" several days before the incident, as a result of

the "beating" he "had taken" up on the hill. Witness worried about it, but not sufficiently to cause him to relieve accused of his command (R8). There was some testimony that combat fatigue might have contributed to his condition (R11,14).

4. Evidence for the defense was, in summary, as follows:

(a) Lieutenant Colonel John F. Ruggles testified that during the official investigation of the case conducted by him, Lieutenant Camper, in answer to a question by accused whether accused was under the influence of liquor on the evening in question, stated that accused had been drinking at the time, but did not state whether or not he was drunk (R18).

Deposition testimony of Lieutenant Colonel Thomas A. Kenan, regimental S-3 officer (Def.Ex.1), and of Major David S. Moon, regimental S-2 officer (Def.Ex.2), showed that in their opinion accused, while at the regimental command post about midnight on 25 June 1944, was oriented as to time and place, spoke coherently, was normal in gait and carriage and that they detected no odor of alcohol on his breath. Both witnesses explained that they were engaged in other duties when they talked to him and neither deposition negatived the possibility of his being under the influence of alcohol at the time mentioned.

(b) Accused who acted as his own defense counsel throughout the trial, stated that he was fully aware of his rights as a witness in his own behalf and elected to testify as such (R19). In his testimony he reviewed his military service and summarized the events of the week preceding 25 June, during which he was engaged in an attack northward and also on an outpost mission, when his company received enemy shelling. On one occasion a shell fell near him and blew him through the doorway and against the wall of a dugout. He estimated that during this week he had approximately 15 hours sleep. On the morning of 25 June his company was one of the attacking companies but was not very heavily engaged. About 1600 hours a mobile reserve was established and accused commenced drinking cognac (R19-20). He consumed eight drinks between that time and about 2130 hours. Because of his exhaustion he decided to sleep on the ground rather than in a foxhole. His next recollection was of being at the battalion command post, after which he was in full possession of his senses and remembered the ensuing events in detail. He did not believe he was drunk and was confident of his ability to receive and execute orders. He attributed his apparent disorientation upon being awakened by Major Edwards to his lack of sleep and the fact that he had been "shaken up pretty well" a few days before.

He denied having received, during his command of Company E, from the battalion commander or any staff officer any written or verbal order that no member of the command would drink alcoholic beverages (R21). Drinking by other officers in the battalion led accused to believe there was no such order in effect. He interpreted Major Edwards' order at 2000

hours on 25 June to "Have them cut it out" as referring to excessive drinking. When accused returned from his patrol, someone else had been drinking from the cognac bottle. Lieutenant Camper stated at the investigation, in reply to accused's question whether he was drunk at about 2100 hours, "No; you were feeling pretty good" (R22).

5. The following procedural matters merit attention:

(a) Ten members of the court named in the appointing order, including the law member, were absent from the first session of the court, which was held on 15 August 1944 (R2). The reason stated for the absence of the law member is "Excused, V.O.C.G." Although the practice of showing the law member as excused by verbal orders of the Commanding General, without stating a valid reason for his absence, is not approved (Par.III,1,Military Justice Circular No.8,10 October 1944, Branch Office of the Judge Advocate General with the European Theater of Operations), it does not appear that accused's substantial rights were injuriously affected by the irregularity (Cf: MCM, 1928, par. 38c,p.28). After adjournment pursuant to a continuance of the trial granted upon motion of the defense, the court reconvened on 12 October 1944. Two of the six members who were present at the first session were absent from the second session and five previously absent members were present at the second session. Two other of the six members who were present at the first session were excused, one at his own suggestion and the other upon peremptory challenge by the defense (R16). This left only two of the original members present at the second session. Accused was accorded full rights to challenge all members of the court (R16) and after the granting of the challenge mentioned, stated that he was satisfied to be tried by the court as then constituted. The record of the proceedings of 15 August 1944 was thereupon read to the new members (R17), and it may be assumed that the original members' recollection was refreshed by such reading. Under the circumstances, it does not appear that any substantial rights of accused were injuriously affected (Cf: MCM,1928,par.38b,p.28).

(b) Although the detailing and employment of defense counsel separate from accused is clearly contemplated by Articles of War 11 and 17 (see MCM,1928,pars.43-45,pp.33-35), there is no prohibition against accused acting as his own defense counsel, even without the assistance of personnel detailed as defense counsel by the appointing authority. It clearly appeared that accused understood his situation and was competent to conduct his own defense and to safeguard his own rights. Cases may arise where an accused officer, by reason of his necessary familiarity with the facts of his own case, is the officer best qualified to act as defense counsel. The right of an accused at civil law intelligently and understandingly to waive his privilege under the 6th Amendment to the Federal Constitution "to have the Assistance of Counsel for his defense" is firmly established (Adams v. United States, ex.rel., McCann, 317U.S.269,63S.Ct.96, and see authorities cited in USCA,Constitution Am.6,notes 325-333,pp.373-379).

(c) Major Frank C. Castagneto, Assistant Adjutant General of the 4th Infantry Division, by command of the division commander, referred the case to the trial judge advocate for trial. Major Castagneto was duly

appointed and sat as a member of the court herein at both sessions (R2,16). In the absence of challenge (R3,16-17) and of indication of injury to any of accused's substantial rights, this may be regarded as harmless (CM ETO 4095, Delre).

6. (a) The findings of guilty of Charge II and its Specification are fully supported by the testimony of Lieutenant Colonel (then Major) Edwards that he gave accused an order substantially similar to that alleged, to have drinking of intoxicants stopped throughout his company, at about 2000 hours on 25 June 1944 and that accused himself, at the place alleged, consumed several drinks of cognac within an hour and a half thereafter (Cf:CM ETO 2867, Cowan). Even assuming that the failure to comply with the order was not willful but resulted from heedlessness, remissness or forgetfulness, it constituted a violation of Article of War 96 (MCM,1928,par.134b,p.148;par.152a,p.187).

(b) Convincing testimony of three officers and depositions of two other officers establish that accused was found drunk within the meaning of Article of War 85, at the place and date alleged while on duty as company commander of Company E, 22nd Infantry (Charge I and Specification). In his own testimony accused admitted consuming eight drinks during the period between approximately 1600 and 2130 hours on 25 June. He was discovered at about 2200 hours in an incoherent, disoriented condition, and by his actions unmistakably manifested that he was in a state of intoxication "sufficient sensibly to impair the rational and full exercise of the mental and physical faculties", which constitutes drunkenness within the meaning of the article (MCM,1928, par.145, p.160; CM ETO 4184, Heil; CM ETO 3577, Tenfel). The court was evidently not convinced by the evidence that combat exhaustion might have contributed to accused's condition. In view of the strong evidence in support of the findings, there is no occasion to disturb them upon appellate review (CM ETO 1953, Lewis, and authorities there cited).

7. The charge sheet shows that accused is 26 years of age, was commissioned 1 June 1939 and entered upon active duty 5 July 1939, with date of present rank 8 August 1942. 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. Dismissal is mandatory upon conviction of a violation of Article of War 85 and is authorized upon conviction of a violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

4619

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain WALTER P. TRAUB (O-377697), 22nd Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4619. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4619).

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

(Sentence ordered executed. GCMO 132, ETO, 13 Dec 1944)

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

BOARD OF REVIEW NO. 2

15 DEC 1944

CM ETO 4622

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Nancy,
	)	France, 6 November 1944. Sentence:
Private ALBERT C. TRIPI,	)	Dishonorable discharge, total for-
(42022641), Medical Detach-	)	feitures, and confinement at hard
ment, 137th Infantry	)	labor for thirty years. United
	)	States Disciplinary Barracks, Fort
	)	Leavenworth, Kansas.

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 Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Albert C. Tripi, Medical Detachment, 137th Infantry, having received a lawful order from Major Kenneth J. Gleason, Medical Detachment, 137th Infantry, his superior officer, to report to Company L, 137th Infantry, in the capacity of Company Aid Man, did at Attilloncourt, France, on or about 14 October 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for thirty years.

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The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 14 October 1944 the Medical Detachment of the 137th Infantry was located at Attilloncourt, France, and that Major Kenneth J. Gleason, Medical Corps, was the regimental surgeon and commanding officer (R6,7). The accused was attached to the third battalion section, at Abancourt, approximately two miles distant. He was assigned as a litter bearer and was under Major Gleason's command (R7,8). Accused's section sergeant informed him he had been detailed as an additional aid man to Company "L". Accused refused to accept this new assignment and was brought to Regimental Headquarters where Major Gleason gave him a direct order to "report to Company 'L' as an aid man" (R7,8,9,12). The accused was further informed that the order given was "a direct order" and that his failure to obey the same would result in "court-martial charges" being preferred against him, with a possible penalty of death (R7,9,10). Accused "went back to the third battalion section, but he didn't go back to Company 'L' as an aid man" (R8,13). His response to Major Gleason's order was "that he couldn't do the job" (R8,13). There were no obstacles to prevent accused from going to Company "L" as the lines of communication were open and a section sergeant was available to guide him there (R13,15). Accused had received training as an aid man and litter bearer, it being the same for both (R8,13). Asked for an explanation as to the difference in functions of men performing these duties, Major Gleason replied:

> "The function of a litter-bearer is to go out and pick up the injured men - the wounded men off the battlefield and bring them to the aid station. The function of the company aid man is to give first-aid treatment to the casualties. In training, the training of the company aid men and the litter-bearer are the same. The litter-bearers receive training as company aid men - bandaging and dressings, and the company aid men receive training as litter-bearers" (R8).

The evidence for the prosecution further establishes that neither of the assignments is considered more hazardous than the other and that accused was physically able to perform the duty of aid man as ordered and assigned (R8,10,13). He was in good health when the order was given him (R13) and was professionally qualified for the job (R10).

4. The accused, after being fully informed, by the court, of his rights as a witness, elected to be sworn and testified that

shortly after induction he was sent to Camp Barkley, Texas, and assigned to the Medical Department, where he received 17 weeks of training as a litter bearer and some training in bandaging patients (R17). He did not get along well in his work and training "because it was too difficult and hard" (R18). He was later transferred to another battalion and given an extra three weeks of training (R18). Thereafter accused was shipped overseas as a replacement in May of 1944. He arrived in France in July and joined the 137th Infantry as a litter bearer with the third battalion. He performed this duty from July until 14 October 1944 (R19). During part of this period his unit was "in combat" but accused never "treated a wounded man" (R19). He told Sergeant Blount, who originally gave him an order to go out as an aid man, that:

> "I couldn't do the job because I was scared of blood and didn't have enough training and I don't know how to put a bandage on" (R19).

Thereafter accused was taken before Major Gleason who gave him the direct order indicated. Major Gleason placed him "under arrest" when accused told him that he couldn't do the job. He never asked accused why he felt he couldn't perform the duty assigned or inquired about his training and qualifications (R20).

5. Competent evidence of record establishes the giving of the order in question and the disobedience of same, by accused, as alleged. Accused told his commanding officer that he "couldn't be an aid man" because of the fear of facing wounds and blood. He had previously informed his unit sergeant that he was unable "to do the job" because of the fear of the sight of blood. He refused to explain what he was afraid of other than he had "a fear of the sight of blood". However, the testimony reveals that for a period of several months, accused worked as a litter bearer evacuating wounded and injured men from combat areas. He unquestionably saw personal injuries,blood and physical suffering in connection with the duty he was then performing. The jobs were equally hazardous.

Winthrop states that "obedience to orders is the vital principle of military life", and that the "obligation to obey is one to be fulfilled without hesitation", adding that, "nothing short of physical impossibility ordinarily excusing a complete performance" (Winthrop's Military Law and Precedents - Reprint, 1920, p.571,572).

The accused produced no evidence in support of the defense that he was psychologically or physically unfit or unable to do the work which the order directed him to perform. The record contains evidence to the contrary.

6. The charge sheet shows that accused is 26 years of age, and was inducted into the army, 26 August 1943.

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

8. The penalty for willful disobedience of the lawful command of a superior officer is death or such other punishment as a court-martial may direct (Article of War 64). Since accused is a general prisoner who will be returned to an eastern port from overseas, designation of United States Disciplinary Barracks, Fort Leavenworth, Kansas, is unauthorized and should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 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. 15 DEC 1944 TO: Commanding General, 35th Infantry Division APO 35, U. S. Army.

1. In the case of Private ALBERT C. TRIPI, (42022641), Medical Detachment, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The United States Disciplinary Barracks, Greenhaven, New York, as the appropriate institution nearest the port of debarkation, should be designated in place of the United States Disciplinary Barracks, Fort Leavenworth, Kansas. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4622. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4622).

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

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

BOARD OF REVIEW NO. 1

20 JAN 1945

CM ETO 4630

U N I T E D S T A T E S	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Doncourt,
	)	France, 11 October 1944. Sentence:
Staff Sergeant FRANKLIN W.	)	Dishonorable discharge, total for-
SHERA (18071011), Company	)	feitures and confinement at hard
C, 357th Infantry	)	labor for life. Eastern Branch,
	)	United States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Staff Sergeant Franklin W. Shera, Company C, 357th Infantry, did at Maizieres, France, on or about the 9th day of October 1944, misbehave himself before the enemy by refusing to lead his squad, which had then been ordered forward by First Lieutenant John G. Saxton, Company C, 357th Infantry, his commanding officer, to engage with German forces, which forces, the said squad was then opposing.

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

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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 forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority, the Commanding General, 90th Infantry Division, disapproved so much of the sentence as sentenced accused to forfeiture of all pay and allowances due or to become due, approved the sentence as thus modified, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved and commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

On 8 October 1944, accused was squad leader of the "first and second squads combined" (R10,13) of Company C, 357th Infantry. The company was holding the left flank of the battalion front and was in contact with the second battalion in the town of Maizieres, France. The enemy was directly to its front and in some places not more than 75 yards away (R7). That evening First Lieutenant John G. Saxton, C Company's Commanding Officer, received an order to attack at 0800 hours the next day (R6,17). At about 0700 hours on 9 October, he communicated the order to Second Lieutenant Raymond E. Springer, Jr., leader of the second platoon (R7,13), who passed on the information to his squad leaders, including accused(R13-14,15,17). Between 0700 and 0800 hours (R14,17) at the platoon command post, in the presence of Springer and Captain William P. Reckeweg, acting battalion liaison officer, Saxton went over the attack order with the platoon leaders, platoon sergeants and squad leaders, including accused (R7-8, 11). The plan of attack had been drawn up by the battalion S-3 and the battalion commander. The objective was

> "about 9 or 10 houses directly in front of the platoon. To extend our left flank up to make contact with the second battalion, we had to take and hold these houses. The battalion order was to attack with the second platoon to seize the houses and as soon as we seized the houses we were to move the third platoon on the left flank.

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making contact with the second battalion line" (R8).

Besides the houses, there were small out buildings and gardens with wire fences around them. The distance from the front line to the main body of houses was about 125 yards (R7-8).

The squad leaders went back to orient their squads and Saxton

"went to the left flank ... that's where the tanks which were going to support us were being held in position ... to bring the tank commanders up to show them their firing position" (R7).

When he returned to the platoon command post accused met him and inquired "where I was going to get the men to follow the tanks" (R7,12). Saxton asked what he meant and accused said his men refused to go. Saxton asked him if he understood what it meant to refuse an order. Accused said that "he did and that he was sticking near his men and would take a court-martial before he would meet the attack". Springer and Captain Reckeweg were present and heard this conversation (R7,13,14-15,17). It was not possible to bring men out of the line and to contact every man as to why he "would not go in", because the line had to be held and an attack was to be made. Saxton asked for the name of every man who refused to make the attack. Accused replied "that wasn't necessary that every man refused to go" (R9). Asked on cross-examination what was the type of terrain, Saxton answered, "Heavy wire. About 7 feet of heavy wire, sir. It was strong tactical barbed wire inside of this mesh wire". As to cover, he stated "there was very little cover. The approaches were very channelized to the fences".

An unsuccessful attack was made on these houses the day before and "started in" with ten men who made their approach, met machine gun and rifle fire and "the platoon withdrew" (R9). After his conversation with accused, Saxton contacted the battalion S-3 and the battalion commander, who came to the platoon command post and gave orders to hold up the attack until "they got it cleared up" (R10). The proposed attack was not made (R14), but its objective was taken without opposition 10 October 1944 (R16).

4. The defense stated that accused had been informed of his rights and elected to make a sworn statement (R18). Accused then testified in substance as follows:

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He joined the 90th Division around 1 April 1942 and had been with C Company "this last time" a week (R18). On 9 October 1944 between 0700 and 0730, Springer "called the squad together and gave us the initial order as to what our objective would be". He immediately went to his squad and told the men what the mission was and "to try and eat a breakfast unit before we moved out". The men refused and he went back to the platoon command post and told Springer. When he heard tanks coming up, he told Springer that "someone ought to contact the tanks and if no one was going to follow they shouldn't come up". Saxton and Reckeweg came to the platoon command post around 0800 hours. Saxton did not give him a direct order (R19) and he never refused to lead his squad on an attack, but

> "when I contacted my men they stated they wouldn't go and I heard tanks coming. I ran out to contact the tanks and I ran into Lieutenant Saxton. Then I told him the men would not follow and I asked him where he was going to get men to follow the tanks. He then asked me what I meant by that. I told him the men in my squad would not follow. After that we went to the platoon CP . . . . ".

His personal reaction was that he felt he

> "had to look out for the safety of my men. If they wouldn't go there was nothing else for me to do. I was going to stick with the men and stand up for their safety if I could".

The strength of his squad was ten men including himself (R20).

Examination by the court produced the following questions and answers:

> "Q. Did you make a statement to Lieutenant Saxton to the effect that you would back up your men if it meant standing court-martial?
> A. No, sir I didn't exactly say that. I just said I would stay with my men.
>
> Q. Your exact words were that you would stay with your men?
> A. Yes, sir.

Q. Did Lieutenant Saxton tell you what that meant?
A. Yes, sir, and I said I would stay with my men.

Q. Regardless of the court-martial?
A. No, sir. I just said I would stay with my men" (R21).

5. The trial was held the day after a copy of the charges was served upon accused. The prosecution explained to the court that military necessity demanded such procedure and that witnesses for the prosecution and any the defense might call "are now on the line". The court was requested by the prosecution to postpone trial for as much time as the defense required, if it objected. The defense announced that it had no objection, which accused personally confirmed (R3). In view of the military situation, this procedure was not improper. There is no indication that accused was in any way prejudiced by the promptness with which the trial followed service of charges and no substantial right of accused was thereby injuriously affected (CM ETO 3475, Blackwell et al).

6. It was clearly shown by the prosecution's evidence, as well as by accused's testimony, that an attack order was given him, that he refused to carry it out and made it manifest to his company commander that instead he would "stay with his men", that he "ran out to" contact tanks to prevent their advancing to take part in the proposed attack and that while before the enemy, he refused to lead his squad as alleged. That an attack was not in fact made is not material (CM ETO 2469, Tibi). The gravamen of his offense was his refusal to lead his squad (CM NATO 1614, Langer). The evidence supports the findings of guilty in violation of Article of War 75 (CM ETO 4820, Skovan; CM ETO 5359, Young).

7. The charge sheet shows that accused is 24 years five months of age and enlisted at Denver, Colorado, on 24 March 1942 to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as the court may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks,

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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

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

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

1. In the case of Staff Sergeant FRANKLIN W. SHERA (18071011), Company C, 357th 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 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 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 4630. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4630).

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

(Sentence as commuted ordered executed. GCMO 45, ETO, 16 Feb 1945)

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

BOARD OF REVIEW NO. 1

CM ETO 4640

28 NOV 1944

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Corporal VINSON GIBBS (34541763), Company E, 377th Engineer General Service Regiment	Trial by GCM, convened at Namur, Belgium, 4 November 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, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Vinson Gibbs, Company E, 377th Engineer General Service Regiment, did, at Chacewater, Cornwall, England, on or about 15 July 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Technician Fourth Grade John Dickey, Jr., one human being, by shooting him with a rifle.

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

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

3. The evidence for the prosecution, elicited from witnesses who were members of accused's organization, showed that on 15 July 1944, accused and Technician Fourth Grade John Dickey, Jr. (deceased), both of Company E, 377th Engineer General Service Regiment, were stationed at Chacewater, Cornwall, England. Their respective tents were on opposite sides of the camp street and were about 35 yards apart (R7-8,10,12,16,19-20). Deceased was a little over six feet tall, weighed about 180 pounds and was taller than accused (R10,14,22-23). On the night of 15 July Private James R. Smith saw deceased hitting accused "pretty hard" several times on the back with a lantern. Accused repeatedly asked deceased to put the lantern down and to "fight fair" but the latter would not do so and continued to swing at the former with the implement. Accused "kept backing up" and fell backward. Deceased continued to strike him with the lantern, which was "torn to pieces" as the result of the blows, and the two men tussled. Another lantern, similar to the one used, was admitted in evidence as Def. Ex. 1 (R12-15). Smith and Corporal Willie C. Bruton separated the two antagonists and took them to their respective tents (R7-9,13). Accused had no gun at that time (R8,15), and, in Smith's opinion, appeared to be angry because he was struck with the lantern (R14). Bruton testified that accused did not appear to be angry but asked deceased why he hit him (R9).

Smith testified that he then returned to his own tent and about ten minutes later heard some shots (R13). At another point he testified that it was two or three minutes later when he heard the firing (R15). He looked out and saw accused who said

> "he had killed him and asked me to go over and pick him up. Said he was dead and he had put all eight in him" (R13).

Witness saw deceased lying on his back between his (deceased's) and the adjacent tent (R13) and saw accused about 30 yards away (R15). Bruton testified that he heard shots about three minutes after he returned to his own tent following the altercation (R9).

Private First Class Claude McGairk and Private Joe H. Gordon, tentmates of deceased, both heard an argument outside their tent that evening. Deceased then entered, changed from his "OD" uniform into fatigues, said he was going to the latrine and departed. It was about 11 pm. As deceased walked between his and the next tent toward the Company D latrine, McGairk and Gordon heard shots, and one of the bullets "burned" McGairk's back. He went out and saw deceased lying near the front corner of their tent. In Gordon's opinion deceased took about five minutes to change his clothes (R10-11,16-18).

Private Willie Ross, a tentmate of accused, was awakened by gun fire that evening. Shortly thereafter someone entered Ross' tent and hung a gun on the center pole. Ross testified "I taken it to be Gibbs /accused/. * * * I wouldn't say for sure". The person who entered said "I got me a man and you can go out there and pick him up". Witness picked up the rifle, smelled of it and "hung it back up". It was "warm and freshly fired". Ross then left the tent and found deceased lying between two tents about 30 yards away. On redirect examination Ross admitted that he made a statement to the investigating officer on 24 July in which he identified accused as the man who entered the tent and made the foregoing remark (R18-21).

Private Hubert T. Smith, who occupied a tent "next door" to accused, heard shots that evening. About ten minutes later accused entered Smith's tent, sat down on the bed and said, "Heavy set, /Smith/ I guess I won't be seeing your auntie". Smith testified that after the war he planned to marry accused's sister and accused was to marry witness' aunt. Smith, on cross-examination, further testified that in his opinion deceased was likeable but

> "there were just a few things about him like in chow line he would argue with the fellows and tell them to get back in line once in a while" (R22-23).

On the same night deceased was examined by the regimental surgeon, Major Charles F. Manges, Medical Detachment. He was dead when examined, and the cause of death was "multiple gunshot wounds" (R21-22).

4. For the defense accused, after being warned of his rights, testified that went to town about 7:30 pm on the evening in question and consumed seven pints of beer, one bottle of ale and some chips. After drinking he was "pretty weak", returned to camp about 11 pm and entered the orderly room. Deceased, who was a cook, then entered and the charge of quarters "asked him first about getting something ready to eat in the morning". Deceased replied that he did not give a damn about it or trust any man in E Company, and that he did not care whether or not the men ate on time. Accused told deceased that "there was no man in E Company gave a damn about him either". Up to this time deceased had said nothing to accused. Accused and deceased "cussed each other" for about a minute and then went outside where the latter hit the former with a lantern (R24-27). Accused was unarmed and did not strike deceased, who continued to swing the lantern. Accused "kept backing up", finally tripped and fell, and deceased hit him hard on the back with the lantern. Accused's back was sore for three days after the incident. He asked deceased to "fight me fair" but the latter "just kept swinging the light what was left of it", and again hit accused. Someone pulled deceased "off". Bruton asked accused if he were hurt and when he replied in the negative, told him to

go to his tent (R25-27). After he was assisted back to his tent, accused sat on his bed for a minute and thought he had to go to the latrine. Before leaving for the latrine he heard deceased "saying he would try to beat my brains out". Deceased was "out there somewhere" but accused did not know "how close". Accused loaded his gun and after spending about two minutes in his tent, took the weapon and left for the latrine which was in the rear of deceased's tent which he had to pass on the way. Accused was angry but did not go in search of deceased. He saw deceased before he reached the latter's tent. Deceased was the tallest man in the company and accused also recognized his voice. When accused was about ten yards from deceased, accused fired his M-1 rifle from his hip and "all of them went off". He fired because he feared deceased "might jump on me again" (R25-26, 28-30). Accused further testified as follows:

"Q. Was he coming toward you?
A. He might have been. It was kinda dark and I was scared and wouldn't take any more chances.
* * *
Q. Who was the taller you or Sergeant Dickey.
A. Sergeant Dickey was about three or four inches taller" (R26).

"Q. Did he have a gun?
A. I don't know, I couldn't tell in the dark.
* * *
Q. Were you afraid of Sergeant Dickey?
A. Yes sir he was a pretty big man.
Q. Did you ask anybody in your tent to go with you to the latrine?
A. No sir. Everybody I guess was in bed as far as I could see" (R29).

"Q. At the time you shot Sergeant Dickey was he doing anything to you?
A. No sir, he was too far off.
Q. Was he making any remarks of threat or motions or anything?
A. He was too far off.
* * *
Q. I understand at that time Sergeant Dickey did not make any threats or say anything to you as you passed by to go to the latrine after you left your tent.
A. No sir, but I saw him standing and maybe he was walking facing me, but I don't know whether he was coming to me or just standing there and so I just shot" (R30).

Accused's rifle had a capacity of eight rounds and it was necessary to pull the trigger eight times to fire the entire load (R30). Deceased's body lay between deceased's tent and another, after the shooting (R29). There had been no trouble between the two men prior to the incident (R30).

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Wellington L. Raney, first sergeant of accused's company, testified that he had know accused since 12 August 1943 and that in witness' opinion he was an excellent soldier. His character was very good and his reputation in the company for truth and veracity was good (R31-32). The latrine of Company D which was used by some of the men of accused's company (E), was behind deceased's tent and was nearer to accused's tent than was the latrine of Company E, which was at the end of the street about 20 feet further along on deceased's side of the street (R32-33).

Second Lieutenant David A. Teicher, a platoon commander in accused's company, testified that according to Army standards he would grade accused as an "excellent" soldier and that in witness' opinion his character and veracity were "satisfactory" (R33-34). Captain William J. Riddle, who was commanding officer of accused's company at the time of the shooting, testified that in witness' opinion accused's efficiency was "very satisfactory" and his character "good". He always carried out orders willingly (R34).

5. McGairk and Gordon, deceased's tentmates, recalled as witnesses in rebuttal by the prosecution, both testified they did not hear deceased utter any threats after he left the tent (R35-37).

6. Major Manges, recalled as a witness by the court, testified that as he recalled, deceased had five gunshot wounds in his chest and one through his arm (R37).

7. The evidence, including the testimony of accused, clearly established the fact that he shot and killed deceased at the time and place alleged. The court, by its findings, resolved any issue of self-defense against accused. After he was beaten by deceased accused heard his adversary outside, threatening to beat his brains out. Accused loaded his gun, left the tent and saw and recognized deceased who was standing near his own tent. He walked toward the victim and shot him at a distance of about ten yards. He admitted that he did not know whether deceased was then armed or coming toward him, and that the victim was at the time, "too far off" to harm him. He also admitted that deceased did not say anything to him or threaten him in any way as accused drew near. The question whether accused acted in self-defense was one of fact for the court's determination and such determination against accused in this respect was fully supported by the evidence (CM ETO 1941, Battles; CM ETO 3180, Porter).

8. The sole question presented for consideration is whether accused was guilty of murder or voluntary manslaughter. The following principles of law are applicable:

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * * Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault and an attempt to commit

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murder" (MCM, 1928, par.148, p.162).

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

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

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

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, 12th Ed., sec.423, p.640).

> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary" (MCM, 1928, par.149a, p.165).

> "At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden fray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment" (29 CJ, sec.115, p.1128).

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The applicable rule of law is stated thus:

> "If before the homicide was committed, defendant's passion had cooled or if there was sufficient time between the provocation and the killing for his passion to cool, the killing will not be attributed to the heat of passion but to malice, and will be murder, although defendant's passion did not actually cool, and this principle is in some jurisdictions embodied in express statutory provisions. The question of cooling time does not arise where there is no adequate provocation, nor where the entire difficulty is one single transaction, nor where the killing is the result of reflection or deliberation, no matter how soon it follows the provocation. On the other hand, the killing need not follow immediately upon the provocation, and where an interval occurs, the question whether or not it is sufficient for cooling time must be determined by the circumstances attending each particular case. It is hot necessary that the malice of defendant be shown by some act of hostility committed or threatened between the provocation and the killing. The exercise of thought, contrivance, and design in the mode of getting the weapon and replacing it immediately after the killing, or a temporary diversion of defendant's mind to some other matter, or a reasonable time between the provocation and the killing, both indicate design and malice, rather than a killing in sudden heat" (29 C.J. sec.133, p.1147). (Underscoring supplied).
>
> "Where the fatal encounter did not immediately follow the provocation, and there is evidence of an outrage on defendant a short time before of sufficient moment to constitute adequate cause, the jury should be instructed to consider whether or not defendant had time to cool his passion before the killing, for if he had such time the act may have been the result of deliberation, which would be murder and not manslaughter" (30 C.J. sec.657, p.413).
>
> "Cooling time dependent on circumstances. Whether there has been cooling time is eminently a question of fact, varying with the particular case and with the condition of the party. There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments, also, vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal 'reasonable man', but by that of the party to whom the malice is imputed.

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> A man may be chargeable with negligence in not duly weighing circumstances which would have checked his passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice when he was acting wildly and in hot blood. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided not by an absolute rule, but by the conditions of each case" (1 Wharton's Criminal Law, 12th Ed., sec.609, p.821). (Underscoring supplied).

> "In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defense appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law" (Winthrop's military Law and Precedents - Reprint, p.672).

> "It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its (sic) existence of malice must be determined as a fact from all the evidence". (29 C.J., sec.74, pp.1099-1101).

From the foregoing statements of the principle of law involved, it will be seen that there are two methods of applying the doctrine of "cooling time";

(a) The "reasonable time" rule: If there is a sufficient period of time between the provocation and the killing for the accused to "cool his passions" the killing will be attributed to malice and will be murder, and the determination of this reasonable time is governed by the standard of an ordinary reasonable person.

(b) The "dependent on circumstances" rule: "Cooling time" is to be determined by the circumstances and conditions of each case whereby the question of malice is determined not by the standard of a "reasonable man" but by the standard of the accused, thereby allowing consideration of the accused's individual temperament and of all of the circumstances involved in the killing.

The Board of Review is not required in this case to adopt one of these rules to the exclusion of the other. In fairness to the accused the Board of Review elects to consider the problem on the basis of both rules. Under either rule the questions whether there was a sufficient cooling time and whether accused acted under heat of passion or with malice, are essentially issues of fact within the exclusive and peculiar province of the court (see authorities cited, supra).

In view of the foregoing authorities, it may be assumed for the purposes of discussion that had accused shot and killed deceased when he was being beaten by the latter with the lantern, accused would have been guilty of voluntary manslaughter and not murder (CM ETO 292, Mickles; CM ETO 72, Farley and Jacobs). However, there is an abundance of competent, substantial evidence equally sufficient under either doctrine with respect to "cooling time", to support the court's finding that accused's passion had in fact cooled, and that he was not acting under the heat of passion but with deliberation and malice aforethought when he shot and killed deceased.

(a) Bruton testified that about three minutes elapsed between the time he returned to his tent and the firing of the shots. Smith testified at one point that two or three minutes elapsed, and at another point that about ten minutes elapsed, between the time witness returned to his tent and the shooting. Both McGairk and Gordon testified that deceased changed from ODs" to fatigues when he was in his tent and Gordon estimated that it took deceased about five minutes to effect the change. Accused estimated that he spent about two minutes in his tent before leaving for the latrine. The distance between the tents of accused and deceased was about 35 yards.

> "Under such a situation the Board of Review cannot say that the court was not justified in concluding that a sufficient period (although not proved with mathematical accuracy) elapsed within which a reasonable man would cool his passions. A reference to decided cases in a question of this nature is not very helpful inasmuch as a question of fact for the court is involved. However, a consideration of cases where conviction of murder was upheld wherein the accused after adequate provocation by deceased, departed to secure a weapon and then returned and killed deceased, indicates that the court in the instant case did not act arbitrarily or without substantial evidence to support its conclusion:
>
> Hawkins v. State, 25 Ga. 207, 71 Am.Dec. 166:
> Defendant went 250 yards.
> Smith v. State, 103 Ala. 4, 15 South 843:
> Defendant went 100 yards.
>
> People v. Kerrigan, 147 N.Y. 210, 41 N.E. 494:
> Defendant was absent from five to fifteen minutes.

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State v. Norris, 2 N.C. 429, 1 Am. Dec. 564:
Defendant ran eighty yards and back.
State v. McCants, 28 S.C.L. 384:
Defendant walked 225 yards.
People v. Fossetti, 95 Pac. (Cal. App.) 384:
Defendant left room, procured pistol and returned.

In the foregoing cases the intervals of absence of the accused between the provocation and the killing were held sufficient cooling time. Therefore, considering the time factor alone and applying to accused in the instant case the standard of an ordinary reasonable person, the Board of Review is of the opinion that there is substantial evidence in the record to sustain the conclusion that sufficient time elapsed to allow accused to cool his passions between the time when he was stabbed by deceased and the time when he returned and inflicted the mortal wound on deceased" (CM ETO 292, Mickles).

(b) The Board of Review is also of the opinion that when the record is examined within the purview of the "dependent on circumstances" rule, it reveals competent and substantial evidence which fully supported the findings of guilty. Accused testified that he knew deceased was "out there somewhere" and was threatening to "beat my brains out". He sat on his bed "a minute", then secured his gun, loaded it, and deliberately went toward the latrine, knowing that to reach it he had to pass the tent of his assailant whom he had every reason to believe was lurking in the vicinity. Outside, he saw and recognized deceased, walked about two-thirds of the distance between the two tents, and then cold-bloodedly shot the victim at a distance of about ten yards when the latter was not only "too far off" to harm accused, but also did not speak to accused or threaten him in any manner. Further, there was no indication that deceased was armed, or that he advanced toward accused. Accused, according to his own admission, fired the full eight rounds which necessitated his pulling the trigger eight successive times. Particularly illuminating was his remark to Ross after the incident, namely, "I got me a man and you can go out there and pick him up". He told Smith that he had killed deceased, that he had "put all eight in him".

The picture presented is that accused deliberately and vindictively planned to secure his revenge upon deceased with a ruthless disregard of the consequences. There is not only substantial evidence to support the finding that sufficient time elapsed between the cessation of the initial conflict with deceased and the shooting to enable accused to cool his anger and passion, but also to prove affirmatively that he acted with malice aforethought when he shot and killed his victim. The Board of Review is, therefore, of the opinion that the record

of trial is legally sufficient to support the findings of guilty of murder (CM ETO 292, Mickles; CM ETO 2007, Harris, Jr.; CM 232400, Thomas (1943), Bull. JAG, vol.II, No. 5, May 1943, sec.450(1), pp.187-188), 19 B.R. 67.

9. The charge sheet shows that accused is 26 years of age and was inducted 29 January 1943 to serve for the duration of the war plus six months. He had no prior service.

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

11. The penalty for murder is death or life imprisonment as a court-martial may direct (AW 92). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 NOV 1944 TO: Commanding General, Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Corporal VINSON GIBBS (34541763), Company E, 377th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 4640. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4640).

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

5 JAN 1945

CM ETO 4661

U N I T E D S T A T E S	3D ARMORED DIVISION
v.	Trial by GCM, convened at Verviers, Belgium, 19,20,21,22 and 23 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private CHARLES J. DUCOTE (14010814), Company C, 36th Armored Infantry Regiment	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 Charles J. Ducote, Company C, 36th Armored Infantry Regiment, did, near Fromentel, Calvados, France, on or about 18 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Marcelle Marin.

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

Specification: In that * * * did, near Fromentel, Calvados, France, on or about 18 August 1944, by force and violence and by putting her in fear, feloniously take, steal, and carry away from the person of Marcelle Marin, 100,000 francs, (equivalent to $2,017.50 U. S. Money), the property of said Marcelle Marin.

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

Specification: In that * * * did, near Fromental, Calvados, France, on or about 18 August 1944, wrongfully strike Marcelle Marin in her face with his fist.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 91 days in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence presented by the prosecution showed as follows:

On 7 August 1944, while American forces were advancing and the Germans retreating through France, Madame Marcelle Marin, her husband and her daughter, Marcelle (hereinafter referred to as "Marcelle"), age 18, all of St. Georges D'Aunay, Calvados, France (R21), were proceeding as refugees along a road in the vicinity of Broyous, France (R23). They carried with them 180,000 francs, most of it in a suitcase in a cart, 11,000 of which belonged to Marcelle and 169,000 to Madame Marin, money accumulated from the sale of farm products and animals and from her husband's pension (R83-84). As a result of their being "machine-gunned along the road" the husband was killed and Madame Marin wounded (R85-86). A German ambulance took Madame Marin to a hospital in Broyous (R23,84) and Marcelle was left with other refugees (R86). On 11 August Marcelle received from the mayor of St. Hilayre her father's pocketbook containing "11,000 or so" in francs. This money was blood-stained since a chest wound had caused his death and blood had run into the billfold (R86,87,88). She paid her father's funeral expenses and transferred all the money, including that contained in the suitcase, to her person (R88), carrying it in varying denominations in two bags of blue canvas (R15,16) worn underneath her combination blouse and skirt (R9). Each bag contained two billfolds - one brown billfold of heavy leather, another small one containing her father's permit to drive vehicles, his identification card, evacuation papers and seven cards of tobacco, another small red one and the fourth a large leather one containing exactly 11,000 francs wrapped up in a piece of newspaper and tied with a string. The total amount of money in the pocketbooks was 180,000 francs (R15,16). She carried it in this manner "because the SS were taking things away and I had them on my person" (R16).

On 18 August she was at the farm of Monsieur Albert Poussier in Fromentel where accused and a few other soldiers gathered at about 1800 hours. The battle of Fromentel had just been concluded and accused's organization was bivouacked nearby. The soldiers "were talking to civilians, drinking cider and getting eggs, as they usually do" (R66). A doctor was taking care of wounded (R7). Accused was drinking with comrades (R36) and could speak a little French (R53). He offered Marcelle coffee and she accompanied him along a path and across some fields (R8,9,40). She went with him "with the intention of getting coffee and not of getting hurt" (R32). He was armed with a revolver (R10). After they had gone 300 to 400 meters from the farm, accused attacked her, forced her to the ground, slapped and hit her with his hand and lay upon her. She testified in considerable detail regarding her resistance (R9,41,42-43,44,45,46,50) and the manner in which he pointed his revolver at her (R10), raised her dress, took off her pants (R12) and had sexual intercourse with her three times (R13,14,27,28,29, 49,50). Her resistance continued for at least half an hour (R56) and she feared that he would kill her (R50). During this encounter she noticed her money bags on the ground, but as soon as she picked them up accused took them away from her (R14) and put them in his helmet (R15). During this struggle, he lost his revolver (R46) and was unsuccessful in finding it (R31). He returned with her to the farmhouse where he left her a little before 2200 hours (R24; Pros.Ex.B), taking her money with him (R51).

At about 2330 hours the guard at his company area challenged him, then in the company of Private First Class Joseph Krynicky of the same organization, noticed nothing peculiar about accused's condition and allowed them both to pass (R24; Pros.Ex.A). Sergeant Raymond A. McMullin, of the same company as accused, had sent him at 1700 hours the same day to Battalion Headquarters with morning reports and, when he returned to the company area at about 2330 hours, McMullin called for him and "wanted to know where he was" (R76,78). Accused related a story of being captured by two Germans who had a woman with them, of having his pistol taken away and of his escape (R77). He was not intoxicated but had been drinking. At accused's request, McMullin felt of his holster to note that his revolver was gone (R78,80). Meanwhile Marcelle reported at the farmhouse how she had been robbed of her money and raped (R32,52). The following morning she was interviewed in his battalion area by Captain Samuel M. Korn, Medical Corps, Battalion Surgeon, 1st Battalion, 36th Armored Infantry Regiment, to whom she related the manner in which she had been assaulted and robbed of a large sum of money (R57,58) and described how the money was pinned together (R67). He observed that she had

> "external injuries on the right side of the face, particularly in the right orbital area, surface around the eyes were swollen, discolored, puffed, giving appearance of what we call in civilian

> life as a 'black eye'. The rest of her face was scratched or scratches were distributed irregularly over the face and some scratches and scratch marks on her neck" (R63).

First Lieutenant Robert T. Bohme, Headquarters 1st Battalion, 36th Armored Infantry Regiment, was also present, heard her story and noticed that she had been "very brutally beaten about the face" (R66,68,70). Her description of the soldier who had attacked her caused him to think at once of accused. He was then brought before her and she immediately identified him as her assailant (R32). Upon request, accused produced his wallet, which was found to contain French franc notes of large denominations pinned together. Marcelle claimed the money was hers but disclaimed the wallet as her property (R59-60,67). A black pocketbook and its contents, including the pay record of accused and 5,535 francs in miscellaneous denominations was offered and received in evidence, without objection (R61,62; Pros.Exs.E,E-1 - E-6). Accused was placed in arrest in quarters and a few minutes later Lieutenant Bohme saw him "going through his duffle bag". The officers then examined it and found a "brown" wallet which contained French franc notes of large denominations pinned together (R67). At the trial Bohme was shown a "tan" pocketbook and French franc notes totalling 54,385 francs, some in denominations of 5,000, of 1,000 (pinned together), of 1,000 (showing pin marks), of 500 with bloodstained corners, separate batches of 100 (pinned together) and lesser denominations (R68). He testified that the pocketbook was the same one found in accused's effects and regarding the money stated:

> "I have seen it since at Regimental Headquarters and Captain Speigelman was holding this evidence and turned it over to Captain Korn - I do not recall - I would not swear I saw that money at Fromentel" (R68).

The pocketbook and money were then offered and received in evidence without objection (R69-69a; Pros.Exs.F,F-1).

4. After his rights were explained to him (R89-90), accused elected to be sworn and testified in substance as follows:

On 18 August 1944 he arrived at his battalion bivouac area in Fromentel at about four o'clock in the afternoon. About 5:30 pm in accordance with directions of his first sergeant, he took the "daily reports of that day" to the battalion command post. Then, after greeting some "buddies" with whom he "shot the bull" for a few minutes, he went to a farmhouse he had "spotted" (R91). There were soldiers inside and outside. He sat down at a table in the house with "at least 3 medics". The owner of the farm sold him a small bottle of cognac (R92-93) and he "had a couple of drinks out of it - me and the three medics" (R92). Three "young ladies" walked into the house, one of whom he afterwards

learned was named Marcelle Marin. She said "hello" to him and he said "hello" to her (R93).

He described at great length the manner in which he and the "medics" assisted the "young ladies", including Marcelle, by bandaging sores on their legs (R94,95). A man came in who related that he had a wounded horse outside. Accused told him he would be out in a few minutes.

> "In the meantime, as I turned my head, Miss Marcelle - the lady that was here today in Court - had shown up in front of me and had asked me for coffee".

He said he would give her some but explained he "had to go and fix this horse up which we had been speaking about 10 minutes". When he started out the door, Marcelle started to follow him, having misunderstood him "when I said I had to fix a horse up". So he said to her again in French:

> "I am sorry, but I am not going for coffee now but I will be right back with you after if you can wait in the house if you want to" (R96).

He never saw Marcelle again after that (R97). He described in detail his ministrations with tape, scissors and iodine to cure the wounded horse, thereafter returning to the house where he sat down on a bench.

> "There were some soldiers there from some other companies - I did not pay attention from which Company they were but they were all happy, laughing, cuddling up" (R98).

He left at 9:30 pm and, after taking a wrong turn, met Private Joseph Krynicky, of his organization, to whom he related a story of having been captured by Germans and his escape, and together they returned to their bivouac area. He gave McMullin

> "the same line of bull that I gave Joseph Krynicky about the 'heinies' had captured me and that they had a beautiful girl with them and he told me to go to bed" (R100).

When he arrived in his bivouac area on 18 August he had two wallets with quite a bit of money in them, one "sorta reddish" and the other, dark brown. In his black wallet he did not carry very much money (R104)

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"and my reason for that is because I had some of my own money in there - what I mean by my own money - my own French print - U.S. print" (R105).

He carried a few French bills

"also with this black wallet for my use in gambling for pastime to pass off time when we have a chance" (R105).

In the brown wallet he carried quite a bit of money - "I never counted it out but a fraction of 52 to 58,000 francs" (R105). He carried the black wallet "at all times ever since I came overseas" (R105). The brown billfold he found two weeks before he "pulled into this bivouac area at Fromentel" laying on the side of the road with "plenty of money in it and alongside - scattered around" near knocked-out German vehicles and tanks. He picked up the money and put it in the billfold, but he did not count it (R106). The evening of 18 August he drank about one-half a pint of cognac and was sober enough to know what he was doing all that evening (R107). He was cross-examined at length by the prosecution (R108-124). Asked whether he had a German pistol with him when he reported to Sergeant McMullin that night (R124), he replied that he "may have taken it off" (R125), but he did have a pistol with him that night. He told the sergeant about the two Germans and a girl because "everytime I would go off that way I would tell them a big lie like that" and "I wanted to give a reason for me being away" (R125). He is married and has two children (R127). When he arrived in France "three and a half months ago" he had $200 to $300, some of it accumulated from gambling and the rest from home. He has been with the 3d Armored Division about one month and 20 days. He gambled extensively (R128) and won "pretty close to One Thousand Dollars". When he picked up the francs and the wallet by the side of the road "some of the guys who were around there" observed it, but "I didn't know their names" (R129), nor did he know in what vicinity in France he was when he picked up the pocketbook (R130). He estimated he had picked up on the road "Fifty to 53,000 francs - something like that" (R130-131). He "counted part of it but not all". There was scattered around there he would say "pretty close to a million dollars", some pinned together and some not, "piles here and piles there" with "several bills each tied in big rolls" (R132).

Asked if he would call a thousand dollars a lot of money, he replied, "No sir; I call that small change for my part, sir" (R131). He was in rightful possession of all the money, it was all his, "it is what I found" except for a thousand dollars he won gambling and ten dollars he received in pay. He did not win any of the pinned-together money gambling or any of the 5,000 franc notes (R133), or the blood-stained notes, but did win some of the 500 franc notes. Upon request, he counted one bundle of money and stated it totalled 5,535 francs and

7 Reich marks. Shown the "balance of money that was found on you", accused examined it and stated, "This money was found alongside of the road in a beat-up half-track" (R134). Accused did not know how much it totalled and, upon request, counted it and announced the amount as 54,385 francs (R135). Accused spent all his life on a farm (R140) and at the end of the last season was paid off "close to two hundred ($200.00) but we made money in between on groceries and cattle" (R141), but "never knew how much I made exactly that year. I never kept account of anything like that" (R141). He referred to this thousands of dollars picked up along the road as "chicken feed" "because I used to gamble a lot and worked in those gambling rooms", although it is true that he never had more than two thousand dollars at any one time (R141). The year before he entered the Army he made "around Two Thousand Dollars" of which amount he won in gambling "around Thirteen Hundred Dollars" which left Seven Hundred Dollars from farming (R142). Asked if that was the most he ever made from farming, he answered:

> "Yes, sir; not all farming - I worked as woodsman and odd jobs in between when we had no other work" (R142).

He was positive that all the money - referring to piles already counted - was his, won gambling and found on the roadside (R143). He was further extensively questioned regarding people at the farmhouse, the amount he drank (R145-149) and other matters already fully covered (R150-174).

5. As to Charge II and its Specification, robbery is defined as

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

It was clearly shown that Marcelle Marin, at the time and place alleged, carried on her person approximately 180,000 francs in varying denominations. This money possessed peculiar or unusual features. Most of it was in budnles of notes pinned together, some of the denomination of 5,000 and some of them stained with blood. The facts that about 60,000 francs in notes fitting this description were found in the possession of accused, as alleged by Marcelle, a few hours after she was deprived of her money, and his absurd explanation of his possession thereof, made it clear beyond any reasonable doubt that he forcibly took the money from her. The cruel beating she suffered leaves no doubt regarding the violence used and all the elements of robbery are fully proved beyond any reasonable doubt (CM ETO 3677, Bussard; CM ETO 2779, Ely et al; CM ETO 1621, Leatherberry; CM ETO 78, Watts).

6. As to Charges I and III and their specifications, the Manual for Courts-Martial, 1928, defines the elements of the crime of rape as follows:

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"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

The victim's version of the manner in which she was beaten by accused and forced to submit to sexual intercourse was positively denied by him. Nevertheless, her accusation was supported by a number of circumstances shown by the evidence. Her prompt complaint at the farmhouse where accused left her, the rapidity with which he was brought before her following her description of her assailant to his superior officers, his possession of money clearly shown to be hers, her beaten face - all were facts from which the court, in the light also of his nonsensical and egregious explanation, could properly give full credence to her testimony. There was no physical examination made of the victim's genitals to support her claim of having been raped. This was not essential to prove accused's guilt. It is the general rule that a conviction of rape may be sustained on the uncorroborated testimony of the prosecutrix, even though the defendant denies the crime, where her testimony is clear and convincing (CM ETO 2625, Pridgen). Citing decisions from many jurisdictions, it is stated in Wharton's Criminal Evidence, Volume 2, Eleventh Edition, section 916, at pages 1587-1594:

"With but few exceptions, the jurisdictions which are not controlled by statute adhere to the rule that a conviction for rape, or for an assault with intent to commit rape, may be sustained on the uncorroborated testimony of the prosecutrix. This is true even though the

> defendant denies the crime, or the prosecutrix is an infant. Her testimony, however, must be clear and convincing.
>
> Some courts have taken the view that the uncorroborated testimony of an unchaste prosecutrix is sufficient to justify a conviction for rape, and that the same rule prevails where the reputation of the prosecutrix for chastity and truth is bad, but other courts hold that where the chastity of the prosecutrix is not unimpeachable, corroboration of her accusation is required to establish her want of consent, which is a necessary element of the offense. Another rule about which the courts are divided relates to cases where the testimony of the prosecutrix is of a contradictory nature. Some take the view that when such evidence is of a contradictory nature, or when applied to the admitted facts in the case her testimony is not convincing, she must be corroborated. Others, however, take a different view. The uncorroborated testimony of the prosecutrix is insufficient to justify a conviction where her testimony is inherently improbable or incredible".

It was within the province of the court to believe the victim's testimony that penetration was effected by accused and that she did not consent to the same (CM ETO 1899, Hicks). The court's findings under Charges I and III and their specifications are supported by substantial competent evidence and are final and binding upon appellate review (CM ETO 3709, Martin, and cases therein cited).

7. The charge sheet shows accused to be 25 years of age. He enlisted 16 August 1940 at Jackson, Mississippi, to serve for three years. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and section 278, Federal Criminal Code (18 USCA 457), and for robbery by

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section 284, Federal Criminal Code (18 USCA 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 Jun 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. 5 JAN 1945 TO: Commanding General, 3d Armored Division, APO 253, U. S. Army.

1. In the case of Private CHARLES J. DUCOTE (14010814), Company C, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4661. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4661).

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

13 DEC 1944

CM ETO 4685

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Staff Sergeant BERNARD J. MITCHELL (37419507), 13th Field Hospital	Trial by GCM, convened at Malvern, Worcestershire, England, 11 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 93rd Article of War.
Specification: In that Staff Sergeant Bernard J. Mitchell, Thirteenth Field Hospital, did, at Ross-on-Wye, Herefordshire, England on or about 5 April 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anum with Norman Davis.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard

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

3. Following arraignment and before pleading the general issue, defense counsel offered a special plea to the jurisdiction of the court on the ground that the accused was not "lawfully called, drafted or ordered into, or to duty or for training in, the said service" within the meaning of Article of War 2. He asked for a continuance under the provisions of Article of War 20, offering thereby to obtain proof that accused, on or about 17 October 1939, was convicted and sentenced to a term of three years in a criminal court at Sioux City, Iowa, "as a result of having fellatio done on him, while drunk, by a 16 year old boy," that he was first confined in the city jail, later moved to the county jail and then to the Anamosa State Reformatory where he completed his sentence with "time off" for good behavior. He stated that accused was then willing to testify that during March or April 1942, he was called before his local draft board in Des Moines, Iowa, where he gave an account of his conviction of such felony, the charge, dates and place of confinement (R5a). Defense counsel maintained that accused was unlawfully inducted into the military service through negligence or oversight of the Selective Service agency concerned, in violation of Revised Statutes No. 1118, Section I, Act of Febraury 27, 1877 (19 Stat. 242), 10 U.S.C.A. 622 which declares:

> "No person under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service."

The Court denied the plea (R5c).

The plea was in effect a plea in bar to shut off trial on the merits. It is proper practice, recognized by the Manual for Courts-Martial:

> "Before passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question" (MCM, 1928, par.64, p.50-51).

While it has been held that it is the duty of the court to hear all relevant and competent evidence (including accused's testimony, if tendered) relative to a plea in bar before deliberating and passing upon it and that it is a right of the accused to secure this determination before being compelled to defend on the merits (CM ETO 108, Abrams; CM ETO 110, Bartlett), it is the opinion of the Board of Review that no substantial rights of an accused is injuriously affected where, as in this instance, the court, before ruling on the plea, accepts as true the evidence offered in its support for the purpose of its determination of the validity of the plea. There was therefore no necessity for a continuance to permit accused to secure other evidence to support his plea. The question whether or not accused was illegally inducted was irrelevant to the issue of his guilt of the offense charged (CM ETO 4820, Skovan, and authorities therein cited).

In effect, accused was assuring the court that he already was a convicted sodomist and felon and maintaining that his alleged illegal induction gave the court no jurisdiction to punish him for reverting to his degenerate practice while serving as a soldier with the army. Justice would be ill served indeed if a sodomist could thus evade punishment by pleading in bar his former lasciviousness. In this connection, it may be noted that an amendment to the Act cited by defense counsel authorized the Secretary of War, by regulations or otherwise, to make exceptions with relation to deserters and persons convicted of felonies so that they may enlist or be mustered into military service (act of 29 July 1941, sec.I, 55 Stat.606). However, as already shown, whether an exception was made as to accused at the time of his induction was a question the court was not required to decide. Inasmuch as the plea in bar was bad on its face as a matter of law, the court's action in denying the same was proper (CM ETO 2212, Coldiron).

4. The evidence was undisputed that accused while serving with the 13th Field Hospital committed the offense of sodomy per anum on Norman Davis, a mentally defective boy of 18 years at the time and place alleged (R10,15-16,18; Def.Ex.1). After being advised of his rights, accused elected to remain silent (R18-19).

5. The charge sheet shows that accused is 30 years three months of age and was inducted 16 June 1942 at Fort Des Moines, Iowa, 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. Confinement in a penitentiary is authorized for the offense of sodomy (AW 42; MCM, 1928, par.90a, p.81; AR600-375, 17 May 1943, par.5d; District of Columbia Code, secs. 24:401 (6:401) and 22:107 (6:7) (CM 171311, Stearne; CM 187221, Sumrall)). As accused is under 31 years of age and the sentence is not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Staff Sergeant BERNARD J. MITCHELL (37419507), 13th Field Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 4685. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4685).

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

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

BOARD OF REVIEW NO. 2

14 DEC 1944

CM ETO 4686

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Stavelot, Belgium, 31 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RAYMOND T. LOREK (33556812), and Private First Class J. R. HEIMAN (38543806), both Company C, 8th 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 soldiers named above has been examined by the Board of Review.

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

LOREK

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Raymond T. Lorek, Company C, 8th Infantry, did, near Losheimergraben, Belgium, on or about 10 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: "an engagement with the enemy", and did remain absent in desertion until he was apprehended near Hunningen, Belgium, on or about 21 October 1944.

HEIMAN

CHARGE: Violation of the 58th Article of War.

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Specification: In that Private first Class J. R. Heiman, Company C, 8th Infantry, did near Losheimergraben, Belgium, on or about 10 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: "an engagement with the enemy", and did remain absent in desertion until he was apprehended near Hunningen, Belgium, on or about 21 October 1944.

Each of accused stated in open court that he did not object to a common trial. Each was accorded the right of one peremptory challenge. Each pleaded not guilty to the Specification but guilty of absence without leave from on or about 10 October 1944 until he was apprehended on or about 21 October 1944 and not guilty to the Charge but guilty of a violation of Article of War 61. Each was found guilty of his respective Charge and Specification. No evidence of previous conviction was introduced as to 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 the term of his natural life. The reviewing authority approved each sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accuseds' pleas of guilty to the lesser included offense of absence without leave, in violation of Article of War 61, as well as competent, uncontradicted evidence adduced upon the trial, establish unauthorized absence for the period specified; The evidence further shows that while their company occupied a position at most 300 yards distant from the enemy, subjected to some mortar, artillery and small arms fire, both accused, with permission, reported to the battalion medical aid center, five miles to the rear, received treatment for minor non-incapacitating ailments, and were marked for and ordered back to duty by the medical officer in charge. Instead of returning to their company, they remained with other troops stationed in the vicinity of the aid station from 10 to 21 October when they were apprehended.

4. Each accused made an unsworn statement in which he denied that he "at any time intended to desert the service of the United States" (R15,16). Such intent was not an issue on the trial. The charge was absence without leave from his organization with intent to avoid hazardous duty: to wit: "an engagement with the enemy". The intent alleged was obvious from the facts proved.

5. Accused Lorek is 20 years of age. He was inducted at Baltimore, Maryland, 19 February 1943, for the duration of the war plus six months. He had no prior service.

Accused Heiman is 19 years of age. He was inducted at Houston, Texas, 29 September 1943, 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 persons and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

7. The offense of absence without leave to avoid hazardous duty, in violation of Article of War 58, is punishable as a court-martial may direct including death if committed in time of war. The designation of Eastern Branch, United Stated 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

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private RAYMOND T. LOREK (33556812), and Private First Class J. R. HEIMAN (38543806), both Company C, 8th 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 to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4686. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4686).

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

10 MAR 1945

CM ETO 4691

U N I T E D S T A T E S v. Private First Class DONALD R. KNORR (13049131), Company I, 142nd Infantry	36TH INFANTRY DIVISION Trial by GCM, convened at Headquarters, 36th Infantry Division, APO 36, U.S. Army (France), 30 October 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Seine Disciplinary Training Center.

OPINION by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 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 75th Article of War.

Specification: In that Private First Class DONALD R. KNORR, Company "I", 142nd Infantry, APO 36, U.S. Army, did, at ELOYES, FRANCE, on or about 2 October 1944, run away from his company, Company "I", 142nd Infantry, which was then engaged with the enemy, and did not return thereto.

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

Specification except the words "ELOYES, FRANCE", substituting therefor the words "TENDON, FRANCE", 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 52 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 reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years and suspended the execution of that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, ordered executed the sentence as thus modified, and designated the Seine Disciplinary Training Center as the place of confinement.

The proceedings were published by General Court-Martial Orders No. 111, Headquarters 36th Infantry Division, APO 36, U.S. Army, 3 November 1944.

3. The only evidence introduced by the prosecution as proof of the commission by accused of the offense charged against him was as follows:

An extract copy of the morning report of Company I, 142nd Infantry, for 11 October 1944 was received in evidence as Pros.Ex.1 after defense counsel stated that the defense had no objection (R6). The form used for making the extract copy, W.D., A.G.O. Form No. 1, March 25, 1943, was a form intended for original company morning reports. The following entries appeared thereon:

"13049131 Knorr, Donald R Pfc
MOS 745 Dy 745 Race W
(NBC) Reasgd to and Jd Co fr Det of Pnts
7th Army 2 Oct 44 then Dy to AWOL 2 Oct 44
AWOL to Conf 8 Oct 44 then Conf Div stockade 11 Oct 44"

Immediately under the foregoing entries appeared the following:

"A TRUE EXTRACT COPY
/handwritten/ Reinhart Hasselbring
/handwritten/ EMY
/typed/ REINHART HASSELBRING
1st Lt. 142d Inf.
Pers. O."
(Pros.Ex.1).

At the bottom of the form, on the line for the signature of the officer who signs the original morning report, appeared the following typewritten entry:

"/S/ Reinhart Hasselbring
REINHART HASSELBRING, 1st Lt Inf"
(Pros.Ex.1).

First Lieutenant Reinhart Hasselbring, personnel officer of the 142nd Infantry, identified Pros.Ex.1 as an extract copy of the morning report of Company I, 142nd Infantry, dated 11 October 1944. He testified that he did not sign the extract copy and that his name and the initials "EMY" had been written thereon by Lieutenant Edward M. Yevics who, on or about 11 October 1944, the date of the morning report, was assistant personnel officer of the 142nd Infantry. The morning report itself also was signed by Lieutenant Yevics. The entry in the morning report showing a change in the status of accused from duty to absence without leave as of 2 October 1944 was not based on personal knowledge but on the "battle casualty morning report" that the company sent down to the personnel office (R6,7).

4. Accused elected to remain silent (R10). Evidence was introduced by the defense relating to the mental, psychoneurotic, and physical condition of accused (R8-10; Def.Exs.A,B). The prosecution introduced testimony in rebuttal of that evidence (R11-14). Def.Ex.A is a mimeographed form of psychiatric report filled out and signed by Major (then Captain) Walter L. Ford, Medical Corps, division psychiatrist. He testified that he examined accused on13 October and that Def.Ex.A was the result of that examination (R11). The space under the mimeographed words "He states that:" is blank. Then the following statement appears:

> "On examination, 13 Oct. 1944, I found the following:
>
> This soldier joined the Div. in April and was in combat about 2 wks in Italy. Was wounded on 27 May and was in hospitals 3 wks. Has been in combat only 4 or 5 days in France. He tells that he has allways been nervous. Stated that in combat he becomes tremulous and 'just can't stand it.' He left his unit when he came under some light shelling".

5. Article of War 75 provides that

> "Any officer or soldier who, before the enemy, * * * runs away * * * shall suffer death or such other punishment as a court-martial may direct".

The Manual for Courts-Martial, 1928, paragraph 141b, page 156, under the heading "Running Away Before The Enemy", contains the following:

"Proof.- (a) That the accused was serving in the presence of an enemy; and (b) that he misbehaved himself by running away".

There is no evidence in the record of trial that at the time accused is alleged to have run away, or at any other time, either the 142nd Infantry or Company I, one of its component companies, was "engaged with the enemy" as alleged in the Specification. That part of Def.Ex.A quoted in paragraph 4, supra, contains the statement, "He left his unit when he came under some light shelling". If this statement was made to the division psychiatrist by accused and related to the offense alleged in the Specification, it constituted an admission against interest and was therefore admissible in evidence (MCM, 1928, par.114b, pp.116-117). Communications between a civilian physician and patient are not privileged, nor are statements made by an officer or soldier to a medical officer (MCM, 1928, par.123c, p.132). It does not appear, however, that the statement in question was made to the division psychiatrist by accused. The information embodied in the statement may well have been obtained by the division psychiatrist from other sources. Since it is impossible to determine that the statement was made by accused it would be highly improper to treat it as an admission. Since there is no evidence in the record of trial showing where accused or his company was at the time he is alleged to have run away, and since it was not proved that accused did in fact run away, the finding of guilty of a violation of Article of War 75 cannot be sustained.

6. The averment in the Specification that accused "did * * * on or about 2 October 1944 run away from his company * * * and did not return thereto" necessarily implies that accused absented himself from his company without leave. In such case absence without leave under Article of War 61 may be a lesser included offense of an alleged violation of Article of War 75 (CM ETO 5114, Acers; CM ETO 4564, Woods). The only evidence introduced to prove that accused absented himself from his company without leave was the extract copy of the morning report of Company I for 11 October 1944 (Pros.Ex.1). The extract copy was in fact signed by the assistant personnel officer, who is not an official custodian of the original (CM ETO 5234, Stubinski). The copy was not, therefore, duly authenticated. Failure by the defense to object to the admission of the copy on the specific ground that it did not appear it was duly authenticated could properly have been regarded by the court as a waiver of that objection (MCM, 1928, par.116a, p.120; CM ETO 5234, Stubinski).

It has been held by the Board of Review (sitting in the European Theater of Operations) that the rule of evidence contained in the Federal statute providing for the admissibility of writings and records made in the regular course of business (Act of June 20, 1936, Ch.640, sec.1, 49 Stat. 1561, 28 USCA 695) is applicable in cases before courts-martial

(CM ETO 2185, Nelson; CM ETO 2481, Newton; CM ETO 4740, Courtney). The basis for the rule is the probability of the trustworthiness of records because they are the routine reflections of the day-to-day acts, transactions, occurrences, or events of an organization (Palmer v. Hoffman, 318 U.S. 109, 87 L.Ed. 645). A morning report is a writing or record within the meaning of the statute cited (CM ETO 2481, Newton).

At the time the morning report in question was made, it was the practice in numerous combat organizations operating under combat conditions to have their morning reports prepared in the unit personnel section. This practice had become the usual and normal procedure in recording facts constituting the daily history of the unit involved. The Commanding General, European Theater of Operations, recognized the military necessity for this practice (Ltr. AG 330.33 Op. JA, 2 Dec 1944) and issued a directive providing that morning reports of units in the Theater are to 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, ETOUSA, 12 Dec 1944, sec.IV). The original morning report in the present case was made by the assistant personnel officer in the course of discharging the responsibility assumed by the personnel officer of recording the day-by-day acts, occurrences, and events of the units served by the personnel section. The document thus prepared was kept in the personnel office and became part of the administrative records of the organization concerned.

The personnel officer, as official custodian of it, testified that it was the morning report of Company I, 142nd Infantry, and that "it was based on the battle casualty morning report that the company sent down to the office" (R7). The Board of Review is of the opinion that the original morning report was admissible as a writing or record made in the regular course of business as provided in the Federal statute cited above. The extract copy was properly received, since its defective authentication as a true copy was waived. The entries were relevant and material to the issue of accused's absence without leave. It was for the court to say to what extent the circumstances surrounding the making of the record, including the lack of personal knowledge by the assistant personnel officer, affected the probative value of the entries.

The Specification alleges that accused ran away from his company "and did not return thereto". This is equivalent to an allegation that at the time the Charge was preferred, namely 10 October 1944, accused's absence without leave had not been terminated. It was therefore proper to permit proof that his absence ended on 8 October - an earlier date of termination than was alleged. The Board of Review is of the opinion that the record of trial is sufficient to sustain a finding of guilty of the lesser included offense of absence without leave from 2 October 1944 to 8 October 1944 and the sentence.

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6. The charge sheet shows that accused is 21 years of age and that he enlisted at Shamshin, Pennsylvania, 23 February 1942 for the duration of the war plus six months. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors affecting the substantial rights of accused were committed during the trial, except as hereinbefore indicated. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did on 2 October 1944 absent himself without proper leave from his company and did remain so absent until 8 October 1944, in violation of Article of War 61, and legally sufficient to support the sentence.

B. Franklin Riter Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 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 First Class DONALD R. KNORR (13049131), Company I, 142nd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings that accused did on 2 October 1944 absent himself without proper leave from his company and did remain so absent until 8 October 1944 in violation of Article of War 61, be vacated.

3. In view of the reduction in the grade of the offense of which accused is legally found guilty, it would be appropriate to make some reduction in the term of confinement.

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. McNEIL,
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 vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 87, ETO, 18 Mar 1945)

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

BOARD OF REVIEW NO. 1 — 8 FEB 1945

CM ETO 4701

	3D INFANTRY DIVISION
U N I T E D S T A T E S	Trial by GCM, convened at Pozzuoli, Italy, 4 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
v.	
Private JOHN F. MINNETTO (32159293), Company L, 15th 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 charges and specifications:

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

Specification: In that Private JOHN F. MINNETTO, Company L, 15th Infantry, did at Statigliano, Italy, on or about 29 December 1943, desert the service of the United States, by absenting himself without proper leave, from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at San Severo, Italy, on or about 19 April 1944.

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

Specification 1: In that * * * did at San Severo, Italy, on or about 19 April 1944, knowingly

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and wilfully apply to his own use & benefit, a United States Army Vehicle, 2½ Ton, G.M.C. of the value of about two thousand six hundred and ten (2610) dollars, property of the United States, intended for the military service thereof.

Specification 2: (Nolle Prosequi)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder, except Specification 2 of Charge II. 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 "remainder" of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, directed that accused be confined at NATOUSA Disciplinary Training Center, Oran, Algeria, pending further orders, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence was as follows:

On 28 December 1943, Technician Fifth Grade Edward A. Quirk, mail clerk of Company L, 15th Infantry, was "in the rear with mail in the kitchen" at Statigliano, Italy, while the company was then "in the line in the vicinity of Mt. Lungo". Accused "was brought in by the 1st Sergeant of Service Company" and turned over to Quirk for the night. The sergeant was to pick him up the following morning and take him "up" to the company, Quirk conducted accused "upstairs in the barn to sleep for the night" and told him he would probably go "up in the line" in the morning on the trucks. The following morning Quirk "went to get him up for chow and he wasn't there" (R5-6). Quirk searched for accused without success and reported his absence to the mess sergeant "who was in charge". The 15th Infantry "withdrew from the line" on 1 January 1944. Quirk continued on duty with Company L until 20 January 1944, during which time accused was absent (R6-7).

On 19 April 1944 at about 1500 hours, while Private First Class Carmelo T. Gandolfo, 975th Military Police Company (Aviation), was on traffic duty at Lucera Road in Foggia, Italy, two "GI vehicles, 2½ ton GCM's" approached him. He noticed civilians in each and therefore stopped both trucks. The first truck was driven by an American soldier, of whom he requested his trip ticket. Two military police from the 975th Military Police Company came up with their motorcycles which they parked beside the trucks. The soldier suddenly put his

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truck in gear and "took off" with the military police in pursuit. Gandolfo then went to the remaining vehicle and noticed "four faces in the truck" and "noticed one in the truck which was Mannetto who started to walk from the vehicle". Gandolfo ordered him back into the truck and talked to him in Italian (R8). Accused "wrote his name down as Mario Giovanni" and explained he

> "was going with the vehicle, he was very poor and was making twenty dollars for the trip, and that it was helping him out. That was what proved he was with the vehicle. He told me he was a civilian, and he was going to make a few dollars for his family. He said his parents were poor people living in Naples" (R9).

After questioning also the driver of the truck (later identified by the defense as Private Israel A. Indictor, 133rd Infantry, 34th Division (R26; Def.Ex.A), Gandolfo got into the vehicle and required him to drive to military police headquarters where he turned both men over to First Lieutenant Robert H. Gass, 975th Military Police Company (R8,12-13). Gandolfo saw accused again the following evening at 2000 hours when the "marshal of the carabiniere * * * was doing the interrogating". Accused again gave his name as "Giovanni", and Gandolfo first learned he was an American, rather than an Italian civilian, when the marshal

> "asked him a few questions--asked where he was born and he got bawled up and said America. The marshal said: Then you can speak English. He said yes. That is the first I knew he was a GI. I asked him if he was a GI and he said yes. I told him to take my seat. I also said I had a feeling of punching him in the nose which I didn't" (R9).

When Gandolfo was asked if he offered accused any promise of gratuity to pursuade him to give information, the defense objected and asked that it be allowed to introduce witnesses out of order in behalf of the defense to show that officers were present at the time of their questioning (R10).

Pursuant to this request, Captain Lawrence J. Dempsey, 975th Military Police Company (the provost marshal of San Severo Police and Prison Officer of the Allied Air Force Air Command Stockade (R22)), testified as a witness for the defense that accused was brought to his attention on 20 April 1944 in San Severo when he was brought in by the military police. Accused signed a "confession" after he was questioned by the marshal of the carabiniere (R11). Captain Dempsey was not interested because the conversation was in Italian (R12). Lt. Gass also was called as a defense witness and testified that

accused was brought into his office in the afternoon on 19 April 1944 after he was "arrested and booked as being a suspect of the black market case at the time". He questioned accused through an interpreter, but did not advise him of his rights. Lieutenant Gass thought he was a civilian as he spoke perfect Italian (R13). While Lieutenant Gass was out of the room, he learned accused was a soldier of the 3d Division and although he was present when accused signed a statement, he did not warn him of his rights. Lieutenant Gass placed his signature on the statement, but did not comprehend its contents as it was written in Italian (R14). He made no threats and did not offer accused any inducements to sign it.

The prosecution then offered the statement in evidence. The defense objected on the ground that Gandolfo had threatened accused by saying he felt like punching his nose, that accused was not warned of his rights and that contents of the statement were "highly prejudicial to this accused" (R15). The court overruled the objections and the statement was received in evidence (R16; Pros.Ex.A), the court "reserving the right to disregard any part of it to allow the prosecution or defense to make further use of the document". The prosecution, the defense and accused stipulated that

> "the document is a true and exact translation into the English language of the statement which has just been accepted in evidence by the court with the limitation stated by the president, as Exhibit 'A' for the prosecution" (R16).

The translation reads as follows:

> "Territorial Legion of the C.C.R.R. of Bari Station of San Severo
>
> Report of interrogation of Mennitto Giovanni of Emilio and of Cardone Rosa born in North Bergen New Jersey the 14th September 1915 (American soldier deserter)
>
> On the 20th day of April 1944, at the office of the American Military Police in San Severo at 2015 hours.
>
> In the presence of Lt. Gass, Officer of the American Police, Lt. Bair, also officer of the American Police, Lt. Dempsey, Cpl Waterfield, Cpl. Gallavan, PFC Gandolfo of the Headquarters of the American Police in San Severo maresciallo maggiore C.C.R.R. Capone Giovanni, commander of the station of San Severo and Vice-brigadiere C.C.R.R. of the above generality, who, questioned, answers:

I am a deserter of the 3rd American Division and /with two other American soldiers, of whom one is named Walter Harvey of the 34th Division, but I do not know the name of the other, from about three weeks ago. We have associated ourselves with trading the grain on the blackmarket. Two civilians of Palma (Naples) operated with us soldiers. I specify that we deserters furnished only the two American motorcars and for each of them we gained 50 thousand lires each trip./ The two trucks are stolen, and they were held by two civilians of Naples of whom I do not know the names.

I, the other two American soldiers and the two civilians of Palma, who I know only by sight did four trips of which three from Ordona (Foggia) and one from S. Martino in Pensilis (Campobasso), all of Palma (Palma). I cannot specify how much was paid for the grain to the sellers.

Made, read and confirmed.

/s/ John F. Minnetto
/s/ Robert H Gass 1st Lt
/s/ Lt. Linwood Bair

A TRUE COPY:
/s/ George G Cohn
/t/ GEORGE G. COHN
1st Lt., I5th Infantry
Investigating Officer"(Pros.Ex.A) (Brackets supplied).

The objection of the defense to the portion of the above translation in brackets was overruled by the court.

Gandolfo, recalled by the prosecution, testified that accused said he would

> "help us all he can to round up all these here black market offenders * * * would show us that these civilians have other trucks GI put away"

and that the trucks he and Indictor were riding in "belonged to the civilians" (R17).

On 5 May 1944, Captain John Chollar, Adjutant of the 4th Field Hospital, while at the Air Force Stockade in San Severo, was asked by Orange C. Dickey, Agent, CID, to "swear some soldiers testimony". He obliged by following Dickey to a room in the stockade where

several soldier prisoners (including accused) were brought in. Dickey told these prisoners that

> "under the proper Article of War, I believe 24, they were not required to be forced at that time to make any sworn statements or any other kind but if they wished to they could make it or simply refuse to say anything and that if they would make a sworn statement there were no promises of any kind to them, and that if they refuse to make statements there would be nothing particularly added to their probable punishment, or no kind of reprimand" (R19).

Dickey handed the prisoners one at a time "testimonies" each with several typed copies and Chollar, after he had again "impressed upon them that they could do one of three things * * * swore them in * * * " and as to each prisoner "signed the testimony right under him" (R19,24). Shown by the prosecution a document dated 25 April and sworn to 5 May 1944, he identified it as one of the "copies of the testimony" referred to. The prosecution then offered it in evidence. The defense objected, maintained that the statement was made in return for benefits offered accused "if he would play ball with the Investigating Officer" and again requested permission to call a witness out of order in support of this contention. The prosecution admitted that promises were made to accused but asserted that they had nothing to do with the taking of the statement then offered (R20).

Dempsey was recalled as a defense witness and testified that on 21 April 1944 in his office he asked accused if he would help "break up this ring" in Naples. Accused said he would and Captain Dempsey replied that he in turn would help accused "as much as possible" and

> "told them [accused and others not identified] when we went to Naples they would be free, that they were entirely on their own and if they boys were ever brought to trial that any of our Officer would contact me I would answer in their behalf during the period they worked with me" (R21).

Accused did cooperate "100%". Dempsey was not present when accused signed the statement sworn to on 5 May 1944 and did not promise him anything if he would sign it (R22). He did, however, promise him he would, when desired at any later date, make a request on his behalf for clemency (R23). Besides his duties as provost marshal and prison officer, Captain Dempsey was also the officer in charge of the stockade where accused was then held and Controller of the VD Hospital in San Severo (R22).

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Called as a defense witness, Dickey testified that he talked with accused and took from him a "pencilled statement" on 25 April 1944. Thereafter accused stated that "a certain Captain Dempsey had told him he had power to dismiss the charges against him", and that Captain Dempsey knew of his "knowledge of all these acts which were going on in Naples, and was desiring to get his knowledge in the apprehension of those men" (R24,25) and promised he would drop the charges "in that case" if accused cooperated. Dickey replied that he "would appear as a witness in a plea for clemency or leniency and that is all I am allowed to do". He did appear for accused as a witness and made a request for clemency for his cooperation in "this black market case". He heard of the alleged promises made accused, but it was after the statement was made and before it was signed and sworn to before Captain Chollar on 5 May 1944. Part of accused's cooperation was giving the information contained in this statement (R25).

The prosecution again offered the statement, the defense objection was overruled by the court, and it was received in evidence (R26; Pros.Ex.B). In this statement, accused relates that he left his organization "near the middle of January 1944" and describes in detail his "black market" activities in which use was first made of a "2½ ton, GMC, 6 x 6" truck having "a white star on the hood", used on one trip by "Albert, one other GI, and myself, along with a fat civilian and a civilian boy" to transport grain from Ordona to Palma, near Naples. The soldiers were paid $500 for their work and they "split it equally three ways". His second trip for grain was made the first part of April in the company of "another GI", known to him as "Julie", and "the fat man" and a "civilian kid". Accused drove. He divided $500, received for their services, with "Julie". On 7 or 8 April he made a third trip in which "two 2½ ton GMC's" were used. He and "Harvey" (later identified by the defense as Private Walter J. Harvey, 168th Infantry, 34th Division (R26; Def.Ex.A)), drove one truck and "Hall", Indictor and another soldier drove the other. The "fat man" paid them off at the rate of $500 for each truck and "the drivers split it up". About 16 April he went on his last trip with Harvey, "Hall" and Indictor after he and Harvey got another "truck, GMC", in San Gennara. It was while he was returning with the load on this trip that "we got lost and asked an MP for directions" which resulted in his apprehension and arrest.

4. On behalf of the defense, two documents were offered and received in evidence without objection (R26; Def.Exs.A,B). Def. Ex.A purports to be a copy of a letter, with copies of four indorsements thereto added as it progressed through military channels, from Lieutenant Colonel A. R. Briggs, Senior Public Safety Officer, Foggia Province in Lucera, to the Provost Marshal, 12 AAF/MTO, APO 650, in which the conduct of accused, Harvey and Indictor, is commended for their cooperations in securing the conviction of certain

black market operators, the case being known as "Romano Mascia and Others". The purported copy of letter contains the following paragraph referring to accused, Harvey and Indictor:

> "In passing I would also like to mention the help the soldiers gave in this case. They have spoken the truth to my officers and at the Court they gave their evidence in a very intelligent manner and there was no doubt that as a result of their testimony that the men were subsequently sentenced" (Def.Ex.A).

Def.Ex.B is a purported copy of a similarly directed letter from the same officer setting forth the names of the defendants at a trial of the case, referred to in Def.Ex.A, before a Superior Allied Military Government Court on 10 June 1944, stating the sentences imposed and commending "Agent Dickey of your C.I.D. Section" and "the willing assistance and co-operation which your department is affording all my investigating officers".

After his rights were explained to him, accused elected to remain silent (R27).

5. Regarding the statement of accused made on 20 April 1944 (Pros.Ex.A) at the office of the American military police in San Severo, Italy, it was apparent that he was not warned of his rights before or during the time he was questioned or prior to his signing the statement. It did not appear that any promises were made to him or that force or threats were used to induce him to talk or sign the statement. When Gandolfo discovered that accused, with whom he had spoken much Italian, was not a civilian as he had pretended, but an American soldier, he experienced considerable chagrin and felt, as he expressed it, like "punching him in the nose". However, it was evident that this threat resulted from a desire to get over with accused for deceiving him, not to induce him to talk or sign a statement.

That part of the statement in which accused alluded to himself as a deserter could not properly be considered by the court as a confession that he absented himself without leave with intent to avoid hazardous duty as alleged. Rather it was an indication that he did not intend to return to the service, which in view of the offense as charged was no more than an admission that he was absent without leave. Regardless of the light in which the court considered his description of himself as a deserter no substantial right of accused was injuriously affected thereby since it was clearly shown by the evidence that he did absent himself from his organization with intent to avoid hazardous duty as alleged. That part of the statement in which accused described his actions in the unlawful use of a government vehicle was a confession to such use as alleged in Specification I of Charge II.

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"It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a prima facie showing to this effect may be required before evidence of the confession itself is received. No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.

A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made.

* * *

The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior" (MCM, 1928, par.114a, p.116).

"Unless otherwise provided by statute, a confession otherwise voluntary is not rendered inadmissible because the accused was not cautioned before making it. As stated by Mr. Joy, 'A confession is admissible although it does not appear that the prisoner was warned that what he said would be used against him, or although it appears that he was not so warned', and this expresses the rule upon the subject. And even though the person confessing is in the custody of police officers, or under arrest, at the time the confession is made, the rule is the same" (2 Wharton's Criminal Evidence, 11th ed., sec.627, pp.1049-1050).

The Board of Review has repeatedly held that the fact that an accused was not warned of his rights under the 24th Article of War does not render the confession involuntary (CM ETO 5584, Yancy, and authorities therein cited). The evidence disclosed that at the time accused was apprehended the American military police in San Severo were concerned with the activities of certain black market operators. The questioning of accused while he was dressed as a civilian and spoke Italian brought out the fact that he was an American soldier. The defense was unable to show either by its cross-examination of Gandolfo or by the testimony of Captain Dempsey or Lieutenant Gass that any threats or promises

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were used to induce accused to answer questions or to sign the statement offered in evidence (R16; Pros.Ex.A), but indicated, on the contrary, that it was given voluntarily. The voluntariness of the confession was a question of fact for the court, which is reflected by its admission of the confession in evidence and the findings of guilty, it determined against accused. In view of the evidence of voluntariness of the confession, the Board of Review is of the opinion that it was properly admitted in evidence, and will not disturb the findings of the court upon appellate review (CM ETO 5584, Yancy, and authorities therein cited).

6. Regarding the statement of accused originally taken 25 April 1944 and signed 5 May 1944, the evidence of defense witnesses indicated that promises were made to him that they would enter pleas for clemency for him at a subsequent trial in return for his services in aiding in the apprehension of black market violators. It was further indicated that he gave the statement as a direct result of such promises and under the circumstances shown the court should have sustained the defense objection to its receipt in evidence (CM ETO 1201, Pheil and authorities therein cited; CM ETO 1486, McDonald and McCrimmon). However, no extended discussion of the law applicable to the statement as taken from accused is necessary as, excluding its contents, there was substantial and compelling evidence of the guilt of accused as charged. An error in receiving in evidence an extrajudicial confession not voluntarily made, is not fatal if the evidence of accused's guilt, outside of the confession, is compelling (CM 160986 (1924), Dig.Op. JAG, 1912-1940, sec.395(10), p.206; CM ETO 1201, Pheil, and authorities therein cited; Cf: CM ETO 1693, Allen; CM ETO 3931, Marquez).

7. Disregarding entirely the statement of accused signed 5 May 1944, all the elements of the offense of desertion with intent to avoid hazardous duty are fully established by competent, substantial and compelling evidence (CM ETO 3641, Roth; CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt and cases cited therein). Since Company L was "in the line" on 28 December 1944, under the circumstances shown, it was without question engaged in "hazardous duty" within the meaning of Article of War 28.

8. Excluding the contents of the accused's statement signed 5 May 1944, the evidence showed clearly that on 19 April 1944 accused and another soldier applied to their own use and benefit a 2½ ton GMC United States Army vehicle as alleged in violation of Article of War 96, an offense similar to larceny and for which the same punishment may be imposed (CM ETO 393, Caton and Fikes). While it was permissible to charge accused under Article of War 96, the circumstances surrounding the use of the government vehicle showed that accused and those associated with him in the offense came into its possession unlawfully and had no intention of returning the vehicle. Such proof would

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have warranted convicting accused of a violation of Article of War 94 (CM 243287 Poole (1944), 27 B.R. 321, Bull. JAG, June 1944, Vol.III, No.6, sec.452 (17), pp.236-237). Although the prosecution did not establish the value of the vehicle, this was not necessary since the court without such evidence, could properly find it had a value in excess of $50 (CM 228274, Small, 16 B.R. 101; CM ETO 393 Caton and Fikes).

9. The charge sheet shows that accused is 29 years of age and was inducted 14 July 1941 at Trenton, New Jersey, for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 FEB 1945 TO: Commanding General, 3d Infantry Division, APO 3, U.S. Army.

1. In the case of Private JOHN F. MINNETTO (32159293), Company L, 15th 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. It was clearly shown by the evidence that accused, following promises and inducements made to him by government officials as regards clemency for the offenses with which he was charged, gave much assistance to the government in its prosecution and conviction of certain black market operators. The sentence and action thereon indicates that accused has not received any leniency for his services which were commended as directly responsible for the government's success in a difficult situation. Under the circumstances, it is considered that some action should be taken to redeem the promises made accused, by a substantial reduction in the period of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4701. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4701).

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

17 FEB 1945

CM ETO 4702

UNITED STATES	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Stavelot, Belgium, 2 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private BEN PETRUSO (32218696), Company I, 8th 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 Ben Petruso, Company "I", 8th Infantry did, near Neuhof, Germany on or about 7 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: "An imminent engagement with the enemy", and did remain absent in desertion until he surrendered himself near Hunnigen, Belgium, on or about 11 October 1944.

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

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

3. On 7 October 1944 accused was a member of the 1st Squad of the 3rd Platoon, Company I, 8th Infantry (R9,10). About 1600 hours on said date the company commenced an attack upon the enemy near the town of Neuhof, Germany. The company's objective was to gain an area of high ground 1,000 yards northwest of the town (R5,7). The Germans countered with a mortar barrage which wounded eight or nine men of the 3rd Platoon (R5). Accused sustained lacerated wounds on his right shoulder and back (R12,13). He left the line of advance and reported to the battalion aid station (R10,12). Captain Walter Salatich, Medical Corps, in charge of the aid station, treated the wounds with sulfanilimide powder and sterile dressing. He pronounced the wounds as nondisabling and directed accused to return to the company for duty (R12,13). Instead of returning to the company, he went to the 1st Battalion area and remained there until 11 October, when he returned to the company (R5,7). In the interim, Company I was subjected to the heaviest counter attack experienced by it since it landed on the European continent, wherein it sustained heavy casualties (R5,8,9,11,12).

4. Accused, as a witness in his own behalf, testified that while in England prior to "D" day his back commenced to pain him; that after landing in France his back troubled him to the extent that he was unable to dig more than shallow foxholes; that on 22 July he was hit with shrapnel and was thereafter hospitalized in England. During his hospital tour his back was treated without benefit. He was returned to his company in France and his back continued to disable him from doing heavy work. He asserted he made frequent complaints to his company officers and medical officers but received no consideration; on 7 October his back was particularly painful and he was unable to "dig in"; after he was treated he could only partially raise his right arm and he "was so bad he could hardly walk and had to take half steps". He went to the 1st Battalion area where he lived in a nearby house with other soldiers. At the end of three days he "felt well enough and went back to the company" (R16-20).

5. 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 Petruso. Such finding is binding on appellate review (CM ETO 1663, Ison; CM ETO 1693, Allen; CM ETO 4095, Delre).

6. The evidence presents a perfect pattern of the offense of absence without leave with intent to avoid hazardous duty. The accused suffered superficial minor wounds which were pronounced nondisabling. He legitimately appeared at the aid station for treatment. With full knowledge that his unit was engaged in an attack on the enemy, he availed himself of the opportunity thus afforded him to avoid further hazards of battle. For three days he remained in comparative safety while his fellow soldiers faced the greatest of battle dangers. When the attack was over he conveniently returned to his command. The charge against him was fully sustained (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

7. The charge sheet shows that accused is 29 years of age. He was inducted 21 February 1942 at Camp Upton, New York. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private BEN PETRUSO (32218696), Company I, 8th 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 has been twice wounded. On the day of his absence he was treated for lacerated wounds of the shoulder and back. He was told by the doctor to return to his company but instead he went to a nearby battalion command post where he remained three days and then reported to his company. The question of whether he had a sacroiliac ailment is left in doubt. A sentence of life imprisonment does not appear justified in this case.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4702. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4702).

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

2 DEC 1944

CM ETO 4704

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private THEODORE MILBURN (37399717), 3865th Quartermaster Truck Company (Transportation Corps)	Trial by GCM, convened at Palais de Justice, Le Mans, France, 18 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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1. The Specification of Charge III obviously alleges no offense. There is no allegation that accused wrongfully or unlawfully threw or caused the hand grenade to explode in the bivouac area. The absence of such inculpatory averment negatives any illegal conduct. The throwing or causing a grenade to explode in the area is not per se an offense. (CM 226512, Lubow 15 BR 105, Bull JAG, Jan 1943,Vol II, No.1 sec.454(37a); Cf CM ETO 1366, English) The record of trial is legally insufficient to support the finding of guilty of said Specification and Charge.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification, but legally insufficient to support the findings of guilty of Charge III and its Specification and legally sufficient to support the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

4704

(240)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, Loire Section, Communications Zone, European Theater of Operations, APO 573, U. S. Army.

1. In the case of Private THEODORE MILBURN (37399717), 3865th Quartermaster Truck Company (Transportation Corps), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support its findings of guilty of Charge II and its Specification, but legally insufficient to support the findings of guilty of Charge III and its Specification and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In view of the elimination of Charge III and its Specification it appears to me that some reduction of the period of confinement is in order. If this suggestion receives favorable consideration by you, your decision should be evidenced by supplemental action which should be forwarded to this office for attachment to record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4704. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4704).

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 JAN 1945

CM ETO 4740

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, (France), 17 October, 11,13 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DONALD M. COURTNEY (36830924), Company A, 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 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 Donald M. Courtney, Company "A" One Hundred Twenty First Infantry, did at vicinity of Gouesnou, France, on or about 1130, 1 September 1944, desert the service of the United States by quitting his organization with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at vicinity Kervalguen, France, on or about 2200, 6 September 1944.

CHARGE II: Violation of the 75th Article of War.

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Specification 1: In that * * * did, at vicinity east of Argel, France, on or about 2300 15 September 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until he surrendered himself at Morgat, France, on or about 2230, 20 September 1944 after the engagement had been concluded.

Specification 2: In that * * * did, at vicinity of Goussnou, France, on or about 1130, 1 September, 1944, misbehave himself before the enemy by refusing upon order of 2nd Lieutenant Lloyd A. Kraus to leave his foxhole and go with said Lieutenant on a check of the platoon preparatory to continuing the attack. /As amended at trial/.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I except the words "desert the service of the United States by quitting his organization with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at vicinity Kervalguen, France, on or", substituting therefor the words "without proper leave absent himself from his organization until", of the excepted words not guilty, of the substituted words guilty, not guilty of Charge I, but guilty of violation of the 61st Article of War; and guilty of Charge II, and Specification 1 and Specification 2 (as amended at trial) thereof. 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 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. With respect to Charge I and its Specification, the evidence shows that accused was absent from his company from 1 September 1944 to 6 September 1944 without authority. The findings of the court, by exceptions and substitutions, are sustained by competent substantial evidence (R11,15,28,39).

4. As to Specification 2 (as amended) Charge II, the prosecution's evidence is clear and specific that on 1 September 1944, the first and second platoons of Company A, 121st Infantry, were

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on the line of combat south of the town of Gouesnou, France, in the proximity of Crozon peninsula. They were in combat with the enemy and had sustained casualties (R5,33). The second platoon of the company, which accused was a radio operator (R15,18,34), was in reserve when the first and third platoons attacked, but at about 10 am it was ordered to protect the right flank. As it came up to the line of combat it encountered artillery, machine-gun and small-arms fire from the enemy. It commenced to "dig in". The enemy was about 100 to 300 yards distant (R5,6,10,12,15,17,19,33). Second Lieutenant Lloyd A. Kraus was in command of the platoon (R32) and he was "running about trying to keep the platoon together" (R22,33). At about 1:30 pm he encountered accused in his foxhole and ordered him by means of his radio to establish contact with the company commander. Accused asserted that he could not reach the company commander via radio. Then Lieutenant Kraus himself operated the radio and talked with the company commander. Following this episode, Lieutenant Kraus, desiring to remain in contact with the company commander, ordered accused to leave his foxhole and accompany him with the radio. Accused heard Lieutenant Kraus order him: "Come out and be a man and stay with me" (R20,33,35). Accused remained in the foxhole with his head between his legs. He was trembling, cried, whined and refused to leave the foxhole. He asserted he was shell-shocked. Lieutenant Kraus informed him that he might be shot because of his conduct, but accused continued to refuse to leave the foxhole. Thereupon Lieutenant Kraus said to him: "All right, you're no good to me, get out of the hole and go to the rear" (R33). In spite of this opportunity afforded him to go to the rear, accused persisted in his refusal to leave the foxhole. Further argument ensued between him and Lieutenant Kraus, wherein accused repeated the statement that he was shell-shocked. Finally he climbed out of the hole and, taking his equipment with him, ran to the rear. Lieutenant Kraus retained accused's rifle for use by another soldier (R20,22,33,34). Following this incident accused absented himself without leave and remained absent until 6 September, when he appeared at a station of the 8th Infantry Division Military Police. He was charged with this absence by Charge I and its Specification (see par.3, supra).

The foregoing recital of facts shows beyond doubt that both accused and his platoon were "before the enemy" as that term is interpreted in applying the 75th Article of War (CM ETO 5475, Wappes, and authorities therein cited; CM ETO 1663, Ison). Accused's conduct exhibits not only a willful and deliberate refusal by accused to "do duty or to perform some particular service" but also that he sought shelter "when properly required to be exposed to fire" (Winthrop's Military Law and Precedents - Reprint, p.623). The offense of misbehavior before the enemy was proved by substantial evidence (CM ETO 5359, Young; CM ETO 4820, Skovan). The amendment in the Specification at trial

(R30) did not in any respect change the substance of the offense as the allegations of time and place of its commission remained as originally alleged. In any event, the prompt adjournment of the trial for two days at the request of the defense completely eliminated any prejudicial effect of the amendment (MCM, 1928, par.73, p.57).

5. Prosecution's evidence in support of Specification 1, Charge II, shows that on 15 September 1944, Company A, 121st Infantry, was seven or eight miles from the town of Crozon, France, and was in reserve in the rear. It received, however, both small-arms and artillery fire from the enemy (R12). The accused was not present for duty with the company at that time (R12,13,24), nor did he physically report to the company on that date (R13,14). He was on 15 September at the regimental field train where he was encountered by Staff Sergeant Stanley Sucharski, Company A, 121st Infantry. Sucharski was at the field train with a truck to secure company rations. It was at the regimental field train where men who had been hospitalized and had recovered assembled to secure transportation to their respective units (R23-25). Accused asked for and obtained permission from Sucharski to ride with him to the company. He was not under orders to proceed by Sucharski's truck. En route there was an enemy barrage thrown across the road a considerable distance forward from the truck in which accused rode. He desired to leave the vehicle at that time, but Sucharski prevented him from doing so. Farther forward, between 11 am and 12 midday, the truck and occupants encountered an "88" barrage. Sucharski, his assistant driver (Private William Coker) and accused dismounted from the truck and took cover. When the barrage lifted neither Sucharski nor Coker could find accused, although they shouted for him. After waiting a short time they proceeded to the company without him (R24-26).

About 9 pm on 20 September 1944 accused appeared at the command post of the Antitank Company and made inquiry concerning the location of the 1st Battalion. Second Lieutenant James Verdun, of that company, informed accused that he might remain at the command post for the night. He was not placed under arrest. The next morning he was picked up by the liaison jeep and returned to his company (R26-28). The 1st Battalion, to which A Company belonged, engaged in no combat after 19 September and on 20 September it was "outposting the beach", "mopping up" and searching part of the Crozon peninsula for the enemy (R37).

6. After his rights were explained, accused elected to remain silent (R42-43).

7. The evidence fails to prove the distance between the regimental field trains and Company A, 121st Infantry, on 15 September. Furthermore, there is no proof of the distance between the point on the highway where accused left the truck and the location on 15 September of Company A. All that is shown is that the company

on that date was seven or eight miles from the town of Crozon. It was under enemy fire. Beyond all doubt it was "before the enemy" within the meaning of the 75th Article of War (see authorities cited in par.4, supra). The burden was on the prosecution to prove as an element of its case that the accused when he ran away was also before the enemy. For proof of this fact it is necessary to rely in part upon the extract copy of the morning report of the company for 3 October admitted in evidence as Pros. Ex. A, the defense stating there was no objection (R29). Proof of the authenticity and genuineness of this extract copy was clearly supplied by the testimony of Captain Norris K. Maxwell, commander of Company A, 121st Infantry (R5,7,8), First Sergeant Jake W. Keeley of said company (R10,11,13) and Captain C. W. Kneeland, Personnel Officer of 121st Infantry (R17,18). With such supporting testimony, and in view of the specific waiver of objection by the defense, it was properly admitted in evidence (Act June 20, 1936, c.640, sec.1; 49 Stat. 1561; 28 USCA 695; CM ETO 2185, Nelson). It is the opinion of the Board of Review that the principle concerned in CM 254182 (1944) (Bull. JAG, Aug 1944, Vol.III, No.8, sec.395(18), p. 337) is not in conflict with the conclusion herein reached. The evidential value of the entries as they pertained to accused was a matter for consideration by the court, and the lack of personal knowledge of the facts by the Personnel Officer did not bar the admission of the extract copy in evidence under the Act of Congress above cited. Unlike the situation which arose in CM 254182, supra, there is no evidence in the record of trial impeaching or impairing the verity of the entries. Oppositely, there is testimony by First Sergeant Keeley to the effect that on 12 September accused was transferred from the hospital and attached to the service company and that he had been relieved from attachment to the service company before he went absent without leave (R13). Whether Keeley testified from his own knowledge or from information shown on the morning report is not indicated. In any event, his testimony tends to confirm the verity of the morning report and not deny or impeach it. Under such situation the Board of Review is of the opinion that the court was entitled to consider the information shown on the extract copy of the morning report and give it such value as it might decide. It appears therefrom that accused had been confined in the 8th Infantry Division Military Police stockade on 6 September but was hospitalized from 8 September to 12 September when he was returned to duty and attached to the Regimental Service Company for rations and quarters (the service company operated the field trains). The extract copy of the morning reports further shows that on 15 September accused was relieved from attachment to the service company for rations and quarters, and that he went absent without leave on said date. Lieutenant Arthur Noland testified that accused was with the field train for two or three days (R41). It is therefore a legitimate inference that, when Sucharski encountered accused and permitted him to ride on his ration truck, accused was in the process of returning to his company after his hospitalization.

The proof is positive that accused was not physically

present with his company at the place it was undergoing enemy fire on 15 September. He was with the Regimental Service Company until he started his journey to the company on Sucharski's truck. When the truck and its occupants came under enemy fire while en route to the company, they sought cover. Accused did not resume the journey with Sucharski and Coker when the barrage lifted.

The 75th Article of War in pertinent part provides:

> "Any officer or soldier who before the enemy, misbehaves himself, runs away * * * shall suffer death or such other punishment as a court-martial may direct" (Underscoring supplied).

The placement of the phrase "who before the enemy" in the present Article is the result of the 1920 amendment effected by Congress (Act June 4, 1920; 41 Stat. 803; 10 USCA 1547). Prior to this amendment the Article read:

> "Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons /etc./" (Act August 29, 1916; 39 Stat. 650-670; RS 1342).

The change in position of the phrase was for the purpose of clarifying the article and making certain that all of the specific acts denounced must be committed by the officer or soldier while he is "before the enemy". The provision of the Article in the Code of 1916 was ambiguous in this respect because the phrase was tied to the phrase "who misbehaves himself" (See CM ETO 1226, Muir, for discussion of historical development of the 75th Article of War). From the foregoing it is clear that both the accused and the organization with which he is under duty to serve must be "before the enemy" at the time of his dereliction in order to make a case against him under the 75th Article of War where the specification charges his abandonment of his organization.

It is obvious that accused at the time he went absent without leave had not physically rejoined his company although administratively and on paper he was a member of Company A. He was under duty to proceed to his company from the field train, but he was not ordered to become a passenger on Sucharski's truck. He voluntarily sought transportation thereon. There was no compulsion on him to continue as passenger on the truck. In view of the fact that the road on which the truck proceeded was under enemy fire it may have been an act of prudence and not of cowardice to discontinue the journey on it and to proceed to the company by other means and by other routes. It cannot be said that accused's presence on the truck placed him physically with his company. The truck was not the company; it was only a means by which accused could reach the company.

The situation is directly controlled by CM 131730 (1919). The following is a digest of the holding:

> "A specification alleging that the accused, having been transferred from one organization to another and duly directed to report to the second organization, which was then engaged with the enemy, did abandon said organization and failed to report thereto until after the engagement had been concluded, does not charge a violation of A. W. 75. * * * The accused cannot be guilty of abandoning his company, within the meaning of A. W. 75, although, in an administrative sense, he was a member of that company. The abandonment contemplated is a physical abandonment of his organization, and he could not abandon it until he had joined it. C. M. 131730 (1919)" (Dig. Ops. JAG, 1912-40, sec.433(1), p.303) (Underscoring supplied).

Inasmuch as accused did not physically "run away from his company" for the reason that he had never joined it, the Board of Review is of the opinion that there was a failure of proof and the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, as involves findings of guilty of absence without leave from 15 September 1944 until he surrendered himself at Morgat, France, on 20 September 1944, in violation of the 61st Article of War.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, as involves findings of guilty of absence without leave from 15 September 1944 until he surrendered himself at Morgat, France, on 20 September 1944, in violation of the 61st Article of War, legally sufficient to support the findings of guilty by exceptions and substitutions of Charge I and its Specification and of Specification 2 (as amended at trial), Charge II and Charge II, and legally sufficient to support the sentence.

9. The charge sheet shows that accused is 19 years of age, was inducted at Marquette, Michigan, 12 August 1943. He had no prior service.

10. Confinement of accused in Eastern Branch, United States

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Disciplinary Barracks, Greenhaven, New York, is proper (Cir.210, WD, 14 Sept.1943, sec.VI as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 JAN 1945 TO: Commanding General, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private DONALD M. COURTNEY (36830924), Company A, 121st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, as involves findings of guilty of absence without leave from 15 September 1944 until he surrendered himself at Morgat, France, on 20 September 1944, in violation of the 61st Article of War, legally sufficient to support the findings of guilty by exceptions and substitutions of Charge I and its Specification and of Specification 2 (as amended at trial), Charge II, and Charge II, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4740. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4740).

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

5 JAN 1945

CM ETO 4743

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Nancy, France, 6 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Disciplinary Barracks, Leavenworth, Kansas.
Sergeant WILBUR A. GOTSCHALL (39329731), Company A, 134th Infantry	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 Sergeant Wilbur A. Gotschall, Company "A", 134th Infantry did, near Alincourt, France on or about 30 September 1944, desert the Service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit; Combat conditions in actual encounter with the enemy, and did remain absent in desertion until he returned voluntarily on 15 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 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 Disciplinary Barracks, Fort Leavenworth, Kansas, 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 may be summarized as follows:

Accused joined Company A, 134th Infantry, as a replacement on 20 or 21 September 1944. He was detailed as a runner at company headquarters (R7,9,10). He was with the company when it was subjected to intensive artillery fire on 22 September and when it engaged the enemy on 26 September (R9). On the morning of 30 September the company, which was then in regimental reserve, was ordered to proceed through the 3d Battalion and clear a wooded area of enemy forces (R7,12,14). The personnel of the company were aware of the impending action (R7). The company set out on its mission in single column. Accused was present with the headquarters unit which marched at the end of the column (R7,8,9,12). As it approached its objective the company ran into artillery, mortar, and small-arms fire. The men "hit the ground" and sought cover (R7,12, 14). Accused was seen at this point but was not seen again until 15 October when he returned to the company of his own accord (R8,12,13,16). Meanwhile the company resumed its advance, attacked the enemy, and accomplished its mission. The action took place near Alincourt and casualties were suffered (R8,12,14,15). The company remained in the woods that night and upon its return the following day, accused was reported as missing in action. An entry was subsequently made to that effect in the morning report (R8,12; Pros.Ex.A). He had not been given permission to leave the company (R8,15). During his absence, in addition to the action on 30 September, the company took part in two minor engagements (R10). Upon his return he stated that he left the company when it went through the 3d Battalion (R16). The morning report entry showing accused as missing in action was corrected and entries were made reporting him as absent without leave from 30 September to 15 October 1944. A duly certified extract copy of the morning report was received in evidence (R9; Pros.Ex.A).

4. After his rights were explained to him, accused, at his own request, was sworn and testified in substance as follows (R16):

He entered the service 18 March 1943 and thereafter became a sergeant and squad leader in an infantry organization (R17). Arriving in this theater as a replacement about the middle of August 1944, he was assigned about a month later to Company A, 134th Infantry, and was detailed as a runner (R18). On 30 September the company commander gave him and the other runners orders to notify the platoons to be ready to move out in 15 minutes. When the company moved out accused was present with the headquarters unit in the rear of the column. On the way the

company encountered artillery and mortar fire. The men scattered and sought cover. He went into a foxhole and remained there until shortly after dark. When he came out his company was gone. He did not know when it left but guessed it was sometime during the afternoon, between shellings. After taking cover in the foxhole he did not see any members of his company. He was more concerned about the shells than about being left behind (R19,21,23). He knew the general direction of the company's movement before it was held up by enemy fire, but did not know exactly where it was going (R22). When he came out of the foxhole he saw an artillery unit back in the field but did not talk to any of the men (R24). He made no attempt to find his company until he spoke to the military police (R23). He left the company without permission and returned voluntarily on 15 October. When asked why he remained away from his company so long, he replied:

> "I really don't know. I guess I knew I would have to face the consequences when I returned for being gone from the company and this would happen what's happening now" (R22).

The defense called as a witness a member of the military police who testified that on the evening of 14 October accused came for shelter to a barn occupied by military police. The following morning accused spoke to him and voluntarily stated that he was absent without leave for about 14 days. He was not placed under arrest but remained there until the arrival of the straggler control truck and was returned to his organization (R24,25). The defense offered no other evidence.

5. The evidence fully established that accused absented himself without leave from his organization though he knew it was then under orders to attack and was actually advancing toward the enemy. He absented himself when he failed to resume the advance with his company (Cf: CM ETO 1663, Ison). The evidence also fully supports the inference that he left his company with the specific intent to avoid the hazardous duty of continuing to advance with his company and engaging the enemy. That accused by his absence did in fact avoid participation in the action 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).

6. The charge sheet shows that accused is 26 years of age and was inducted at Fort Lewis, Washington, 19 March 1943. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 JAN 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Sergeant WILBUR A. GOTSCHALL (39329731), Company A, 134th 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. Pursuant to pertinent directives of the War Department, the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended). This may be done in the published order directing execution of the sentence.

3. Five of the nine members of the court recommended clemency in this language:

> "2. Sergeant Gotschall became separated from his company during his first major engagement with the enemy. He had been with the organization only ten days and was apprehensive about returning for fear of the consequences of having been away. However, he did voluntarily surrender himself for return to his unit and has since served in the line as a rifleman, so as to win the respect of the other members of his organization. In view of his truthfulness on the stand, voluntary return and conduct since his return, it is felt that clemency is well deserved in this case".

It seems to me that is an excellent summary of this case. This soldier appears to have possibilities of useful service; in fact if the above be true, he has already rendered it. The government should preserve its right to use him again as a soldier. It is suggested that you consider suspending the execution of the sentence, or at least of the dishonorable discharge, with such reduction of the term of confinement as may seem appropriate.

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 4743. For

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convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4743).

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

15 FEB 1945

CM ETO 4750

U N I T E D S T A T E S v. Private IRVING J. HORTON, JR. (33329128), 3398th Quartermaster Truck Company	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Rambouillet, France, 12 October 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Seine Disciplinary Training Center, Paris, France.

OPINION by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 opinion, 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 96th Article of War.

Specification: In that Private Irving J. Horton Jr., 3398th Quartermaster Truck Company, did, at Negreville, France, on or about 7 July 1944, with intent to deceive Captain Robert C. Kaser, officially state to the said Captain Robert C. Kaser that his name was George Smith, which statement was known by the said Private Irving J. Horton Jr., to be untrue in that his true name was Irving J. Horton Jr.

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

Specification: In that * * * having received a lawful command from Captain Robert C. Kaser, his superior officer, to dig a hole for a latrine, did, at Negreville, France, on or about 7 July 1944, wilfully 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 both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 25 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 15 years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and of Charge II as involved a finding of guilty of insubordinate conduct in violation of Article of War 96, approved only so much of the sentence as provided for dishonorable discharge, total forfeitures, and confinement at hard labor for five years, but directed that the execution of that portion thereof adjudging dishonorable discharge be suspended 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 by General Court-Martial Orders No. 100, Headquarters Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army, 18 November 1944.

3. The undisputed evidence for the prosecution clearly established that on 7 July 1944, near Negreville, France, Captain Robert C. Kaser, Commanding Officer of the 3398th Quartermaster Truck Company, was proceeding in a jeep en route from his bivouac area to Valogne on official business. He noticed a soldier in the doorway of a French home. He stopped his jeep (R8), called the soldier over to him and asked his name. The soldier replied that it was George Smith. Asked his organization, the soldier informed the captain he was from "the 644th". Further questioned, the soldier was sure about it, alleged he did not know the captain, and insisted he was George Smith. The captain's organization had just received 40 men from England and, although he was not then very well acquainted with them, he felt that this soldier was of this group and that his name was Horton. However, he dismissed the soldier and proceeded on his way. Later he questioned his first sergeant and verified the fact that the soldier he had seen was accused, Private Irving J. Horton, Jr., a member of his company. In the bivouac area he met accused and instructed him to report to the orderly room. Upon accused's arrival, the captain questioned him as to why he was

"trying to deceive me and he just didn't know why at the time. So, I told him in punishment for lying to me and trying to deceive me, that he could go out and dig a latrine for the company use. He then informed me that was not for Horton; that that was in the States but not in France. And that in France he would not dig a latrine or a hole for me or anyone else. I pointed out to him that I had given him an order and asked him if he understood the seriousness of the order. He said that he did, but that he still would not dig a hole or a latrine in France for anyone" (R9).

Accused did not dig a hole and was placed in arrest. The following questions put to Captain Kaser and his answers upon cross-examination are pertinent:

"Q. You would not have given him the order to dig a hole had he not given you a false name?
A. I wouldn't have nothing to punish the man for.

Q. Digging the hole was punishment under the 104th Article of War?
A. That's what it was going to be; yes" (R9).

He explained to accused

"that that was one thing I did not stand for; I had no use for a man who would lie. Especially, a man who would lie to his Commanding Officer",

and said to him, "'For this, you can go out and dig a latrine for the company'". Accused did not appear to be under the influence of alcohol (R10). First Sergeant Bennel Davis, of accused's company, was present in the orderly room on this occasion and his testimony confirmed the conversation between accused and the captain as above set forth (R11, 12,13).

4. For the defense, it was shown by the testimony of Captain Kaser that the day following the alleged offense accused approached the captain and apologized for the manner in which he had acted. He said that he had been drinking and that had influenced what had taken place the night before. He wanted to know "if we could forget the whole thing". The captain replied that papers "had been drawn up, charges were already drawn up upon him" (R14).

Examination by the court showed that the order was given by the captain to accused as punishment for having given a false name and that he did not explain to accused his rights under the 104th Article

of War because "the refusal of the order was given before that could be brought out" (R14). In further direct examination it was emphasized that he did not explain to accused his right to appeal from the punishment which was given because accused gave a false name (R15).

Cross-examined, the captain testified that there was need for a latrine in the area at the time (R15). Such work was normally taken care of by the supply section, "and often times, why, the platoons -- it is given the detail one day and another platoon another day". Asked whose turn it was to dig the latrine at that time, he answered, "I couldn't recall" (R16).

5. After his rights were explained to him, accused elected to remain silent (R17).

6. With reference to Charge I and Specification, the evidence was amply sufficient to support the court's findings of the guilt of accused as alleged (CM 153703 (1922), Dig.Op.JAG, 1912-1940, sec.453(18), p.345; CM ETO 5107, Nelson).

7. With reference to Charge II, there can be no doubt that the order given accused was clearly intended as a punishment for the conduct of accused in giving a false name to his company commander, Captain Kaser. When asked by the court if the order was given as punishment for having given the wrong name, Captain Kaser answered, "That's right" (R14).

As the order was intended as punishment, the provisions of Article of War 104 became pertinent. The offense of accused of knowingly making a false official statement was a "minor offense" for which punishment might be imposed pursuant to the provisions of that article (See MCM, 1928, par.104c, p.100).

The order to dig a hole for a latrine was clearly intended in this instance as a punishment, but there was no evidence that accused was notified that disciplinary action under Article of War 104 was contemplated, that he could demand trial by court-martial in lieu of accepting the punishment, or that he was informed of his right to appeal to superior authority if he believed the punishment unjust. No advice whatever was given the soldier. The failure of the officer imposing the punishment to notify accused of his rights nullifies the order of punishment and renders it illegal (Dig.Op.JAG, 1912-1940, sec.462(5), p.370; CM ETO 1015, Branham).

The reviewing authority recognized the illegality of the order given accused and therefore approved only so much of the court's findings of guilty of the Specification, Charge II, and of Charge II as involved a finding of guilty of insubordinate conduct in violation of Article of War 96. This was not a lesser included offense. The most disrespectful statement made by accused was his statement to his company commander

in refusing to obey the illegal order that "he would not dig a latrine or a hole for me or anyone else". The Specification alleges willful disobedience in the traditional manner, but contains no allegations of any acts of disrespect or insubordination by accused. Insubordination is not a necessary element in disobedience of orders. The Board's conclusions are not at variance with CM ETO 1366, English (which specifically distinguishes the Branham case, supra) wherein the restriction ordered by the company commander was within his inherent legal power, or with CM ETO 1057, Redmond, wherein the order to report periodically during restriction was likewise within his legal power and there was substantial compliance with the procedural requirements of Article of War 104.

In view of the foregoing, the Board of Review is of the opinion that the evidence is legally insufficient to sustain the findings of guilty as approved of only so much of the court's findings of guilty of the Specification of Charge II and of Charge II as involved a finding of guilty of insubordinate conduct, in violation of Article of War 96.

8. The charge sheet shows that accused is 24 years and 11 months of age. He was inducted 20 August 1942 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. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, however, 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 the Specification thereunder, legally insufficient to support the findings of guilty of Charge II and of the Specification thereunder as approved, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for one month and forfeiture of two-thirds of accused's pay per month for a like period.

_____ 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. 15 FEB 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 U.S.C. 1522) and as further amended by Act of 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private IRVING J. HORTON, JR. (33329128), 3398th Quartermaster Truck Company.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge II and of the Specification thereunder as approved be vacated, that so much of the sentence be vacated as is in excess of confinement at hard labor for one month and forfeiture of two-thirds of accused's pay per month for a like period, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings and sentence so vacated, be restored.

3. The accused in this case was surly and undisciplined. He deserves more punishment than this holding permits, but the responsibility for that result lies elsewhere. This case is an example of the exercise of unrestrained authority by officers, which caused the Congress after the last war to revise the procedure governing courts-martial to include the present Article of War 104, limiting and regulating the disciplinary power of a commanding officer. Punishments must be of the kind permitted by the Article and imposed as there required; soldiers may not be punished at the arbitrary whim of an officer. The records of trial sent to this office for review compel the conclusion that there is need for the instruction of junior officers in their duties with respect to administering disciplinary punishment under the 104th Article of War.

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

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

(Sentence confirmed by order of the Theater Commander 11 Mar 1945. Findings of guilty of Charge II and the Specification thereunder vacated; so much of sentence vacated as in excess of confinement for one month and forfeiture of two thirds of accused's pay per month for like period. GCMO 413, WD, 25 Aug 1945)

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

BOARD OF REVIEW NO. 1

17 FEB 1945

CM ETO 4756

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U. S. Army (France), 30 October 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Seine Disciplinary Training Center.
Private TONY CARMISCIANO (32904228), Company A, 143rd Infantry	

OPINION by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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 opinion, 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 58th Article of War.

Specification: In that Private Tony Carmisciano, Company A, 143rd Infantry, did, near Velletri, Italy, on or about 27 May 1944, desert the service of the United States, by absenting himself without proper leave from his organization and did remain absent in desertion until he returned to military control on or about 9 October 1944.

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CONFIDENTIAL

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * * did, near Bruyeres, France, on or about 18 October 1944, run away from his company, Company A, 143rd Infantry, which was then engaged with the enemy.

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 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 20 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 as the place of confinement.

The proceedings were published by General Court-Martial Orders No. 112, Headquarters 36th Infantry Division, APO 36, U. S. Army, 3 November 1944.

3. The charge sheet, the record of trial, and the accompanying papers disclose the following matters:

Accused was 19 years of age. The charges were preferred on 20 October 1944. The division psychiatrist, Captain Walter L. Ford, Medical Corps, submitted a report dated 9 October 1944 relating to accused consisting of a mimeographed form completed in pencil in which he states that he examined accused on 9 October because of pending charges and found "no significant psychiatric disorder". On 21 October the charges were referred to Second Lieutenant Betram H. Lebeis, 143rd Infantry, for investigation in accordance with the provisions of Article of War 70 and paragraph 35a of the Manual for Courts-Martial. In his "Report of Investigation of Charges", dated 23 October, Lieutenant Lebeis states that he examined no witnesses, considered the morning reports of Company A, 143rd Infantry, dated 27 May 1944 and 27 October 1944, and the mentioned psychiatric report, and added the following remark:

> "As former First Sergeant of Company A, 143rd Infantry, I observed soldier from 26 December 1943 to 22 January 1944 and from 29 February 1944 to 31 March 1944. His performance in combat and in bivouac did not appear to me to be satisfactory. He frequently found it convenient to be ill or otherwise indisposed when his unit was in contact with, or about to become in contact with, the enemy and when his unit was undergoing rigorous training preparatory to entering combat".

He concluded that, in his opinion, accused should be eliminated from the service, and recommended trial by general court-martial. Accused was placed in confinement in the 36th Division stockade on 26 October. By mimeographed form indorsement, directed to the Commanding General, 36th Infantry Division, containing neither a summary nor an analysis of the evidence, the Staff Judge Advocate, Lieutenant Colonel Stephen J. Brady, J.A.G.D., recommended trial by general court-martial. The following mimeographed statements are found in the indorsement:

> "I have carefully examined the charges and all accompanying papers, including the report of investigation made in compliance with the 70th Article of War, and submit herewith my report and recommendation. * * * In my opinion the charges are appropriate to the evidence, are sustained thereby, and trial thereon by court-martial is warranted".

The indorsement is dated 26 October. A copy of the charges was served on accused on 30 October and he was put on trial at 1505 hours on the same day. There is no indication of what time intervened between the service of the charges and the commencement of the trial or that any military necessity existed requiring the trial of accused on the same day that the charges were served. There is likewise no intimation that defense counsel, Major Benjamin F. Wilson, Jr., had any notice of the charges before they were served on accused or that he had any opportunity to consult with accused or to prepare for trial. The law member detailed for the court was Second Lieutenant Bertram H. Lebeis, the officer who investigated the charges. He was excused and did not sit as a member of the court. The defense made no motion for a continuance and offered no objection to going to trial at that time. A total of 35 minutes elapsed from the time the court met to the time the president announced the findings and the sentence.

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A proper evaluation of the evidence against accused requires a consideration of a memorandum submitted to the reviewing authority by the staff judge advocate. It is dated 3 November 1944, the same day the commanding general approved the sentence, and is a separate document from the staff judge advocate's review which bears the same date. The memorandum reads as follows:

> "1. It is noted on this case, from the papers attached to the investigation, that the company commander of A Company interviewed this man on 2 October so that he must have returned to military control on that date, regardless of the morning report entry. It will be noted from the report of investigation, which was not introduced into evidence, that there are MP reports showing that the accused was picked up on the 24th of May, the 1st of June, and the 9th of September by various MP units. These MP outfits were written, asking for more complete details but, since no reply was received, it was left to the defense to explain these if it so desired. It would appear, that if the accused was actually picked up, that he remained in military control only a short time on these occasions. The accused in an interview, in which he was not sworn or warned, stated that he went AWOL 3 May, was picked up by the MP's in Bari on 24 May, held a few days and released; picked up June 1 on Highway 7, near Sparanize, held a few hours and released with directions as to where to find his unit. He states he did not attempt to locate his unit. He was picked up for the third time in Rome on 9 September and states he has been in military control since that time. There is nothing in the correspondence in the file to disprove this.
>
> 2. The Reviewing Authority, according to AW 47, has the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt.

3. Since there is nothing in the Record of Trial to indicate that the accused returned to military control anytime prior to 9 October, it is my opinion that it would not be proper for you, in your action, to disapprove the date of termination and set it as of 9 September. It is my understanding that the trial judge advocate, due to the confused situation in regard to the accused various apprehensions, offered to stipulate with the defense as to any termination date that accused and defense counsel could agree upon. Having interviewed the accused, who is a little slow witted, I can understand that the defense counsel may well have become confused as to the actual termination date. However, in view of the evidence contained in the report of investigation, it appears to me that the defense counsel was somewhat lax in protecting the rights of the accused. I do not, however, feel that accused's substantial rights were injured in any degree" (Underscoring supplied).

Copies of three letters mentioned in the memorandum as having been written to "MP outfits" are included in the papers accompanying the record of trial. All three were dated 21 October 1944 and each recited that a delinquency report had been previously received from the military police unit concerned, one stating that accused was arrested in Bari, Italy, by military police on 24 May 1944, another stating that he surrendered to military authorities on 1 June 1944 because he had been unable to find his unit following his discharge from the 3rd Convalescent Hospital, and the third report stating that he was apprehended by military authority in Rome on 9 September 1944. Each letter contained a request for "station blotter or morning reports showing any entries" regarding accused which might be used in the trial of his case. The three delinquency reports were also among the papers accompanying the record of trial.

4. The evidence presented by the prosecution was as follows:

a. Charge I and Specification (Violation of Article of War 58). Defense counsel stating there was no objection, an extract copy of the morning report of Company A, 143rd Infantry,

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was received in evidence (R7; Pros.Ex.1). The extract copy showed the following entries:

"27 May 1944
32904228 Carmisciano, Tony NMI Pvt
Fr Dy to AWOL as of 0630 Hours.
7 September 1944
32904228 Carmisciano, Tony NMI Pvt
Fr AWOL to drptd fr rolls 8 October 1944
32904228 Carmisciano, Tony NMI Pvt
Fr AWOL & drptd fr rolls to Abs in Conf
18 October 1944
32904228 Carmisciano, Tony NMI Pvt
Fr Abs in Conf to Dy as of 17 Oct 44".

The copy was authenticated on 27 October 1944 by the personnel officer of the 143rd Infantry who certified that he was official custodian of the morning reports of Company A and that the foregoing "is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at APO 36, U. S. Army for the dates indicated in said copy which relates to Carmisciano, Tony NMI, 32904228 Pvt Co A, 143rd Infantry" (Underscoring supplied). No signatures or initials are shown on the extract copy. The trial judge advocate offered the following oral stipulation:

"It is agreed between and among the Trial Judge Advocate, Defense Counsel and accused that accused returned to military control on or about 9 October 1944".

Defense counsel declared that the stipulation was agreed to by the defense and it was received by the court (R7). It does not appear that accused assented to the stipulation or that he understood what it involved.

b. Charge II and Specification (Violation of Article of War 75). First Lieutenant Herman L. Tepp, assistant to the adjutant of the 143rd Infantry, testified that on or about 18 October 1944 his regiment was in the vicinity of Bruyeres and, more specifically, that the regimental command post was situated at Laval within two kilometers from Bruyeres. The 1st Battalion was between Bruyeres and another town. Company A of the 143rd Infantry was near Bruyeres. The trial judge advocate then asked the following questions:

"Q. Was Company A of the 143rd Infantry tactically before the enemy on the 18th of October 1944?
A. It was.

Q. Do you know of your own knowledge whether Company A of the 143rd Infantry was receiving enemy fire?
A. Yes Sir, I do. It was receiving enemy fire" (R6).

No objection was interposed by defense counsel to either of the foregoing questions. On cross-examination Lieutenant Tepp further testified that he knew Company A was receiving fire on 18 October because on that day he went to the headquarters of the 1st Battalion to obtain the signature of an officer and came within 200 yards of Company A. While there he was personally subjected to artillery fire (R6,7).

An extract copy of the morning report of Company A, 143rd Infantry, for 22 October 1944 was offered in evidence. Defense counsel asserted that defense had no objection and the court received it (R7; Pros.Ex.2). The extract copy showed the following entry:

"22 October 1944
32904226 Carmisciano, Tony NMI Pvt
Fr Dy to AWOL as of 18 Oct 44"

The copy was authenticated on 26 October by Second Lieutenant Bertram H. Lebeis (the same officer who investigated the charges and who was detailed, but did not sit, as law member on the court) as assistant personnel officer of the 143rd Infantry, who certified that he was the official custodian of the morning reports of Company A and that the foregoing "is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted as APO #36, U. S. Army for the dates indicated in said copy which relates to Carmisciano, Tony, NMI, 32904226, Pvt, Co A, 143rd Infantry" (Underscoring supplied). No signatures or initials are shown on the extract copy.

5. Accused elected to remain silent. No evidence was offered by the defense (R7,8).

6. It appears from the charge sheet and record of trial that the charges were served on accused on 30 October 1944 and that the trial began at 1505 hours on the same day. It is not

shown that any time intervened between the service of the charges and the commencement of the trial, or that defense counsel had any opportunity to prepare for trial. Accused was 19 years of age and a "little slow witted". He was charged with two capital offenses arising out of two distinct transactions. The over-all time consumed in the trial of accused on both charges was 35 minutes. In the course of this hurried trial, defense counsel displayed his lack of preparation by failing to assert accused's rights in the following instances:

(a) He failed to object to the admission of Pros. Ex. 1 on the ground that it did not appear that the original morning reports from which the extract copy was made were authenticated as required by paragraph 42a, AR 345-400, 1 May 1944 (see discussion in (a) infra).

(b) He agreed to the stipulation that accused returned to military control on or about 9 October 1944, although it appeared from information contained in the delinquency reports accompanying the record of trial that accused returned to military control on 1 June 1944 and again (apparently the last time before the charges were preferred) on 9 September 1944.

(c) He asserted no objection to the two questions quoted in paragraph 4b, supra, the first of which was clearly objectionable because flagrantly leading and calling for a conclusion and the second obviously leading. The answers to both questions were presumably intended to supply directly one of the essential elements of a violation of Article of War 75, namely, that accused's company was before the enemy.

(d) He failed to object to the admission of Pros. Ex. 2 on the same ground that rendered Pros. Ex. 1 inadmissible and on the additional ground that it was not a duly authenticated copy of the original (see (d) infra).

(e) He failed to move for a continuance in order to have a reasonable opportunity to prepare for trial and to provide a reasonable period for the receipt of replies to the letters sent to the three military police organizations.

The Board of Review is of the opinion that accused was deprived of a reasonable opportunity to prepare for trial and of the effective assistance of counsel in the preparation and conduct of his defense (CM ETO 4564, Woods). That his substantial rights were injuriously affected thereby is demonstrated by considering the legal sufficiency of the record of trial after eliminating the evidence which should have been ex-

cluded if proper objection had been made, and the stipulation to which defense counsel improperly agreed.

(a) Pros. Ex. 1 was a duly authenticated extract copy of the morning reports of Company A (MCM, 1928, par.116a, p.119). In his certificate of authentication the personnel officer states that the extract is a true and complete copy "including any signature or initials appearing thereon" of that part of the morning report which relates to accused. No signatures or initials are shown on the extract copy. It is to be presumed that, in accordance with his statement, the personnel officer would have included such signatures or initials if they appeared on the originals. There is likewise a presumption that the original morning reports were authenticated by the commanding officer of the reporting unit or, in his absence, by the officer acting in command - the only persons who were authorized to authenticated original morning reports (CM 189682, Myers, (1930), 1 B.R. 179; CM 254182, Roessel, (1944), III Bull. JAG, pp.337-338, 35 B.R. 179; CM 239068, Knierim, (1943), 25 B.R. 35, 39; MCM, 1928, par.112a, p.110; CM 230290, Crouch, (1943), 17 B.R. 355,358; pars.42a, 42b, AR 345-400, 1 May 1944; Cir.119, Hq ETOUSA, 12 Dec.1944, sec.IV). Where the application of the same presumption leads to the purported existence of two contradictory facts, the presumption is of no assistance in determining the actual existence of either fact. On this state of the evidence, and left unaided by any presumption, it was impossible for the court to determine from the extract copy that any of the original morning reports were authenticated by any person. Therefore, upon proper objection, Pros. Ex. 1 should have been excluded. Defense counsel, however, not only failed to object but stated that there was no objection.

(b) Under the circumstances of this case it was improper for defense counsel to agree to the stipulation offered by the prosecution (CM ETO 4564, Woods).

(c) Objections to the second question quoted above on the ground that it was leading and to the first on grounds that it was both leading and called for a conclusion would clearly have been sustainable (MCM, 1928, par.121c, p.128; Dig.Op.JAG, 1912-1940, sec.395(23)(24), p.217). Indeed, as to these questions, failure to object did not amount to a waiver of the objections (MCM, 1928, par.126c, p.137).

(d) The same defect which rendered Pros. Ex. 1 objectionable was present in Pros. Ex. 2. In addition thereto, it appeared on the face of Pros. Ex. 2 that the copy was authenticated by the assistant personnel officer, who was not the official custodian despite his assertion in the certificate of authentication that he was. The personnel officer himself is the official custodian of one of the three originals of the morning report and the

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assistant personnel officer is not the proper person to certify copies thereof (CM ETO 5234, Stubinski). A proper objection to the admission of Pros. Ex. 2 would have been sustainable. In this instance also, defense counsel not only failed to object but affirmatively stated that there was no objection. Apparently no notice was taken by defense counsel or any member of the court of the fact that the original entry shown by Pros. Ex. 2 was made two days after the charges were preferred and related back four days to the date of the alleged violation of Article of War 75. Even if admissible, this entry, unaided by any other evidence, was insufficient to show that accused was physically present with his company or that it was before the enemy or that he ran away.

Thus if the objectionable evidence is eliminated from the record, the only evidence that remains is a fragment of the testimony of Lieutenant Tepp (elicited in part by defense counsel (R6,7)) substantially to the effect that on or about 18 October 1944, the 143rd Infantry was in the vicinity of Bruyeres with its command post at Laval within two kilometers from Bruyeres; that the 1st Battalion was between Bruyeres and another town; that Company A of the 143rd Infantry was near Bruyeres; and that on 18 October 1944 Company A was subjected to artillery fire. There is no testimony as to where accused was, who saw him, or what he did. This evidence is obviously inadequate to prove that accused committed any offense whatever.

The rule is that an objection to proffered evidence of the contents of a public record based on the ground that it does not appear that a purported copy thereof is duly authenticated may be regarded as waived if not asserted when the proffer is made (MCM, 1928, par.116a, p.120). Likewise failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection (Ibid., par.116b, p.120). Under the circumstances of this case, neither of these rules may be applied to the prejudice of accused. He had a right to assume that defense counsel would exercise reasonable diligence in safeguarding his interests. The presumption is that defense counsel did perform his full military duty in this regard (CM 231504, Santo (1943), 18 B.R. 235,237; MCM, 1928, par. 112a, p.110). But this presumption is rebuttable and disappears when the fact is shown to be otherwise (MCM, 1921, par.278, p.221; CM 199270, Andrews, (1932), 3 B.R. 343,344; CM 229477, Floyd, (1943), 17 B.R.149). In this case it plainly appears from the record of trial that defense counsel did not perform his duties properly and that accused's substantial rights were prejudiced thereby.

7. The Board of Review is of the opinion that, as in CM ETO 4564, Woods, accused was deprived of liberty and property

without due process of law and that the findings of guilty and the sentence are therefore invalid and should be vacated.

8. The charge sheet shows that accused is 19 years of age and that he was inducted at Kings, New York, on 7 May 1943. He had no prior service.

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

10. Errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

(274)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 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 TONY CARMISCIANO (32904228), Company A, 143rd 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 had been deprived by virtue of the findings and sentence so vacated be restored.

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

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

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

(Findings and sentence vacated. GCMO 94, ETO, 29 Mar 1945)

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

(275)

BOARD OF REVIEW NO. 2

30 NOV 1944

CM ETO 4774

UNITED STATES	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened in the vicinity of Soumagne, Belgium, 4 October 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant HOWELL D. REUSS (O-1554257), 2nd Ordnance Medium Maintenance Company.	

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

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

Specification: In that Second Lieutenant Howell D. Reuss, Second Ordnance Medium Maintenance Company, did, without proper leave, absent himself from his command at La Marais, France, from about 1600 hours 27 August 1944 to about 1100 hours 29 August 1944.

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

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place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, First United States Army, approved the sentence but reduced the period of confinement to two years and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as modified, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows that on 27 August 1944 accused was the motor and recovery officer of the Second Ordnance Medium Maintenance Company, located at that time about eight miles from Paris, at the town of Ville Juif, France. The unit was about to move and did move at 1100 hours 29 August. Sometime in the afternoon of 27 August Lieutenant Jenkinson of the same company asked for and received from Captain Fred A. Tadini, Company Commander, permission to "use a jeep this afternoon" not mentioning where he was going or who, if anyone, was to accompany him. Accused neither asked for nor obtained permission from Captain Tadini to leave the company area at that time and his absence was not discovered until the morning of 28 August. Jenkinson was not given a pass and the impression of Captain Tadini was that he was "going to Corps with a report" (R6-11). Jenkinson knew Paris was "off limits" at the time. Accused left the area about three o'clock in the afternoon with Jenkinson, Sergeant Simmons and the driver Private Le Beau. They took a report to corps headquarters and then went on to Paris. After riding around sight-seeing they stopped at a small cafe in the Montmartre district for a drink. Sometime after five o'clock, with the exception of accused, they left, agreeing to return within a half hour to meet him. They returned in twenty minutes but were unable to find accused though they inquired of the English-speaking bartender and others for him remaining in that "general vicinity until about 1 o'clock in the morning", coming back to the cafe at intervals. They then went to a hotel "a block away from the cafe" for the night returning to the same place and waiting for about a half hour the next morning. They returned to their company area about seven o'clock in the morning of 28 August. Jenkinson did not ask permission for any of the others to leave the company area (R11-18). Both the sergeant and the driver of the vehicle corroborated these facts in their testimony as witnesses at the trial (R18-24). The morning report of accused's unit for 30 August 1944, admitted in evidence, shows accused "duty to AWOL 0800, 28 Aug 44, AWOL to duty, 1100, 29 Aug 44" (Pros.Ex.1).

4. Accused, at his own request was sworn and testified that 27 August was a Sunday. Work was lax and he and Jenkinson decided to go to Paris sight-seeing. He was to get a vehicle and Jenkinson permis-

sion to leave. Their sight-seeing trip ended at the cafe where he remained while the others visited areas he had seen. They were to return in half an hour.

> "I waited for a while and went to a hotel which was around the corner from this small cafe, after leaving word with the bartender that I would be found at this hotel and also leaving word at the hotel, expecting that the men would look me up and find me very easily. * * * I woke up the next morning at 7 o'clock and went out to this cafe and of course it was closed and there was no sign of the vehicle"

or men. He tried to find a ride back and caught a ride with a Signal Corps lieutenant and two men about eight o'clock Monday evening but they took the wrong road, got lost and they all slept in the jeep that night. Accused returned to his company area about 11 o'clock Tuesday morning 29 August. He "assumed" Lieutenant Jenkinsen had gotten permission for both of them to leave on 27 August. He did not know the name of the Signal Corps lieutenant. He further testified as his reason for not going on this short trip with the others that they had "chased what sounded like a German sniper" and that he

> "went up to the top of the building in that section of the town with one of the FFI men and by the time I got back to meet the other three men I was too darned tired to go back and see something I had seen before. * * * I thought they had figured on staying in town overnight and I would meet them at the hotel; that is why I left word with the cafe keeper".

He did not mention his intention of going to a hotel to the others but "when they said they would be back in 20 or 30 minutes, 'I said, I will be around'". It was then about "8:30" in the evening and he did not go back to the cafe that night. He went to bed "between 8:30 and 9 o'clock" (R24-27). The defense produced no other witnesses or evidence.

5. The undisputed evidence shows and accused admits his absence without authority from 1500 hours 27 August 1944 and his return at 1100 hours 29 August. Accused "assumed" that Jenkinsen secured permission for him to leave but Jenkinsen did not get permission for anyone to visit Paris which they knew was "off limits". His activities as shown on an afternoon when work was lax do not appear such as to have completely worn out an officer on active service, surely not to such an extent that he could not wait a half hour for his companions' return. His story of his attempts to return to his unit has little appearance of truthfulness or of real effort on his part. The court saw and heard

the witnesses and could judge their credibility. They did not believe accused's story and there is substantial evidence to support their action in concluding that accused willfully absented himself from his command for the time alleged (CM ETO 1953, Lewis).

6. The charge sheet shows that accused is 35 years six months of age. He was inducted 13 May 1942, and discharged to accept a commission 2 June 1943.

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

8. Conviction of absence without leave is punishable as a court-martial may direct (AW 61). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, par.2a, 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. 30 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant HOWELL D. REUSS (O-1554257), 2nd Ordnance Medium Maintenance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4774. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4774).

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

(Sentence ordered executed. GCMO 116, ETO, 8 Dec 1944)

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

BOARD OF REVIEW NO. 1

29 NOV 1944

CM ETO 4775

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Corporal WILFORD TETON (39315061), and Private ARTHUR J. FARRELL (32559163), both of Troop C, 17th Cavalry Reconnaissance Squadron	Trial by GCM, convened at Rennes, Brittany, France, 16, 23 October, 1944. Sentence: As to accused TETON: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. As to accused FARRELL: To be hanged by the neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 charged separately and tried together with their consent.

Accused Teton was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Wilford Teton, Troop C, 17th Cavalry Reconnaissance Squadron, did, at Au Fayel, Brittany, France, on or about 24 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Lucie Hualle.

Accused Farrell was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Arthur J. Farrell, Troop C, 17th Cavalry Reconnaissance Squadron, did, at Au Fayel, Brittany, France, on or about 24 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Lucie Hualle.

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 Specification preferred against him. Evidence was introduced of one previous conviction of accused Farrell by summary court for absence without leave for 30½ hours, in violation of Article of War 61. No evidence of previous convictions of accused Teton was introduced. All members of the court present at the time the vote was taken concurring, accused Teton 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, and accused Farrell was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, with respect to accused Teton, 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. With respect to accused Farrell, he 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 imposed upon accused Farrell and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on 24 September 1944, Monsieur Andre Descormiers and his wife Denise, Monsieur Hillion Adrieu, and Madame Lucie Hualle, 57 years of age, lived in Au Fayel, Department of Ille at Vilaine, France (R10,21-22,30,33), in separate houses not far apart (R12,15,34). At the trial, both Monsieur and Madame Descormiers, Adrieu, and the victim, Madame Hualle, positively identified accused Farrell (the "tall" soldier) and accused Teton (the "short" soldier), as the two soldiers involved in the events hereinafter set forth (R12,23,30,34,36). About 7 pm, 24 September, Descormiers saw both accused pass by and go to the house of Madame Hualle (R17-18). About 8 pm "sun time", accused knocked on the door of Descormiers' house. When Descormiers allowed them to enter, accused Farrell immediately went to a bed occupied by Descormiers' mother, took her blankets away and then "put them on again". Accused Teton left the house, returned and sat down near a table, while Farrell remained near the woman's bed (R10-11,22-23).

Shortly after 8 pm Descormiers went with Teton to Madame Hualle's house, called her by name and said that an American soldier wanted to talk to her. She replied that she was in bed and did not intend to arise. Teton said "'Madame coucher' which means 'Madame in bed'". Descormiers returned to his own house and Teton followed him (R18). Descormiers asked accused to leave but they "did not wish to go away" (R12,23). When Teton began to handle his revolver, Madame Descormiers became frightened and went to get their neighbor, Adrieu. When she returned with Adrieu shortly thereafter, Teton put some bullets in his revolver, pointed the weapon at Adrieu's breast, "led him smoothly" outside the house and told him to go away and go to bed. It was then about 8:30 pm (R12-13,24-25,28,30-32). About 8:50 pm, because Teton "became more and more nasty" Madame Descormiers again left the house to get Ardieu. Teton followed her into the courtyard, struck her with his fist and knocked her down. She screamed for help and when Descormiers started to go to her aid, Farrell seized him and pushed him on a piece of furniture. Descormiers took Farrell by the arm, pushed him outside the house, and then went toward Teton who fled. The Descormiers reentered their house, locked the door and left both accused in the courtyard. It was then about 9 pm (R14-15,18-20,25-26). Shortly thereafter the Descormiers heard knocking at Madame Hualle's door, and heard the door open. They recognized her voice as she screamed loudly for help several times, and they heard people walking or running in the courtyard. In some manner not revealed by the evidence, the Descormiers requested American military aid and an American officer and one or two soldiers arrived in a car about 10 pm. The cries of Madame Hualle continued for almost an hour and ceased upon the arrival of the United States soldiers. Fifteen minutes later Farrell was found by the soldiers about 50 meters away and was identified by Descormiers. The Descormiers did not go to the aid of Madame Hualle because they feared Teton's revolver (R15-17, 20-21,26-29). Adrieu also heard Madame Hualle call for help shortly after 9 pm, but did not leave his house because he also was afraid of the revolver (R31-32).

The Descormiers testified that both accused wore jackets, that Teton wore leggings, and Farrell wore boots (R19,27-28). Descormiers further testified that no other soldiers were in the vicinity that evening (R22), and that, although accused "had been drinking", they did not act as if they were drunk (R17).

Madame Hualle testified that about 7 pm both accused came to her house "with a Frenchman". She was in bed and Teton, who entered the house with the Frenchman, said "Madame coucher". The men left and at 8 pm Teton returned, knocked on the shutters and on the door which was locked, and "cried all of the time, 'Madame coucher'". Madame Hualle recognized his voice, got up, went into the courtyard and Teton followed her. He then went to the Descormiers house and witness again went to bed (R33-34,36-38).

"Then always the same thing happened. The small one [Teton] shook my shutters and at my door" (R34).

Finally, Madame Hualle heard Madame Descormiers shouting and her husband bringing her back to their house. Witness decided to go to the village as she was afraid to stay alone in her home. She arose, left the house and proceeded about 15 meters when Farrell seized her by the arm, hit her in the face with his fist, threw her to the ground in the yard between the two houses and got on top of her (R34-35). She struggled and attempted to get up "but it was impossible" because he held her down. She shouted for help but "nobody has come". Farrell tore her clothes, lifted her skirt, unbuttoned his trousers, inserted his penis in her private parts and had intercourse with her by force. She did not consent and struggled (R35). During this time Teton was beside her on his knees, "directing his revolver on me". When she cried for help both accused put their hands over her mouth and held her on the ground. Teton kicked her with his feet. He also unbuttoned his trousers and forced her to take his penis in her hand. Teton did not, however, penetrate her private parts with his penis. Farrell was the only one who had intercourse with her and was on top of her for about an hour (R36,38). When the "American police" arrived both accused left her and fled (R36-37). The American soldiers found Farrell that evening and Madame Hualle identified him (R37). The victim testified that Teton wore white leggings and that Farrell wore high boots (R38).

4. For the defense, First Lieutenant Maurice C. Reeves, 1391st Engineer Forestry Battalion, testified that as the result of a report he received that evening he and an interpreter drove to the scene where he arrived about 10 pm (R42,45). He heard the voices of two individuals as he drove up in his "jeep", and two Americans ran from the vicinity (R42,44-45). Farrell then "came staggering" around a building about 75 yards away from the house (Madame Hualle's) and faced Reeves with a Mauser pistol. The officer halted him and brought him under the light. Farrell surrendered his pistol and Reeves took him to the French civilians for identification (R43,45-46). Madame Hualle identified him (R43,46) and gave a very good description of both accused (R44). She described Teton as short, heavy-set and dark complexioned, and from her description Reeves assumed Teton was either a Mexican or an Indian (R46). (It is stated in the review of the Staff Judge Advocate, Brittany Base Section, Communications Zone, European Theater of Operations, that Teton is a Shoshone Indian.) Reeves was unable to find Teton that evening (R44,46). Madame Hualle "had bled quite a bit" from a scalp wound and there was blood on her face and clothing (R43). Her house was two or three miles from accuseds' camp (R44).

Called as a witness by the defense, Madame Hualle reaffirmed her testimony as a prosecution witness that she identified Farrell as the tall soldier who assaulted her that evening, that Teton was kicking her

during Farrell's attack, and that both accused ran when the American car arrived. She further testified that after the assault her head was bleeding and that blood was on her shirt and blouse (R47-48).

Both accused elected to testify as witnesses after they were advised of their rights (R48-49). Their testimony concerning events which occurred prior to their separation that evening was substantially the same. They left camp about 6 pm that evening to obtain some eggs and cognac. On the road they met a Frenchman who promised to get them some cognac. He took them to the house of an old lady and Teton and the Frenchman entered the house while Farrell remained outside. Teton testified that the old lady was in bed and after a few minutes she arose and gave something to the Frenchman. Both accused then went to the Frenchman's house, drank cider and then returned to get more cognac and eggs at the village. They met two soldiers from an "engineer outfit" about 7 pm, who said that they were also looking for something to drink (R50,53,56). They asked accused if they knew anyone in the village and Teton said "Madame coucher lives over there, she is an old lady". The two soldiers replied, "OK" and both accused then went to the next house which was lighted (the Descormiers home). A young Frenchman (Descormiers) opened the door and invited them in. Teton sat in a chair and Farrell went over to an old lady who was in bed and asked if she were ill. Farrell thought she had been shot, said, "boom, boom, Boche", and pointed to the woman in the bed. He went over to the old lady, patted her on the head, and said "poor woman". He ran his hand over her hair and when she pulled the covers down to her breast, he pulled them up again and told her she would "catch cold". Teton started to demonstrate "about whether she was shot" by the Germans. He removed the clip and showed the French people that the gun would not fire. Farrell also showed them that the gun was empty, pointed it to the floor and pulled the trigger "a couple of times". The French people "got all excited" and Descormiers said something to his wife who ran from the house. Another Frenchman (Adrieu) then appeared and began to talk with the husband. Teton asked Adrieu if he had any cognac, took him by the shoulder and walked out of the house (R51-53,57).

Teton testified that after they went to Adrieu's house and the latter said he had no cider, Teton returned to the house, heard "this girl" scream, and saw someone run across the yard in front of him. He ran to the door and said to Farrell "let us get out of here" (R51). Farrell testified that after Teton left, Madame Descormiers left the house, as witness supposed, to get some eggs. As he was talking with her husband she screamed and ran into the house. Teton then came to the door and said "let us get the hell out of there, there is something funny going on". (R53-54,57).

Both accused then walked up the road "quite a ways", came to two houses, spent about ten minutes smoking, and then went toward camp. After they again passed the village they heard a scream, and Farrell said he was going back "to see what is going on". Teton gave Farrell his gun and returned to camp (R51,55-57).

Farrell further testified that after Teton left:

"I went down through the field and I circled around these houses and I waited and I did not hear no scream. I went around the back and there was a road through this here village and I went up to the other Frenchman's house and I waited there along the road and I did not hear nothing. I came back and I stayed at the end of the road where you come in and I did not hear anything and I circled around the house and I waited for while and I heard some talking. I did not know what the talking was. All of a sudden, somebody said to me 'what are you doing here?' Just out of a clear sky and to throw him off, I said, 'I am looking for some eggs.' With that he flashed the light in my face. I said, 'take the light out of my eyes, I can't see.' He said, 'give me your gun.' He said, 'come on over to the house' and he and I went over to the house, but they said, 'oui, oui' because I had been there earlier in the night. I stayed there and I did not say anything. The officer asked me my name, rank and where I was from. Then he said, 'all right, come on, go over, I will bring you back to your troop.' We were going through this courtyard and it was quite deep and muddy and I said to one of the fellows, 'let us get over on the side of this mud. The water is going down in my shoes.' He said, 'the van is only right here.' We went back to the troop and I went to the first sergeant, I think it was, and Lieutenant Henderson came along and this lieutenant from the engineers--I don't know what his name is. He said to the troop commander, 'have Private Farrell here. There has been a rape case down here in this next village.' I was dumbfounded, then, to find out he said rape because I did not know anything about any rape at all. All I thought, these people were excited about us being there and they went and got help so then I got up under arrest in quarters and I stayed there until the morning and I got brought to the guardhouse" (R54).

Teton further testified that he was a scout corporal and was in combat 47 days (R52). Farrell testified that he (Farrell) wore regular "GI shoes" that evening and that he did not have any "tall boots" (R54). When he heard the screaming he returned to see if he could be of any assistance. He returned without Teton who said he did not wish to go back, and as Farrell had possession of the revolver he thought "that was sufficient" (R57).

5. Certain matters and irregularities appearing in the record of trial are commented upon in the reviews of the Staff Judge Advocate, Brittany Base Section, Communications Zone, European Theater of Operations, and of the Staff Judge Advocate, European Theater of Operations. Further discussion thereof is deemed unnecessary.

6. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

* * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

* * *

Proof.--(a) That the accused had carnal knowledge of a certain female, as alleged; and (b) that the act was done by force and without her consent" (MCM.1928, par.148b, p.165).

It was clearly established by the evidence that accused Farrell had intercourse with Madame Hualle and that such intercourse was accomplished by the use of force and violence employed by both accused. When she left her house to go to the village because she was afraid to stay alone, Farrell seized her arm, hit her in the face and threw her to the ground. He got on top of her, tore her clothes, lifted her skirt, unbuttoned his trousers, inserted his penis in her person and had sexual intercourse with her. During this time Teton was on his knees by her side, pointing his revolver at her. He also kicked her with his feet. The victim continually struggled, attempted to rise, and cried loudly for help. Both accused held her on the ground and when she struggled, both accused put their hands over her mouth. Teton also unbuttoned his trousers and forced her to hold his penis in her hand. The incident was of about one hour's duration. Both accused desisted and ran from the scene when Lieutenant Reeves arrived in his "jeep".

The testimony of the victim was amply corroborated by the testimony of the Descormiers who heard Madame Hualle's cries for help very shortly after both accused left their house about 9 pm. The cries lasted about an hour and ceased only upon the arrival of the officer and American soldiers about 10 pm. The victim's testimony was further corroborated by that of Lieutenant Reeves who testified that when he arrived at the scene about 10 pm, two American soldiers ran away. Shortly thereafter Farrell was apprehended about 75 yards from the house and positively identified by Descormiers and by Madame Hualle who was suffering from a scalp wound and whose face and clothing were bloodstained. She gave Reeves accurate descriptions of both accused. Both Monsieur and Madame Descormiers,

Adrieu, and the victim Madame Hualle, positively identified both accused at the trial. Both accused admitted that they were in each other's company that evening in the vicinity of the crime.

The fact that only Farrell actually accomplished penetration is immaterial. It was clearly established by the evidence that both accused were engaged in a wrongful joint venture that evening to secure sexual intercourse by any means whatsoever. It is abundantly evident that Teton aided and abetted Farrell in the latter's accomplishment of penetration, and that accused were interrupted solely by the arrival of Reeves. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider or abettor engaged in sexual intercourse with the victim (CM ETO 3740, Sanders, et al, and authorities cited therein). The Board of Review is of the opinion that as to each accused the evidence fully supported the findings of guilty of rape (CM ETO 2686, Brinson & Smith; CM ETO 3740, Sanders, et al; CM ETO 3197, Colson & Brown; CM ETO 3859, Watson & Wimberly).

7. The charge sheets show that accused Teton is 23 years of age and was inducted at Portland, Oregon, 15 August 1942, to serve for the duration of the war plus six months. He had no prior service. Accused Farrell is 37 years and ten months of age and was inducted at Newark, New Jersey, 28 September 1942, to serve for the duration of the war plus six months. He served in Company A, 104th Engineers from 1 April 1925 to 31 March 1928 and was discharged as a private, character excellent, because of the expiration of his term of service.

8. 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.

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 NOV 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Corporal WILFORD TETON (39315061), Troop C, 17th Cavalry Reconnaissance Squadron, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient, as to the soldier named above, 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 and this indorsement. The file number of the record in this office is CM ETO 4775. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4775).

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

1st Ind.

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

1. In the case of Private ARTHUR J. FARRELL (32559163), Troop C, 17th Cavalry Reconnaissance Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. 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 4775. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4775).

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

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

(Sentence ordered executed. GCMO 11, ETO, 10 Jan 1945)

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

BOARD OF REVIEW NO. 2

13 DEC 1944

CM ETO 4782

U N I T E D S T A T E S	44TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 44, France, 25-26 September 1944.
Second Lieutenant LEONARD C. LONG (O-1307717), Anti-Tank Company, 324th Infantry	Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Federal Reformatory, Chillicothe, Ohio.

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 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: In that Second Lieutenant Leonard C. Long, 324th Infantry did, on the high seas aboard naval transport B0883, APO 44 c/o Postmaster, New York, New York, on or about 6 September 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with a human being, to-wit: Private Goldon F. Burrell.

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

Specification 1: In that * * * did, on the high seas aboard naval transport BO 883, APO 44 c/o Postmaster, New York, New York, on or

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about 6 September 1944, wrongfully and unlawfully have in his possession aboard said transport intoxicating liquor, in violation of Par 14, General Order Number One, issued by the Transportation Officer of said transport.

Specification 2: In that * * * did, on the high seas aboard naval transport BO 883, APO 44 c/o Postmaster, New York, New York, on or about 6 September 1944, wrongfully and unlawfully drink intoxicating liquor with the following named enlisted men: Private Goldon F. Burrell and Private Martin M. Dwyer.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, 44th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Accused is a second lieutenant, Anti-Tank Company, 324th Infantry (R5,53). He sailed with this regiment on a transport, Boat 883, on 5 September 1944. That day, the transportation officer issued "General Order Number 1", which forbade the possession or use of intoxicating liquor aboard ship (R5; Pros.Ex.1). This order was publicized by the colonel commanding the 324th Infantry to his troops (R5-6). Accused was assistant mess officer and his duty was to straighten out one of the mess lines; the particular line under his supervision passed room 217 (R9,10,27,30,32). On 6 September this duty occasioned the presence of accused in the vicinity of this stateroom and he stopped there three or four times, once after lunch (R10,19-20). The room was occupied by Privates Goldon F. Burrell and Martin M. Dwyer, Sergeant James G. Gillin and nine or ten other enlisted men of the 44th Quartermaster Company (R9-10,19,32-33). Accused had known Private Dwyer, the latter having driven a supply truck for accused in Louisiana (R19,22). Burrell met accused for the first time on 6 September when accused stopped in their stateroom. Early in the afternoon, accused "said he had a bottle of whiskey he wanted to kill". Burrell told him to bring it down. About eight o'clock accused stopped in and played checkers with Burrell and about 10 o'clock he brought down a quart or a fifth of Four Roses whiskey. Accused, Burrell and Dwyer passed the bottle around and consumed about all of it. Burrell had about ten "good drinks" each the equivalent of a double and single whiskey glass.

Dwyer drank "quite a lot"; "the bottle came fast" (R10,12,20-21,27-28). When accused brought the bottle to this room, there was only one light turned on and that was in the bunk of Sergeant Gillin (R20). Twelve enlisted men beside Burrell were present (R19,25,57-60). These men slept in four tiers of triple-decked beds, arranged in rows of two tiers on each side of the room (R8; Pros.Ex.2). Burrell slept on a mattress laid out on the floor immediately to the left on entering the door (R11, 18; Pros.Ex.2). Dwyer's bunk was next to Burrell's mattress and, during their drinking and the episode in chief, Burrell's head was about a foot and a half from that of Dwyer. Sergeant Gillin's bunk was the bottom bunk next to Dwyer in the far, left-hand corner of the room (R18,20). During the drinking, the enlisted men were evidently all in their bunks; Burrell, dressed in a pair of shorts, was "lying down" on his mattress on his left side; and accused was seated on Burrell's mattress with his back to Burrell's chest (R11,15). After the drinking had been going on for about 15 minutes, accused asked Dwyer to put a blanket up between his bed and that of Sergeant Gillin, who was reading, so the light would not reflect in the hall. This was done. The blanket fell down once or twice and was restored, whereupon Gillin turned off the light because, as he explained, the heat caused by the light and the blanket were unbearable (R11,22,33). Dwyer went to sleep at this point. The liquor had made him dizzy (R22). The light went out at about 10:20, after 20 minutes of drinking (R10-11), and accused "started monkeying around and playing" with Burrell's leg and then "went down" on Burrell. Burrell, who alone testified as to the "unnatural act", described it as a "blow job" during which he had an emission (R11-12,17). Thereafter, he said, each of the two had a drink and Burrell handed the bottle to Dwyer. The accused put the bottle of whiskey in his shirt and went out (R14,19,22-23). Burrell fixed the time of the "unnatural act" as 10:25 o'clock (R11). He was unable to see accused in the room after the light went out at 10:20. He fixed the time by a luminous wrist watch which accused wore (R11). Besides Burrell and Dwyer, Gillin and two other enlisted men testified that accused was in the room that night at about 10 o'clock and that accused was drinking with Burrell and Dwyer. Dwyer and Gillin alone testified as to the blanket fixing episode. Dwyer said accused was sitting in Burrell's "crevice" (R20-22,27-28,30,33). Gillin did not see accused in the room but recognized his voice and heard him called by his name (R33). Dwyer claimed he was asleep at the time Burrell fixed as "that of the unnatural act". He was awakened by a "noise from the locker", and saw accused leave the room. He said that Burrell then started talking about his mother and sister and "the dirty deal he was getting in the Quartermaster" (R21-22, 25). "He had a crying jag on" (R21-22,25). Sergeant Gillin said that after he put out his light (following the blanket episode), the lights went on again, about ten minutes later at the most. There was noise and commotion. Accused had already departed. (Gillin did not testify as to the unnatural act.) He heard Dwyer say to Burrell:

> "I told you he was a muff-diver * * * you are going to be real weak. * * * He went twice on you" (R33-34).

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On 7 or 8 September, accused told an investigating officer that he had played checkers in the stateroom in question at about six o'clock in the evening, but that he had not been there afterwards, and he denied all of the accusations made against him (R36,38).

On cross-examination, Burrell said that the liquor he consumed never really took effect until after he went asleep (R16), but that at the time of the act he did not have full control of his faculties (R16). He also testified that "after the act" occurred accused took a drink, handed the bottle to him and that he, in turn, handed it to Dwyer (R19). Dwyer testified that he was asleep (during the act) and was awakened by accused leaving the room (R23). Dwyer knew accused in Louisiana during the maneuvers when accused had been mess officer and Dwyer had driven supplies (R22). Dwyer went back to the Quartermaster "two days before the problem ended", but he had not been relieved by accused for inefficiency (R22-23). According to Dwyer, at the time accused left, Burrell was drunk (R25). According to Sergeant Gillin, Burrell was very drunk at the time the lights went back on. He was lying on the floor on his stomach, his head on the railing and partly in Dwyer's bunk. He was talking to Dwyer just like a man drunk (R29-30). Gillin testified, further, that during this time, after the light was extinguished, although he was awake, he heard no unusual noise; however, an electric fan in operation was making a noise (R35-36).

4. For the defense, four second lieutenants who shared accused's stateroom testified they saw him in his bunk reading a book on the night in question. One of these officers was ill and returned to his room about 9:30 p.m. and stayed there until one or two o'clock the next morning. He testified that accused did not leave the room to his knowledge and that while he could not answer under oath that accused did not leave the room, he could "hardly see how he could without my knowledge, having to get down from the upper bunk. I was on the floor" (R41-43). The second of these officers testified that accused was in the stateroom at 9:30 and that to the best of his knowledge accused did not leave the room from that hour until 11:00 or 11:30; that to do so accused would have had to pass within a foot and one-half of his bunk. He also said that accused couldn't get out without making a noise (R43-45). A third officer, roommate of accused, testified that he returned to this room from the officers' lounge at approximately 10 o'clock; that he washed some clothes and went to sleep around eleven (R46-47); that accused was present and did not leave the room during this time, he was positive; and that while he was washing his clothes it would have been impossible for accused to have left the room without his knowledge (R48). The fourth officer testified that he returned to this stateroom about 11 o'clock, at which time accused was in his bunk, reading a book (R49-50).

Three officers testified as character witnesses for accused. Each had known him for about a year and five months. They all stated that accused's reputation for sobriety and moral conduct was "good"

(R51-53). One of these character witnesses, Lieutenant Colonel Charles G. Kelly, commanding officer of Special Troops and Headquarters Commandant, testified that he had known accused for one year and five months, socially and professionally, as a member of his command; that accused's reputation was good; and that as a soldier he would rate him in the upper third of the officers under his command (R51).

On 16 September 1944, accused was examined by an admittedly qualified psychiatrist who testified that in his opinion accused was neither a homosexual nor homosexually inclined (R40). This psychiatrist, as developed by the defense, also examined Burrell on 17 September after the occurrence. He testified that Burrell told him, at that time, "that he had a faint memory of Lt Long performing fellatio on him". This witness continued:

> "I asked him the question if things were hazy and he replied, and I quote verbatim 'In a way, I'd say they were'" (R40).

The psychiatrist said, further, with respect to Burrell:

> "I cannot say definitely he is a homo. I will add, he denied having homosexual experience during childhood. My impression is, he might have had homosexual experience" (R41).

Accused's rights as a witness having been explained to him, he testified under oath. He was one of the mess officers on the transport, and at seven o'clock on the evening in question he was keeping the mess line "straightened out". Sitting on the stoop of the door of stateroom 217, he watched the line go through and at that hour "played a game of checkers with a tall fellow by the open door" (R53-54). Accused believed the "tall fellow" was Burrell (R55). He said that he finished "feeding that evening" a little after seven, that his duties were completed by a little after eight o'clock, that he sent his men in for showers and "went in and went to bed". He denied specifically that he had anything at all to drink or that he drank any alcoholic beverages with enlisted men that night; he also denied having any alcoholic beverages on board ship, saying that he "didn't have that much money" (R54). Accused said further that he had known Dwyer while the latter served under him on maneuvers in Louisiana and that then he had reprimanded him almost daily (R56).

5. If the testimony of the five enlisted men is accepted as true, then the credible evidence shows that accused had a bottle of intoxicating liquor in his possession at about 10 o'clock on the night of 6 September 1944, at which time he was aboard transport BO 883, and that he drank intoxicating liquor out of this bottle with Privates Burrell and Dwyer. These facts, if true, constituted full proof of Specifications 1 and 2 of Charge II and a violation of Article of

War 96, the article under which Charge II was laid. The possession of the liquor aboard the transport was a violation of General Order Number 1, lawfully issued by the transportation officer of that transport, and such violation was obviously prejudicial to good order and military discipline, which is a violation of Article of War 96 (MCM, 1928, par.152, p.187). It is also a violation of Article of War 96 for an officer publicly to drink intoxicating liquor with enlisted men (Dig. Ops. JAG, 1912-1940, sec.453(9), p.342, CM 119492 (1918), CM 124799 (1919).

Similarly, if the testimony of Burrell is believed, accused committed on Burrell the act of sodomy per os, which is a violation of Article of War 93 (MCM, 1928, par.149k, p.177).

6. It is not the function of the Board of Review to weigh the evidence in this case. Its only duty is to determine whether there was substantial, credible evidence to sustain the findings and the sentence of the court (CM ETO 1953, Lewis). Were the issue only as to whether accused had liquor in his possession and drank it with the enlisted men, there would be no difficulty in saying that the evidence supporting the finding on that issue was substantial and credible. The question of whether accused performed the act of sodomy on Burrell, went to the court largely on the testimony of Burrell. No one else testified that he saw the act or heard any unusual noises. No one else even claimed that he saw accused in the stateroom after the light was extinguished, except Dwyer. Dwyer's position in the entire picture is not above suspicion. He testified he had gone to sleep, dizzy, under the influence of liquor, and had awakened just in time to see accused by the light in the hallway leave the cabin. Burrell, however, had Dwyer awake, taking a drink, just after the act was completed. And if Gillin's story is true, it would appear that Dwyer knew that accused was a pervert who had designs on Burrell; and it is highly improbable that he would have gone to sleep expecting that unnatural acts were about to occur within a few feet of his head. As stated, Dwyer's story is open to suspicion. There can be little doubt that he had had trouble with or from accused in Louisiana. As to Burrell himself, the entire evidence is that he was very drunk immediately afterwards. His testimony is not convincing.

There is, however, in the testimony of Sergeant Gillin, whose motives have not been impugned, corroboration of the incident which involved the hanging up of a blanket in front of his bed. This blanket was hung there at the request of accused. In that request may be found a guilty state of mind on the part of accused sufficient to give credence to the story of Burrell as to the unnatural act. True, accused was shown to have sat close to Burrell. That in itself was not wrong; and it might, but for the other evidence, explain Burrell's story in the light of inflamed desires and an errotic dream. The implications found in accused's request with respect to the blanket, in the opinion of the Board of Review, tend to render the testimony of Burrell credible, thereby affording substantial basis for the findings of

guilty of Charge I and its Specification, sodomy, in violation of Article of War 93.

7. Accused is 24 years of age. He was inducted into the service on 8 May 1942; and was commissioned second lieutenant, Infantry, 11 January 1943. He had no prior service.

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

9. The offense of sodomy per os, in violation of Article of War 93, is punishable by confinement for five years (MCM, 1928, par.104c, p.100). Penitentiary confinement is authorized (AW 42; DC Code, Title 22-107; 35 Appeal Cases, DC, 306). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1a(1) and 3a).

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant LEONARD C. LONG (O-1307717), Anti-Tank Company, 324th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4782. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4782).

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

(Sentence ordered executed. GCMO 144, ETO, 21 Dec 1944)

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

BOARD OF REVIEW NO. 1

4 DEC 1944

CM ETO 4783

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Spa, Belgium, 15 October 1944. Sentence: Dismissal, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant I. J. DUFF, JR. (O-1288871), Company K, 22nd Infantry	

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 75th Article of War.
Specification: In that 2nd Lt. I. J. Duff, Jr. being present with his Platoon, which had been ordered forward to engage with the enemy, did at near Buchet, Germany on or about 14 September 1944 shamefully abandon his Platoon and seek safety in the rear without permission, and did fail to rejoin it until the next day.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for the remained of his natural life. The reviewing authority, the Commanding General, 4th Infantry Division, approved the

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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 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence though deemed inadequate punishment for the shocking cowardice manifested by accused with selfish disregard for the consequence of his conduct under such critical circumstances, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that about 11:00 am 14 September 1944, accused's regiment, the 22nd Infantry, in a column of battalions, attacked the Siefried Line near Buchet, Germany. The 3rd Battalion led the attack and was supported by a platoon of tanks and a tank destroyer company. Company K was one of the assult companies. Accused commanded the second platoon of this company which was "loaded on tanks" and the rest of the company were on tank destroyers (R5,7,10,14-15). Accused rode on a tank with Sergeant Luther Richmond of his company, and was immediately in front of a tank on which rode Second Lieutenant Clifford L. Mereitt, accused's "understudy" in the platoon (R7,12). Accused's platoon was composed of approximately 35 men who rode on about three tanks (R12). He was ordered by Captain Charles W. Whaley, the company commander, to attack a main road on the opposite side of a hill (R5). Theattack began and the tanks advanced about 100 yards over a wooded area, went up the reverse side of a hill and arrived at a point about 75 yards fron "the line". An enemy anti-tank gun "opened up" and "knocked out" one of the tanks (R5,8). Richmond testified that when the enemy anti-tank gun fired, someone, not accused, said "Run". The men "took off" and the tank (on which accused and Richmond were riding), backed up and also "commenced to take off". Accused ran to the rear with his men and gave no orders to them as they retreated. The platoon retreated about 300 yards (R12-13).

Lieutenant Mereitt testified that accused's platoon remained with the tanks until the enemy shelling occurred, at which time some of the men withdrew from the tanks to take shelter. When the tanks stopped the men dismounted, and when the tanks began to withdrew the men "stayed with the tanks". Accused, who was with his platoon, ran. He did not issue any orders to Mereitt's knowledge as his platoon withdrew (R7-8). The tank on which accused was riding was about 25 yards from the one which was hit (R9).

When enemy fire knocked out the tank, Captain Whaley, the company commander, saw the tank crew which "had to run" and observed that some men in accused's platoon, together with some men in the first platoon

> "started pulling back with the tanks and kept going to the rear * * * They ran back pretty plainly".

Whaley sent a sergeant forward "to get the men back on the line" and to find accused. The sergeant was unable to find him and Whaley then sent a runner with an order that

"I wanted to find the platoon leader and get the platoon back on the line".

As the runner also could not find accused, Whaley told Lieutenant Mereitt to take charge of the platoon, get it reorganized and ready to move on (R5-6, 8). Whaley did not receive any word that accused was wounded nor did he receive a report from anyone who carried a message from him. He did not recall seeing accused after the tanks pulled back, nor did he recall that the latter told him that he (accused) turned over his platoon to Mereitt (R6). Neither did he remember ordering accused to the rear. Captain Whaley did not order him to withdraw his platoon nor did he receive a request from him for permission to go to the rear (R18).

When Mereitt was reassembling the platoon he saw accused in a field about 100 yards from the tanks. Accused was "practically crying" and made a remark to Mereitt who was in a hurry and did not understand what he said (R8-9). Mereitt replied "OK", and when he reorganized the platoon and took it forward again, accused did not accompany them (R10).

About noon, after the tanks "had started off again" (R11), First Lieutenant James D. Hayden, forward observer of accused's company, followed Captain Whaley toward the enemy pillboxes at the top of the hill. Accused was about 30 yards from Whaley, was on foot and close to Hayden. About three shells landed approximately 50 yards from accused who appeared "extremely frightened". He started toward some woods which were to "our left rear". No enlisted men were with him at the time (R10-11).

Colonel C. T. Lanham, commanding officer of the 22nd Infantry, and his regimental S-2, Captain Howard C. Blazzard, observed that the attack came to a halt shortly after it began. The tanks "seemed to break down" and backed off the hill (R14-15). Colonel Lanham saw a tank crew running to the rear and learned that a tank had been knocked out. He and Blazzard went up the hill and Colonel Lanham discovered that

"the attack of the whole battalion had not only stopped but that it had gone to the rear. I found that the tank that had suffered this hit had been knocked out, that the others had moved back. The infantry had stopped in general along the line established by the tanks and the tank destroyers, with the exception of what appeared to me to be one platoon, which was farther to the rear * * * between one hundred and two hundred yards. The situation was extremely hazardous because the attack had been discovered - we had disclosed our position - so I went forward to reorganize the attack. I went first to the platoon that went back and tried to find the platoon leader. It was a platoon of Company K. I asked, I suppose, a dozen men

where the platoon leader was * * *. We had to get going fast. No one knew the platoon leader or where he was. My S-2 and I between us recognized the attack and got it started and it jumped off" (Underscoring supplied) (R15-16).

When Colonel Lanham returned with Captain Blazzard from the hill and approached some woods they "saw an individual rise up out of the undergrowth", who said he was Lieutenant Duff of Company K. When questioned by Colonel Lanham accused said he did not know where his company was, that he commanded the second platoon of Company K, and that the company commander ordered him to the rear and put another officer in charge of the platoon. Accused was then about 200-300 yards behind his company, half the line of which had already passed through the woods. He stated that he was beside the tank which was knocked out by "an eighty-eight" and that he was "shaken up" by the explosion. When Colonel Lanham told accused to lead him to the tank, he replied that he did not know where it was. When asked why he did not know if he had been beside it, he said that perhaps he was mistaken, that "'Maybe it was another shell that came in'". The conversation then terminated (R14-16). Blazzard testified that accused appeared calm and normal, that witness observed no indication that he was wounded, and that he did not seem nervous (R14-15). Colonel Lanham testified that accused appeared in full possession of his faculities, that there was no indication of undue nervousness, that he did seem to be frightened but that "in that fight everybody I think was frightened including the witness".

On 17 September Colonel Lanham interviewed accused who was "sent back" by his company commander because he was in a highly nervous state. Colonel Lanham "with a view to reclassification" asked him why he was in such a condition (R16-17) Accused said that he was simply unable to stand artillery fire whether it was "ours going out or the enemy's coming in; that he just couldn't take it". Colonel Lanham at the time had no statements from accused's company commander or from anyone connected with the incident "that later developed". With reclassification proceedings still in mind he appealed to accused's manhood, the fact he was an American, that he was an officer and had voluntarily accepted a commission. Accused replied that he could not help it, that he "just couldn't take it and that was all there was to it". The interview terminated and the reclassification proceedings continued. Colonel Lanham made his own statement and the reclassification papers were sent to accused for his signature (R17). It was only then that Colonel Lahham realized that accused was the leader of the platoon of Company K which he observed on 14 September (the platoon which was leaderless and which had gone farther to the rear) (R16-17). He cancelled the reclassification proceedings and directed a formal investigation of the matter with a view of preferring charges against accused under Article of War 75. Colonel Lanham further testified that he did not recall ordering accused on 14 September to report to the regimental coomand post (R17).

4. For the defense, Captain Robert B. McLean, 22nd Infantry, testified that on the morning of 14 September he "was going back" to bring up a tank destroyer platoon at a time when artillery fire was "going overhead

He saw accused start to "duck into a hole". When McLean told him it was "friendly artillery fire," accused asked the location of the first-aid station and followed witness down the road (R18-19). Sergeant Robert W. Smith and Technician Fifth Grade George W. Smith, both of Battery C, 44th Field Artillery Battalion, and members of Lieutenant Hayden's forward observer party, saw accused behind the crest of the hill sometime after the attack started and at a time when the battle was being fought. Accused said a shell "had just about knocked him out". He appeared dazed, "not just exactly right" and "seemed as if he had a shock"(R19-20).

Accused, after being warned of his rights, testified that he was riding on the leading tank with Sergeant Richmond when the attack started. Later, when the tanks were standing still and the men were standing beside him, a shell knocked out of action an adjoining tank which was about 40 feet away. Accused's platoon became disorganized. He could not issue any orders to reassemble the platoon because the

> "whole company was scattered out, with the men on the tanks, and with all the firing there was no way in the world for me to possibly control them at the time"(R22,24).

When the tank was hit all the tanks began to move back on a general line. Accused gave no orders to the group in his own tank when the other tanks started for the rear.

> "We moved back with then to the back of the line and beyond them * * * about twenty yards behind the line" (Underscoring supplied).

It then appeared to accused that the tanks maneuvered to get into position, and he went behind a small knoll where he would be protected from small arms fire (R22,24). He told the men "to hold up there" until he contacted Captain Whaley for orders (R24). A shell then burst near accused who "got a concussion or something" and he next recalled seeing Lieutenant Mereitt and telling him to take over the platoon. Mereitt acknowledged the order and told accused to "carry on". About 25 yards further on toward the front accused saw Captain Whaley, told him a shell burst near him, that he had to pull himself together, and that he had turned his platoon over to Lieutenant Mereitt. Whaley replied "that was al right * * * to * * * come on in * * * to take it easy". Accused saw Lieutenant Hayden and the soldiers named Smith who were near Whaley, and also saw Colonel Lanham who said something about "being kind of giddy" and told accused to go down to Colonel Lanham's command post. Accused reported to the regimental command post about 30 minutes later and spent the night in an adjoining bard. He rejoined his unit the following morning and went to the aid station that afternoon (15 September). Accused further testified that the shell which hit near him "tore me all to pieces. I just couldn't stand the artillery fire". Asked if he could stand artillery fire "now", he testified that he did not know, that it "remains to be seen" (R23-24).

5. There is first presented for consideration the question whether an offense in violation of Article of War 75 was properly charged. It is alleged in the Specification that accused

> "being present with his Platoon which had been ordered forward to engage with the enemy, did * * * shamefully abandon his Platoon and seek safety in the rear without permission, and did fail to rejoin it untill the next day" (Underscoring supplied).

The Specification contained no specific allegation that accused's misconduct occurred "before the enemy".

> "A specification which does not allege that the misconduct was committed 'before the enemy' does not charge a violation of A.W. 75, and the defect cannot be cured by proof". CM 125263 (1919) (Dig.Ops.JAG, 1912-1940, sec.433(1), p.303).

> "An allegation that accused abandoned his company when it was about to be engaged with the enemy is sufficient to charge a violation of A.W. 75". CM 126645 (1919) (Ibid.) (Underscoring supplied).

> "The Specification fails to allege in the words of the statute that accused was 'before the enemy' when he ran away from his company. However, it does allege that he was 'present with his company while it was engaged with the enemy'. The phase 'engaged with the enemy' is properly construed as an allegation of place as well as time. It is identical in meaning with 'before the enemy'" (CM ETO 1249, Marchetti, and authorities cited therein).

The case of CM 134518, Stone (France, 24 May 1919 - AJAGO 201-4170) is especially pertinent. One of the specifications in that case, laid under Article of War 75, was as follows:

> "Specification 2: Having been ordered by his Commanding Officer, to lead a patrol beyond the front lines for the purpose of ambushing a party of the enemy, did at or near Flirey, in the Toul sector, on or about the 17th day of June 1918, fail and neglect to lead his patrol beyond the front lines and did seek safety in the rear".

With reference to this Specification it was held that:

" The above specification is laid under the 75th Article of War, and alleges that the accused, having been directed to lead a patrol beyond the front lines for the purpose of ambushing the enemy, did fail and neglect to lead his patrol beyond the front lines and did seek safety in the rear. This specification alleges an offense under the 75th Article of War. While it does not expressly allege the misbehavior as being 'before the enemy' that element of the offense is substantially alleged in the words 'for the purpose of ambushing a party of the enemy'. Winthrop, vol.2, pages 963, 964, defining 'before the enemy' states:

> 'It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehavior committed will be "before the enemy" in the sense of the Article"' (Underscoring supplied).

This specification alleges a movement directed against the enemy. It is also alleged that the accused having been ordered to lead his patrol beyond the front lines, failed and neglected to do so, and did seek safety in the rear. This alleges misbehavior 'before the enemy'.

> 'Misbehaviour before the enemy is often charged as "Cowardice"; but cowardice is simply one form of the offense, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency.' Winthrop, vol.2, p.963).

The specification therefore alleges the necessary elements of the offense and the evidence sustains the finding of guilty".

Another specification in the Stone case, laid under Article of War 75, was as follows:

"Specification 5: Being present with his command, while it was advancing to engage with the enemy, did, at or near the Houppy Bois, on or about the 22nd day of October 1918, shamefully quit and abandon his command and seek safety in the rear and did not rejoin it until the engagement was concluded".

With reference to this Specification it was held that:

" The above specification alleges that accused, 'being present with his command while it was advancing to engage with the enemy, did shamefully quit and abandon his command and seek safety in the rear, and did not rejoin it until the engagement was concluded'. Although it does not expressly allege the misbehavior as being 'before the enemy' this office has held that the words 'being present with his battery while it was going into position to engage with the enemy' and 'being present with his company while it was about to be engaged with the enemy' may be properly construed as words alleging place as well as of time, and to indicate with sufficient particularity that at the time of the offense alleged the organization to which the accused belonged was in such a position that an engagement was imminent and pending, and therefore the words are equivalent to 'before the enemy' (Slagle, AJAGO 201-1200; Roach, AJAGO 201-1205; Perry, AJAGO, 201-3371; Richards, AJAGO 201-3374). This office has also held that the words 'being present with his battery while it was marching to engage the enemy' (Cohen AJAGO 201-3434), and 'did leave the forces of which he was a member, which forces were then marching forward to take their place in the line of battle' (Schrader, AJAGO 201-2098), and 'being present with his company while it was marching forward from woods near Savoye, France, to the Bois-de-Farvis, en route to engage with the enemy' (Martin, AJAGO 201-1424), are equivalent to the term 'before the enemy'. In the specification at hand the words 'advancing to engage with the enemy allege a movement 'directed against the enemy' (Winthrop, Vol.II, pages 963,964) and indicate that the engagement was imminent and pending,

> and the words 'advancing to engage with the enemy' when taken in connection with the words 'did not rejoin it until the engagement was concluded' indicate with sufficient particularity the presence of the enemy. The specification therefore substantially alleges an offense under the 75th Article of War".

The Specification in the instant case contained specific allegations as to the time and place with reference to the offense alleged. It was further alleged that he was present with his platoon which had been ordered forward to engage with the enemy. These words clearly allege a service which was "directed against the enemy" and which accused was required by his military obligation to perform. He was, therefore, 'before the enemy' within Winthrop's definition of that term. The allegations in the instant case are substantially similar in principle and intendment to those in the Stone case wherein it was alleged that accused was ordered by his commanding officer

> "to lead a patrol beyond the front lines for the purpose of ambushing a party of the enemy".

The words "shamefully abandon his Platoon and seek safety in the rear without permission" further indicate the immediate presence of the enemy. No objection was made by the defense to the form of the Specification nor was there any indication whatsoever in the record of trial that accused was in any way misled by the allegation. On the contrary, accused's testimony itself shows that he was fully apprised of the fact that he was charged with misbehavior before the enemy and that he was completely cognizant of the particular incident involving such misbehavior. Further, the evidence clearly shows that he was before the enemy. In view of the foregoing authorities the Board of Review is of the opinion that the wording of the Specification properly alleged a violation of Article of War 75 (CM ETO 1249, Marchetti).

6. The Board of Review is also of the opinion that competent substantial evidence fully supported the findings of guilty. When one of the tanks was hit by enemy fire someone, not accused, shouted "Run". Part if not all of the platoon commanded by accused turned and ran to the rear about 300 yards. Accused ran with his platoon and issued no orders of any nature to his fleeing men. Two messengers sent to find accused by Captain Whaley, who observed the retreat, were unable to locate him. Finally, the company commander was obliged to order Mereitt to assume charge of the platoon, reorganize it and to lead it in a second attack. As he was reorganizing the unit, Mereitt saw accused in a field, about 100 yards away. He was "practically crying". Accused did not accompany his platoon when it again went forward under Mereitt's leadership. When the attack began a second time, Lieutenant Hayden saw accused start toward the woods to the "left rear" when some shells landed about 50 yards away. No enlisted men were with accused at the time and he appeared

"extremely frightened". Captain McLean also saw accused start to "duck into a hole" when artillery fire was "going overhead". McLean informed him it was "friendly artillery fire". In view of the retreat the situation was, in the words of Colonel Lanham, "extremely hazardous" for the attack had been discovered by the enemy and "we had disclosed our position". During the course of his investigation Colonel Lanham discovered that the infantry stopped in general along the line established by the retreating tanks but that one platoon had even retreated between 100-200 yards farther to the rear. Its leader could not be found, and the evidence plainly indicated that this platoon was the one commanded by accused. After the attack was resumed accused was discovered by Colonel Lanham emerging from the undergrowth, after his organization had gone forward. Accused in his testimony admitted that he joined the retreat, that hisplatoon retreated to a place beyond the line established by the retreating tanks and that he issued no orders to his men as they fled. He later admitted to Colonel Lanham that he could not stand artillery fire, that he "just couldn't take it and that was all there was to it".

The gist of accused's defense was that it was impossible for him to issue orders reassembling the platoon during its retreat, and that a shell which later burst in his vicinity dazed him and "tore me all to pieces". He could not stand the artillery fire andhe requested Mereitt to assume command of the platoon. He testified that Captain Whaley approved his action and told him to "come on in" and to take it easy. He also testified that Colonel Lanham mentioned something about "being kind of giddy" and told him to go to the Colonel's command post. Both Captain Whaley and Colonel Lanham denied these facts. The two soldiers named Smith testified that accused appeared dazed, "not exactly right" and "seemed as if he had had a shock" when he told them a shell "had just about knocked him out". Whether or not accused "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior", which would constitute a defense (Winthrop's Military Law and Precedents, Reprint, p.624) was essentially a question of fact for the court's determination (CM ETO 1409, Mieczkowski).

> "In view of substantial, competent evidence that accused suffered from lack of self control and self discipline * * * rather than from illness or disability the court's determination of the issue against him in its findings of guilty will not be disturbed upon appellate review" (CM ETO 4095, Delre).

The Board of Review is of the opinion that the foregoing language of the Delre case is particularly pertinent in the instant case. Accused joined his men in full retreat, issued no orders, made no attempt whatsoever to control his men who were in complete disorder, and later abandoned his command altogether and sought safety in the woods at the rear. Such shocking behavior which occurred after the attack started and after our position therefore became fully known to the enemy, directly endangered the lives of all who participated in the assult, and might well have resulted in consequences of the most disastrous proportions. The findings of guilty were supported by abundant evidence of the most convincing

character (CM ETO 1249, Marchetti; CM ETO 3196, Puleio; Cf: CM NATO 573, Chiatovich).

7. The charge sheet shows that accused is 25 years and seven months of age and that he was commissioned a second lieutenant 28 July 1942. Accused stated that he was an enlised man from 20 June 1941 to 27 July 1942 (R25). No other prior service is shown.

8. The court was legally constitued 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 misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

(310)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant I. J. Duff, Jr. (O-1288871), Comapny K, 22nd 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 the 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 4783. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4783).

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

(Sentence ordered executed. GCMO 124, ETO, 11 Dec 1944)

Branch Office of The Judge Advocate General (311)
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

CM ETO 4808

4 DEC 1944

UNITED STATES	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Nancy France, 9 October 1944. Sentence: To be dismissed the service.
	)	
2nd Lieutenant DONALD V. JACKSON (O-1556893), 837th Ordnance Depot Company.	)	
	)	

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 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 Second Lieutenant Donald V. Jackson, then with 837th Ordnance Depot Company Headquarters 70th Ordnance Group, was, at or near Barneville, France, on or about 7 August 1944, found drunk while on duty as an officer courier.

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

Specification: In that * * * did, on or about 7 August 1944, while acting as an officer courier, wrongfully leave documents classified as SECRET, which were in his custody, in an unattended one quarter ton U. S. Army vehicle on a public street in the town of Barneville, France.

4808

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 6 August 1944 and for ten days continuously prior thereto accused was detailed as courier, operating between the respective headquarters of the Third Army and 70th Ordnance Group. This assignment required him to be available daily during the 24 hours, ready to function in his official capacity at any time (R7,10-11). On the evening of 6 August 1944, after delivering official messages from Headquarters Third Army, accused received from the executive officer, 70th Ordnance Group, certain operation reports, classified as secret, for delivery to Third Army Headquarters. Promptly thereafter, at approximately 11 p.m., accused departed in a jeep, accompanied by an enlisted driver (R7-8,11,15).

About midnight First Lieutenant D. A. Towle, Jr., 713th Military Police, saw accused's jeep, parked unattended on a street in Barneville, France (R12). Towle testified that he searched the vehicle and found, on the front seat, "a leather dispatch case, a map and dispatch case, a looseleaf binder, and a plain manila envelope containing various military documents and papers". He noticed that "several of them were marked 'Secret' and several 'Confidential'" (R13). Towle retained personal custody of these items and ordered the jeep moved to the parking lot at the military police headquarters in Barneville (R13-14).

> "A few moments afterward the driver of the jeep came in and asked for his jeep. We asked him who the officer was with him. He stated that a Lieutenant Jackson was in charge of the vehicle. We asked him where Jackson was and he stated he was up the street, I believe, calling upon or visiting a Red Cross worker there in town. We drove up to the street where the driver believed he might be found. We heard voices up a street, a narrow street, alongside of the building. I used my flashlight and I saw Lieutenant Jackson and Mrs. Campbell probably a hundred feet from the main street talking together".

Accused identified himself in response to Towle's inquiry and accompanied the latter to the parking lot (R15). Towle noticed that

"his speech was incoherent, his voice was uncertain, unsteady, his reasoning or his remarks weren't rational, and he walked unsteadily as he came back to the jeep. He had to be assisted into the jeep. His breath smelled from intoxicating beverage" (R15-16).

Towle thereupon escorted accused to his (Towle's) company headquarters at Carteret, where Towle examined the documents found in the jeep

"and listed briefly their nature, the signatures, numbers, orders and memorandums that appeared on each one, the date and so forth. * * * Those marked 'Secret' pertained in general to movements of ordnance units from certain stations to other stations" (R16).

Captain Oliver W. Homer, commanding Company A, 713 Military Police Battalion, testified that accused was in his orderly room at Carteret for an hour and a half (R23,27). There he admitted to Captain Homer that he had had five drinks and that he had left in his unattended jeep the manila envelope which Towle had discovered there. Witness observed that accused was definitely under the influence of intoxicating liquor (R24). The smell of it was on his breath (R25). He was staggering and unable to stand unsupported when he rose to comply with witness' instructions to empty his pockets (R25,28). He was drunk, according to both Homer and Towle (R22,26). After Captain Homer had talked to him for a while, accused

"said he had a mission to perform, and he removed from his undershirt some papers. He said it was necessary to go down near the front with them. I told the lieutenant I didn't think he was in condition to go down on a mission and to turn the papers over to T/5 Russe and the two of them left" (R23-24);

not, however, until Captain Homer had attempted unsuccessfully to telephone to accused's company commander (R17,25,27). "At the time he left the office he had sobered up considerably and there was no question he could walk" (R27).

Private Francis P. Hemeon, 713th Military Police Battalion, who was driving Lieutenant Towle when the two of them originally discovered the unattended jeep and who also accompanied accused to Carteret, corroborated Captain Homer's and Lieutenant Towle's testi-

mony as to accused's conduct and statements including observed indicia of intoxication and accused's admissions that he had been drinking (R29-34).

4. For the defense, Technician Fifth Grade Serge Lo Russo testified that on the occasion in question he was driver for accused who was then on liaison duty, traveling "from Briquebec which was Group Headquarters, to Beauchamps which was Third Army Headquarters" (R35). Between these points the two stopped at Barneville where they visited a "Red Cross woman's house" and asked for coffee (R35-36). It was then about 11 or 11:30 p.m., too late for coffee. They stayed half an hour and accused had one drink of scotch (R36,37). Witness left first to "get the vehicle ready to leave". He found it already gone and was referred to "M.P. headquarters, which was a half-block away". There

> "an MP lieutenant placed me under arrest and asked me to accompany him where my lieutenant was at the time. I did. We went in one of the MP's jeeps, and the MP lieutenant put Lieutenant Jackson under arrest and we went to Carteret, which was about two or three miles away. The captain of the MPs questioned me and questioned Lieutenant Jackson and took some papers from him. * * * After holding us there for a while and trying to get Army--the line was down and they couldn't get them; they tried to get Group and the line was down and they couldn't get them--they let us on our way" (R36).

There were a number of vehicles under guard in the vicinity of the place where he parked the jeep. He heard the conversation between accused and the Military Police. Accused sounded normal and, in the witness' opinion, "he wasn't drunk" (R37). On cross-examination Russo testified that "on the way going from Beauchamps to Briquebec we met these Red Cross women", when they stopped that morning at the Barneville Red Cross Club for about fifteen or twenty minutes on their way to Group Headquarters, had coffee and doughnuts and were invited to stop again on their way back (R38-39). This they did, not at the Club but at the home of one of the Red Cross workers, leaving in the unattended jeep their "personal belongings, bedding and things like that", as well as accused's map case and a manila envelope (R39-41). They stopped once to urinate before they reached Barneville "and on that occasion I noticed the lieutenant took some papers out of his pocket and put them in a little pocketbook and put it in his shirt" (R43). Witness did not know that accused was carrying secret papers. He saw nothing wrong with the way accused was walking when he (witness)

accompanied the "MP" lieutenant from the home of the Red Cross worker (R44-45).

5. After his rights were explained to him, accused elected to be sworn as a witness in his own behalf (R46). He testified that, on the date of his alleged offenses -

"My driver and I arrived at Group Headquarters around between 6:30 and 7:00 in the evening, and I reported into Major Martin, who was in command, Colonel Baker being absent on reconnaissance. I turned over to him the messages which Colonel Horridge had given me for the Group Headquarters. We stood and talked a little bit. He invited me to have a drink. We had a drink. I went down to get some more of my things. I needed some more toilet articles and clean underwear. I went to my tent in the bivouac area to get those. I met the Chaplain and talked to him for a few minutes and we went to the kitchen to see if there was anything to eat. There wasn't. My driver and I hadn't eaten since noon except the coffee and doughnuts which we had at Barneville. The Chaplain invited me to have a drink with him. I had a drink with him. I waited around until Major Martin had the documents he wanted to go back to Army. A little while before I left I had one more drink with the major. Around 10:30 we left to go back to Army. We stopped just outside of Barneville for a piss stop, and I told the driver we were going to stop at Barneville to see if we could get some coffee and doughnuts because it was cold that night. I took the papers out of this folder. I told the driver at the time that I was going to keep them on my person. We went on to Barneville and stopped at Mrs. Campbell's place. The driver said there were several other vehicles outside where we left ours. We went in and stood and talked a few minutes, and I had one drink there. My driver went out to get the vehicle and found it gone. I went out a little afterwards and saw it was gone. I asked the MP on the corner if he knew what had happened. He said the MPs had taken my vehicle away and that the driver had gone after it.
I went back and talked to Mrs. Campbell. When the MP lieutenant, his driver, and my driver returned, the MP lieutenant asked me my name--and asked me if that was

my vehicle. I said, yes. He grabbed me by the shoulder and said, 'Come on, you are going to headquarters.' I knocked his hand off my shoulder and said I had plenty of power to get anywhere he wanted me to go. We got into his jeep and went to Carteret, went into the building to Captain Homer. The MP lieutenant said he found the manila envelope and dispatch case. The dispatch case is a map case. It has no resemblance to a dispatch case. Captain Homer told me to clean myself. I did. I took everything out of all my pockets, and I reached inside my shirt and pulled these other papers out which I had taken out of the manila envelope. We stood there and talked. He said he would have to hold me. I said it was quite important that I get to Army with these reports. He said he would have to call my commanding officer or whoever I was taking orders from. I gave him both the phone number of the ordnance section, Lucky Rear, and my group. He couldn't get through by telephone. In about an hour or an hour-and-a-half he released us and told us to continue our mission, which we did. When I arrived at Army, close to 5:00 o'clock in the morning, there was no one up, so I kept the papers on my person then. Russo gave them back to me and I kept them on my person until 7:00 the next morning, when I got up and turned them over to the ordnance (R47-49).

On cross-examination he testified that when he left the manila envelope in the vehicle it was empty except for his trip tickets and a materiel requisition for field glasses. All his other papers he had on his person. He turned them over to the military police after reaching headquarters at Carteret (R50). He made a trip between Army and Group headquarters

"just about every day. Once in a while Colonel Horridge, whose orders I was taking, would send me out on different missions. If he didn't have anything to go to Group he would send me out on some other missions to some other organizations. * * * There was absolutely no telephone communication and when the colonel had something he wanted Group to know he turned it over to me and told me to deliver it" (R51-52).

The reason for his later departure from Group Headquarters was not that any message or document he was carrying was of an urgent or important nature.

"Regardless of what documents I would have been carrying I would have left anyway. Colonel Horridge requested I deliver my messages to Group and then return regardless of whether they had anything for me or not" (R52).

In response to questions by the court, accused testified that on 7 August he left Army Headquarters to go to Briquebec a little after noon, arriving around 6:30 or 7:00 p.m. "It was right at the time when traffic was very heavy", he added. He left Briquebec at 10:30 p.m., rather than at 6:00 the following morning, because "Colonel Horridge requested that I make the trips and return. * * * We had been out for almost forty-eight hours with very little sleep at the time this happened" (R53). He left a notebook in the jeep.

"The manila envelope was lying in the notebook. In the notebook were merely notes that I had taken. Sometimes the colonel would give me a message and I would jot it down, sketchy notes, so I would remember the complete message. They weren't always written messages".

The contents of the notebook were not secret, and the manila envelope, he reiterated, was empty, "except for the MR and the trip tickets". In the map case was one road map only - just a plain, road map. It was no part of any message he was carrying (R54). "Both my driver and I were very tired", he explained. "I didn't feel any effects of the drinks". He thought they would brace him up and keep him from sleeping. At the time of his arrest, he had not eaten since noon - and then only three doughnuts and a cup of coffee. The three drinks he had before his departure from Group Headquarters were spaced over a period of three hours. He felt better after his drink of scotch at the Red Cross. "It warmed me up. It was cold and the top was down on the jeep" (R55). As for his difficulty in standing at military police headquarters accused testified,

"At the MP headquarters they asked me to sit down when I got in there and I sat there for a few minutes. Then when this Captain Homer came in I was sitting on a small stool and when I got up I had a slight cramp in my leg and my knee buckled on me" (R56).

6. While the testimony of accused and his driver would, if believed, exonerate the former on both counts, competent substantial evidence of his guilt was adduced from the prosecution's witnesses. The conflicting testimony as to his sobriety or drunkenness at the time of his apprehension, as well as the nature of the papers which

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he left in the jeep, raised issues of fact merely, which were solely for the determination of the court. The court's determination of such issues, where supported by competent and substantial evidence, will not be disturbed on appellate review (CM ETO 1953, Lewis).

7. The charge sheet shows that accused is 29 years of age and that he was commissioned 3 July 1943, with prior enlisted service from 16 December 1933 to 15 December 1936 and from 13 September 1940 to 2 July 1943.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed. A sentence of dismissal is mandatory upon conviction of an officer of a violation of Article of War 85 in time of war and authorized upon conviction of a violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind. (319)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of 2nd Lieutenant DONALD V. JACKSON (O-1556893), 837th Ordnance Depot 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 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 4808. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4808).

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

(Sentence ordered executed. GCMO 127, ETO, 12 Dec 1944)

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

BOARD OF REVIEW NO. 1

11 DEC 1944

CM ETO 4820

U N I T E D S T A T E S v. Private STEPHEN SKOVAN (32445273), Company B, 110th Infantry	28TH INFANTRY DIVISION Trial by GCM, convened at Camp Elsenborn, Belgium, 23 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT 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 75th Article of War.

Specification 1: In that Private Stephen Skovan, Company B, 110th Infantry, while before the enemy enroute to join his company as a replacement, did, at or near Heckhuscheid, Germany, on or about 27 September 1944, wrongfully and unlawfully cast away his rifle, ammunition, and equipment.

Specification 2: In that * * * while before the enemy enroute to join his company as a replacement, did, at or near Heckhuscheid, Germany, on or about 27 September 1944, shamefully run away from the Motor Pool, 1st Battalion, 110th Infantry and did seek safety in the rear and did not return thereto until apprehended and returned 28 September 1944.

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Specification 3: In that * * * enroute to join his company as a replacement, did, at or near Heckhuscheid, Germany, on or about 28 September 1944 misbehave himself before the enemy by refusing to go forward from the Command Post, First Battalion, 110th Infantry to join his company.

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 all specifications thereunder. Evidence was introduced of two previous convictions: one by special court-martial and one by summary court for absences without leave for 15 and 11 days, respectively, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Uncontroverted evidence of a convincing nature, including accused's own testimony, given after explanation of his rights, establishes the following in summary:

On 27 September 1944 accused, who was assigned to Company B, 110th Infantry, as a combat replacement, was brought by the motor officer of the 1st Battalion to the motor pool of that organization (R8-9,11-12). On that day Company B, which was in a defensive position about 1200-1400 yards forward of the battalion command post, was the leading company of the battalion, which had penetrated the Siegfried line about 3000 yards south of Heckhuscheid, Germany, and was under enemy fire of various types (R12,14). Accused was equipped with an M-1 rifle, ammunition and equipment including a belt when he arrived at the motor pool (R15,24). The motor officer instructed him to put down this equipment and remain in the radio shack, where he was, until dark, when he would be taken forward to his company (R9-10,24-25). Accused, who was somewhat frightened and nervous as a result of the sound of artillery fire in the vicinity, left his equipment in the shack and "walked away" without permission and without any particular objective (R25). He was not in the shack when the motor officer returned later in the evening to "pick him up" (R9).

About 0930 hours the next morning (28 September), accused was discovered by an outpost patrol of the 102d Cavalry. He was in a shed in enemy territory about 100 yards from the line near Heckhuscheid. He stated that "he was over the hump" (R13-14). He had with him a canteen of water and an Army "K" ration unit but no weapon, "unless it was

concealed", and no pistol belt (R14). He was returned to the 1st Battalion command post which was in a pill box on the Siegfried Line, where the motor officer demanded an explanation of his absence. Accused stated that he was a conscientious objector and did not wish to kill anyone (R9-10).

In the afternoon of 28 September, a lieutenant of the Service Company, 110th Infantry, designated to bring accused from the battalion command post to Company B, asked him if he was ready to accompany him there. Accused replied, "'No sir, I am not going'", and stated again that he was a conscientious objector and "did not want to shoot anybody" (R11-12). The lieutenant thereupon turned him over to the commanding officer of the headquarters company who questioned him and asked him if he still refused to go forward, and he replied in the affirmative, giving the same reason as before. He did not have his rifle with him at this time (R12,15).

On or about 12 October 1944, the commanding officer of the Casual Company, 28th Division, interviewed accused at the casual company, to which he was evidently evacuated, and asked him "if he still felt the same way about going back to duty". He replied in the affirmative and refused to obey a direct order to report to his organization. Asked if he would go in any capacity such as an aid man or a litter bearer, he said he would not, even though he realized that serious charges might be preferred against him. He stated that he refused to do any kind of front line duty, that it was against his religious convictions to kill, and that he could not stand the sight of blood (R16-17).

4. The essence of accused's defense, as shown in his testimony, was that he was, at the time of commission of the alleged offenses and from the days of his early Catholic training, a conscientious objector to killing and any form of violence, and made known his attitude to his draft board prior to induction as well as to the chaplain at Camp Edwards, Massachusetts, following his basic training with the 80th Infantry Division, two years after induction. At no point was his claim given consideration (R18-19,23). On cross-examination, he admitted that he was not taught that he should not kill in time of war and that his disaffection for handling wounded and sick people was not the result of religious beliefs but "might be mental" (R22-26).

5. (a) Specification 1 of the Charge alleges that accused

> "while before the enemy enroute to join his company as a replacement, did, at or near Heckhuscheid, Germany, on or about 27 September 1944, wrongfully and unlawfully cast away his rifle, ammunition, and equipment".

Article of War 75 provides in pertinent part:

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"Any * * * soldier who, before the enemy, * * * casts away his arms or ammunition * * * shall suffer death or such other punishment as a court-martial may direct".

The Specification follows the phraseology of Form No. 51, Forms for Specifications (AW 75) Manual for Courts-Martial, 1928, Appendix 4, page 245, and that of the quoted portion of Article of War 75. It undoubtedly sta tes an offense in violation thereof.

(b) Winthrop comments upon the offense as follows:

"This offence, which, from an early period of history, has been viewed as a most serious one, especially in time of war, is, under the present Article, completed by the act itself of 'casting away,' whatever its inducement - whether it be to aid flight or relieve weariness, or a mere 'wanton renunciation.' * * * Where - as is thus the general rule - the arm or ammunition discarded belongs not to the offender himself but to the United States, the offence is aggravated; and, in time of war, it is also aggravated by the further fact that the arm, etc., is likely to fall into the hands of the enemy.

That the arm or quantity of ammunition which the party is accused of having cast away, was thrown aside at the order of a commander, in requiring his command to lighten themselves of impedimenta, in order to facilitate a more rapid retreat, when pursued by the enemy, or for other military purpose, will of course constitute a defence to the charge" (Winthrop's Military Law and Precedents - Reprint, p.626) (Underscoring supplied).

The evidence shows that on 27 September accused, a combat replacement, equipped with an M-1 rifle, ammunition and equipment including a belt, was en route to join his company which was in contact with the enemy less than one mile forward in the front lines near Heckhuscheid, Germany. He was thus before the enemy (Cf: CM ETO 3828, Carpenter, and authorities therein cited). After being instructed by the battalion motor officer to put down this equipment and remain in the shack where he was, until dark, and after hearing artillery fire which caused him to be somewhat frightened and nervous, he deliberately left his equipment in the shack, which he thereupon left without permission and from which he was absent when the motor officer returned for him. The following morning he was discovered in enemy territory without rifle, ammunition or equipment other than his canteen.

The verb "cast" is thus defined, in part:

> "To throw off, out, or away; eject; get rid of; discard; as the horse cast a shoe".

The verb compound "cast away" is thus defined, in part:

> "To dismiss or reject; * * * To waste or squander" (Webster's New International Dictionary, 2d Ed., Unabridged, p.417).

The language of Winthrop above quoted indicates that "casting away" may be the equivalent of "wanton renunciation" or discarding "whatever its inducement". Accused, in discarding and abandoning his rifle, ammunition and equipment when he absented himself without leave, was guilty of "casting away" these articles within the meaning of Article of War 75. His conduct was particularly aggravated by the facts (1) that the articles were abandoned near the front lines at a point when they were likely to fall into the hands of the enemy and (2) that he himself wantonly proceeded into enemy territory without the protection afforded by his rifle, ammunition and other equipment (see below, par.6), thereby endangering his own safety.

The record affords no basis for a defense on the ground that accused threw the articles aside at the order of a superior officer. The surrounding circumstances confirm the obviously temporary nature of the relinquishment contemplated by the motor officer's instruction and fail to indicate any military convenience which would be served by relinquishment other than temporary. The most likely explanation of accused's abandonment of the articles is his disaffection for killing and violence in any form, admitted and even urged by him in his own testimony. Such is clearly not a defense to the Specification (see par.7 below), guilt of which in all its elements is adequately established by uncontradicted evidence of a competent and substantial nature, including such testimony.

6. (a) Specification 2 alleges that accused while before the enemy en route to join his company as a replacement did, at the place and time alleged in Specification 1, shamefully run away from the Motor Pool, 1st Battalion, 110th Infantry and did seek safety in the rear and did not return thereto until apprehended 28 September 1944. The evidence shows that after "casting away" his arms, ammunition and equipment (Specification 1), accused proceeded to leave the 1st Battalion motor pool without either permission or any particular objective, and at some time prior to being discovered at about 0930 hours the next morning (28 September), crossed the line into enemy territory. As indicated above, the evidence leaves no doubt that accused was before the enemy while en route to join his company at the time and place alleged in Specification 2. That he shamefully ran away from the motor pool and

did not return thereto until apprehended on 28 September 1944, as alleged, was adequately proved (CM ETO 1404, Stack; CM ETO 1659, Lee; CM ETO 1663, Ison; CM ETO 1685, E. Dixon).

The Specification alleges further that accused "did seek safety in the rear", but the evidence indicates that accused proceeded at least eventually toward the enemy lines, albeit perhaps unintentionally. It may be inferred from his testimony affirming that his departure was without permission and that he did not feel he was going anywhere in particular that he "sought safety" as alleged, but it may hardly be inferred that he sought it "in the rear". There is no evidence that accused went to the rear. The Board of Review is of the opinion, however, that the lack of proof of this element of the Specification is immaterial. The essence of accused's offense was his absence, under the circumstances, from the place where it was his duty to be, i.e., the motor pool (CM ETO 1663, Ison), caused in this instance by his running away. The Specification would have stated an offense in violation of Article of War 75 had it omitted all of the words: "and did seek safety in the rear" (AW 75; MCM, 1928, Form 45, App.4, p.244; CM ETO 1249, Marchetti; CM ETO 1404, Stack, etc., supra; CM ETO 4005, Sumner). Hence the failure of proof as to part of those words, to wit: "in the rear", was immaterial. The offense was complete when accused, being before the enemy, ran away (from the motor pool), regardless of where he ran (supra). This latter element is essentially evidentiary in character.

(b) Specification 3 alleges that accused, en route to join his company as a replacement, did, at the place above alleged on or about 28 September 1944 misbehave himself before the enemy by refusing to go forward from the 1st Battalion command post to join his company. The evidence shows that at the time and place alleged, accused expressly stated to the officer of the Service Company that he was not going forward because he was a conscientious objector, and to the commanding officer of the headquarters company that he still refused to go forward for the reason previously given. All of the elements of the Specification, in violation of Article of War 75, were amply proved. In CM NATO 1614, Langer, 1944, the accused officer was found guilty of misbehavior before the enemy by refusing to advance with his command which had been ordered forward. After accused confirmed to his company commander the report that he so refused, he was relieved of his duties and placed in arrest. It was held that a defense motion for a finding of not guilty, in that the restraint of accused prevented his advancing as ordered, was properly denied, as the gravamen of the misbehavior as alleged was not accused's failure to make the advance, but was his avowal of his intention not to go forward. The refusal lay in his declaration rather than his physical actions and his statements themselves amounted to conduct not conformable to the "standard of behavior before the enemy set by the history of our arms" (Cf: as to scope of "misconduct", CM ETO 3937, Bigrow, and authorities therein cited). So also in this case, the lack of allegation or proof that accused did in fact fail to go forward to join his company is

immaterial in view of his deliberate avowal of intention not to go forward, i.e., his refusal (Cf: as to in praesente effect of orders, CM ETO 2469, Tibi). The testimony as to his subsequent refusal of 12 October 1944, addressed to the commanding officer of the casual company, based upon the same reason as previously given, was admissible in evidence, although such refusal was not made the basis of a separate Specification, for the purpose of proving the relevant factor of accused's state of mind at the time of his alleged refusal some two weeks before.

> "When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged. The court should not consider evidence so offered as bearing in any way upon the question of the accused's character" (MCM, 1928, par.112b, p.112; Cf: CM ETO 3811, Morgan and Kimball).

7. As stated, the only possible ground of defense to the Charge and its specifications raised by accused was that he was a conscientious objector, opposed to killing and any form of violence from his early Catholic school days up to and including the commission of the acts charged. There is no evidence contradicting accused's testimony in this respect. Rather, the fact that he repeated the claim to several different persons tends to corroborate his testimony. Unlike the claim of the accused combat replacement in CM ETO 3380, Silberschmidt, there is no evidence that accused herein acquired his status as "conscientious objector" only after an unpleasant battlefield experience or that his claim was not at some time made in good faith. It is accordingly entitled to consideration by the Board of Review, which will carefully scrutinize any possible infringement of constitutional rights of an accused or of statutory privileges accorded him (CM ETO 1693, L. Allen; CM ETO 2297, Johnson and Loper; Cf: United States ex rel. Innes v. Hiatt et al, 141 F.2d 664).

The Supreme Court of the United States has defined and declared accused's liability for military service in the following language:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it" (Arver v. United States, 245 U.S. 366,378; 62 L.Ed. 349,353).

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> "The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception /eligibility to the Presidency/, every right possessed under the Constitution by those citizens who are native born (Luria v. United States, 231 U.S. 9,22, 58 L.ed. 101,105, 34 S.Ct. 10); but he acquires no more. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege" (United States v. Macintosh, 283 U.S. 605,623,624; 75 L.Ed. 1302, 1310).

Acting upon the foregoing constitutional premise, Congress provided exemption from combatant and even noncombatant service for conscientious objectors who, "by reason of religious training and belief", were opposed to participation in war in any form (Selective Training and Service Act of 1940 (sec.5(g), Act of September 16, 1940, 54 Stat. 889; 50 USCA App.305)). The exemption under the cited Act is broader than that accorded by Congress in the Draft Act of 1917, which required a status of membership in a sect or organization whose religious convictions were against war. But the objection, in order to be a valid basis of exemption under the 1940 Act, must arise from "a compelling voice of conscience, which we should regard as a religious impulse" rather than from convictions of a different character (Augustus Hand, J., in United States v. Kauten (CCA-2d, 1943, 133 Fed.2d 703,708; United States ex rel. Phillips v. Downer (Ibid.), 135 Fed.2d 521).

Accused admitted that he was never taught that a soldier in time of war should not kill, that his religious beliefs did not conflict with aiding the sick and wounded, that being with sick people affected him, especially if there was blood around, and that his disaffection with regard to such persons "might be mental" rather than the result of religious training or belief. He also admitted that he refused on 12 October to go to the front for <u>any</u> type of duty. It is thus evident that his objections to "participation in war in any form" were not based entirely upon "religious training and belief", even as construed by the Kauten case, supra. Accordingly, it appears that the failure of accused's draft board to classify him as a conscientious objector was not an error of law "to be rectified by the courts" or otherwise, but rather the determination of a question of

the weight of evidence, which was clearly within the draft board's province. "The courts cannot act as appellate tribunals for the draft machinery" (United States v. Downer, supra, p.525).

It is appropriate to note that accused failed to pursue, and thereby waived, any remedies available to him to correct any error of law by the draft board, which included appeal to the appeal board and in the event of failure in that forum, habeas corpus proceedings (Kauten case, supra). Furthermore, the fact that he underwent extensive combat training without renewing his claim tends to indicate an abandonment thereof.

Although the Board of Review has deemed it proper and advisable in this case to give serious consideration to accused's defense, it is not the intent hereby to imply that a soldier, regularly inducted into and accepted by the military service, may in a military court defend a charge against him arising under the Articles of War on the ground that he was wrongfully inducted into the military service. Conversely the Board is decidedly of the opinion that the authorities above cited sustain the opposite principle. Strictly speaking the court should have excluded all of defense's evidence pertaining to accused's draft status as irrelevant to the issues.

8. (a) The practice, indulged in with unfortunate regularity by the trial judge advocate herein, of pointing out accused in open court to witnesses before they identified him, is to be condemned as a matter of principle, even though accused's own testimony, which conclusively identified him as the actor involved in the offenses charged, prevented the irregularity from injuriously affecting his substantial rights in this trial.

(b) The record shows (R5) that the trial took place only four days after the charges were served on accused. In the absence of objection and of indication that any of his substantial rights were prejudiced, the irregularity, if any, may be regarded as harmless (CM ETO 3948, Paulercio, and authorities therein cited).

9. The charge sheet shows that accused is 32 years one month of age, was inducted at Camp Upton, New York, 1 August 1942, and had no prior service.

10. 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.

11. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 DEC 1944 TO: Commanding General, 28th Infantry Division, APO 28, U. S. Army.

1. In the case of Private STEPHEN SKOVAN (32445273), Company B, 110th 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 sentance.

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 4820. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4820).

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 14 DEC 1944

CM ETO 4825

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	
Private SAMUEL B. GRAY (38387289), 570th Ordnance Ammunition Company	Trial by GCM, convened at Palais de Justice, Le Mans, France, 5 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 18 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Samuel B. Gray, 570th Ordnance Ammunition Company, did, at or near Beaufay, France, on or about 21 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Marcelle Vivien, by willfully and feloniously dragging her back of a hedge and throwing her to the ground.

Specificication 2: In that * * * did, at or near Beaufay, France, on or about 21 August 1944, unlawfully enter the dwelling house of Rene Vivien with intent to commit a criminal offense, to-wit, rape therein.

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Specification 3: In that * * * did, at or near Beaufay, France, on or about 21 August 1944, with intent to commit a felony, namely, murder, commit an assault upon Mr. Rene Vivien by willfully and feloniously shooting at him with a carbine.

Specification 4: In that * * * did, at or near Beaufay, France, on or about 21 August 1944, with intent to commit a felony, namely, murder, commit an assault upon Madame Renee Vivien by willfully and feloniously shooting at her with a carbine.

Specification 5: (Finding of Not Guilty).

He pleaded not guilty and was found guilty of Specification 1, except the words "commit a felony, viz., rape" and "back of a hedge and throwing her to the ground" substituting therefor respectively the words "do her bodily harm", and "into a field", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2, except the word "rape", substituting respectively therefor the words "an assault", of the excepted word not guilty, of the substituted words guilty; guilty of Specification 3, except the words, "commit a felony, namely, murder", and "a carbine", substituting therefor respectively "do him bodily harm" and "a dangerous weapon, to wit, a carbine", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 4, except the words "commit a felony, namely, murder", and "a carbine", substituting therefor respectively "do her bodily harm" and "a dangerous weapon, to wit, a carbine", of the excepted words not guilty, of the substituted words guilty; not guilty of Specification 5; and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 18 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. Under Specification 1 of the Charge the court by exceptions and substitutions, which negatived the evidentiary detail of throwing the victim to the ground, found accused not guilty of assault with intent to commit rape, but guilty of assault with intent to do bodily harm.

Assault with intent to do bodily harm is not a lesser included offense in a Specification alleging assault with intent

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to commit rape (Cf: MCM, 1928, par.148b, p.165; 31 CJ sec.522, p.868; State vs. McDonough, 104 Iowa 6, 73 NW 357; Winthrop's Military Law and Precedents - Reprint - p.689). Accused, having been charged with an assault involving one specific intent could not properly be found guilty of an assault requiring an entirely different one (1 Wharton's Criminal Law, 12th Ed., sec. 841-842, pp.128-134).

> "It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature. * * * And this though the evidence clearly shows that the greater or the distinct offence was the one actually committed; for a party cannot be convicted of an offence of which he has not been notified that he is charged and which he has had no opportunity to defend" (Winthrop's Military Law and Precedents - Reprint, p.383).

It follows, therefore, that the record of trial as to Specification 1 of the Charge, is legally sufficient to support only so much of the findings of guilty as involve findings of guilty of the lesser included offense of assault and battery in violation of the Article of War 96. However, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty by exceptions and substitutions of Specifications 2, 3 and 4 of the Charge and the sentence.

4. The charge sheet shows that accused is 25 years of age and was inducted 13 January 1943 at Shrevesport, Louisianna, 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 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 the findings of guilty to the extent indicated and the sentence.

6. Confinement in a penitentiary is authorized for the

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offense of housebreaking by Article of War 42 and sections 22-1801 (6:55) and 24-401 (6:401), District of Columbia Code, and also for the offense of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA sec.455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

C. Franklin Potts Judge Advocate

Elwood Kirkpatrick Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind. (337)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private SAMUEL B. GRAY (38387289), 570th Ordnance Ammunition Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of the Charge as involves findings of guilty of assault and battery in violation of Article of War 96, and legally sufficient to support the findings of guilty, by exceptions and substitutions, of Specifications 2, 3 and 4 of the Charge and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and its indorsement. The file number of the record in this office is CM ETO 4825. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4825).

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

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

BOARD OF REVIEW NO. 2

CM ETO 4854

2 DEC 1944

U N I T E D S T A T E S	)	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
First Lieutenant LESLIE H. WILLIAMS, Jr. (O-1111983), Corps of Engineers, 1317th Engineer General Service Regiment.	)	Trial by GCM, convened at Brockenhurst, Hampshire, England, 12 September 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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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 93rd Article of War.

Specification 1: In that First Lieutenant Leslie H. Williams, Jr., 1317th Engineer General Service Regiment, did, at or near Romsey, Hants, England, between, on, or about 25 May 1944, and on or about 10 June 1944, feloniously embezzle, or fraudulently converting to his own use, certain funds, the property of enlisted men, entrusted to him by the said enlisted men, as follows:

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About £30, equivalent value $121.05, the property of Technician 4th Grade Fred Cooper, Company C, 1317th Engineer General Service Regiment.

About £10, equivalent value $40.35, the property of Corporal James C. Williams, Company C, 1317th Engineer General Service Regiment.

About £24, equivalent value $96.84, the property of Technician 5th Grade Noah Abbott, Company C, 1317th Engineer General Service Regiment.

Specification 2: In that * * * did, at or near Romsey, Hants, England, between, on, or about 25 May 1944, and on or about 10 June 1944, feloniously embezzle, by fraudulently converting to his own use, funds in the amount of about £28-0-0, equivalent value about $112.98, the property of Private Johnnie Anderson, Jr., Company C, 1317th Engineer General Service Regiment, entrusted to him by the said Private Anderson, Jr.

Specification 3: In that * * * did, at or near Romsey, Hants, England, between, on, or about 25 May 1944, and on or about 10 June 1944, feloniously embezzle, by fraudulently converting to his own use, funds in the amount of about £10-0-0, equivalent value about $40.35, the property of Private 1st Class Johnnie J. Jackson, entrusted to him by the said Private 1st Class Jackson.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, as successor in command, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances, reduced the period of confinement to two years, changed the place of confinement to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

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3. The prosecution's evidence shows that the 1317th Engineer General Service Regiment arrived in England on 28 March 1944. About three weeks later, verbal authority was given each company administration officer to handle the money sent home by his company. The normal method in the regiment is to forward money either by Finance Officer, or by money orders handled by the regimental mail clerk (R7). The Finance Officer always gives a receipt. Accused had never given the personnel officer of his regiment any moneys to be sent home. Neither the regimental mail clerk nor his assistant who are the only persons in the regiment who handle money orders for money sent back to the states (R8) ever received any money from accused for money orders nor did they ever receive any in behalf of Technician Fourth Grade Fred Cooper, Corporal James C. Williams, Technician Fifth Grade Noah Abbott, Private Johnnie Anderson, Jr., or Private First Class Johnnie J. Jackson (R8-10). Neither had the company mail clerk of Company "C" of the 1317th Engineer General Service Regiment ever been asked by accused to secure any money orders for him (R11).

Technician Fourth Grade Fred Cooper, a member of the first platoon of the Company "C" aforementioned, commanded by accused, on 12 May 1944, gave accused 12 pounds and eight dollars in American money to send home to his wife. He later asked accused for a receipt and whether he had sent the money, and accused answered that he didn't need a receipt. "People were honest and it would get there". When Cooper was insistent about a receipt for the money, accused said, "'I will see about it'". Some weeks later witness again asked accused about it saying his wife had not received it, and accused promised "he would see about it". On 3 June Cooper gave accused ten pounds ten shillings (R42.00) and when accused was later asked for a receipt, said "he had sent it but didn't have the receipt right then" (R12). Accused stated he had sent the money through the Finance people. On 9 June Cooper gave accused seven pounds, ten shillings, and later asked for the receipt, whereupon accused said he had it in his tent but when Cooper went there for it, he did not get it. On 2 June Cooper sent $36.00 home himself, sending it to the Finance Officer by accused and a Sergeant Brooks who got the receipt. Cooper showed accused a couple of letters received from his wife saying she had not received the money. Accused's only answer was, "I will see about it". Three letters received by Cooper from his wife which he had shown to accused were admitted in evidence as Prosecution's Exhibits A, B and C. Exhibit C acknowledged receipt of the money which accused had sent and got a receipt for. None of this money was ever repaid by accused to Cooper but Lieutenant Gilmore, his company commander, gave Cooper 33 pounds, the amount Cooper had turned over to accused (R13-16).

Technician Fifth Grade Noah Abbott, Company C, was a member of the platoon commanded by accused and on 3 May 1944 gave him 18 pounds to send home to Abbott's wife. Accused gave him no

receipt though it was requested but stated the money was sent through the Finance Officer in bulk and would be sent to his wife when it got there. During the week of 9 June Abbott gave accused six pounds more and again was not given a receipt. About the middle of July when Abbott asked about this money and told accused his wife had written that the money had not been received, accused stated, "I am going into the Red Cross today and I will check on the money". Lieutenant Gilmore paid Abbott back the money given accused by Abbott about ten days before the trial (R16-18).

Private First Class Johnnie J. Jackson, Company C, of the first platoon commanded by accused, on or about 30 May 1944, gave accused 20 pounds to send home for him. Although requested, accused did not give him a receipt, except for $40.35 of this money, though he promised to do so. Witness told accused later that he had received a letter saying that the money, except the $40.35 had not arrived. The letter was received more than two months after the money was given to accused. The money was not repaid to Jackson (R18-20).

Private Johnnie Anderson, Jr., of Company C, accused's regiment, about the first of May 1944, gave 50 pounds to Corporal Williams to keep for him. Williams had some money of his own and didn't want to keep so much so with Anderson's permission Williams gave both his and Williams' money to accused to keep for him (R21). Sometime later, in June, Anderson asked accused for his money as he wanted to send it home. Accused said he didn't have that much and later on, about the first of the month, accused gave him eleven pounds of the money and at Anderson's request paid a similar amount to the mail corporal whom Anderson owed. On July payday, accused gave him an additional seven pounds (R22). At the time the money was given to accused there was no way to send it home and it was turned over to him for safekeeping only (R23).

Corporal James C. Williams turned over Anderson's 50 pounds together with $40.00 of his own, to accused to keep for them. A day later he asked for the money and accused said it was over at his sleeping quarters about a block away, and he would bring it when he returned to the company. Accused did not give him the money and when Williams later asked accused for it, he was told it was in the bank at Southampton. He asked accused several times for the money and on one occasion he was given two pounds (R24-26).

Information came to First Lieutenant Herbert S. Gilmore, commanding officer of accused, that accused was having money difficulties with some of the men in the company and he inquired of Anderson who said "Yes". Accused was called in and asked if he owed Anderson and answered, "I paid him some last night" (R27). He was told the thing for him to do was to get the money and pay Anderson and accused said he could get it as he had some money in the bank at Southampton. Transportation was furnished him to go there and get it. The next

morning Anderson informed Gilmore that he had not been paid and later in the day on being asked accused informed Gilmore that he had paid Anderson. When told what Anderson had said, accused answered, "Well, its his word against mine". Gilmore then checked to find if other men were involved and found eight. This information was given accused who stated "that all the money he had collected he had transmitted to the states" and that he had given the receipts to the men. About the 10th or 12th of July, Gilmore advised accused to write home and get the money to pay off the men and accused said he would write and get it (R28). A month later Gilmore again questioned accused who stated he had received no reply and he then agreed to send a telegram and later that day informed Gilmore that he had done so. Gilmore received through one of accused's allotments that didn't go through, 60 pounds to pay some of the men (R29).

A stipulation signed by accused, defense counsel and trial judge advocate (Pros.Ex.D) was admitted in evidence to the effect that from 1 May 1944 "until the present date", accused had had no account in his name in any of 32 listed banks in Southampton, England (R30-31).

4. The defense presented but two witnesses, Miss Joyce Oakley of Southampton, cashier at the American Red Cross there, testified that she knew accused; that he kept some money locked in a cabinet in the dining room at her home because he had lost the key to his locker. When accused's troubles were being investigated, she was asked if accused had given her any money, at which time she did not admit knowing of any money belonging to accused (R33). When asked why she failed to inform the investigating officer, she claimed she "didn't think about that at the time". She testified accused came sometime in July and got the money, "about £20" that he had kept at her home. It was in a sealed envelope which accused said contained 20 pounds and the entire transaction occurred in the month of July. Her mother kept the key of the cabinet and she thought if there had been any other or further moneys her mother would have told her (R34-35).

Accused, at his own request, was sworn and testified to receiving money belonging to Williams and Anderson and that on repeated requests he had given them part of it back; that Lieutenant Gilmore had asked him if he had repaid the money and he answered, "Yes". He was given a jeep to go into town and get the money and went to the girl's house and got the 20 pounds. Gilmore had advised him to send to the states for the money and gave him one week to get it. When the week was up he had received no word and "I was brought in here". He testified that he received Cooper's money, 30 pounds, and sent it home by the Finance agent on the post, giving Cooper one receipt and keeping one (R36). He gave Cooper three receipts, one each time Cooper gave him money. Williams gave him the 50 pounds to keep for him. Abbott gave him some money which he sent home by the Finance Officer on the post, receiving two receipts, one of which

he gave Abbott and one he kept. He destroyed the receipts as well as all his records of the money transactions when the unit moved the latter part of June. Anderson's was part of the money given him by Williams. He denied Cooper ever showed him any letters or that he had ever seen those admitted in evidence (R36-37). He admitted he destroyed his records after complaints had been made that the money had not been received in the states and he denied he ever told Abbott the moneys were sent to the states in bulk where it was broken up and sent to each individual and Abbott's story to that effect was false. He admitted that Abbott's inquiries and complaints were also made before he (accused) destroyed his records. Williams asked for his money in May and he (accused) gave him some but not all as he did not then have it but he "could have got it * * * at Miss Oakley's". When it was suggested that she had testified that accused did not take any money to her house until July, he answered that "at the time I brought the money down she was not at home" and intimated that he gave it to her father who kept it "until his wife came home" as "he didn't have the key". When asked if he wished to have "time to produce Mr. Oakley before the court", accused answered "No". He testified that he actually had more money at Miss Oakley's than she knew about (R38-39) and he denied he told Williams his money was in accused's quarters or that Williams informed him that he and Anderson wanted their money, and that part of Williams' story is false. He gave the 20 pounds he got from Miss Oakley to Anderson and his story about not receiving it is false. He denied telling Williams or Gilmore at any time that he (accused) had money in the bank and admitted that he never had a bank account in Southampton. He denied Anderson ever asked him for all his money (R40-42). He had never had any trouble with these men and could not explain why they should tell such stories in court. He had played blackjack, a few times for as high as two pounds a card, the games sometimes lasting all night but he didn't believe he ever told Lieutenant Gilmore he had won some 150 to 160 pounds playing blackjack. He admitted telling he had won 50 pounds that way. He wrote home asking for $500 after talking to Lieutenant Gilmore but had not as yet received it though he had a letter saying "it was on the way". This money was to be used to replace money he was accused of having received from the men and not sending to the states. Although the Finance office could have furnished him a complete record of his moneys sent, he admitted he did not inquire there (R42-44).

Lieutenant Gilmore on rebuttal for the prosecution, testified that on an evening early in June accused had a large amount of money which he (accused) said amounted to 157 pounds and which he said he won at blackjack (R45).

5. "Embezzlement is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same" (2 Wharton's Criminal Law, sec.1258, p.1568).

"Repayment or restitution of money or property embezzled, after the completion of the crime, will constitute no defense to a prosecution for the embezzlement, and a subsequent settlement with the prosecuting witness or an arrangement between the employed and employer for the refunding of the money embezzled, will not constitute a defense to a prosecution for the crime charged" (2 Wharton's Criminal Law - 12 Ed., sec.1316, pp.1628-1629; CM ETO 1302, Splain).

Every essential element of the offense of embezzlement is clearly shown by the evidence as to each of the specifications if the court believed the witnesses other than accused, as apparently it did. Accused's story was so implausible, so crudely and blatantly false, that by it he confirms the truthfulness of the prosecution's witnesses. From the evidence submitted the court could hardly have decided otherwise than as they did. They are the sole judges of the credibility of the witnesses (CM ETO 1621, Leatherberry, et al).

6. The court before which accused was arraigned and tried on 12 September 1944 was appointed by the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, on 12 August 1944. Southern Base Section was dissolved as of 0001 hours 1 September 1944 and the United Kingdom Base, Communications Zone, European Theater of Operations, was activated at the same time and date (GO 42, 31 August 1944, Communications Zone, European Theater of Operations). United Kingdom Base absorbed Southern Base Section and the court became an instrumentality of the United Kingdom Base with all its jurisdiction and legal functions unimpaired (CM ETO 4054, Carey et al).

7. The charge sheet shows that accused is 21 years and seven months of age. He was inducted 10 August 1942 at Jefferson Barracks, "Kansas City, Missouri"; commissioned Second Lieutenant, Corps of Engineers, 17 March 1943, at Fort Belvoir, Virginia.

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

9. Dismissal of an officer is authorized upon conviction of embezzlement in violation of Article of War 93. Designation of 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, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant LESLIE H. WILLIAMS, Jr. (O-1111983), Corps of Engineers, 1317th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 4854. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4854).

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

(Sentence ordered executed. GCMO 125, ETO, 11 Dec 1944)

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

BOARD OF REVIEW NO. 2

27 DEC 1944

CM ETO 4886

U N I T E D S T A T E S	)	30TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Kerkrade, Holland, 31 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WOODROW W. TURNER (38471252), Company F, 117th 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 75th Article of War.

Specification 1: In that Private Woodrow W. Turner, Company F, 117th Infantry, being present with his platoon while it was engaged with the enemy, did at or near Mortain, France, on or about 11 August 1944, shamefully abandon the said platoon and seek safety in the rear, and did refuse to rejoin it after lawful command given by Captain George H. Sibbald, his superior officer.

Specification 2: In that * * *, on or about 7 August 1944 at Romagny, France, did misbehave himself before the enemy by failing to advance with his command which had been ordered forward by the Battalion Commander to engage with the Germany Army

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which forces the said command was then opposing.

He pleaded not guilty to and was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution showed that accused was a private, Company F, 117th Infantry (R6,7). Early on 7 August 1944, accused's company was ordered to proceed to and occupy Romagny, France, a nearby town. The company proceeded down the road until within 600 yards of Romagny, when it came under the fire of the enemy who had already occupied the town. Shortly after the company left its position on this mission, accused broke out of ranks and started for the rear. He was stopped at the end of the platoon by Staff Sergeant Andrew A. Nudge of Company F, whom he told: "I can't go on". Captain George H. Sibbald, company commander, came up and ordered accused to return to his platoon. Accused refused and was told to report to the first sergeant at Headquarters Company "in the rear of the column". On his way back he met "Colonel Lockett" who persuaded him to return to his platoon (R7,8,10,14,15).

On 11 August 1944, at Mortain (France), this company was under orders to hold the position it had taken and which it then occupied facing the town. The first platoon dug in. A shell burst occurred in accused's vicinity and he left his hole and went over to Nudge and asked to "dig in" with him. He was asked by Nudge "if any of the other fellows decided to get up and leave", and replied, "No, but I am not made like the other fellows". Nudge took accused's rifle away from him and "marched him back to the Company C.P. * * * 200 yards to the rear"(R7,8,10,12,13). By this time, darkness was approaching. Captain Sibbald talked to accused at the command post and told him of the need for "every man who could possibly perform his duty". This was without result, and the Captain finally ordered him to return to his position, only to be told that "he absolutely could not do so". Later, accused said that "he could not and would not perform front line duty any more" (R8,13).

4. On cross-examination, the defense showed that between 7 and 11 August, accused was "once" one of the members of a "guard patrol walking" a post which consisted of a gap between two units of the company (R11). Accused's platoon commander said that except for the incidents on 7 and 11 August, accused did his job as well as any other

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man (R12). One of the headquarters company lieutenants testified that he had observed accused for a two-week period in June in a bivouac area, waiting to "jump off" and that accused, then in the headquarters company, had performed his work satisfactorily (R15,16). Two enlisted men testified that accused had been a willing worker in the division's rear echelon, since the 11th of August. They said that when enemy aircraft "came over" accused would say he was afraid and would take cover (R17,19).

Accused advised of his rights testified under oath as a witness on his own behalf. He said, in substance, that he went to the rear on 7 and 11 August. On 7 August: "artillery started falling close and I got excited and started back to the rear to see if I could find a ditch"; that on that day he was at the rear for a "short time". He said that between 7 and 11 August he went out on "about two" patrols; and that near Mortain he volunteered with three or four others to investigate the condition of two or three men who had gone down under enemy fire and that they had found and taken back one man who was alive. On 11 August he asked Nudge for permission to dig in with him because he wanted to be with someone, actually "to see Sgt Nudge so" he "could go to the first sergeant" on personal business (R19-23).

5. Each allegation of the two specifications was fully sustained by the evidence, except that the order to advance, mentioned in Specification 2, was given by the regimental executive and not by the battalion commander as alleged. This variance between allegation and proof was immaterial. The gist of the offense was misbehavior before the enemy by failing to advance with his command. The advance in question was pursuant to proper orders. On both August 7 and 11, Company F was advancing toward and in combat with the enemy.

The allegations of Specifications 1 and 2 of the Charge, thus proved stated two separate offenses under Article of War 75 (CM 134518, Stone (1919); CM NATO 573, Chiatovich; CM ETO 1249, Marchetti). Proof that accused later returned to his command after his failure to advance on 7 August was immaterial to the offense alleged in Specification 2 (CM ETO 1659, Lee).

6. Accused is 20 years of age. He was inducted at Tulsa, Oklahoma, 24 June 1943, for the duration of the war plus six months. He had no prior service.

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

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8. The offense of misbehavior before the enemy in violation of Article of War 75 is punishable as a court-martial may direct, including death. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

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. 27 DEC 1944 TO: Commanding General, 30th Infantry Division, APO 30, U. S. Army.

1. In the case of Private WOODROW W. TURNER (38471252), Company F, 117th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4886. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4886).

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

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

BOARD OF REVIEW NO. 2

23 DEC 1944

CM ETO 4914

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CLYDE M. SOLOMON (6924471), 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot.	Trial by GCM, convened at Lichfield, Staffordshire, England, 16 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Clyde M. Solomon, 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, while en route to the 9th Replacement Depot, Glastonbury & Street, Somerset, England, on or about 15 June 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Bristol, Gloucestershire, England, on or about 6 September 1944.

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

Specification: In that * * * did, at Northfield, Birmingham, Warwickshire, England, on or about 25 August 1944, feloniously take, steal, and carry away one (1) oak chiming clock of the value of over twenty ($20.00) dollars, the property of Mrs. Amplais Davis.

He pleaded not guilty and, by exceptions and substitutions, was found guilty of absence without leave as alleged from June 15 to September 6, 1944, in violation of Article of War 61. Other exceptions and substitutions were designed merely to correctly designate accused's organization. Evidence was introduced of two previous convictions, by special court-martial, for absence without leave for 35 days, in violation of Article of War 61, and for breaking parole while a prisoner, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused, while attached to the 316th Replacement Company, 10th Replacement Depot, was attached to the 303rd Replacement Company, 10th Replacement Depot, for shipment to the 9th Replacement Depot, to which he was ordered to proceed on or about 5 June 1944 (R9; Pros.Ex.5). Accused's company commander and the record clerk, transportation section, both testified that accused departed on 14 June 1944, pursuant to this order, for Glastonbury and Street, Somerset, England (R9,11). Copy of morning reports of the 303rd Replacement Company, concerning the transfer of accused and of his reported absence without leave, and a copy of letter from the 9th Replacement Depot, advising that accused never reported to his station, were received in evidence over objection of the defense (Pros.Exs.1,3). The morning report of 14 June 1944 (Pros.Ex.2) was admitted in evidence without objection. The evidence further shows that on 6 September 1944, accused, while in uniform, voluntarily returned to military control by turning himself in to the military police at Bristol, England. He reported at the time that he was "AWOL" (R14). Later, accused made a written statement to an investigating officer, wherein he admitted leaving camp without pass at 1200 hours, 14 June 1944, and remaining absent without leave until he surrendered to military authority at Bristol, England, on 6 September 1944 (R15; Pros.Ex.4). During a

part of such period of absence, accused stayed in the home of Mrs. Amplais Davis, Birmingham, England, from whose house on 25 August 1944, he took, without her consent, a mantel clock of the description and value alleged (R18,19,21).

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

6. The morning reports of the 303rd Replacement Company and the letter of the 9th Replacement Depot (Pros.Exs.1,2,3) were both incompetent to prove that accused had been absent without leave since 15 June 1944 and that he had not reported to his new station. These entries and reports were obviously hearsay. However, it was shown by competent evidence that accused left his organization on 14 June 1944; that between 21 and 25 August 1944 he stayed at the home of Mrs. Amplais Davis of Birmingham, England, a place some distance from the location of his new station; and that he was definitely some distance therefrom on 6 September 1944, when he surrendered himself at Bristol. This evidence is in itself sufficient to establish the corpus delicti, for the purpose of rendering competent the confession of accused, in which he admitted his absence without leave for the total period alleged in the Specification of Charge I (MCM, 1928, par.114a, p.115).

7. The charge sheet shows that accused is 26 years of age. He enlisted at Fort Oglethorpe, Georgia, on 4 August 1937, and was discharged on 27 October 1939. He re-enlisted at Fort Oglethorpe, Georgia, on 26 January 1940.

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

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

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, APO 413, U. S. Army.

1. In the case of Private CLYDE M. SOLOMON (6924471), 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4914. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4914).

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

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

BOARD OF REVIEW NO. 2

22 DEC 1944

CM ETO 4915

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHN W. MAGEE (32461312), 337th Replacement Company, 88th Replacement Battalion, 16th Replacement Depot	Trial by GCM, convened at Warminster Barracks, England, 5 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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 above named has been examined by the Board of Review.

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

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

Specification: In that Private John W. Magee, 337th Replacement Company, 88th Replacement Battalion, 16th Replacement Depot, then of Detachment 37, Ground Forces Replacement System, did, without proper leave, absent himself from his organization and station at or near Barton Stacy, Hampshire, England, from about 4 August 1944 to about 16 August 1944.

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

Specification 1: In that * * * did, at or near Winchester, Hampshire, England, on or about 16 August 1944, unlawfully enter the American Red Cross building, with intent to commit a criminal offense, to-wit, larceny therein.

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Specification 2: In that * * * did, at or near Winchester, Hampshire, England, on or about 16 August 1944, feloniously take, steal, and carry away about four pounds sixteen shillings (£4.16.0d), English money, value about nineteen dollars ($19.00), the property of the American Red Cross.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of three previous convictions by special courts-martial for absences without leave for two, 30 and 48 days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen years. The reviewing authority approved the sentence but remitted five years of the confinement, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that the accused was, at the time of trial, a private, 337th Replacement Company, 88th Replacement Battalion, 16th Replacement Depot, Warminster Barracks, Warminster, England (R7). He was first attached to this organization on "25 August 1943" (sic, obviously 1944), and had come to that organization from the "Ground Force Replacement System * * * located at Barton Stacy". It was also shown that accused was in the city of Winchester, England, on the nights of 5,6,8,10,11,13, and 15 August 1944 where he occupied sleeping accommodations in dormitories or "sleeping quarters" maintained by the American Red Cross in that city (R8,15,16). It was stipulated that accused "returned to military control" on 16 August 1944 (R15).

With reference to Charge II and its specifications, the prosecution showed, through the testimony of Mr. William Hayden, night porter at the American Red Cross sleeping quarters in Winchester, that at about 2200 hours on 15 August 1944, accused came to the Red Cross and entered the office (a former linen room converted to this use) where he registered for and was assigned a bed (R8,16). Accused was intoxicated at this time (R16). At about 0100 hours, 16 August 1944, Mr. Hayden left the room, locked the door, and went "to go stoke up the boilers" (R9). In the room when he left, in a tobacco box on a small table, was the sum of four pounds and sixteen shillings, the property of the American Red Cross (R8,9,11). Upon his return at about 0120 hours both the box and the money it contained were missing (R9,11). Mr. Hayden noticed that a blackout screen which was "up" when he left the room was "against the wall * * * away from the windows" upon his return (R11). He had given no one permission to enter the room during his absence (R9).

Police Constable Stephen Harris, of the Winchester constabulary, testified that as the result of a telephone message he proceeded to the American Red Cross sleeping quarters in Winchester at about 0130 hours on 16 August 1944. An examination of the premises disclosed that the "blackout" had been removed from the window of a linen room used by the night porter as an office and that there were marks on the outside of the building which "may have been caused by the boots on a person scaling up the wall to the window". Accused, who was the first person seen by the constable upon his arrival, was questioned and eventually taken to the police station. He was there searched and produced 35 shillings and " a few coppers" which "he admitted were part of the money stolen". Accused was later released to the custody of the American Military Police (R12,13).

The prosecution introduced two statements made by the accused to the investigating officer, after having been advised of his rights, in which he recited that he absented himself without leave from Package X 45-G, Barton Stacy Marshalling Area, about 1 August 1944 and went to Winchester where he stayed at the Red Cross. At approximately 0100 hours, 16 August 1944, he left the Red Cross sleeping quarters by the front door and "approached the linen room window from the outside". He pushed in the blackout and climbed through the window. He then placed the "cash tin" in his pocket and left in the same manner as he had entered. He stated that he was intoxicated at the time. He also said that "the reason I stole * * * the money was because I was broke" (Pros. Exs.1,2).

4. Accused, after having been advised of his rights as a witness, elected to remain silent. The defense introduced no evidence.

5. The evidence in the record in support of Charge I and its Specification is somewhat meager but is sufficient to support the court's finding that accused was guilty of the offense charged. Accused was shown to have been at the American Red Cross sleeping quarters in Winchester on the nights of 5,6,8,10,11,13 and 15 August 1944. The stipulation that accused "returned to military control" on 16 August 1944 supports the inference that his absence from his organization and his presence in Winchester was unauthorized. There was thus sufficient proof of the corpus delicti to admit that portion of accused's confession in which he stated that he absented himself without leave from his organization at Barton Stacy during the period alleged (Cf: CM ETO 3686, Morgan). The evidence adduced under Charge II and its specifications is amply sufficient to support the court's findings of the offenses alleged.

6. The charge sheet shows that accused is 25 years of age and was inducted at Newark, New Jersey, on 19 August 1942. No prior service is shown.

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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 is legally sufficient to support the findings of guilty and the sentence.

8. Confinement in a penitentiary is authorized for housebreaking (AW 42; sec.22-1801, Title 22, ch.18, D.C. Code, 1940 Ed). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

(SICK IN QUARTERS) Judge Advocate

Judge Advocate

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(361)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private JOHN W. MAGEE (32461312), 337th Replacement Company, 88th Replacement Battalion, 16th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4915. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4915).

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

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

BOARD OF REVIEW NO. 2

17 JAN 1945

CM ETO 4931

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at APO 253, U. S. Army, (Belgium), 25 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSEPH G. BARTOLONI (32917715), Company A, 23d Armored Engineer Battalion	)	

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 Joseph G. Bartoloni, Company "A", Twenty-third Armored Engineer Battalion, did, near Eupen, Belgium, on or about 1800 hours, 12 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, Company "A", Twenty-Third Armored Engineer Battalion, APO 253, U. S. Army, with intent to shirk important service, to wit: Duty of Company "A", Twenty-third Armored Engineer Battalion, operating under the control of the Twenty-third Armored Engineer Battalion, then a part of the reserve force

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of the Third Armored Division, and did remain absent in desertion until he was apprehended at Verviers, Belgium, on or about 26 September 1944.

Specification 2: (Finding of not guilty)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 2 and guilty of Specification 1 and of the Charge. Evidence was introduced of one previous conviction, by summary court for disobedience of a standing order, 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 30 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on the 12th of September 1944, the 23rd Armored Engineer Battalion was stationed near Eupen, Belgium. Company A thereof, accused's organization, was under the control of the Battalion which was operating as a part of the 36th Infantry supporting two combat commands in this territory. Captain Jefferson G. Artz, the Commanding Officer of Company A, testified that his unit was being called upon from time to time to give additional men to maintain gaps made in the "dragon's teeth" to construct bridges and to maintain road blocks as defensive measures against counter-attacks by the enemy. On the 12th of September 1944, accused's squad was in the bivouac area in division reserve (R10) and on the evening of this day accused was missing and absent from the company area (R6,7,8). He had no permission to be absent, and a company order had been issued that nobody was to leave the area under any circumstances (R9). An extract copy of the morning report, containing entries showing accused's absence without leave on 12 September 1944 and his return to military control on 10 October 1944, was received in evidence, without objection, as Prosecution Exhibit A (R12).

The testimony of Sergeant Nicholas Rusin, the squad leader of accused's unit, fully corroborated that of the company commander. He added that accused joined the squad, as a replacement, some time after the first engagement with the enemy, around June 30, and that on the night of 11 September 1944, before accused was missing and absent on the 12th, the company bivouac area and his squad was under enemy fire, which mortar and shellfire was continuous all night (R11,12).

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First Lieutenant Thomas J. McKimmey, Corps of Military Police, testified that on 30 September 1944 accused was brought before him, as summary court officer, in Verviers, Belgium. At this time, witness recognized accused as having previously been before him when apprehended by members of the military police on 26 September 1944 at which time accused gave his organization as "25th Truck Company, APO 230". On the latter date, accused had been released, after trial, with the understanding that he would return to his organization. He admitted to witness that he had never returned to his unit but instead had remained in Verviers, in a private home, where he was apprehended on 30 September 1944. He gave without explanation as his reason for not returning to his organization that he was "scared" and "afraid" (R13,14).

4. After his rights as a witness were explained, accused elected to remain silent. No evidence was introduced on behalf of the defense.

5. Competent uncontradicted evidence establishes that on 12 September 1944, accused's organization was operating as a part of the 36th Infantry, supporting two combat commands in an advanced position near the enemy. Throughout the night of 11 September 1944, Company A, including accused's platoon, had been under enemy mortar and shellfire. The following day accused absented himself, without proper leave, from his organization. He did not return and remained absent until apprehended on 26 September 1944 when he was directed to return to his unit. He did not do so but continued to remain away from his unit until he was again apprehended at Verviers, Belgium, on 30 September 1944. His only explanation for his conduct was that he was "scared" and "afraid". The evidence is clear and convincing that his absence was accompanied by a specific intent to shirk and avoid important duty at the front. His unit was under enemy fire all of the night before and was acting in support of two combat commands, furnishing replacements for combat. All of the elements of the offense, charged in Specification 1 hereof, are thus established (CM ETO 1400, Johnston; CM ETO 1406, Pettapiece; CM ETO 2473, Cantwell). The date of the termination of the offense is not a vital element in a charge alleging desertion by absenting himself without proper leave with intent to shirk important service. All of the essential elements are fully established (MCM,1928, par.130a, p.143). The court improperly admitted in evidence Prosecution's Exhibit B, the record of accused's conviction by a summary court on 26 September 1944, inasmuch as such evidence did not relate to an offense committed, by accused, "during the one year * * * next preceding the commission of [the] offense charged" (MCM, 1928, par.79c, p.66). The date of such offense, as shown by the admitted evidence, is 26 September 1944, a

time subsequent to the beginning of the absence of accused and simultaneous with the date of the termination of the desertion, as found by the court. In view of all the circumstances, as disclosed by the record of trial, the Board of Review is of the opinion that such error was not prejudicial to the substantial rights of the accused.

6. The charge sheet shows that accused is 21 years of age. He was inducted, without prior service, at Newark, New Jersey, 24 April 1943.

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. Confinement in a pentitentiary is authorized for the offense of desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, 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. 17 JAN 1945 TO: Commanding General, 3rd Armored Division, APO 253, U. S. Army.

1. In the case of Private JOSEPH G. BARTOLONI (32917715), Company A, 23rd Armored Engineer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4931. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4931).

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

2 JAN 1945

CM ETO 4945

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.	
Private THOMAS MONTOYA (38014195), Section 8, Squadron B, Maintenance Division	Trial by GCM, convened at Blackpool Borough Police Court, Blackpool, Lancashire, England, 2,3,4 and 5 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt. Thomas Montoya, Section 8, Squadron B, AAF Station 582, APO 635, BADA, ASC, USSTAF, U.S. Army, did, at Blackpool, Lanc., England, on or about 25 July 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Joan Long, a human being by strangling her with his hand.

He pleaded not guilty and was found guilty of the Specification except the words "with malice aforethought, deliberately and with premeditation", of the excepted words not guilty, and not guilty of the Charge, but guilty of violation of the 93rd Article of War. No

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

3. A careful examination of the record of trial indicates that there are only two questions which merit consideration. The first is the mixed question of law and fact of whether or not the victim's death was proximately caused by accused. The second is the legal question of the admissibility in evidence of an extrajudicial statement made by accused to a noncommissioned officer following a misleading statement by the latter. The evidence for the prosecution, insofar as it bears upon these questions, was substantially as follows:

(a) Evidence concerning death of Joan Long:

About 10:40 - 10:45 pm on 25 July 1944 accused was seen with a girl identified as Joan Long, age 22 (the deceased), in the tram queue at North Promenade, near North Pier, Blackpool, Lancashire, England (R70-71,74-75,84,92; Pros. Ex.12). The couple attracted attention because of the contrast between accused's smart appearance and the shabbiness of the girl, who was clad in gray slacks, a tweed coat with a torn pocket and a red "Pixie" hood (R70,75,76,84). Conversation between them was overheard, during which the girl expressed the hope that they could board a train for Bispham and accused inquired whether, if she went home, she would come out again and meet him (R70,77,82-83). After remaining a few minutes in the queue they proceeded northwards towards the Hotel Metropole (R71,83,85).

The dead body of Joan Long was discovered about 2:45 am 26 July in an air raid shelter on the Colonnades Promenade near the Hotel Metropole (R18-19,32-33,39-40). She was on her back on the floor with her legs apart, one leg removed from her slacks, and one shoe removed. Her coat was off her shoulders, her clothing was pushed up leaving her trunk and breasts exposed, and a red scarf was across her forehead (R20,24,41,43,49-50,59; Pros. Exs.1,2). The time of death was fixed at between about 11:30 pm 25 July and 12:50 am the following morning (R151,170). External examination of the body revealed numerous abrasions or scratches on the face, which was slightly livid, and on the upper margins of the nostrils, and two on the neck (R153,172,182; Pros. Ex.12). Her clothing was blood-stained and her coat and slacks were urine stained. Two rubber contraceptives were found near her left buttock (R174,179,182-185).

The autopsy disclosed a fairly large area of bruising on the back of the head, the presence in the stomach of about a pint of fluid which smelled of alcohol, and the presence of a fluid similar to seminal fluid in the vulva. The girl was not a virgin (R156,159). Conditions and symptoms in the lungs and other organs led the examiner to conclude that death was due to asphyxia, defined as deprivation of oxygen, probably caused by manual suffocation through application of a hand over the deceased's nostrils and mouth (R155), but possibly caused by convulsion during an epileptic seizure (R162-163). Scrapings from under accused's fingernails contained animal tissue material and a trace of blood (R146,177).

(b) Evidence concerning accused's statement:

On 25 August 1944 accused was warned of his rights under Article of War 24. No inducement or threat was offered (R105-106), but when accused stated that his counsel had advised him he need not make a statement to anyone, he was informed by the staff sergeant who took his statement that no defense counsel had been assigned to him (R137) and that so far as the sergeant knew, charges had not been filed against him. Charges had in fact been forwarded to the commanding general and turned over, with the entire file on the case, to the sergeant (R139). Accused thereupon made a statement which was recorded in shorthand and transcribed, after which he read, corrected and signed the typewritten statement (R106). Before it was offered in evidence, the defense objected to its admission on the ground of probable discrepancy between its contents and those of the shorthand notes taken when the statement was made by accused (R107). Upon examination of the stenographer, his original stenographic notes were offered in evidence by the defense and admitted (R119; Def.Ex.A). Upon cross-examination, pursuant to the request of defense counsel, witness read these notes to the court (R123-129). Thereafter the prosecution offered the typewritten transcription of the statement in evidence and the law member, overruling the objection of defense counsel on the ground that the statement was involuntary, admitted the same (R144; Pros. Ex.17).

In the statement, which is identical with Def. Ex.A in all particulars material to the questions under consideration, accused admitted that, after drinking a whiskey and about ten pints of beer, he met a girl whose appearance, as described by him, accorded with the foregoing evidence (subpar.(a), supra), at a public house in Blackpool about 10:30 pm on the evening in question. Pursuant to her solicitation they agreed to have sexual intercourse and entered a tram queue "along the main street" for the purpose of going to the girl's home. After waiting for a tram for about ten minutes (p.3), accused announced his decision to return to camp, but the girl said she knew "another place" and conducted him to a nearby air raid shelter. She lay on the floor and removed one leg from her slacks. He unbuttoned his trousers and got on top of her, but before

effecting penetration of her person he inquired if she had any disease and she replied in the negative. They thereupon engaged in sexual intercourse, to which the girl fully consented, for about ten minutes. Accused remained upon the girl for about two minutes more, withdrew and knelt between her legs as she assumed a sitting position. While in this position

> "I asked her again if she did not have any disease. She said, 'You'll know who to come to if you get it'. Then she said, 'I have it'. When she said that, I got hot and my blood boiled and I struck her with my right hand and with a half closed fist, and I struck her on the left side of the face. She screamed and then fell back. I heard the thump of her head hit the floor, and she screamed again. Everything seemed to go blank. I was afraid that the scream would attract someone. I had my right hand free and I put it over her mouth. I was holding my pants with my left hand as my fly was open up to the top button and my belt was undone. When I placed my right hand over her mouth, the heel of my hand was on the left side of her face and my fingers extended to her right cheek. The pressure of my weight seemed to go forward from the position I was kneeling in. I did not extend my fingers over her nose in any manner. I am not sure if the side of my hand where the little finger is pressed up under her nose or not. She did not struggle or try to remove my hand from her mouth. She did not scratch me. I do not know what position her arms were in. She lay motionless on her back on the floor. I held my hand over her mouth for what I would judge to be 5 minutes. She did not seem to move, so I came up into a standing position, adjusted my clothing. I am not sure if she was conscious, dead or alive. I was mad and frightened and did not know whether she moved or not when I stood over her adjusting my clothes. When I left the air raid shelter, she had not made a move or did not speak" (pp.4-5).

Accused then described his journey back to camp (p.5). On 27 July he saw the girl's picture (the same as Pros.Ex.12) in a newspaper and read the accompanying article stating that she was found dead in an air raid shelter on the morning of 26 July. Although he knew he was with this girl on the night of the 25th,

> "it did not have any effect on me * * *
> I was not aware that any American soldier
> was suspected in the case involving this
> girl" (p.6).

When informed on 3 August that he must attend an identification parade, he "did not know why this identity parade was being conducted". He had not engaged in intercourse for three weeks prior to the occasion on 25 July and did not do so thereafter. On 4 August he was hospitalized because of a venereal disease. He had never had one before (p.7).

4. The evidence for the defense, so far as pertinent to the issues under consideration, was substantially as follows:

(a) Evidence was introduced that Joan Long suffered from seizures or "fits", when she was angered, during which she would froth at the mouth, throw her arms about, tremble, grow pale, occasionally lose consciousness and occasionally urinate involuntarily (R238-239,242-243,261-262). She suffered "dizzy bouts" about two weeks before her death (R241).

Medical testimony was introduced to the effect that from the anatomical findings in the case it was impossible to conclude whether death was due to manual asphyxia or asphyxia resulting from epileptic or convulsive seizure (R215-217,219-220), and that alcohol or the excitement of sexual intercourse might be the "trigger mechanism" to set off a convulsion (R228-229). Death during an epileptic seizure would be caused by the obstruction of the entry of air into the lungs. Such obstruction could result from a closing off of the mouth beyond the victim's control and the simultaneous cramping of the muscles preventing breathing through the nose (R258).

The staff sergeant who took accused's statement told him

> "that since no Defense Counsel had been appointed and no charges had been preferred, he thought there would be no harm in making such a statement" (R132).

The statement was the result of questions by the sergeant and answers by accused, some of which latter were merely in the affirmative (R117).

(b) After his rights were explained to him, accused elected to make an unsworn statement (R264) at the end of which he stated "I did not kill this girl and I had no intention of doing it" (R265).

5. The following rules govern the admissibility in evidence of accused's statement (Pros. Ex.17).

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(a) "A confession is an acknowledgment of guilt" (MCM,1928, par.114a, p.114).

"In many instances an accused has made statements which fall short of being acknowledgments of guilt, but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in evidence without any showing that they were voluntarily made. Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement" (Ibid., par.114b, pp.116-117).

"A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime" (State v. Masato Karumai, 126 P (2nd) 1047,1052).

"A confession is an acknowledgment, in express terms, by a party in a criminal case of the truth of the crime charged, while an admission relates to subordinate facts that do not constitute guilt in themselves. A confession is an acknowledgment of guilt, while an admission admits material facts but not guilt. C.M. 141755 (1920)" (Dig. Op. JAG, 1912-1940, sec.395 (10), p.205).

Accused in his statement admitted facts which connected him with the death of Joan Long. He not only did not acknowledge that he killed her but specifically stated that he was not aware any American soldier was suspected in the case and did not know why the identification parade was being conducted. In the opinion of the Board of Review, therefore, his statement was in law an admission against interest rather than a confession and hence admissible in evidence without regard to whether or not it was voluntary (CM ETO 292, Mickles, pp.8-10; CM ETO 804, Ogletree et al, p.14; CM ETO 895, Fred A. Davis et al, p.28; and authorities cited in those cases).

(b) The fact that the admission was obtained after a false or misleading statement by the person to whom it was made does not bar its admissibility in evidence (Olmstead v. United States, 277 U.S. 438, 72 L. Ed. 944,951; CM ETO 895, Fred A. Davis, et al, pp.28-29). The court was justified in believing that the means by which the statement was procured were not of such character that they may have caused accused to make a false statement. The admission is thoroughly consistent in all its details with the other evidence in the case and there is no apparent reason to believe that it was not true.

In view of the foregoing, the Board is of the opinion that Pros. Ex.17 was properly admitted in evidence. It is thus unnecessary to determine whether the defense effectively waived its objections thereto by offering in evidence the stenographer's original notes and causing the same to be read into the record.

6. The principles of substantive law governing the question of legal sufficiency of the record to sustain the finding of accused's legal responsibility for the death of Joan Long are as follows:

(a) "A person is not criminally responsible for a homicide unless his act can be said to be the cause of death. * * * he is not to be deemed guilty of homicide where the death of such other person results proximately * * * from some other intervening cause. One cannot, however, escape criminal responsibility for homicide merely because factors other than his felonious acts contribute to the death, provided such other factors are not the proximate cause of death" (26 Am. Jur., sec.45, pp.189-190).

"One who inflicts an injury on another is deemed by the law to be guilty of homicide if the injury contributes mediately or immediately to the death of such other. * * * Criminal responsibility for inflicting an injury which is the efficient cause of death is not lessened merely because of the predisposed physical condition of the decedent, without which the blow or wound would not have been fatal" (Ibid., sec.48, p.191).

"One who inflicts a blow or wound upon another, which devolves into or initiates an affliction or disease, is criminally responsible for the death of such person ultimately resulting from the affliction or disease. This rule is applied

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> * * * where the condition developing is anatomically dissociated from the mere external wound, as in the case of miscarriage or pneumonia, or where blows cause congestion of the brain resulting in death, or in exposure which causes death. It is equally well settled that the consequences of an act which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the pre-existing physical condition of the person killed, at the time the act was done, or by his low vitality, which rendered him unable to withstand the shock of the wound inflicted, and without which predisposed condition the blow would not have been fatal, if a causal connection between the blow and the fact of death is made to appear" (Ibid, sec.52, p.195).

(See also 1 Wharton's Criminal Law, secs.193, et seq., pp.250, et seq.). The question whether a death was the result of the felonious or unlawful act of the defendant, so as to afford a basis for a charge of homicide, is one of fact for the jury (or court-martial) to determine (26 Am. Jur., sec.507, p.509; People v. Kane, 213 NY 260, 107 NE 655; People v. Brengard, 265 NY 100, 191 NE 850, 93 ALR 1465). In the instant case the determination of the factual question whether accused's wrongful act of holding his hand over deceased's mouth and possibly against her nostrils for five minutes during and after which period she lay motionless, was the cause of the asphyxia that led to her death, immediately or mediately, following an epileptic or other seizure, induced by the excitement, blows or obstruction of breathing or whether death was the result of an independent cause unaided by accused's act, was peculiarly within the province of the court (30 C.J. sec.606; pp.352,353; People v. Brengard, supra). The court's findings against accused are supported by competent, substantial evidence, and will therefore not be disturbed upon appellate review (CM ETO 132, Kelly and Hyde; CM ETO 1554, Pritchard; CM ETO 1631, Pepper; CM ETO 5052, Malley).

(b) Accused was charged with murder in violation of Article of War 92. The court by exceptions found him guilty of voluntary manslaughter in violation of Article of War 93.

> "If the act of killing, although intentional, is committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is not the result of wickedness of heart or cruelty or recklessness of disposition, then the law, out of indulgence to the weakness of human nature, or rather, in redognition of the laws upon which

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human nature is constituted, very properly regards the offense as of a less heinous character than murder and gives it the designation of voluntary manslaughter. The absence of malice and the influence of sudden passion are the characteristics of this offense" (26 Am. Jur., sec.19, p.167).

(See also CM ETO 82, McKenzie, and authorities therein cited).

The court was warranted in concluding that accused acted in the heat of sudden uncontrollable passion caused by adequate provocation and that his act was the proximate cause of Joan Long's death. According to his statement, accused, who had never had a venereal disease and had imbibed heavily of beer, engaged in sexual intercourse with the girl relying upon her assurance that she was not diseased. About two minutes after completing the intercourse the girl indicated to him in a taunting manner that she was infected with a venereal disease. Thereupon accused "got hot", his "blood boiled" and he struck the girl on the face, causing her to scream and her head to hit the floor. She screamed again. "Everything seemed to go blank. I was afraid the scream would attract someone". He then put his hand over her mouth, as indicated, and exerted pressure thereon. "I was mad and frightened". This provocation was more then mere words. It was a deliberate misrepresentation made by the girl in order to secure sexual intercourse with one who would not have engaged in the act had he known the truth. Accused was suddenly outraged at having been duped into this loathsome situation. The Board of Review is of the opinion that the findings of guilty of voluntary manslaughter were fully warranted by the evidence (CM ETO 82, McKenzie, and authorities therein cited).

7. The charge sheet shows that accused is 24 years ten months of age and was inducted 6 April 1942 at Sante Fe, New Mexico, to serve for the duration of the war plus six months. He had prior service.

8. The court was duly 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.

9. Confinement in a penitentiary is authorized upon conviction of the crime of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). As accused is under 31 years of age and the sentence is for five years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 JAN 1945 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private THOMAS MONTOYA (38014195), Section 8, Squadron B, Maintenance Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have 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 4945. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4945.)

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

1 FEB 1945

CM ETO 4949

U N I T E D S T A T E S	) 28TH INFANTRY DIVISION
v.	) Trial by GCM, convened at Camp Elsenborn, Belgium, 7-8 October 1944.
Private STEPHEN W. ROBBINS, JR. (20302665), Headquarters Company, 2nd Battalion, 109th Infantry	) 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, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Stephen W. Robbins Jr., Headquarters Company, Second Battalion, 109th Infantry, did, at or near Ecouen, France, on or about 30 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Francis J. Wise, Headquarters Company, Second Battalion, 109th Infantry, a human being by shooting him with a .45 caliber Service Pistol.

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

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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. Except for those who gave medical testimony, all witnesses for the prosecution were members of accused's company. The evidence for the prosecution shows that about 3 pm 30 August 1944, accused's organization was "Just outside Saint Denis", France, near Paris (R16,26,48). The trucks were "lined up" by the side of the road and one anti-tank truck "lacked 5 yards of being in front" of a beer garden or cafe which was along the sidewalk (R16-17). (Accused's division marched through Paris the preceding day and his organization was on its way to Ecouen, where it stayed the night of 30 August. It had halted temporarily (R48,101)). The principal characters involved in the alleged incident were a soldier named Moos, Staff Sergeant Francis J. Wise (the deceased), and accused. Moos was about six feet two inches in height and heavy, Wise about six feet one inch, and accused five feet six inches and slight (R33,36, 62,83,88). Wise was accused's squad leader (R19,27,48). That afternoon Moos, accused and Private George Dailey entered the cafe for a drink (R25-26). Technician Fifth Grade James C. Hoag was already inside (R37). As the three men entered, Moos said to accused "'Don't give me any more of your shit or I'll kick hell out of you'". They went to the bar, ordered a drink and Dailey then joined Hoag. There was an argument at the bar and Hoag heard Moos say "'If you leave us alone everything will be all right'". Both Dailey and Hoag then heard a helmet strike the floor. Dailey walked over to accused and Moos, saw that the latter had a cut on his right eye and observed accused's helmet on the floor. Dailey picked up the helmet and gave it to accused. When Moos asked "'Are you going to drink with him [accused] after what he did to me?'", Dailey replied that he came in to drink with both of them. Thereupon accused "Took his money" and angrily left the cafe. Moos walked down to the other end of the bar, bathed his eye for about 15 minutes and walked out of the door. He carried his carbine with his right hand at "the small of the stock * ** Muzzle facing up" (R26,29-30,35,37-38,41-42).

Dailey testified that when he left the cafe about five minutes after Moos' departure, he saw Moos and accused facing each other about four feet apart. Moos was holding his carbine with both hands at the level of his hip, and the muzzle pointed at an angle toward the ground. Accused was pointing his pistol at Moos and had his right elbow close to his side and his forearm just above his hip. Accused reached out, attempted to twist the carbine from Moos' grasp, released the carbine and took one step backward

(R26,30-32). Wise, who was in a crowd "right there", ran to accused from the latter's left front at an angle of 45 degrees, threw his left arm around accused's neck and with his right hand seized the latter's right arm above the elbow. The two men struggled for about 40 seconds and then Wise slipped and fell against the barrel of a 57 mm gun which was on an anti-tank vehicle about two feet from the curb. Accused pulled away from Wise, twisted around, pointed his pistol at Wise for "at least ten seconds, and fired one shot as the latter was trying to regain his balance. Immediately prior to the shooting accused said "'And you too'". When he shot Wise with his .45 caliber pistol, accused was about three feet away from Wise and his right hand in which he held the pistol was by his right hip. Wise was not holding accused's pistol or accused at the time (R26-27, 32-36). After Wise was placed in an ambulance accused said "'I didn't mean it. I didn't mean it'". In Dailey's opinion both accused and deceased were sober but Moos was under the influence of liquor (R28-29). Deceased was unarmed (R28). Also in witness' opinion a bad feeling existed between Wise and accused because of previous arguments, but neither man had threatened the other (R37).

Hoag testified that after he left the cafe he heard Moos and accused shouting angrily, looked and saw accused, who was carrying his pistol, approach Moos. Witness did not recall if Moos had his carbine. "Everybody seemed to back away" and Hoag jumped into a doorway. He then heard Wise say to accused "'Give me that pistol'" and saw him throw both arms around the upper arms or shoulders of accused from the rear. Deceased's back was towards the curb, both arms were around the upper arms or shoulders of accused, and his hands were joined in front of accused who did not surrender the pistol. Wise tried to seize the weapon and the two men struggled backward toward the curb where Wise stumbled, lost his grip on accused, hit the 57 mm gun, and then fell "right on his seat". Wise then arose and was fully erect when accused aimed at him "a few seconds" and then fired one shot with his pistol from the hip. The two men were then about three feet apart and accused's right forearm was parallel to the ground and held close to his hip. Wise at the time was not holding either accused or his pistol (R38-40,42-46). A Lieutenant Linik yelled to accused "'Give me the gun'" and swung his rifle at accused but missed him. Linik then pulled back the bolt of his rifle and aimed it at accused whose pistol was aimed at Linik. Accused then told Linik he was sorry, that he "didn't mean it", and gave the officer his weapon (R38-39). Hoag could not see if deceased was armed (R39). Accused appeared to be sober but excited and nervous (R40,46).

When Private Lecil E. Taylor was standing in front of the cafe, he saw Moos, who was bleeding on one cheek, holding the stock of his carbine in his left arm and the barrel in his right hand. He was carrying the carbine "Like you would go through the woods with

a shot gun nestled in your arms". Accused was standing on the edge of the sidewalk and Moos walked up to him and talked to him. Moos' "voice was a little excited" and the barrel of his carbine was pointing to the right of accused's body. Accused said "'Give me that carbine'" and at the same time reached into his clothing with both hands, extracted his pistol, pulled back the slide and cocked it. The two men were close together and accused, holding his pistol close to his body, aimed it at Moos' "middle" (R75-76, 79-81,85). Wise, who then appeared to "come in from his /accused's/ right rear", said something to accused which Taylor believed was "'Give me the gun Stevie'", seized him, and tried to get possession of the pistol. After a brief struggle the two men became separated and Wise nearly fell and was "half way off his balance". At this moment, when accused and deceased were three to five feet apart, the former took "a very deliberate stance", stiffened his arm, pointed his pistol at Wise, "aimed it a long second", said something and fired. At that time accused's feet were spread apart, his elbow was slightly bent "but his arm was straight from the body", and the barrel of the weapon was parallel to the ground. He raised the pistol and came to a position one would assume on the target range. Asked if accused's hand in which he held the pistol was at "eye level", Taylor testified "Something to that effect" (R76-77,81-85). Moos was then 10-12 feet away in the crowd on the sidewalk (R77,84). When the weapon was fired, accused was out in the street about 10 feet from the curb and about even with the muzzle of the 57th mm gun and deceased was a little further out in the street (R86). Lieutenant Linik disarmed accused (R77).

About 3:30 Private First Class Stanley Marcum was standing in front of the cafe when Moos came out with a large lump under his eye. He "looked fairly mad and angry", and carried a carbine over his shoulder. He asked "'Where's Robbins?'", said to another soldier "'Hold this carbine'", and took the weapon from his shoulder. Accused said "'Put down that carbine'", reached for the weapon and the two men struggled for its possession. Marcum next observed that accused had a pistol in his hand and that Moos and accused were three or four feet apart in the middle of the sidewalk. Accused pulled back the slide of the pistol and cocked it. Witness next saw Wise "coming in from the right side", who put his left arm around accused's shoulders and the back of his neck and his right hand near the front center of accused's body. He tried to get accused's pistol and the two men stumbled into the street and separated. Wise was "leaning a little forward off balance" with his hands out in front of him and his left foot in an advanced position. At this moment accused, who was three or four feet away, raised his arm just below shoulder level, held the pistol "for a second or so", said "'And you too'" and fired. Wise was not then holding accused or the pistol. Moos was 12-15 feet away on the sidewalk and still held his carbine (R87-94).

About 3:30 pm Private Paul T. Kearney, who was sitting in a vehicle in front of the cafe, saw accused holding a .45 caliber service pistol in his right hand pointed at Moos' "mid-section", and Moos holding a carbine in his two hands, "barrel to the ground". The two men were arguing angrily. Accused said "'I will shoot you if you don't put that carbine down'" and with his left hand knocked the carbine from his opponent's grasp. Wise stepped between them and said to accused "'Give me your pistol. I have had enough of this!" Accused backed up four paces, "held the pistol right at him" and Wise followed with his hands stretched forward and stood in front of accused. He put his arms behind accused's neck and then lowered his left arm in an attempt to disarm accused whose back hit the 57 mm gun parked at the curb. Wise slipped to the pavement and fell on his hands. Accused moved around the gun out into the road and Wise arose and went three or four feet toward him. When the two men were about three yards apart accused held his pistol "Straight out", said "'And you too'" and fired. Wise groaned and fell to the street. The shooting occurred out in the street and not on the curb or sidewalk. When Lieutenant Linik swung his carbine at accused the latter stopped the blow with his left arm, surrendered his weapon to the officer and said that he "didn't mean it". Accused appeared sober and did not seem to be excited. Kearney did not see any weapon in deceased's possession (R59-67).

Private First Class Irving Moskowitz saw Moos leave the cafe with his carbine slung over his shoulder. His eye was "banged up" and he asked "'Where is Robbins?'" Accused and Moos walked toward each other, stopped when they were about three yards apart and then engaged in a struggle, during which accused stepped back three or four feet, pulled a .45 caliber pistol from his raincoat, and raised and cocked the weapon. Wise then appeared in front of accused from the latter's left, used both hands in an effort to wrench the pistol from accused's hands, and in the ensuing struggles both men went into the street. Wise slipped and fell. Accused, who was three or four feet away, raised his pistol, aimed it, fired and deceased fell to the street. Accused raised his right forearm to a position horizontal to the ground, with his elbow close to his right side. Witness did not observe any weapon in Wise's possession. When Lieutenant Linik attempted to hit accused on the head and shoulders, the latter surrendered the pistol to the former, put his hands in the air and said, "'I didn't mean to do it'". The time interval between Moos' leaving the cafe and the shot was three to five minutes (R68-75).

Technician Fourth Grade James J. Aiello and Technician Fifth Grade Weldon Ulery testified substantially the same as the foregoing witnesses with respect to the incident. Ulery said that deceased was not armed (R49) and that both deceased (R51) and accused (R50) appeared to be sober. Aiello also testified that deceased was sober (R20). According to Aiello, deceased slipped during the struggle for the pistol. As deceased was rising to about

a half-bent accused, who was about a yard away, stepped back, said something and fired when his (accused's) right forearm was about halfway between a hip-firing and a raised pistol position (R18,20,23). Wise first approached accused from the front (R18,24), and asked the latter two or three times to give him his pistol (R18,23). Ulery testified that accused fired at deceased from the hip when the two men were five or six feet apart and Wise was trying to regain his balance. Before he fired accused said "'And you too'" (R48-49,55). Ulery also testified that deceased first approached accused from the front (R55) and said to him "'Put your pistol down Stevie'" (R48,55).

Captain Francis J. McDougall, battalion surgeon, Second Battalion, 109th Infantry, heard a shot and arrived on the scene about five minutes later. Wise was lying entirely off the sidewalk and at a right angle to the curb in front of the cafe. His head was pointed to the center of the road. He was in extremis and in a state of severe shock. His pupils were dilated and "all the various signs were present that the man was dying". He was unconscious. Captain McDougall applied some sulfanilamide powder, bandaged the wound and sent Wise to the hospital as he "assumed" there was a "large internal hemorrhage". There was a perceptible odor of powder and witness' experience with gun shot wounds caused him to believe that the wound was caused by a weapon which was fired at very close range. The size of the wound was "less than a 10 cent piece. The wound had closed making it appear smaller". About three hours later he treated Moos who had a severe abrasion and a considerable amount of discoloration and swelling over his right eye. Moos' injury was apparently caused by a hard object (R8-12).

About 4 pm 30 August, Captain Melvin R. Aungst, Company D, 103rd Medical Battalion, a medical officer in the "Clearing Company", examined Wise who was dead (R12-13). He found a very small circular gun shot wound in the upper right quadrant of the abdomen. Witness could not "find the hole of exit". Not much bleeding had occurred. Although he performed no autopsy he was of the opinion that death occurred as the result of the wound, and "it was very possible that the missile could have gone through the liver and hit some very large vessel causing an internal hemorrhage". This wound was the only one Captain McDougall discovered. He did not recall that there were any powder burns but as deceased wore woolen "OD's" and a jacket, witness did not know whether such burns would appear on the body because of the "amount of clothes on". The small size of the wound might be explained by a shrinkage of the loose tissues of the abdomen (R12-15).

4. For the defense, Staff Sergeant William B. Trehey of accused's company testified that immediately after he entered the cafe during the afternoon of 30 August accused said to Moos "'I wouldn't drink with you' or words to that effect", and left. Moos, who had a mark on his face, asked witness for his pistol a few minutes later but Trehey did not give it to him. Moos appeared angry

(R95-96). Deceased, who was the squad leader of both witness and accused, was not a strict disciplinarian, was not unfair and was very well liked by the men (R96,98). To witness' knowledge there were no ill feelings "outwardly" between accused and deceased (R96).

Accused, after being advised of his rights (R98), testified that he was 22 years of age and was born in Scranton, Pennsylvania. His father and mother were separated for 20 years and he was reared in an orphanage from the age of two until he was 17 years old. His father visited him three times during this interval and his mother visited him once or twice a year. After leaving the orphanage he went to a "CCC" camp for six months and later lived with his aunt. He then lived with his mother who "ordered me out". He enlisted in the Pennsylvania National Guard 13 February 1941 when he was a farm chore boy, and was inducted into the Federal service four days later (R99-100). He had been for several months a member of deceased's squad. Wise was "fair to everyone" and accused "always got along with him all right". He never had any serious trouble with deceased, who was a fine fellow and who treated him the "same as the rest of the men". Accused once asked for a pass and had a quarrel with deceased who thought the pass should not be granted (R100-101,108,110).

The day before the shooting accused marched through Paris with his division and when his platoon came to its first halt, he left his truck and "looked for a place to drink". He returned in ten minutes, discovered that the trucks had "moved out", returned to the place and drank until midnight. He "had at least 20-25 drinks that night", of cognac, wine and calvados. He finally found the area of his organization at 2 am the following morning. He arose that morning about 7 am, "finished drinking" a bottle of cognac with Dailey and Trehey, went to the cafe in question and consumed about eight or ten drinks that morning. He had lunch, immediately returned to the cafe and had seven or eight drinks during the afternoon (R101-102). By 3 pm he "was drunk enough that I spoke loud" (R102,108). He went to the trucks, met Moos and Dailey, and when Dailey asked accused to buy them a drink, replied he would buy Dailey one but not Moos, and that "I just had my reasons why I wouldn't buy Moos a drink". Moos said "'I am too good for you ain't I'" whereupon accused replied "'If that's the way it is, it's O.K. with me'". Thereupon, Moos pushed accused's helmet down on the latter's head and accused threw his helmet and hit Moos below the eye. The helmet fell to the ground and was recovered by Dailey (R102,103,105). (The three men had apparently entered the cafe before the incident). Moos then asked Dailey "'Are you going to drink with me?'" and when Dailey replied in the affirmative accused left, returned to his truck and put on his raincoat as it was starting to drizzle (R103). When he left the cafe his .45 caliber service pistol was in his holster (R103,106,108). As he again walked by the cafe he saw Moos open the cafe door. Accused knew by the tone of Moos' voice that he "was looking for me". The two men walked toward

each other. Moos' carbine was pointed directly at accused who "pulled * * * and loaded" his pistol (R103,104,105,109). Asked why he did not retreat, accused testified "I never retreated from a man yet" (R110). He pointed his pistol at Moos and intended to fire if Moos fired at him (R109,111). When Moos was "close to me" he said "he'd just as soon shoot me as not". Accused, who knew his antagonist's carbine "was naturally loaded at all times", seized the carbine with his left hand and tried unsuccessfully to wrest it from Moos' grasp for two or three minutes. His pistol was pointed at the other man during the struggle (R103,106,109), and his feelings were then "very high because I feared Moos and figured he would fire that carbine just as soon as not" (R104).

> "I was about 2 feet from him [Moos] when Wise had grabbed my arm from around the back with his two hands around me and the tussle began between me and him. We started out on the sidewalk and I leaned up against the 57 mm gun and as I do so I couldn't drop the .45 or let it out of my grasp as he had his both hands over mine. At that time the .45 was fired. After it was fired Wise seemed to jump back and then go on the sidewalk and make a run and just fell on the pavement" (R103).

> "I didn't see what angle Wise came up on me or anything. I was looking at Moos. The first thing I knew I was grabbed like this (Witness indicating Wise putting both arms around him from the rear) until he got in front of me with his two hands around mine and I leaned on the 57 mm gun. Wise seemed to have slipped and I was in a crouch when the .45 went off" (R104).

Both hands of deceased were over accused's two hands when the pistol was discharged (R107). Witness denied he and deceased were three to six feet apart when the shot was fired, and that he (witness) deliberately broke away, aimed at and shot deceased. Wise "broke away" when the pistol was fired (R104-105,107-109), and could not have been three to six feet away when the shooting occurred, after having fallen and arisen (R110). Accused did not realize that it was deceased who seized him until the deceased jumped back, said "'I am hit'" and fell to the ground (R104,107,111). He did not say to deceased "'And you too'" (R104,108), and accused did not hear Wise ask him to put down his pistol (R104,106). Accused realized that someone was trying to prevent him from firing the pistol (when deceased was struggling with him). He did not surrender the weapon because he was "still in a rage over Moos", and "It could have been a man siding with Moos. Couldn't a man who was siding with Moos try to take the weapon away from me?" (R106,108-109).

After the pistol was discharged accused saw Lieutenant Linik in a crouched position, pointing a carbine at him. Accused took his pistol in his left hand and said "'Here, take it. I didn't mean it'", and Linik "came and took it off me'". Witness denied that he went toward and pointed his pistol at Linik and that the latter told him to give up the weapon or put it down (R104-105, 107). Accused did not see Moos load his carbine (R106), did not know if the latter told him to put down his pistol, and did not recall telling Moos that he (accused) would shoot if Moos did not put down the carbine (R105). His antagonist's carbine did not fall to the ground and witness did not recall Moos saying to him in the cafe "'Get out of here and everything will be all right'" (R110).

5. Recalled as a witness by the court, Staff Sergeant Trehey testified that he was in accused's squad for over a year. During most of the year accused was an officer's orderly and was on special duty. Witness was a noncommissioned officer in the squad for several months. The nature of accused's duties caused no objection by witness but when there were problems, Trehey had to care for the guns and "At times that would come up". Trehey discussed with the platoon leader the possibility of accused's transfer because witness felt he would be better off without accused as the latter was an officer's orderly. If it were not for this fact Trehey would have been glad to keep him (R111,112).

6. a. After the prosecution rested its case, the defense moved for a finding of not guilty on the ground that the evidence did not establish a "corpus delicti" because the undisputed medical testimony showed that Wise was killed by a missile not greater in size than .32 caliber, whereas it was stated in the specification that accused fired a shot from a .45 caliber pistol and the undisputed testimony also showed that he had no weapon other than the .45 caliber pistol. The defense also moved "to dismiss the specification laid under the 92nd Article of War" on the ground that the "undisputed" testimony showed that the shooting occurred during the course of a quarrel in the heat of blood between Moos and accused, that the shooting of deceased as an intervener was incidental thereto, and that the offense "if any, cannot rise any higher than the 93rd Article of War". The defense also moved to strike from the Specification the words "willfully", "deliberately" "and with premeditation" because no evidence "has been introduced to justify any conviction of unlawful, deliberate premeditated murder". After argument by both the defense and prosecution the three motions were denied (R94).

With reference to the first motion, one medical officer, Captain Aungst, when asked his opinion of the caliber of the pistol used, testified "I am not a ballistic expert, but it was small. I would say it was .25 or .32 caliber". When later asked the same question he replied "I wouldn't say, I don't know. I am not a ballistic expert". He also testified that a smaller hole might develop because

of the possibility of a subsequent shrinkage in the loose tissues of the abdomen. Captain McDougall testified that the size of the hole was "less than a ten cent piece. The wound had closed making it appear smaller". In view of such testimony the motion by the defense was entirely without merit.

The two other motions by the defense are subsequently treated herein.

b. During the argument of the prosecution the defense moved "for a mistrial or a continuance of the case" on the ground that the prosecution in its argument introduced a new element in the case, namely, that a homicide

> "was with malice aforethought when it is shown that the accused intended to oppose force to a non-commissioned officer or other member of the military service lawfully engaged in the duty of arresting or keeping the peace or quelling a display or deadly weapons, force, or violence, provided the offender has noticed that the person killed is such non-commissioned officer or other member of the military service so employed" (R113).

The defense also stated that the specification as drawn did not allege the material facts necessary to constitute such a new offense and that trial of accused without notice of such facts constituted a denial of due process of law. The motion by the defense was denied (R113). Attached to the record of trial is a "BRIEF FOR ACCUSED", filed by the individual counsel for accused in which the same contention is discussed.

At common law, in order to prove the crime of murder predicated upon a homicide committed in the perpetration of another crime, it is unnecessary that the indictment charge that the murder was committed in the perpetration of such other crime. It is sufficient to charge murder in common form (State v. King, 24 Utah 482, 68 Pac. 418). Similarly, under statutes a conviction of first degree murder on an indictment charging murder is common form, i.e., "willfully, feloniously, and with malice aforethought", may be sustained by proof that the killing was done in the commission of any felony, or one of the felonies enumerated by the statute (People v. Giblin, 115 NY 196, 21 NE 1062; People v. Lytton, 257 NY 310, 178 NE 290, 79 ALR 503). In the last cited case, Chief Justice Cardozo wrote:

> "The rule is settled that there is no need to charge in an indictment that the homicide was wrought in the commission of another felony. It suffices to state in the common law form that the defendant acted 'willfully,

> feloniously, and with malice aforethought.' People v. Nicholas, supra; People v. Giblin * * *; People v. Osmond, 138 N.Y. 80, 33 N.E. 739. This would never do if the independent felony were conceived of as changing the identity of the crime instead of merely characterizing the degree of culpability to be imputed to the killer" (79 ALR at p.507).

Resisting arrest or official action is an unlawful act from which malice may be implied, and an indictment charging a killing with malice aforethought is sufficient is such a case. It is not necessary to charge that the person killed was an officer or engaged in the performance of the duties of an officer at the time of the shooting, to warrant proof of such facts upon the trial (Keady v. People, 32 Colo.57, 74 Pac. 892; Commonwealth v. Phelps, 209 Mass. 396, 95 NE 868; Bullock v. State, 65 NJL 557, 47 Atl.62; see annotation in 66 LRA 381). In the last cited case appears the following quotation from Fost, C.L. 308, which indicates the well established juridical basis of the principle:

> "Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law. * * * And for these reasons the killing of officers so employed hath been deemed murder of malice prepense, as being an outrage willfully committed in defiance of the justice of the kingdom".

(As to the foregoing, see 26 Am.Jur., sec.253). In Holmes v. United States (Ct. of Ap.,DC, 1926), 11 Fed. (2d) 569, in which the above quotation was cited with approval the appellant contended that he had no notice from the indictment, which was evidently in common form, that the alleged victim, of whose murder he was convicted, was a police officer. The court answered the contention thus:

> "Here the crime charged was that of killing a human being; the fact that the one so killed was a policeman is only an evidentiary fact, bearing upon the character of the killing and the degree of culpability of the one charged with the crime. The official character of the person killed does not aggravate or modify the crime; the legal relations, however, of the deceased and the accused to each other, at the time of the alleged crime, are proper matters for the consideration of the jury. Not only is it not necessary to allege the official character of the deceased in the indictment, to warrant proof of the same on the trial,

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but any proof of the capacity in which he was acting is proper" (pp.572-573).

The court held that if the defendant observed and recognized the uniform of the officer, which was a question of fact for the jury, this was sufficient to put him upon notice of his official character.

It is well established that the prosecution may properly state and discuss the evidence and all reasonable and legitimate inferences therefrom (United States v. Holt (CCA,Ind.) 108 Fed. (2d) 365, certiorari denied 60 S.Ct. 616, rehearing denied 60 S.Ct. 806; 23 CJS, sec.1093, pp.546-550). It may draw and state to the jury its own conclusions from the law and evidence, provided it does not misrepresent the same (23 CJS, sec.1093, p.550, authorities cited in note 33).

In the instant case accused was charged with murder in the common law or common form of specification, modeled upon Form 86, Appendix 4, Manual for Courts-Martial, 1928, page 249. This is the only form of murder specification suggested in the Manual and is in customary use in the administration of military justice. The Manual defines the crime of murder in paragraph 148a, page 162, as "the unlawful killing of a human being with malice aforethought" and states that "malice aforethought may exist when the act is unpremeditated" and may mean, among others, the following state of mind preceding or coexisting with the act by which death is caused:

> "An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace * * * provided the offender has notice that the person killed is such officer or other person so employed" (par. 148a, p.164).

Immediately following this statement is the discussion entitled Proof, the second part of which provides: "(b) that such killing was with malice aforethought".

It is clear from the foregoing that the provision in the Manual that the facts stated in the specification and those reasonably implied therefrom should include all the elements of the offense sought to be charged (par.29,p.18), was followed in the instant case. The element under discussion is nothing more or less than malice aforethought and was specifically charged herein. The form to be taken by the proof of that element necessarily depended upon the facts of the case. The defense was clearly put upon notice under the Specification herein that all competent, material, relevant evidence tending to prove malice aforethought,

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defined in the Manual, would be admissible in evidence. The fact that the proof took the form of evidence showing that accused deliberately opposed force to a noncommissioned officer in the execution of his duty imposed by Article of War 68 to part and quell the quarrel and disorder between accused and Moos and to arrest accused, did not prejudice any of accused's rights, under the foregoing authorities.

Defense counsel's arguments are but a confession that he failed to appreciate the well recognized legal effect of pleading murder in common form and was surprised when confronted with the necessity of defending against the prosecution's case as it actually, and quite properly, developed. Accused's substantial rights were not injuriously affected, however, as indicated by the fact that in his own testimony he stated he did not realize that it was deceased who seized him until the former "jumped back", said he was hit and fell to the ground. He also testified that deceased's hands were over his (accused's) when the pistol was discharged and that the two men were not then apart. Accused testified he was looking at Moos when deceased approached, was "still in a rage over Moos", and emphasized the possibility that deceased "could have been a man siding with Moos". The court evidently chose not to believe accused's version of the killing. And well it might so choose in view of the testimony of most of the eye witnesses that accused refused to surrender his pistol to Wise, who approached from the front, that they struggled for its possession, that the two men were apart at the time of the shooting, and that accused said "'And you too'" immediately before the shooting. Clearly the prosecution confined its argument to the evidence developed in its case and correctly stated the law applicable thereto (Holmes v. United States, supra).

The foregoing was but an application to accused of well recognized procedure of both the military law and civil law, of which he and his counsel had full notice. The military procedure not only was applied in "a fundamentally fair way" to accused but followed the long established civilian procedure in similar cases . It clearly did not constitute a denial of due process of law under the Fifth Amendment to the Federal Constitution (U.S. ex rel Innes v. Hiatt, Warden, et al., 141 Fed. (2d) 664). The Board of Review is of the opinion that no rights of accused, constitutional or otherwise, were injuriously affected by the form of the Specification or by the prosecution's argument.

7. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * *

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or

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

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

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

* * *

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

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C.J., sec.74,pp.1099-1101) (Underscoring supplied).

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

An intent to kill

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

The evidence clearly showed that accused refused to accede to Wise's request that he surrender his pistol and that a struggle for the possession of the weapon ensued. All witnesses for the prosecution, who observed the shooting, testified that accused and deceased were at least three feet apart when the shot was fired, and the highest estimate of this distance was that the two men were about three yards apart. All but two witnesses testified that when the shot was fired Wise, who had slipped and fallen, was trying to regain his feet and balance, and two witnesses testified that he had fully regained his balance. Four witnesses testified that accused was sober, and no witness testified that he was intoxicated. Four witnesses heard him say "'And you too'", immediately before he fired the fatal bullet and others testified that he uttered something but they did not know what he said. Deceased was unarmed, and when shot he was not holding either accused or the latter's pistol. Several witnesses testified that accused aimed his pistol at Wise before he fired it. The estimates of the time interval involved in the aiming of the pistol were as follows: "at least" ten seconds, "a few seconds", "a second or so", and "a long second" with "a very deliberate stance". At least five witnesses testified that Wise approached accused from the latter's front. Accused was the only witness who testified that he and Wise were not apart when the pistol was discharged, and asserted that at this moment both hands of deceased were over the two hands of accused. He denied that he deliberately aimed at deceased, that he said "'And

you too'", and claimed that he did not hear deceased's request that he (accused) put down the pistol. He testified that he did not realize that it was Wise who was trying to prevent him from firing the gun until the latter said "'I am hit'" and fell to the ground.

It may be considered that one of accused's contentions was that the shooting was accidental. The question whether the death of Wise was caused accidentally or whether accused killed him deliberately, willfully, feloniously and with malice aforethought was one of fact for the determination of the court, as was the sharp conflict between the testimony of the witnesses for the prosecution and of accused. The distance between the two men when the pistol was discharged, the action of accused in aiming deliberately at deceased, his saying "'And you too'" before he fired, the helpless position of his unarmed opponent, and the fact that deceased was not holding accused or his pistol at the time, fully warranted the findings of guilty by the court which rejected accused's version of the shooting as accidental. In view of the overwhelming evidence that deceased approached accused from the latter's front, the inference is fully justified that accused recognized the person with whom he was struggling before he fired the pistol (CM ETO 3042, Guy, Jr.,and authorities cited therein; CM ETO 3585, Pygate).

The defense also claimed that the shooting occurred in the heat of blood and passion during the course of a quarrel between Moos and accused, that the killing of deceased as an intervener was incidental thereto, and that the offense, "if any, cannot rise any higher than the 93rd Article of War". The distinction between murder and voluntary manslaughter is stated as follows:

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, 12th Ed., sec.423, p.640).
>
> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary" (MCM, 1928, par.149a, p.165).
>
> "At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden affray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to

create such passion as temporarily to unseat the judgment" (29 CJ, sec.115b, p.1128).

"'The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.' (Stevenson v. United States, 162 U.S. 313, 320; 40 L.Ed. 980,983) (Cf: Wallace v. United States, 162 U.S. 466, 40 L.Ed. 1039, Brown v. United States, 159 U.S. 100, 40 L.Ed. 90)" (CM ETO 3585 Pygate).

Whether or not accused's intent to kill was formed suddenly under the influence of an uncontrollable passion or emotion aroused by adequate provocation, whether or not a sufficient "cooling period" had elapsed for the passion or emotion, if any, to abate, or whether the formation of the intent was the result of mere anger, were questions of fact peculiarly within the province of the court, whose determination thereof against the accused in finding him guilty of murder rather than manslaughter, is supported by substantial evidence and will not be disturbed upon appellate review (CM ETO 292, Mickles; CM ETO 2007, Harris; CM ETO 3180, Porter).

Even assuming, however, that the court believed that any action on the part of Moos was sufficient provocation to reduce the homicide to voluntary manslaughter had it been committed on Moos, the following rule is applicable:

"The provocation must have been given by the person who was killed, except in those cases in which the wrong person was killed by accident or mistake, or deceased was present aiding and abetting the person causing the provocation" (40 CJS, sec.53, p.917, quoted with approval in CM ETO 3042, Guy Jr.).

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As has been stated, the evidence fully justified the determination of the court that accused's attack on Wise was not the result of accident or mistake. The evidence also clearly shows that Wise was not aiding or abetting Moos in any way but was trying to secure accused's pistol and to prevent bloodshed. As has also been stated, the inference is thoroughly justified that accused knew that it was his squad leader who was struggling with him for the possession of the pistol. Several witnesses heard deceased tell accused to give him the weapon or to put it down, and accused himself testified that he knew that the man struggling with him was trying to prevent him from firing the pistol. The evidence surrounding accused's unjustified shooting of Wise, wholly unprovoked by the latter, who was using all proper means within his power to avert a quarrel which very possibly would result in death or serious bodily harm to one or both of the participants therein, fully warranted the court in determining all factual questions against accused, and in finding him guilty of murder as alleged.

> "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been an adequate provocation" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.655-656, quoted with approval in CM ETO 2007, Harris, Jr).

The evidence plainly showed that accused, without any genuine cause or provocation, deliberately raised and aimed his pistol at an unarmed, helpless man, said "'And you too'", and fired. The proven facts disclose such a cold-blooded, deliberate act of homicidal violence, as to carry within itself proof of malice aforethought and thereby definitely stamp the offense as murder and not manslaughter (CM ETO 3585, Pygate and authorities cited therein; CM ETO 3042, Guy, Jr.; CM ETO 2007, Harris).

8. The charge sheet shows that accused is 21 years 11 months of age and enlisted at Honesdale, Pennsylvania, 13 Febraury 1941. 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 murder is death or life imprisonment as a court-martial may direct (AW 92). Confinement in a penitentiary is authorized by Article of War 42 and sections 275,330 Federal

Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June, 1944, sec.II, pars. 1b(4),3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 FEB 1945 TO: Commanding General, 28th Infantry Division, APO 28, U.S. Army.

1. In the case of Private STEPHEN W. ROBBINS, JR. (20302665), Headquarters Company, 2nd Battalion, 109th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Lieutenant Colonel Thomas L. Hoban, special counsel for accused filed a brief for consideration upon appellate review of the record of trial. The same was carefully considered by the Board of Review and myself. While the legal points raised in the brief have been overruled by the Board of Review (which conclusion has my approval), I feel that Colonel Hoban should be commended for his diligent and able representation of accused. Such conduct of a defense counsel reflects credit upon the administration of military justice. I suggest that the holding of the Board of Review be made available to Colonel Hoban for his information.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4949. For convenience of reference please place that number in brackets at the end of the order: CM ETO 4949).

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

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